Tribal Court–State Court Forum Meeting

FEBRUARY 15, 2018
9:30 A.M.–4:30 P.M.
SAN FRANCISCO, CA

JUDICIAL COUNCIL OF CALIFORNIA

TRIBAL COURT–STATE COURT FORUM

TRIBAL COURT–STATE COURT FORUM MEETING

JUDICIAL COUNCIL OF CALIFORNIA
TRIBAL COURT–STATE COURT FORUM

February 15, 2018
9:30 a.m. to 4:30 p.m.
455 Golden Gate Avenue, 3rd Floor Boardroom
San Francisco, California

Agenda

THURSDAY, FEBRUARY 15

9:30 – 10:20 a.m. **INVOCATION**

WELCOME AND INTRODUCTIONS

FORUM MEMBER PROJECT UPDATES

Approve Meeting Minutes for December 14, 2017

Hon. Abby Abinanti, Co-Chair, Chief Judge of the Yurok Tribal Court

Hon. Dennis M. Perluss, Co-Chair, Justice of the Court of Appeal, Second Appellate District, Los Angeles

Ann Gilmour, Attorney/Forum Counsel, Judicial Council's Center for Families, Children & the Courts (CFCC)

PUBLIC COMMENT

10:20 – 11:00 a.m. **SESSION 1: HIGHLIGHTS OF FORUM PROJECTS**

Continuing the Dialogue—Indian Civil Rights Act 1968

Hon. Abby Abinanti

Hon. Trina Thompson, Judge, Superior Court of Alameda County

Hon. Claudette White, Chief Judge, Quechan Tribal Court

Hon. Christine Williams, Chief Judge, Shingle Springs Tribal Court

Partnerships—Report on Joint Jurisdiction Courts

Hon. Abby Abinanti

Hon. Joyce Hinrichs, Presiding Judge, Superior Court of Humboldt County

Hon. Suzanne Kingsbury, Presiding Judge Superior Court of El Dorado County

Jennifer Walter, Consultant/Facilitator

Hon. Christine Williams

11:00 a.m. – 12:30 p.m. **SESSION 2: JURISDICTION & SAFETY IN TRIBAL COMMUNITIES**

Law Enforcement Collaborations and Agreements

Presenters will discuss the agreements and processes that have been adopted between tribes and law enforcement in Mendocino County to facilitate the cross-jurisdictional protection of victims of domestic violence.

Thomas Allman, Sheriff, Mendocino County Sheriff's Office
Board of Director, California State Sheriff's Association
Hon. Les Marston, Chief Judge, Blue Lake Tribal Court

Trafficking in Tribal Communities – Unique Problems and Proposed Solutions

This session will address what we know at a national level of trafficking in tribal communities and of tribal individuals. How the inter-jurisdictional landscape plays into the problems of trafficking and possible ways to address these issues.

Hon. Richard C. Blake, Chief Judge, Hoopa Valley, Smith River Rancheria, and Redding Rancheria Tribal Courts
Suzanne Garcia, Tribal Child Welfare Specialist, Capacity Building Center for Tribes, Tribal Law and Policy Institute

VAWEP/VOCA

Staff will discuss current projects being undertaken within CFCC to work with tribal communities and advocates to improve access to justice for tribal victims of domestic violence.

Greg Tanaka, Supervising Attorney, Judicial Council's CFCC
Frances Ho, Attorney, Judicial Council's CFCC

12:30 – 1:30 p.m. **WORKING LUNCH: COLLABORATION WITH TRIBAL COMMUNITIES (Sequoia Room)**

Workbook/Survey Format

1:30 – 2:15 p.m. **SESSION 3: ACCESSING SERVICES**

Suzanne Garcia
Seprieono Locario, Tribal Tech, Substance Abuse and Mental Health Services Administration (SAMHSA)
April McGill, California Consortium for Urban Indian Health (CCUIH)

2:15 – 2:30 p.m. **BREAK**

2:30– 3:30 p.m. **SESSION 4: INDIAN CHILD WELFARE ACT (ICWA) AND CHILD WELFARE**

Update From California Department of Social Services, Office of Tribal Affairs

Heather Hostler, Director, California Department of Social Services, Office of Tribal Affairs

Update on ICWA Task Force Report

Delia Sharpe, Executive Director, California Tribal Families Coalition

3:30 – 4:30 p.m. **SESSION 5: FORUM PRIORITIES 2018-2019 AND ANNUAL AGENDA/ WORK PLAN**

4:30 p.m. **ADJOURN**

This meeting is supported with funds from the U.S. Department of Health and Human Services, Court Improvement Program, the California Department of Social Services and from the Subgrant No. CW 17 16 1535 awarded by the state administering office for the STOP Formula Grant Program. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or U.S. Department of Justice, Office on Violence Against Women.

JUDICIAL COUNCIL OF CALIFORNIA
TRIBAL COURT–STATE COURT FORUM

www.courts.ca.gov/forum.htm
forum@jud.ca.gov

TRIBAL COURT–STATE COURT FORUM

MINUTES OF OPEN MEETING

December 14, 2017
12:15-1:15 p.m.
By Conference Call

Advisory Body Members Present:	*Hon. Abby Abinanti, Co-chair, Hon. Dennis M. Perluss, Co-chair,* Hon. April Attebury, Hon. Richard Blake, Hon. Hilary A. Chittick, Hon. Gail Dekreon, Ms. Heather Hostler, Hon. Lawrence C. King, Hon. Patricia Lenzi, Hon. Devon Lomayesva, Hon. Mark Radoff, Hon. David Riemenschneider, Hon. John Sugiyama, Hon. Sunshine Sykes, Hon. Christine Williams, and Hon. Joseph Wiseman
Advisory Body Members Absent:	Hon. Leonard Edwards(Ret.), Hon. Kimberly Gaab, Hon. Mark Juhas, Hon. Susanne Kingsbury, Hon. William Kockenmeister, Hon. Anthony Lee, Hon. Lester Marston, Hon. Juan Ulloa, Hon. Claudette White, and Hon. Christopher Wilson
Others Present:	Ms. Carolynn Bernabe, Ms. Vida Castaneda, Ms. Christine Cleary, Ms. Charlene Depner, Ms. Ann Gilmour, and Ms. Bonnie Hough

OPEN MEETING

Call to Order and Roll Call
The co-chairs called the meeting to order at 12:17 p.m.

Approval of Minutes
The forum approved the October 12, 2017 meeting minutes.

DISCUSSION AND ACTION ITEMS (ITEMS 2–6)

Item 2
Cochairs Report

- *Welcome New Members*
  Justice Perluss welcomed new members, Chief Judge Devon Lomayesva of Intertribal Court of Southern California and Ms. Heather Hostler, director for Office of Tribal Affairs.

- *December 6th National Forum Report Back from Justice Perluss*
  The Tribal Law and Policy Institute (TLPI), with funding from the Bureau of Justice Assistance, hosted the *Emerging Strategies in Tribal State Collaboration: Enforcement of Tribal Protection Orders* in Palm Springs. The meeting highlighted strategies that tribes and states have utilized to enforce tribal protection orders. The meeting was attended by tribal and state court personnel, law enforcement, and advocates.

Presentations include panels from Arizona, California, Michigan, and New Mexico. The panels discussed difficulties experienced in their jurisdictions in enforcing tribal court protective orders and shared strategies they had developed to resolve these problems. California was represented by forum cochair Justice Dennis Perluss, current and former forum members Judge Richard Blake and Olin Jones, current and former Judicial Council staff Jennifer Walter and Ann Gilmour. The California panel discussed the educational video with Attorney General Xavier Becerra, Judge Abby Abinanti, and Ms. Kate Kenealy and the Law Enforcement Information Bulletin issued by former Attorney General Kamala Harris on the obligation of law enforcement in California to recognize and enforce tribal court protective orders. An overall theme on communication emerged from the various presentations.

- *Annual Agenda Review*
  The proposed annual agenda for 2018 is attached and will be sent to the Executive and Planning Committee for approval. Forum members can send comments to Ann Gilmour.

- *February 15, 2018 for the in-person meeting in San Francisco.*
  Justice Perluss encouraged members to attend the meeting and reminded them to make travel arrangements.

- *The Judicial Council's Rules and Projects Committee (RUPRO) Invitation to Comment*
  Several rules of court relating to membership on the Judicial Council's advisory committees proposed amendments are currently circulating for comment. The amendments would amend rule 10.31, the general rule on membership, to clarify the terms of the chairs, members, and advisory members. They would also amend the rules relating to four specific advisory committees, including the Tribal Court–State Court Forum, to add new or modify existing categories of membership.

  The forum proposed amending Rule 10.60 (c)(4) concerning Forum membership of representatives of the Executive Branch. Both the director of the California Attorney General's Office of Native American Affairs and the Governor's Tribal Advisor have retired. It is unclear whether either of them will be replaced. The co-chairs of the Forum recommended including executive branch officials as members of the Forum to reflect changes in structure and personnel conducting tribal-related work.

Item 3:
Report Back from the Information and Technology Advisory Committee
Presenter: Hon. Joseph Wiseman
Judge Wiseman gave an update on the work of the Information Technology Advisory Committee (ITAC). The committee recently had an annual meeting in Sacramento with discussions on promoting the digital court, optimizing judicial branch resources, optimizing judicial branch infrastructure, and promoting rule and legislative changes related to technology to improve technology and court access. The goal is to create a statewide management system in which court technology is completely accessible to parties and to determine who will have access to the materials. The proposed definition of a government entity that would be allowed to have access to the electronic stored documents in the court system includes federally recognized Indian tribes

and departments and tribal courts. However, the current definition would permit access to electronic database only when there is concurrent jurisdiction in a particular case.

Judge Wiseman solicited forum input on the proposed rule in respect to tribal court access to statewide electronic case information specifically whether there should be any limitation on tribal court access to electronic documents or whether access should be authorized only when the court has concurrent jurisdiction. Also how should access to court file be handled when the file includes confidential information. Judge Abby Abinanti asked that ITAC think about people who don't have access to electricity. Forum members to send further comments to Judge Wiseman.

Item 4:
Report on National Level Developments and National American Indian Court Judges Association (NAICJA)
Presenter: Hon. Richard Blake
Judge Blake reported on the NAICJA conference in conjunction with TLPI in Palm Springs, which was well attended. NAICJA is working with tribes in PL 280 states to improve access by tribes to funding for court evaluation and court improvement needs. Not certain if there will be 2018 budget. NAICJA is looking at expanding provision of technical assistance for court development and peacekeeping, with assistance from Tim Connor in Michigan and representatives in New Mexico offering possibility of arrangements to enter into different tribal communities. NAICJA hired Jennifer Walter, former Judicial Council staff, to assist with deliverables. The goal is to develop forums around the country to use as example to build on. NAICJA is also getting significant youth involvement in tribal court.

Item 5:
Keeping Kids In School (KKIS)–Regional Convening Involving Tribal Communities
Presenter: Christine Cleary, Attorney, Judicial Council's Center for Families, Children & the Courts
In 2012, the U.S. Attorney General and Secretary of Education, launched supportive school discipline initiatives. New connections between justice and education. Research consistently demonstrates that children who are regularly attending safe and supportive schools are less likely to become involved in the justice system. The Council of State Governments released a study highlighting the impact of exclusionary discipline on high school students, particularly students of color, and found that use of these practices actually increased the likelihood that suspended students would become involved in the justice system. The disproportionate involvement and with these school discipline practices may partially explain some of their disproportionate contact with the juvenile justice system.

The Chief Justice charged the Blue Ribbon Commission on Children in Foster Care (BRC) to hold a California Summit, provided through private funds, to learn about the new initiatives. In 2013, 32 counties led by their Juvenile Court Presiding Judges sent multidisciplinary teams to the KKIS summit. The teams included leaders from education, child welfare, probation, mental health and community based organizations. In 2014 BRC sunsetted, and Chief Justice launched the KKIS initiative and appointed a steering committee chaired by Judge Stacy Boulware-Eurie of Sacramento and Judge Gregorio Roman of Los Angeles. KKIS had its first convening in October 2017 in Humboldt County to learn about and discuss a range of topics, including an innovative approach to restorative justice that is being used in the Klamath-Trinity Joint Unified

School District located in Hoopa Valley, California. The two-day convening aimed to provide content that was relevant to the specific needs of four rural northern California counties: Del Norte, Humboldt, Shasta, and Trinity. The convening had about sixty participants from all systems and had young people to talk about tribal youth experience with non-tribal youth.

Two more convenings for Northern California are tentatively planned with a seven county area to include Placer, Inyo, and Mono counties under funding guidelines. If other areas are interested in holding something similar, funding is available for convenings to discuss these issues. Chronic truancies survey came out, and California is on top of the list with high percentage of truant kids. Need to come up with strategy or local solutions to deal with before its chronically truant.

Forum members should inform Chris if interested in being placed on the KKIS weekly e-blast list.

Item 6
Recent and Upcoming Conferences
Presenter: Vida Castaneda
Ms. Vida Castaneda reported on these upcoming events:
Beyond the Bench 24: Uniting for a Better Future is the Judicial Council CFCC's largest conference happening next week. There will be pre-conference workshops held on December 18 with the main conference occurring from December 19-20 at the Manchester Grand Hyatt in San Diego, California. Tribal/State Programs Staff will facilitate a number of sessions including:

- A pre-conference meeting for the California Tribal Families Coalition to engage stakeholders and obtain feedback on the California ICWA Compliance Task Force Report and recommendations. This meeting is taking place the morning of December 19th;
- A session on the afternoon of December 19th concerning the California ICWA Compliance Task Force report and implementation;
- A screening of the documentary "Tribal Justice" taking place the evening of December 19th from 7pm to 9pm, including a discussion with the Judges featured in the film;
- A session on the morning of December 20th concerning the new Federal Indian Child Welfare Act regulations and their implications for law and practice in California; and
- A session on trafficking and tribal communities during the afternoon of December 20th, which will provide background information that will include definitions of trafficking, brief overview of historical trauma, factors that impact trafficking within tribal communities that can differ from other communities, model examples of trafficking prevention or programs created in tribal communities, legal information, resources available to Native American survivors of trafficking and best practice when conducting outreach or partnering with tribal communities.

The Bay Area ICWA Symposium:
Title IV-E/MSW program representatives from Bay Area universities in collaboration with Tribal/State Programs staff are coordinating the Bay Area ICWA Symposium on April 13, 2018 to be held at the State of California Building (Lower Level) in San Francisco, California. The symposium is intended to ensure that attendees strengthen their understanding of ICWA and bring together local communities. Judge Abby Abinanti will be the keynote speaker, and the

symposium will feature an array of ICWA related workshops. Symposium announcements and an RFP for workshop proposals to be distributed.

Other Business

Judge Sunshine Sykes reported that in Riverside County, Judge Marquez's son, a Berkeley undergraduate had a Powerpoint presentation that can be presented to county and tribes to develop a youth court to service youth in Riverside County. The plan is to allow minors to address their conduct through restorative methods. Tribes to step up and come up with tribal youth program to determine sentencing and/or community service to help the community. Beginning stage in Riverside next session in February. Riverside County is excited with the possibility to work with tribe, tribal court, district attorney, and sheriffs to help develop youth court within the tribal court system. If anyone wants more information, email Judge Sykes.

Action: Forum staff to send a copy of the Powerpoint presentation to the forum.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:13 p.m.

Pending approval by the advisory body on February 15, 2018.

PUBLIC

Tribal Court-State Court Forum

Effective September 15, 2017 (Rev. 11/1/17)

Hon. Dennis M. Perluss, Co-Chair
Presiding Justice of the Court of Appeal
Second Appellate District, Division Seven

Hon. Abby Abinanti, Co-Chair
(Yurok)
Chief Judge of the Yurok Tribal Court
Klamath, California

Hon. April E. Attebury
(Karuk)
Chief Judge of the Karuk Tribal Court
Yreka, California

Hon. Richard C. Blake
(Tolowa Dee-Ni', Hoopa and Redding Rancheria)
Chief Judge of the Tolowa Dee-Ni' Nation,
Hoopa and Redding Rancheria Tribal Court
Hoopa, Redding, and Smith River,
California

Hon. Hilary A. Chittick
Judge of the Superior Court of California,
County of Fresno

Hon. Gail Dekreon
Judge of the Superior Court of California,
County of San Francisco

Hon. Leonard P. Edwards (Ret.)
Volunteer Mentor Judge of the
Center for Families, Children & the Courts
Judicial Council of California

Hon. Kimberly A. Gaab
Assistant Presiding Judge of the Superior Court of
California, County of Fresno

Ms. Heather Hostler
Director
Office of Tribal Affairs

Hon. Mark A. Juhas
Judge of the Superior Court of California,
County of Los Angeles

Hon. Lawrence C. King
Chief Judge of the Colorado River Indian Tribes
Parker, Arizona

Hon. Suzanne N. Kingsbury
Presiding Judge of the Superior Court of California,
County of El Dorado

Hon. William Kockenmeister
Chief Judge of the Bishop Paiute Indian
Tribal Court
Bishop, California

Chief Judge of the Washoe Tribal Court
Gardnerville, California

Hon. Anthony Lee
(St. Regis Mohawk Tribe)
Chief Judge of the San Manuel Tribal Court
Highland, California

Tribal Court-State Court Forum

Effective September 15, 2017

Hon. Patricia Lenzi
Chief Judge of the Cedarville Rancheria of Northern Paiute Indians Tribal Court
Alturas, California

Hon. Devon Lomayesva
Chief Judge of the Intertribal Court of Southern California

Hon. Lester J. Marston
(Chiricahua and Cahuilla)
Chief Judge of the Blue Lake Rancheria Tribal Court
Blue Lake, California

Hon. Mark Radoff
Chief Judge of the Chemehuevi Tribal Court
Havasu Lake, California

Hon. David A. Riemenschneider
Judge of the Superior Court of California,
County of Mendocino

Hon. John H. Sugiyama
Judge of the Superior Court of California,
County of Contra Costa

Hon. Sunshine S. Sykes
Judge of the Superior Court of California,
County of Riverside

Hon. Juan Ulloa
Judge of the Superior Court of California,
County of Imperial

Hon. Claudette C. White
(Quechan)
Chief Judge of the Quechan Tribal Court
Winterhaven, California

Hon. Christine Williams
(Yurok)
Chief Judge of the Shingle Springs Tribal Court
Shingle Springs, California

Hon. Christopher G. Wilson
Assistant Presiding Judge of the Superior Court of California,
County of Humboldt

Hon. Joseph J. Wiseman
Chief Judge of the Round Valley Indian Tribes and Tule River Tribe

INFORMATION TECHNOLOGY ADVISORY COMMITTEE LIAISON

Hon. Joseph J. Wiseman
Chief Judge of the Dry Creek Rancheria Band
Chief Judge of the Northern California Intertribal Court System

TRIAL COURT PRESIDING JUDGES AND COURT EXECUTIVES ADVISORY COMMITTEES LIAISON

Hon. Suzanne N. Kingsbury
Presiding Judge of the Superior Court of California, County of El Dorado

JUDICIAL COUNCIL STAFF TO THE COMMITTEE

Ms. Ann Gilmour
Attorney
Center for Families, Children & the Courts
Operations and Programs Division
Judicial Council of California

Ms. Carolynn Bernabe
Administrative Coordinator
Center for Families, Children & the Courts
Operations and Programs Division
Judicial Council of California

SESSION 1: HIGHLIGHTS OF FORUM PROJECTS

a. ***Continuing the Dialogue–Indian Civil Rights Act 1968***

b. ***Partnerships–Report on Joint Jurisdiction Courts***

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C.§§ 1301-1304 (ICRA), provides as follows:

§ 1301. *Definitions: For purposes of this subchapter, the term*

1. "*Indian tribe*" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.
2. "*powers of self-government*" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
3. "*Indian court*" means any Indian tribal court or court of Indian offense, and.
4. "*Indian*" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 19, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies.

§ 1302. *Constitutional Rights: No Indian tribe in exercising powers of self-government shall:*

(a) In general

No Indian tribe in exercising powers of self-government shall—

1. make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
3. subject any person for the same offense to be twice put in jeopardy;
4. compel any person in any criminal case to be a witness against himself;
5. take any property for a public use without just compensation;
6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

8. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
9. pass any bill of attainder or ex post facto law; or
10. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

1. Has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
2. Is being prosecuted for any offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

1. provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
2. at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
3. require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

4. prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
5. maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

1. to serve the sentence—

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)[1] of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

2. to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

§ 1303. *Habeas corpus*

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

§ 1304. *Tribal Jurisdiction over Crimes of Domestic Violence*

(a) *Definitions*.—In this section:

1. *Dating Violence*.—The term ‘dating violence’ means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

2. *Domestic Violence*.—The term ‘domestic violence’ means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.
3. *Indian country*.—The term ‘Indian country’ has the meaning given the term in section 1151 of title 18, United States Code.
4. *Participating tribe*.—The term "participating tribe’ means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.
5. *Protection order*.—The term ‘protection order’—

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a Pendente lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of the person seeking protection.

6. *Special domestic violence criminal jurisdiction*.—The term ‘special domestic violence criminal jurisdiction’ means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.
7. *Spouse or intimate partner*.—The term ‘spouse or intimate partner’ has the meaning given the term in section 2266 of title 18, United States Code.

(b) Nature of Criminal Jurisdiction.—

1. In general.—Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 201 and 203 [25 USC § 1301 and 1303, respectively], the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.
2. Concurrent jurisdiction.—The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.
3. Applicability.—Nothing in this section—

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

4. Exceptions.—

(A) Victim and defendant are both non-Indians.—

(i) In general.—A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) Definition of victim.—In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term 'victim' means a person specifically protected by a protection order that the defendant allegedly violated.

(B) Defendant lacks ties to the Indian tribe.—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—

(i) resides in the Indian country of the participating tribe;

(ii) is employed in the Indian country of the participating tribe; or

(iii) is a spouse, intimate partner, or dating partner of—

(I) a member of the participating tribe; or

(II) an Indian who resides in the Indian country of the participating tribe.

(c) Criminal Conduct.—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

1. Domestic violence and dating violence.—An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.
2. Violations of protection orders.—An act that—

(A) occurs in the Indian country of the participating tribe; and

(B) violates the portion of a protection order that—

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of title 18, United States Code.

(d) Rights of Defendants.—In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—

1. all applicable rights under this Act;
2. if a term of imprisonment of any length may be imposed, all rights described in section 202(c) [25 USC 1302(c)];
3. the right to a trial by an impartial jury that is drawn from sources that—

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

4. all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

(e) Petitions to Stay Detention.—

1. In general.—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 203 [25 USC § 1303] may petition that court to stay further detention of that person by the participating tribe.
2. Grant of stay.—A court shall grant a stay described in paragraph (1) if the court—

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

3. Notice.—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 203 [25 USC § 1303].

ABA Human Rights Magazine, vol. 40, no. 4

Tribal Sovereignty

A Short History of Indian Law in the Supreme Court

Matthew L.M. Fletcher

Matthew L.M. Fletcher is a professor of law at Michigan State University College of Law.

The history of federal Indian law in the Supreme Court is dynamic, controversial, and inspiring. The history starts with the earliest decades of the Supreme Court and tracks the growth of the American Republic.

Guiding Principles in Indian Law

The long history of Supreme Court decisions in Indian law has cemented several guiding principles. First, Congress has plenary power in the exercise of its Indian affairs duties. Second, the United States owes a duty of protection to Indian nations and tribal members akin to a common law trust. Third, Indian nations retain inherent sovereign powers, subject to divestiture only by agreement or by Congress. Fourth, state law does not apply in Indian country absent authorization by Congress. Finally, Congress must clearly state its intention to divest tribal sovereignty.

Modern federal Indian law has given space for Indian nations to exercise self-governance and to preserve tribal lands, economies, and cultures. But for too long before the modern era, the Supreme Court ratified the mass dispossession of Indian lands, exploitation of Indian resources by outsiders, and attacks on tribal cultures, governments, and economies.

Until the Warren and Burger Court eras, the Supreme Court deferred absolutely to Congress and the executive branch prerogatives in setting federal Indian policy, which usually was designed to undermine tribal self-determination. However, during the Warren and Burger Court eras, the Court increasingly pushed back on bad federal policy and became a leader in modernizing federal Indian law. Strangely, despite congressional and executive branch support for tribal self-governance since the 1970s, the Supreme Court often has continued to resist federal Indian policy, undermining tribal governance.

Beginnings

The history of Indian law in the Supreme Court opens with the Marshall Trilogy—*Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832). The Trilogy, primarily authored by Chief Justice John Marshall, established federal primacy in Indian affairs, excluded state law from Indian country, and recognized tribal governance authority. Moreover, these cases established the place of Indian nations in the American dual sovereign structure that still governs today.

Johnson is best known for the adoption of the so-called Doctrine of Discovery as the origin of American property title, but the case more properly should be known as the decision that established federal supremacy in Indian affairs over the states and individuals. The case involved a dispute over the ownership of parcels of land in the Ohio River Valley. Both parties claimed they had acquired title from Indian nations in the area, the Piankeshaw and Illinois Indians. The Supreme Court held that Indians could not sell their property interests— known to the Court as Indian title, original Indian title, or aboriginal title—to anyone except the national sovereign. Indian sales to individuals (as in this case) or to states or any other nation were void. The Court confirmed national authority over Indian affairs, which had barred all land and commercial transactions with Indians absent sovereign consent since at least the 1763 British Proclamation, a policy adopted by the First Congress in the 1790 Trade and Intercourse Act.

Congress reaffirmed federal supremacy over Indian affairs in the two Cherokee cases, *Cherokee Nation* and *Worcester*. There, the State of Georgia tried to assert the authority to legislate the Cherokee Nation's government out of existence, and then to confiscate Indian lands and resources. In the first case, a deeply split Court held that the Cherokee Nation was a domestic nation, but neither a state nor a foreign nation. In the second case, the Court held that the state laws had "no force" in Indian country, barred under the Supremacy Clause by federal statutes and the Cherokee Nation's treaties with the United States. *Id*. at 561. Of course, the Court's decision favoring the tribe did nothing to prevent the political and military process that eventually forced the Cherokee people to undergo the Trail of Tears.

The Interregnum

The Supreme Court's foundational cases allowed the federal political process— and all its attendant prejudices, inconsistencies, and complexities—to dominate Indian affairs after the Marshall Trilogy for a century and a half. A second trilogy of cases, informally known as the plenary power trilogy, memorialized the darkest decades for Indian people in American history. These cases—*Ex parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Kagama*, 118 U.S. 375 (1886); and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)—explored the outer boundaries of congressional and executive power over Indian affairs, Indian lands, and even Indian lives—almost always without the consent of Indian people or Indian nations.

Federal Indian policy of the nineteenth century featured the wholesale removal of entire Indian nations from the East to what is now the central United States; large-scale and destructive warfare with Indian nations in the Southeast, the Great Plains, and the far West; and confiscation and exploitation of remaining and reserved Indian lands and resources by the United States and its citizens. Indian nations often became isolated on reservations or checkered parcels of detached lands in out-of-the-way regions.

The legal import of this isolation came to the forefront in *Crow Dog* and *Kagama*. In *Crow Dog*, leaders from the Sicangu band of Lakota Indians were conflicted over whether to concede additional lands and resources to the United States. Crow Dog, the leader of the group opposed to the concession, allegedly murdered Spotted Tail, the proponent of the concession. Federal officials wanted to prosecute Crow Dog under federal law, but the Supreme

Court held that no federal statute or Indian treaty expressly authorized federal criminal jurisdiction over an Indian-on-Indian crime on Indian lands.

Congress quickly passed the Major Crimes Act, expressly authorizing federal criminal jurisdiction in such cases. *Kagama* was the first prosecution under the Act to reach the Supreme Court. For the first time, the Court addressed the source of Congress' constitutional authority over Indian affairs and Indian country. The Court rejected the government's contention that the Indian Commerce Clause authorized the extension of federal criminal jurisdiction over Indian country, the provision that Congress long had relied upon for much of its Indian affairs program. The Court held instead that more generalized federal interests in maintaining law and order on Indian lands, and protecting Indian people from states and their citizens, authorized the Major Crimes Act. 18 U.S.C. § 1153.

Meanwhile, Congress established allotment as national policy. Allotment involved the breakup of Indian reservations by "allotting" parcels to individual Indians and then selling "surplus" lands on the open market. Allotment was an unqualified disaster for Indian people, tribal governments, and reservation governance. Non-Indians quickly and efficiently acquired the most valuable allotted and surplus lands through legal and illegal means, and by 1928 two-thirds of the tribal land base disappeared.

Lone Wolf involved the objection to an allotment plan for the Kiowa- Comanche-Apache reservation. *See generally* Angela R. Riley, *The Apex of Congress' Plenary Power over Indian Affairs: The Story of* Lone Wolf v. Hitchcock, *in* Indian Law Stories 189 (Carole Goldberg et al. eds., 2011). Under the terms of the treaty, two-thirds of the adult males of the tribes would have to consent before the treaty could be amended. Lone Wolf the Younger argued that the Americans fraudulently acquired the consent of the tribe and the allotment plan approved by Congress should be enjoined. The Court held that Congress had the authority to proceed with the allotment plan under its plenary power over Indian affairs, that federal altering of Indian property rights over tribal objections could proceed because the tribe would receive compensation, and that the Court would presume that Congress was acting in good faith in setting the terms of compensation. The Court seemingly held that Indian claims challenging congressional and executive branch decisions on Indian affairs were not subject to judicial review by the courts.

The Supreme Court's extreme deference to the federal government's Indian affairs policies extended to the mid-nineteenth century. The capstone plenary power decision has to be *Tee- Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). *See generally* Walter R. Echo-Hawk, In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided 359 (2010). There, the Interior Department authorized the harvesting of valuable timber in the Tongass National Forest claimed by Alaska Natives. The Court held that Congress never vested Alaska Native property rights and that the taking of property protected by Indian title was not subject to the Fifth Amendment Takings and Just Compensation Clause.

The Modern Era

The Supreme Court reaffirmed inherent tribal authority in *Williams v. Lee*, 358 U.S. 217 (1959), a decision heralded by Charles Wilkinson as the first case of the modern era of federal Indian law. Charles F. Wilkinson, American Indians, Time, and the Law 1 (1987). A non-Indian shop owner sued two members of the Navajo Nation in state small

claims court to force the payment of debts incurred at the store, which was located in the Navajo reservation. The Supreme Court modernized tribal sovereignty by holding that state courts do not possess jurisdiction to hear claims brought arising on Indian lands against Indian defendants without congressional authorization.

Following *Williams*' lead in relation to state authority, the Court reaffirmed several principles initially announced in *Worcester v. Georgia* and its progeny—that states may not tax on-reservation transactions involving tribal members (for example, *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965)), may not tax on-reservation income of tribal members (for example, *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973)), may not tax on-reservation tribal economic development projects (for example, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)), and may not regulate onreservation activity inconsistent with tribal government prerogatives (for example, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)). The high point for tribal interests was the Supreme Court's dramatic rejection of the State of California's effort to regulate tribal bingo operations in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Further following *Williams*' lead in relation to tribal governance authority, the Supreme Court affirmed numerous aspects of tribal governance authority—including the power to tax members and nonmembers (for example, *Washington v. Colville Confederated Tribes*, 447 U.S. 134 (1980)), the power to prosecute Indian lawbreakers (*United States v. Wheeler*, 435 U.S. 313 (1978)), tribal sovereign immunity (for example, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)), the power to adjudicate civil claims (for example, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)), and the power to exclude persons from Indian lands (*Merrion v. Jicarilla Apache Tribe*, 445 U.S. 130 (1982)). The Court further held that Indian treaty rights remain extant unless Congress expressly abrogates them (for example, *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979)), and even then only if the government pays just compensation. *Cf. Menominee Tribe v. United States*, 391 U.S. 404 (1968). However, despite a lack of clear congressional guidance, the Supreme Court also held that Indian nations cannot prosecute non-Indian lawbreakers, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and that tribal civil jurisdiction over non-Indians is limited, *Montana v. United States*, 450 U.S. 544 (1981).

Despite significant limitations on tribal governance authority, the Supreme Court in the early decades of the modern era of federal Indian law marked the path of national Indian affairs, joining Congress in recognizing and encouraging tribal self-determination as the guiding principle in federal-state-tribal affairs.

Retrenchment

In recent decades, the Supreme Court has markedly shifted toward skepticism of tribal interests and tribal claims, and away from federal policies announced by Congress and the executive branch. *See generally* Wenona T. Singel, *The First Federalists*, 62 Drake L. Rev. 775 (2014). The Court routinely, though not always, has reversed presumptions favoring tribal interests and federal interests favoring Indian tribes. From the beginning of the Rehnquist Court to the current term of the Roberts Court, tribal interests have prevailed on less than one-quarter of the cases.

The turning point is not obvious, and some point to the *Oliphant* and *Montana* cases as the starting point, but the most vivid change occurred in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). There, the Supreme Court held that a state may tax a non-Indian company extracting natural resources from Indian trust lands on the Jicarilla Apache Reservation. The Court held that a tribe's interest in its own reservation resources was not sufficient to preempt the state tax, even though the state tax created a double taxation scheme that effectively undermined the tribal tax.

The Supreme Court also held in a series of cases that tribal courts may not exercise criminal jurisdiction over all nonmembers, including nonmember Indians, in *Duro v. Reina*, 495 U.S. 676 (1990). Though Congress quickly corrected that holding in the so-called Duro fix, *United States v. Lara*, 541 U.S. 193 (2004), Justice Anthony Kennedy's theory about why tribal governments may not exercise jurisdiction over nonmembers—because nonmembers have not expressly consented to tribal jurisdiction—continues to inform the Court's views on tribal regulatory and tribal court jurisdiction. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co*., 554 U.S. 316 (2008); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997). When informed that the Court's decisions created jurisdictional loopholes or statutory contradictions, the Court directs tribal interests to Congress to deal with the problems. *See, e.g., Duro*, 495 U.S. at 696.

The Supreme Court has also been undeterred by the unique history of the relationship between Indian nations and the United States in its decisions. Recent decisions have relied upon 19th century congressional policy declarations thoroughly repudiated in the modern era to reach decisions that a tribe's reservation boundaries have been diminished (for example, *Hagen v. Utah*, 510 U.S. 399 (1994)), to undermine 70 years of administrative interpretations of a statute designed to benefit Indian nations (*see Carcieri v. Salazar*, 555 U.S. 379 (2009)), to allow states to tax on-reservation land owned by the tribe (*Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998)), and to hold that state governments can invoke equitable defenses against tribal claims brought under federal statutes (*City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005)). Perhaps most painfully for Indian people, the Court will not protect Indian sacred sites. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Assn*., 485 U.S. 439 (1988). See generally Amy Bowers & Kristen A. Carpenter, *Challenging the Narrative of Conquest: The Story of* Lyng v. Northwest Indian Cemetery Protective Association, in Indian Law Stories, *supra*, at 489.

The Court's reasoning in several cases turns the notion of tribal self-determination against tribal interests by denigrating the federal-tribal trust relationship. In *United States v. Navajo Nation*, 537 U.S. 488 (2003), the Court excused unethical ex parte contact with the interior secretary by a mining company in royalty negotiations with the tribe to wipe out a $600 million judgment against the federal government. In *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), the Court held that the federal government did not have to disclose documents to the tribe about the scope of the government's trust duties to the tribe. Even when affirming a tribe's immunity from suit, the Court implored Congress to abrogate tribal immunity by statute. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

In cases involving the mere interpretation of a statute or treaty, tribal interests have fared much better. Tribal interests have prevailed in critical decisions involving the Indian Self-Determination and Education Assistance Act (*Salazar v.*

Ramah Navajo Chapter, 132 S. Ct. 2181 (2012); *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005)), the Indian Gaming Regulatory Act *(Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014)), and treaty interpretation (*Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)). But the Court has ruled against tribal interests (and the federal government) in decisions involving the Indian Reorganization Act (*Carcieri v. Salazar*, 555 U.S. 379 (2009)), the Freedom of Information Act (*Department of Interior v. Klamath Water Users Protective Assn*., 532 U.S. 1 (2001)), the Indian Gaming Regulatory Act (*Chickasaw Nation v. United States,* 534 U.S. 84 (2001); *see also Seminole Tribe of Florida v. Florida*, 516 U.S. 44 (1996) (striking down a critical provision in the Indian Gaming Regulatory Act)), the Quiet Title Act (*Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012)), and the Indian Child Welfare Act (*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013)).

The win-loss rate, some argue, is skewed by Indian nations that overstep, making claims beyond what the Court has articulated as settled precedent or what Congress desires. But there is strong evidence that an institutional bias against tribal interests drives the current Supreme Court. Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 Ariz. L. Rev. 933 (2009). Even when the federal government sides with tribal interests, the Court is unimpressed. This institutional bias runs against the nowsettled national policy favoring tribal self-determination.

Conclusion

Tribal interests have always faced an uphill climb in what Chief Justice Marshall once referred to as the “courts of the conqueror.” *Johnson v. M’Intosh*, 21 U.S. 543, 588 (1823). But, despite tough lessons learned in the Supreme Court in recent decades, Indian people and their governments have become players in the American constitutional structure in a way likely thought inconceivable at the Founding of the Republic, and perhaps even as late as three or four decades ago. The future is bright.

Key Federal Statutes (link to statutes where underlined)

Indian Reorganization Act (also called Wheeler–Howard Act) was the first comprehensive attempt to incorporate Indian tribes as political entities within the legal and political systems of the United States, embodying the endorsement of a policy to promote tribal self-government as well as a government-to-government relationship between Indian tribes and the United States. (1934)

The Indian Reorganization Act, June 18, 1934 (Wheeler-Howard Act - 48 Stat. 984 - 25 U.S.C.
§ 461 *et seq*) *--An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.*
BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.
Sec. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.
Sec. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by residential proclamation, or by any of the public land laws of the United States; Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: Provided further, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: Provided further, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: Provided further, That the order of the Department of the interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: Provided further, That the damages shall be paid to the Papago Tribe for loss of any improvements of any land located for mining in such a sum as may be determined by the Secretary of the Interior but not exceed the cost of said improvements: Provided further, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Indian Tribe: Provided further, That in the event that any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: Provided further, That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of

improvements not heretofore said in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that the patent is not required. Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained therein, except as expressly provided, shall be construed as authority by the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

Sec. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: Provided further, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

Sec. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing lands for Indians. For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be ppropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures how pending in congress and embodied in the bills (S. 2531 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law. The unexpended balances of any appropriations made pursuant to this section shall remain available until expended. Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Sec. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

Sec. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

Sec. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

Sec. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

Sec. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

Sec. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: Provided, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

Sec. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who maybe appointed, without regard to civil service laws, to the various positions maintained, now or hereafter, by the Indian office, in the administrations functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Sec. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16 shall apply to the Territory of Alaska: Provided, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following named Indian tribes, together with members of other tribes affiliated with such named located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the indians of the Klamath Reservation in Oregon.

Sec. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (25 Stat.L. 891), or their commuted cash value under the Act of June 10, 1886 (29 Stat.L. 334), to all Sioux Indians who would be

eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 (35) Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue tobe paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

Sec. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

Sec. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Sec. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Sec. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against it application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.
Sec. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all person who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years. *Approved, June 18, 1934.*

Amendments to the Wheeler-Howard Act, June 18, 1934
(The Indian Reorganization Act)
Section 15 of the Indian Reorganization Act was modified in part by the following provisions contained in the Act of August 12, 1935 (Public Law 260 - 74th Congress, 1st Session):
Sec. 2. In all suits now pending in the Court of claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; and in all cases now pending or hereafter filed in the Court of Claims in which an Indian tribe or band is party plaintiff, wherein the duty of the court is merely to report its finding of fact and conclusions to Congress, the said Court of Claims is hereby directed to include in its report a statement of the amount of money which has been expended by the United States gratuitously for the benefit of the said tribe or band: Provided, that the expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims asserted; and expenditures under the Act of June 18, 1934 (48 Stat. L. 984), except expenditures under appropriations made pursuant to section 5 of such Act, shall not be charged as offsets against any claim on behalf of an Indian tribe or tribes now pending in the Court of Claims or hereafter filed.
Sec. 19. The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term “tribe” wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words “adult Indians” wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Indian Civil Rights Act imposing on tribes such basic requirements as the protection of free speech, free exercise of religion, due process, and equal protection of the laws (1968)

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C.§§ 1301-1304 (ICRA), provides as follows:

§ 1301. *Definitions: For purposes of this subchapter, the term*

1. "*Indian tribe*" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.
2. "*powers of self-government*" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
3. "*Indian court*" means any Indian tribal court or court of Indian offense, and.
4. "*Indian*" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 19, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies.

§ 1302. *Constitutional Rights: No Indian tribe in exercising powers of self-government shall:*

(a) In general

No Indian tribe in exercising powers of self-government shall—

1. make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
3. subject any person for the same offense to be twice put in jeopardy;
4. compel any person in any criminal case to be a witness against himself;
5. take any property for a public use without just compensation;
6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

8. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
9. pass any bill of attainder or ex post facto law; or
10. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

1. Has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
2. Is being prosecuted for any offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

1. provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
2. at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
3. require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

4. prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
5. maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

1. to serve the sentence—

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)[1] of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

2. to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

§ 1303. *Habeas corpus*

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

§ 1304. *Tribal Jurisdiction over Crimes of Domestic Violence*

(a) *Definitions*.—In this section:

1. *Dating Violence*.—The term ‘dating violence’ means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

2. *Domestic Violence*.—The term ‘domestic violence’ means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.
3. *Indian country*.—The term ‘Indian country’ has the meaning given the term in section 1151 of title 18, United States Code.
4. *Participating tribe*.—The term "participating tribe’ means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.
5. *Protection order*.—The term ‘protection order’—

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a Pendente lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of the person seeking protection.

6. *Special domestic violence criminal jurisdiction*.—The term ‘special domestic violence criminal jurisdiction’ means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.
7. *Spouse or intimate partner*.—The term ‘spouse or intimate partner’ has the meaning given the term in section 2266 of title 18, United States Code.

(b) Nature of Criminal Jurisdiction.—

1. In general.—Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 201 and 203 [25 USC § 1301 and 1303, respectively], the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.
2. Concurrent jurisdiction.—The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.
3. Applicability.—Nothing in this section—

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

4. Exceptions.—

(A) Victim and defendant are both non-Indians.—

(i) In general.—A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) Definition of victim.—In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term ‘victim’ means a person specifically protected by a protection order that the defendant allegedly violated.

(B) Defendant lacks ties to the Indian tribe.—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—

(i) resides in the Indian country of the participating tribe;

(ii) is employed in the Indian country of the participating tribe; or

(iii) is a spouse, intimate partner, or dating partner of—

(I) a member of the participating tribe; or

(II) an Indian who resides in the Indian country of the participating tribe.

(c) Criminal Conduct.—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

1. Domestic violence and dating violence.—An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.
2. Violations of protection orders.—An act that—

(A) occurs in the Indian country of the participating tribe; and

(B) violates the portion of a protection order that—

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of title 18, United States Code.

(d) Rights of Defendants.—In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—

1. all applicable rights under this Act;
2. if a term of imprisonment of any length may be imposed, all rights described in section 202(c) [25 USC 1302(c)];
3. the right to a trial by an impartial jury that is drawn from sources that—

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

4. all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

(e) Petitions to Stay Detention.—

1. In general.—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 203 [25 USC § 1303] may petition that court to stay further detention of that person by the participating tribe.
2. Grant of stay.—A court shall grant a stay described in paragraph (1) if the court—

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

3. Notice.—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 203 [25 USC § 1303].

Indian Self Determination and Education Assistance Act expanding tribal control over reservation programs and authorizing federal funds to build public school facilities on or near Indian reservations (1975)

PART III—INDIAN EDUCATION
Indian Self-Determination and Education Assistance Act
(Public Law 93–638)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [25 U.S.C. 450 Note] That this Act may be cited as the ‘‘Indian Self-Determination and Education Assistance Act’’.

CONGRESSIONAL FINDINGS

Sec. 2. [25 U.S.C. 450]

(a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

DECLARATION OF POLICY

SEC. 3. [25 U.S.C. 450a]

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

SEC. 4. [25 U.S.C. 450b] For purposes of this Act, the term—

(a) ''construction programs'' means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including, but not limited to, housing,

law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities;
(b) ''contract funding base'' means the base level from which contract funding needs are determined, including all contract costs;
(c) ''direct program costs'' means costs that can be identified specifically with a particular contract objective;
(d) ''Indian'' means a person who is a member of an Indian tribe;
(e) ''Indian tribe'' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;
(f) ''indirect costs'' means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;
(g) ''indirect cost rate'' means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;
(h) ''mature contract'' means a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: *Provided,* That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 102(a) of this Act, a contract of the tribal organization which meets this definition shall be considered to be a mature contract;
(i) ''Secretary'', unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;
(j) ''self-determination contract'' means a contract (or grant or cooperative agreement utilized under section 9 of this Act) entered into under title I of this Act between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided,* That except as provided, 1 the last proviso in section 105(a) of this Act, no contract (or grant or cooperative agreement utilized under section 9 of this Act) entered into under title I of this Act shall be construed to be a procurement contract;
(k) ''State education agency'' means the State board of education or other agency or officer primarily responsible for supervision by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law;
(l) ''tribal organization'' means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided,* That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

(m) ‘‘construction contract’’ means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract—

(1) that is limited to providing planning services and construction management services (or a combination of such services);

(2) for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or

(3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

REPORTING AND AUDIT REQUIREMENTS

SEC. 5. [25 U.S.C. 450c]

(a)(1) Each recipient of Federal financial assistance under this Act shall keep such records as the appropriate Secretary shall prescribe by regulation promulgated under sections 552 and 553 of title 5, United States Code, including records which fully disclose—

(A) the amount and disposition by such recipient of the proceeds of such assistance,

(B) the cost of the project or undertaking in connection with which such assistance is given or used;

(C) the amount of that portion of the cost of the project or undertaking supplied by other sources, and

(D) such other information as will facilitate an effective audit.

(2) For the purposes of this subsection, such records for a mature contract shall consist of quarterly financial statements for the purpose of accounting for Federal funds, the annual single-agency audit required by chapter 75 of title 31, United States Code and a brief annual program report.

(b) The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in the preceding subsection of this section, have access (for the purpose of audit and examination) to any books, documents, papers, and records of such recipients which in the opinion of the Comptroller General or the appropriate Secretary may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to in the preceding subsection.

(c) Each recipient of Federal financial assistance referred to in subsection (a) of this section shall make such reports and information available to the Indian people served or represented by such recipient as and in a manner determined to be adequate by the appropriate Secretary.

(d) Except as provided in section 8 or 106(a)(3) of this Act, funds paid to a financial assistance recipient referred to in subsection (a) of this section and not expended or used for the purposes for which paid shall be repaid to the Treasury of the United States through the respective Secretary.

(e) The Secretary shall report annually in writing to each tribe regarding projected and actual staffing levels, funding obligations, and expenditures for programs operated directly by the Secretary serving that tribe.

(f)(1) For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract entered into, or grant made, under this Act, the tribal organization that requested such contract or grant shall submit to the appropriate Secretary a single-agency audit report required by chapter 75 of title 31, United States Code.

(2) In addition to submitting a single-agency audit report pursuant to paragraph (1), a tribal organization referred to in such paragraph shall submit such additional information concerning the conduct of the program, function, service, or activity carried out pursuant to the contract or grant that is the subject of the report as the tribal organization may negotiate with the Secretary.
(3) Any disagreement over reporting requirements shall be subject to the declination criteria and procedures set forth in section 102.

PENALTIES

SEC. 6. [25 U.S.C. 450d] Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or subgrant pursuant to this Act or the Act of April 16, 1934 (48 Stat. 596), as amended, embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such grant, subgrant, contract, or subcontract, shall be fined not more than $10,000 or imprisoned for not more than two years, or both, but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

WAGE AND LABOR STANDARDS

SEC. 7. [25 U.S.C. 450e] (a) All laborers and mechanics employed by contractors or subcontractors (excluding tribes and tribal organizations)in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to this Act, shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494), as amended. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 2 of the Act of June 13, 1934 (48 Stat. 948, 40 U.S.C. 276c)
(b) Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible—
(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and
(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77)
(c) Notwithstanding subsections (a) and (b), with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

CARRYOVER FUNDING

SEC. 8. [25 U.S.C. 13a] Notwithstanding any other provision of law, any funds appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208), for any fiscal year which are not obligated or expended prior to the beginning of the fiscal year succeeding the fiscal year for

which such funds were appropriated shall remain available for obligation or expenditures during such succeeding fiscal year. In the case of amounts made available to a tribal organization under a self-determination contract, if the funds are to be expended in the succeeding fiscal year for the purpose for which they were originally appropriated, contracted or granted, or for which they are authorized to be used pursuant to the provisions of section 106(a)(3), no additional justification or documentation of such purposes need be provided by the tribal organization to the Secretary as a condition of receiving or expending such funds.

SEC. 9. [25 U.S.C. 450e–1] The provisions of this Act shall not be subject to the requirements of chapter 63 of title 31, United States Code: *Provided,* That a grant agreement or a cooperative agreement may be utilized in lieu of a contract under sections 102 and 103 1 of this Act when mutually agreed to by the appropriate Secretary and the tribal organization involved.

* * * * * * *

(NOTE.—Title I of P.L. 93–638, the Indian Self-Determination Act, is omitted from this compilation.)

Indian Health Care Improvement Act clarifying trust responsibilities of the Indian Health Service (1976)

American Indian Religious Freedom Act in which Congress recognizes its obligation to "protect and preserve for American Indians their inherent right of freedom to believe, express and exercise traditional religions (1978)

Indian Child Welfare Act establishing U.S. policy to promote the stability and security of Indian tribes and families by giving tribal courts jurisdiction over children living on reservations (1978)

Indian Gaming Regulatory Act (1988)

Native American Graves and Repatriation Act requiring return to Native American claimants of human bones and artifacts recovered from government sponsored archaeological excavations on public lands (1990).

Judicial Toolkit on Indian Law
An Overview of Key Federal Indian Law Cases
Prepared by Judge Joseph J. Wiseman[1]

I. The Foundational Cases: *The Marshall Trilogy*

Johnson v. M'Intosh, 21 U.S. 543 (1823) – the foundational legal principle laid out in *Johnson* is "that discovery gave title to the government by whose subjects or by whose authority, it was made, against all other European governments, which title might be consummated by possession." The opinion incorporates the principles of the doctrine of discovery into United States law: the exclusive rights of the discovering European nation to acquire the soil from the Indians; the diminished sovereignty of tribes resulting as a consequence of discovery; and the Indian right of occupancy. Under this doctrine, the Indians' "title of occupancy" is not a fee simple; it can only be conveyed to the discovering sovereign; but unless "recognized" by treaty, statute, or executive order, it can be "taken" by the federal government free of the strictures of the just compensation clause of the Fifth Amendment of the U.S. Constitution.

Cherokee Nation v. Georgia, 20 U.S. 1 (1831) – the Court held that tribes are not foreign states, as that term is used in the Constitution, in describing the court's original jurisdiction over "controversies" between a state (here, the state of Georgia) and "foreign states." Rather, Justice Marshall's opinion holds that tribes are "domestic dependent nations," whose relations with the U.S. resemble that of a "ward to his guardian." Marshall's language represents the genesis of the trust doctrine in federal Indian law, which holds that the U.S. has a trust responsibility to act on behalf of Indian Tribes.

Worcester v. Georgia, 31 U.S. 515 (1932) – the Court held that the "laws of Georgia could have no force" in Cherokee territory. Here, Marshall defines Indian nations as "distinct political communities, having territorial boundaries within which their authority is exclusive." This seems to suggest that discovery, and the colonial charter grants under the doctrine of discovery, did not extinguish the inherent sovereignty of the Indians, and that the Cherokee's acts of entering into treaties and associating with a stronger nation for its protection likewise do not strip itself of the right of governing itself. Marshall states that tribes retain "their original natural rights as the undisputed possessors of the soil from time immemorial." Marshall also finds that the U.S. Constitution grants Congress the exclusive authority to regulate Indian affairs.

II. Shifting Law and Policy

Ex Parte Crow Dog, 109 U.S. 556 (1883) – in examining a habeas petition where one Indian was convicted in federal court for the killing of another Indian on an Indian

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reservation, the Supreme Court determined that the United States' treaty with the tribe did not provide for U.S. criminal jurisdiction over crimes committed by one tribal member against another. The Court came to this conclusion by examining the treaty language that allowed the U.S. to deduct from the accused tribe's annuities compensation to be paid to a non-tribal-member victim. Such a provision did not provide jurisdiction over crimes where the injured part is of the same tribe as the accused. The U.S. intended by the treaty to secure to Indian tribes "an orderly government," to create self-governing societies, and to allow "the regulation by themselves of their own domestic affairs." Dicta further justifies this decision by suggesting Indians are racial inferiors, incapable of understanding the white man's law, and that the Court therefore should not force them to be subject to it.

In response to *Crow Dog*, Congress passed the Major Crimes Act in 1885, granting the U.S. criminal jurisdiction over a set of enumerated "major" crimes committed within Indian country by one Indian against another.

United States v. Kagama, 118 U.S. 375 (1886) – affirming Congress' power to enact the Major Crimes' Act, this is a seminal case signaling a clear shift away from tribal sovereignty. The Court appears to deny the existence of tribal sovereignty, and affirms Congress' power to regulate tribes, not through the Commerce Clause, but because "the Indians are within the geographical limits of the United States." This case appears to create the congressional plenary power doctrine, wherein Congress' authority over Indian tribes flows from the guardian/ward relationship and exists because such a relationship has "never existed anywhere else."

United States v. Sandoval, 231 U.S. 28 (1913) – The Court confirmed that the Pueblo Indians' lands were "Indian country" over which Congress has legislative authority, even though the Pueblos' lands, unlike Indian reservations, were owned communally in fee simple by the Pueblos under grants from the Spanish government, later confirmed by Congress. In so holding, the Supreme Court noted that the Pueblos were still Indians by virtue of race, customs, and domestic government. Therefore, they are an "inferior people… requiring special consideration and protection like other Indian communities."

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) – The Court held that in cases involving a controversy between Indians and the government, Congress has the unquestioned power under U.S. law to unilaterally abrogate an Indian treaty. The case also held that the regulation of Indian affairs is a political question, government by Congress and not subject to judicial review. The Court must presume Congress will only exercise this plenary power in good faith.

III. Tribal Sovereignty and Jurisdiction

Solem v. Bartlett, 465 U.S. 463 (1984) – Reservations lands/ Indian country does not necessarily coincide with Indian fee ownership: this case lays out the analysis as to

whether the non-Indian purchase of land necessarily diminishes the Indian's reservation lands. First, only Congress can divest a reservation of its land and diminish its boundaries. Second, a clear intent by Congress to change boundaries must be shown before the diminishment of lands is allowed. The most probative evidence of this congressional intent is the statutory language. When clear language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian for the land, there is an almost insurmountable presumption that Congress meant for the tribe's land to be diminished. Likewise evidence that non-Indian settlers have flooded into the opened portion, is also probative that diminishment occurred.

Carcieri v Salazar, 555 U.S. 379 (2009) – The Indian Reorganization Act ("IRA") enacted in 1934, allows the Secretary of the Interior to acquire land and hold it in trust "for any recognized Indian tribe *now* under Federal jurisdiction" (emphasis added). The Court found that this limited the Secretary's authority to take land into trust only for tribes that were under federal jurisdiction in 1934. Since the Narrangansett Indian Tribe was not federally recognized in 1934, it was not entitled to the benefits. The court refused to see any ambiguity and refused to entertain any policy arguments.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) – the Court denies tribes criminal jurisdiction over non-Indians who committed crimes within reservation boundaries. The Court held that the power to prosecute nonmembers was an aspect of the tribes' external relations, part of the tribal sovereignty that was divested by treaties and by Congress when they submitted "to the overriding sovereignty" of the United States. Even though there are no treaties or statutes explicitly forbidding tribes from exercising criminal jurisdiction over non-Indians, the implied limitations on tribal sovereignty arise out of their dependent status. It is up to Congress to decide whether Indian tribes should be authorized to try non-Indians.

Montana v United States, 450 U.S. 544 (1981) – the Court held that the Crow tribe could not exclude by regulation non-Indians from fishing and hunting on reservation lands owned in fee by non-Indians. The Court determined that the Indians' sovereign rights as a nation within the U.S. have necessarily been limited to no longer include the right "*to determine their external relations. . . .* They involve *only the relations among members of a tribe.*" (emphasis in original). From this, the tribes do not have "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations" unless Congress expressly grants it. The Court listed two exceptions: a tribe may regulate the activities of nonmembers on fee lands who enter a consensual relation with the tribe through commercial dealing; the tribe also may civilly regulate where the conduct of non-Indians on fee lands "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Brendale v. Confederated Tribes and Bands of Yakima, 492 U.S. 408 (1989) – An Indian tribe attempted to enforce its zoning laws in a "closed area," which was

primarily trust land and mainly undeveloped forest; and in an "open area," which was about half fee land, and contained towns, and airport. In a fractured decision, the Court found that, while a tribe had the inherent authority to zone fee-land in the closed area, the tribe did not have the authority to zone fee-land in the open area. Stevens' opinion, allowing regulation on the closed area, found that the tribe's power to exclude nonmembers from lands that retained the tribe's "'traditional' tribal 'character' includes the lesser power to define the character of that area." However, the tribe lost that power over the open land because the "subsequent alienation" of that land, by allowing nonmember to own it in fee, had produced an integrated community that was not "economically or culturally delimited by reservation boundaries."

Duro v. Reina, 495 U.S. 676 (1990) – the Court further limited the scope of tribal criminal jurisdiction beyond that in *Oliphant*, holding that the retained sovereignty of the tribe to govern its own affairs does not include the authority to impose criminal sanctions against an Indian who is not a tribal member, even if that individual commits crimes within the reservation's boundaries.

> *Duro* was subsequently overridden by congressional legislation in 1991 recognizing and affirming the power of tribes to exercise criminal jurisdiction within their reservations over all "Indians." This statute is colloquially known as the "Duro fix."

United States v. Lara, 541 U.S. 193 (2004) – the Court affirmed Congress's authority to enact the "Duro fix," finding that under the Constitution's "plenary grants of authority over Indian affairs, Congress has the power "to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority." Breyer was careful to note that Lara did not raise the more difficult issue of the "potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status." However, the opinion did note that "the Constitution does not dictate the metes and bounds of tribal autonomy," which raises the question as to whether there are any judicially enforceable protections from Congress' actions regarding tribal sovereignty.

IV. Tribal and State Conflicts over Civil Regulatory and Adjudicatory Jurisdiction

Nat'l Farmers Union Ins. Cos. v Crow Tribe, 471 U.S. 845 (1985) – the Supreme Court held that exhaustion of tribal remedies is required before a federal court may entertain a claim that a tribal court has exceeded its jurisdiction. The existence and extent of a tribal court's jurisdiction "will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions;" the Court felt that the long-standing federal policy of supporting tribal self-government favored allowing the tribal court to conduct this examination first.

Strate v. A-1 Contractors, 520 U.S. 438 (1997) – a heavily criticized case, the Court, chose to applying *Montana v United States,* 450 U.S. 544 (1981), which applies a presumption against tribal jurisdiction over non-members on non-member land on reservations. Using this presumption, the Court denied an Indian tribe's inherent power to adjudicate a civil lawsuit brought by a non-Indian plaintiff against a non-Indian defendant for personal injuries arising from an automobile accident on a state highway within reservation boundaries. The first exception *Montana*, allowing tribal jurisdiction over non-members who enter a contractual relationship with the tribe, did not apply because the suit sounded in tort. Likewise, the second exception, which allows tribal jurisdiction over matters that substantially affect the tribe, did not apply because Ginsberg felt allowing this exception in this case would swallow the rule.

Nevada v. Hicks, 533 U.S. 353 (2001) - In this case, the Court denied tribal jurisdiction over an Indian's claim against a state official regarding the Indian's civil rights claims (under tribal and federal law) when the officers entered tribal land to execute a state search warrant. The Court repeatedly relied on *Oliphant's* principle of implicit divestiture of tribal powers lost to the United States' sovereignty to justify this expansion, stating that "where nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" (emphasis supplied by Justice Scalia).

> At least one lower court has confined *Hicks* to the limited situation of state officers entering the reservation to enforce off-reservation law. *Water Wheel Camp Recreational Area, Inc. v. Larance,* 642 F.3d 802, 812-813 (9th Cir. 2011).

Plains Commerce Bank v Long Family Land and Cattle Co., Inc., 554 U.S. 316 (2008) – the Court held that the tribe could not exercise jurisdiction over a claim brought by an Indian-owned entity to recover rights to its land upon which a Bank had foreclosed. Although the company claimed the bank had violated tribal tort law by subjecting the company to discriminatory mortgage lending practices, the Court characterized the tribal court action as an effort to regulate the sale of non-Indian fee land on the reservation. Once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it, so therefore the tribe had no regulatory of this sale. The Court specifically found that *Montana's* first exception allowing civil jurisdiction over nonmembers with consensual relationships with the tribe did not apply, as this exception has only been applied to nonmember "conduct" inside the reservation and not contests with nonmembers over land ownership.

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) – a Choctaw woman gave birth to twins off of the reservations, and the parents (both Choctaw) signed adoption papers for the children to be adopted by a non-Indian couple. ICWA provides exclusive jurisdiction over Indian child custody cases where the children are "domiciled" on the reservation, and the Choctaw tribe interceded here claiming jurisdiction. Even though the children had never been on the reservation, the Court

found that the children were domiciled on the reservation because their parents were domiciled on the reservation, and the tribe had jurisdiction. The Court found that "[t]ribal jurisdiction under the ICWA was not meant to be defeated by the actions of individual members of the tribe," specifically noting that Congress' concern in enacting the ICWA "was based in part of evidence of the detrimental impact on the children themselves of such placements outside their culture."

V. The Contours of Tribal Sovereignty

Talton v. Mayes, 163 U.S. 376 (1896) – the Court found that by virtue of the Cherokee Nation's inherent sovereignty, the protections of the Bill of Rights of the United States Constitution do not apply to the actions of the Cherokee government. The Cherokees' powers of self-government are not derived from the federal government.

> *Talton* was later used as justification for the passage of the Indian Civil Rights Act (ICRA) in 1968, which subjected tribes to several provisions similar to those encompassed in the Bill of Rights.

United States v Wheeler, 435 U.S. 313 (1978) – the Court held that tribal criminal jurisdiction over a tribe's own members arises out of the tribe's retained sovereignty, and therefore the Double Jeopardy clause of the U.S. Constitution does not bar prosecution by both federal and tribal courts for the same acts. The Court stated, "[i]t is evident that the sovereign power to punish tribal offenders has never been given up by the Navajo Tribe and that tribal exercise of that power today is therefore the continued exercise of retained tribal sovereignty." Therefore, "when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government."

Santa Clara Pueblo v Martinez, 436 U.S. 49 (1978) – in this case, an Indian woman filed suit against her tribe in federal court stating that a tribal ordinance denying membership to children of female members who marry outside the tribe (while extending membership to children of male members who marry outside the tribe) violated the ICRA's equal protection provision. The Court held that the sovereign immunity of the Indian tribes bars the tribes from suit, and that nothing within the Indian Civil Rights Act created a federal cause of action changing this. The Court noted that providing a federal civil forum would interfere with tribal autonomy and self-government beyond that which Congress created in the Act. The Court felt Congress intentionally only provided a federal forum for habeas detention cases to allow tribal courts to adjudicate the ICRA's civil aspects.

Williams v. Lee, 358 U.S. 217 (1959) – the Court denied state jurisdiction over a civil matter between an Indian and a non-Indian over a transaction that took place on the reservation. The Court noted that the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants, and that at that time, no federal act had given state courts jurisdiction over

internal Indian affairs. Because the state court infringed "on the right of the reservation Indians to make their own laws and be ruled by them," the state's infringement would not be tolerated.

VI. Public Law 280

Bryan v Itasca County, 426 U.S. 373 (1976) – the Court held that Public Law 280, while granting certain civil powers to the State over Indians in Indian territory, did not include the right to levy a property tax on Indians within the reservation. The central focus of P.L. 280 was the provision for state criminal jurisdiction over offenses on the reservation. The legislative history suggested that the civil powers granted within P.L. 280 were for resolving private civil disputes and civil causes of action. The Court concluded that the primary intent of the subsection was only to grant jurisdiction over private civil litigation involving reservation Indians in state court. To decide otherwise would allow tribes to be "subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments" and potentially turn tribes into mere "private, voluntary organizations."

VII. Challenges to Tribal Economic Development

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) – the Court found that a state law restricting gambling could not be applied to a reservation's bingo operations. Public Law 280 grants criminal jurisdiction to states, but does not permit state civil regulation of tribes. P.L. 280 did not authorize the state to enforce its gambling statute within the reservations, because the gambling statute was civil/regulatory and not criminal/prohibitory in nature. The Court also found that a state couldn't prevent Tribes from allowing non-members to gamble. A state law may preempt Indian Law if the "state interests at stake are sufficient to justify the assertion of state authority." The Court did not find a compelling state interest to justify the intrusion of state law onto the reservation in this matter.

> In 1988 Congress passed the Indian Gaming Regulatory Act, adopting the *Cabazon* holding, and dividing games into three classes based on the type of game and outlining the tribes' and states' discretion in accepting or rejecting the game on tribal land.

Seminole Nation v. United States, 316 U.S. 286 (1942) – the Court found that the U.S. government breached its fiduciary duty to the Seminoles when it continued to pay money to the tribal counsel even after the government discovered that the money has been misappropriated. The Court held that it has "recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people," and then defined the scope of the government's obligations within equitable trust principles. To continue to pay the tribe's money when the government knew it was being fraudulently misspent was a violation of the government's duty to the tribe.

VIII. Taxation and Regulation

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) – the Court upheld a tax imposed by the tribe on the oil and natural gas used or taken from the reserve by a non-Indian mining company. The Court found that "the power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." The Court further stated that "Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands is conditioned by the limitations the Tribe may choose to impose."

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) – Indian tribes in Washington had been permitted to possess unstamped cigarettes for resale, which they then sold at a lower price wholesale, plus levying their own tax. State authorities "seized as contraband" truckloads of cigarettes bound for the reservations. The Court ruled on a number of tax issues, finding: 1) tribes had the authority to levy a cigarette tax on non-tribal members, as the "power to tax transactions occurring on trust land and significantly involving a tribe or its members is a fundamental attribute of sovereignty;" 2) the state was allowed to impose sales and cigarette taxes on nonmembers who purchased cigarettes from the tribal smokeshops, as the principles guiding Indian law did not "authorize Indian tribes to market an exception from state taxation to persons who would normally do their business elsewhere;" 3) the state's interest also allowed the state to impose sales and cigarette taxes on Indian residents of the reservation who were not enrolled in the governing tribe; and finally, 4) the Court upheld the state's seizure of the cigarettes since it was done in response to the tribe's "wholesale evasion of . . . valid taxes." The Court noted that the tribes' interest in raising revenues is strongest "when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services."

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) – the state of Kansas imposed a fuel tax on distributers, and the distributors passed the cost of that tax to their customers, including a tribal fuel wholesaler and the wholesaler's client, a tribal gas station on tribal land. States are categorically barred from placing the legal incidence of an excise tax on a tribe or on tribal members for sales made inside Indian country without congressional authorization. Even if the legal incidence of the tax is on a non-Indian seller, the tax may still be preempted if the transaction giving rise to the tax occurs on the reservation and the imposition of the tax fails an interest-balancing test. The tribe argued that the state tax should be preempted, as the lower Kansas Supreme Court had held that the legal incidence of the tax was on the tribe. However, the Court disagreed, upholding the tax, and finding that the preemption analysis did not apply since the legal incidence of the tax was off-reservation and on the distributor.

Montana v Blackfeet Tribe of Indians, 471 U.S. 759 (1985) – analyzing the Indian Mineral Leasing Act of 1938, the Court found that the State of Montana may not tax the Blackfeet Tribe's royalty interests under oil and gas leases issued to non-Indian lessees. An earlier Act from 1924 authorized leases for terms not to exceed 10 years on Indian land and provided for the State to assess taxes. The 1938 Act did not contain a provision authorizing state taxation, but nor did it repeal the 1924 authorization. Under Indian law, and under the trust doctrine, States may tax Indians only when Congress has clearly manifested its consent; likewise, any ambiguity in such a provision must be construed in favor of the Indians. Since that consent was missing in this case, and since there was no indication in the legislative history that a tax was intended, no state taxation could be upheld.

IX. Indian Religion and Culture

Lyng v. Northwest Indian Cemetery Protective Association, 471 U.S. 759 (1985) – while admitting that a road and logging project by the U.S. Forest Service would "have devastating effects on traditional Indian religious practices," the Court permitted the U.S. Forest Service to proceed with the project. The Court found that the project did not violate the Indians' free exercise of religion under the First Amendment as no religious practices were prohibited. The Court noted that the Government was prepared to accommodate the religious practices to some extent, but that the Government could not to be entirely divested "of its right to use what is, after all, *its* land." (emphasis in original). The Court also found no protection for the tribe under the American Indian Religious Freedom Act (AIRFA), holding that the congressional intent behind AIRFA was to insure the "basic right of the Indian people to exercise their traditional religious practices," but not to "confer special religious rights on Indians."

> In response to this case, tribal religious advocates went to Congress and were able to get favorable amendments to several federal public land use planning statutes, the most important being the National Historic Preservation Act.

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) – the Supreme Court upheld Oregon state law prohibiting the religious use of peyote, finding that the Court had "never held that an individuals' religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." "To permit this," Justice Scalia wrote, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." In reaching this conclusion, as in *Lyng,* the Court refused to apply the "compelling government interest test."

The Indian Citizenship Act of 1924

Passed by Congress June 2, 1924

Courtesy National Archives and Records Administration

H. R. 6355 (PUBLIC ___ No. 175 68th CONGRESS)

Sixty-eighth Congress of the United States of America;

At the First Session,

Begun and held at the City of Washington on Monday, the third day of December, one thousand nine hundred and twenty-three.

AN ACT

To authorize the Secretary of the Interior to issue certificates of citizenship to Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

Speaker of the House of Representatives.

Acting President pro tempore of the Senate.

Approved, June 2, 1924.

Transcript

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F. H. Gillette
Speaker of the House of Representatives.

A. B. Cummins
Acting President pro tempore of the Senate.

Approved June 2, 1924.
(Signature unreadable)

Courtesy National Archives and Records Administration

The Secret Treaties
With California's Indians

By Larisa K. Miller

In 1852, with the world rushing in to California and gold coursing out, senators in Washington, D.C., met in executive session to consider 18 treaties made with Indians across California. Treaties with Indians, like those with foreign governments, required ratification by the Senate, and ratified Indian treaties had the status of an agreement made with a sovereign nation. Unratified treaties had no force.

As roads not taken, unratified treaties could be easily forgotten. Senate rules requiring strict confidence in deliberations on treaty matters inadvertently contributed to forgetting. This appeared to be the fate of the California Indian treaties, which were rejected by the Senate. But the treaties acquired a second life when senators at the dawn of the 20th century were forced to confront this action of their gold rush–era predecessors.

Newly tapped correspondence in the papers of Senator Thomas Bard of California reveals for the first time who resurrected the unratified treaties and why their value endured. The story is another facet in the unique history of the Indians of Northern California.

California had been densely populated by several hundred thousand natives before European contact. Under Spanish and Mexican rule, many thousands were lost to disease and forced labor. The gold rush of 1849 brought massive streams of outsiders who overran much more of the state. Over the following decades, the Indians were murdered,

killed by disease, or driven from their lands and livelihoods by miners and settlers.

In much of the western United States, the federal government extinguished native title to Indian lands by treaty. Treaties typically required the Indians to reduce their land holdings or move to areas that were not desired by whites. This was the intent of the California Indian treaties, which were made between the United States and Indian groups in California between 1851 and 1852 under three U.S. commissioners.

The Indians ceded title to their land to the United States and agreed to accept reservations, while the government pledged to pay for the ceded land and permanently set aside the reservations for Indian use. The commissioners assumed the groups they treated with were tribes. Today we know that most were simply villages, but contemporaries did not care to question the qualifications of the Indian signatories.

When the treaties came up in executive session of the U.S. Senate, the senators found them problematic. It was unclear if Mexico—from which California was acquired—recognized native land titles. If Mexico did not, then Indians in California came under U.S. sovereignty without legal claims to the land. Furthermore, the commissioners' appointments were irregular, and in the wake of the gold rush, white Californians strongly objected to the treaties.

For these reasons, the Senate rejected the treaties and, following Senate rules, imposed an injunction of secrecy on them. The record copies of the treaties were returned to the Department of the Interior; only the copies printed for use by senators fell under the secrecy action.

Unratified Treaties Leave Land Issues Unresolved

The treaties were never truly secret. The work of the commissioners was public knowledge at the time, contemporary publications mentioned the unratified treaties, and the Indians had their own copies of the treaties. Several scholars examined the treaties in the 1880s and 1890s. Even so, they languished, largely lost and forgotten.

With the treaties rejected, Indian title to the land was left unresolved. A series of executive orders and a congressional act in 1891 led to the creation of small, scattered reservations of varying quality for Indians in Southern California.

Northern California had only two reservations in 1900, at Hoopa and Round Valley; a third was at Tule River in central California. The number of Indians living outside their borders was unknown. These uncounted, nonreservation Indians had virtually no legal rights, protections, or government support.

The Northern California Indian Association (NCIA) found the situation deplorable. This organization of white reformers bent on educating, civilizing, and uplifting the landless California Indians embarked on a campaign to provide them with relief in the early 1900s.

Formed by women in and around San Jose in 1894, the NCIA got its start supporting missionary work with Indians at Greenville and Hoopa in Northern California. It was easy to set up operations when the Indians lived on government land, but the NCIA had a harder time providing domestic instruction, education, and religious services to Indian bands that lacked secure land tenure.

Charles Edwin Kelsey, a lawyer, was one of several field workers for the Northern California Indian Association, which undertook an extensive and "careful survey" to chart the location and size of almost all Indian groups in Northern California.

The NCIA could not afford to set up staff and facilities and then start over whenever the Indians might be evicted. The association bought land at Manchester in Mendocino County, but this expensive solution could not work for all the homeless Indians. The NCIA instead decided to press the government to provide relief to these Indians. But first it had to build a case to justify their cause. Because these Indians were not on reservations and had no government protection or support—characteristics that typically came with ratified treaties—they had been overlooked and forgotten.

The NCIA started its campaign methodically by doing research into the number, location, condition, and history of all the Northern California Indian bands. It sought government reports about the Indians from the commissioner of Indian affairs, who told the NCIA that there were none and made no mention of unratified treaties. Clearly the nonreservation Indians of Northern California were off the Indian Office's grid.

In the field, NCIA workers surveyed all the Northern California Indian bands. Charles Edwin Kelsey, a lawyer in San Jose, California, was one of those field workers and an NCIA director. Kelsey later explained in the *Indian's Friend*, the newsletter of the NCIA's parent organization, that the association

> decided to make a careful survey of our field and endeavor to learn the location and situation of each band in our territory. We were constantly learning of new outrages and of new distresses and it seemed advisable to see the entire situation if possible. Our means were limited and we were not able to make a very thorough canvass, but still we were able to get the approximate location and size of practically all the Indians in California. We found a much larger number than the federal census of 1900 shows.

Opposite: A group of California Indians, ca. 1920, on land near Millerton and Friant that had been purchased by Indian agent C. E. Kelsey. The Senate found problems with 18 treaties made with Indians across the state, and rejected them, leaving most Native Americans there impoverished and without land.

The association publicized the harsh living conditions it found, like the 46 Indians at Grand Island who were "confined to a little place of 4 acres, three acres being the old *grave yard* of their people," their water supply a 10-foot-deep well among the graves, their children refused attendance at the public school, and their men paid less as laborers than white men doing the same work. It was during its fieldwork that the NCIA first learned about a "treaty made with the Korus on the Sacramento." This was its first knowledge of any treaty made with these Indians, but the NCIA could not ascertain any details about it.

Appeals Made to Congress, President Roosevelt for Help

When President Theodore Roosevelt visited San Jose in May 1903, the NCIA launched its campaign by presenting him with a memorial. It asserted that the "title and ownership [of the Indians of Northern California] to this beautiful land have never been extinguished." The northern tribes outside the Hupa and Yuki reservations, "numbering some ten or twelve thousand souls, are wholly landless."

Because the government had sold much of the land taken from the Indians, the NCIA's memorial suggested that the government buy back some land for the Indians. Rather than reservations, the NCIA wished that "each band shall have a home in the neighborhood where they now live, with such fixity of tenure that they may have the opportunity to develop into intelligent, self-respecting citizens." To this end, the NCIA would petition Congress, which might in turn require presidential action.

Roosevelt sought a full report from William A. Jones, the commissioner of Indian affairs. Pointing to the 1900 U.S. census, Jones figured there were only 7,000 or 8,000 landless Indians. He opposed any federal intervention on their behalf because it would mean "the taking away of [the Indian's] individual character and his independence and making him a ward."

The commissioner confirmed "that no compensation has ever been made the California Indians for their lands, as the Government seems to have followed the policy of Mexico, from whom it got its title to California, in not recognizing the Indians' right of occupancy." Jones also reported that in the 1850s, "treaties were made with 80 or 90 bands, none of which were ever ratified."

"The Indian bureau, the War Department, which had charge of Indian matters in the fifties, and the State Department all denied all knowledge of the treaties."

The President sent the commissioner's report to C. E. Kelsey for his response. Kelsey insisted that the NCIA's population count was accurate, having been "compiled from actual enumerations made by our agents, part from their close estimates." While the initial memorial did not mention the treaty with the Korus that the NCIA had heard about, Kelsey now argued that the "appalling series of broken promises evidenced by the eighty or ninety unratified treaties" fixed legal and moral responsibility for the Indians on the government.

The erroneous reference to 80 or 90 treaties, misconstrued from the commissioner's statement about treaties made with that many bands, shows how little the NCIA knew about the treaties in 1903.

Privately, in a letter to Matthew Sniffen of the Indian Rights Association (IRA), Kelsey noted that the statement about treaties made with 80 or 90 bands appeared to be a direct quote from the 1890 census volume on Indians published by the Census Bureau. He doubted that the Indian Office knew anything about the Northern California Indians "aside from that census article and what we have furnished it."

NCIA Petitions Congress, But Treaties Prove Elusive

It was this exchange with the commissioner that Kelsey later stated "settled the fact that the Indians had never been paid for their rights in their lands." The government had received the benefits of the treaties without legally acquiring the right of occupancy. Seeing the moral and legal power inherent in the treaties, the NCIA knew its petition to Congress would be strengthened if it could incorporate more information about them.

With the assistance of the IRA in Philadelphia, the NCIA tried to locate the treaties, which were somewhere in Washington, 3,000 miles away. There was no central repository for federal records because the National Archives did not yet exist.

Kelsey wrongly believed the treaties were at the Department of State, and the NCIA's canvass of the capital came up empty. As Kelsey said afterwards at the NCIA's Zayante Indian Conference, "The Indian bureau, the War Department, which had charge of Indian matters in the fifties, and the State Department all denied all knowledge of the treaties."

Through the summer of 1903, the NCIA continued doing fieldwork. In the fall, unable to locate the treaties and unwilling to delay any longer, it drafted a petition to Congress.

It described the history of the Indians' dispossession from the land and asserted that "in every other State and Territory the Indian title to the soil has been recognized by the Government of the United States and has been extinguished only by payment therefor." It also contained the NCIA's first public mention of the unratified treaties, describing them much as Jones had in his report to Roosevelt.

The petition emphasized that the "results of the failure of these treaties have been disastrous to the Indians of northern California." It recommended that "our landless Indians be given small tracts of land in severalty where they now reside; that their own lands be given them wherever possible, and that a sufficient sum be appropriated to purchase these tracts wherever there is no Government land available."

Following the narrative was a remarkable report on the location and numbers of the various bands of nonreservation Indians in Northern California.

The report said 13,733 Indians lived in 418 settlements in 47 Northern California counties, excluding those on reservations. For all of California, the Office of Indian Affairs reported 15,325 Indians in 1903, with nearly 6,000 of them on reservations. The remaining 9,000 were spread all over California, yet were only about two-thirds of the number the NCIA reported in Northern California alone.

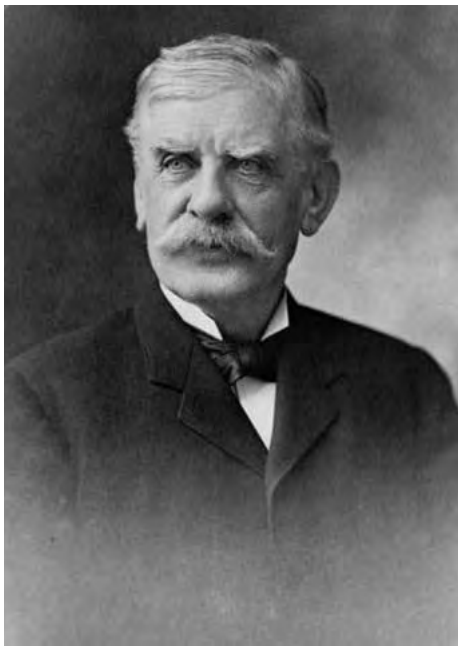
In December, Kelsey shared the petition with Sniffen. Kelsey proposed that the IRA use its lobbying experience to navigate the petition through Washington while the NCIA appealed to California's congressional delegation and collected signatures on the petition. Sniffen agreed.

Kelsey suggested that Senator Bard introduce the petition in the Senate. Many Indians lived near Bard's home in Southern California, and he was a member of both the Senate's Indian committee and the Sequoya League, another Indian reform organization. Representative James Gillett of California, "who has more than half the landless Indians in his district," would handle the petition in the House.

The First Legislative Campaign: Seeking an Investigation

Samuel Brosius, the IRA's lobbyist in Washington, met with Bard in January 1904. Brosius gave the senator the NCIA's petition with the census schedule and the correspondence with Roosevelt and Jones appended. Days later, Bard introduced the petition in the Senate. Though he initially objected to its length, he ultimately secured the support of the Senate Committee on Indian Affairs for the petition's proposition as well as its printing. Printing gave the petition greater standing.

Rather than provide money for land purchases, Bard sought an investigation of the situation. As he explained to the president of Stanford University:



Senator Thomas Bard of California, a member of the Senate Committee on Indian Affairs, introduced the petition of the Northern California Indian Association to the committee in 1904. The petition emphasized that failure to enact the treaties had been disastrous to the Indians of Northern California.

> I have asked the Commissioner of Indian Affairs to consider the matter and to formulate an amendment to the Indian appropriation bill, providing only for an investigation to ascertain the condition of the Indians in Northern California, through the agencies of the Department, and to report upon the same at the next session of Congress. I am quite sure that this is all that can be accomplished at the present time.

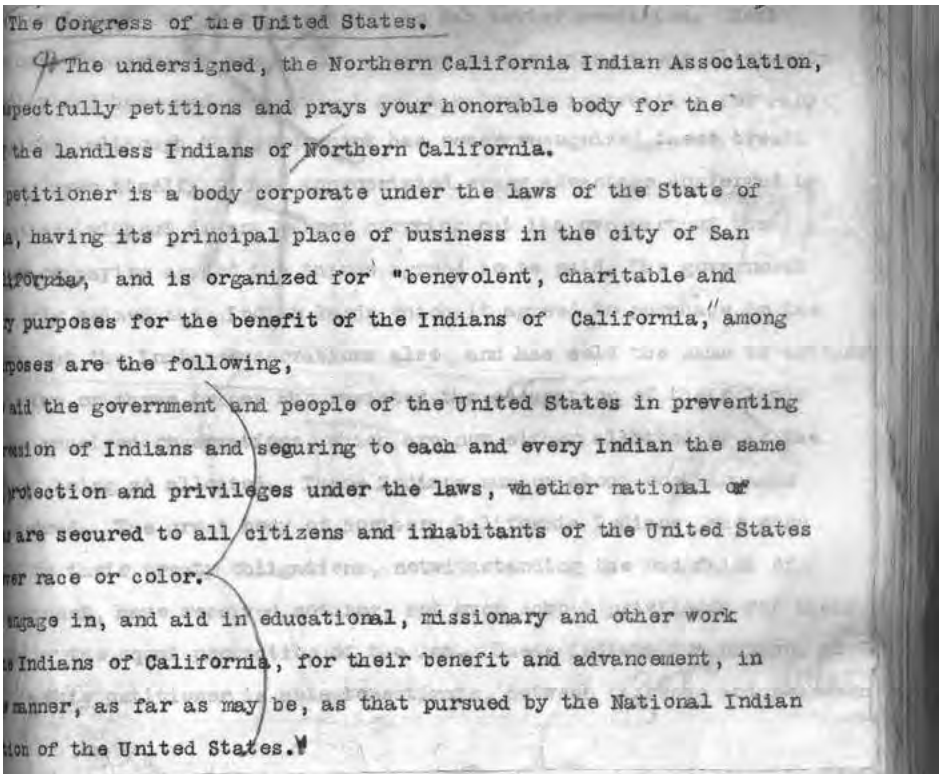
Brosius thought that postponing action to the next session was smart, as Congress could not be expected to appropriate funds without having information provided by government officials.

Writing to Sniffen, Kelsey expressed mixed feelings about Bard's approach. On the one hand, he thought that "we certainly cannot object to a full report by the proper officers of the Government as to the number of Indians in need of assistance. We have never expected the Government to accept our figures." On the other hand, with time critical, "If the mater [*sic*] goes over till next session what are we to do with the three bands that are being evicted now?"

Through the winter the NCIA built support for its petition, reporting in the *Indian's Friend*, "Prominent clergymen have taken the matter up and presented it at men's clubs, the California Federation of Women's Clubs (28,000 strong) has espoused it, editors have championed it, professors at Stanford and Berkeley Universities are aiding it, and the state is getting generally aroused." The *San Francisco Chronicle* came out in its favor.

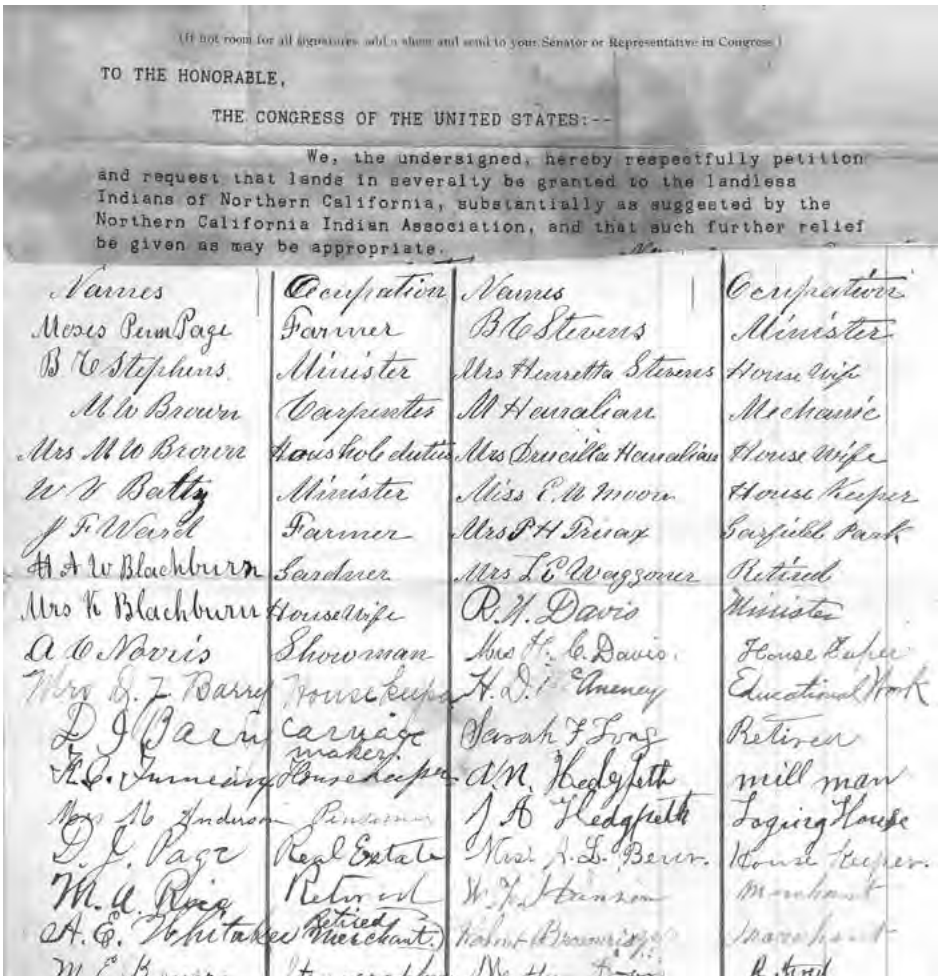
While the NCIA did not know how many petitions were sent to Congress—it had asked signers of individual petitions to send them directly to their congressmen—Senator George Perkins reported that he "was receiving a multitude of letters." In a symbolic indicator of support, the governor's wife accepted her election as vice president of the NCIA.

Despite this groundswell, the provision failed in conference committee in the spring of 1904. According to the *San Francisco Chronicle*, the conferees agreed that it "opened the way to a big appropriation later on for a reservation for these Indians." Kelsey saw things differently. He wrote to Sniffen, "We think our request is very moderate, perhaps too much so to attract attention. But one thing seems certain, that our proposition involves the least expense of anything that will come before the government." The NCIA decided to continue its fight. Strategizing over how to get its proposal through Congress and onto the President's desk, the association turned again to the unratified treaties.



The Congress of the United States.

The undersigned, the Northern California Indian Association,
spectfully petitions and prays your honorable body for the
the landless Indians of Northern California.
petitioner is a body corporate under the laws of the State of
a, having its principal place of business in the city of San
ifornia, and is organized for "benevolent, charitable and
y purposes for the benefit of the Indians of California," among
poses are the following,
aid the government and people of the United States in preventing
sion of Indians and securing to each and every Indian the same
rotection and privileges under the laws, whether national or
are secured to all citizens and inhabitants of the United States
er race or color.
ngage in, and aid in educational, missionary and other work
Indians of California, for their benefit and advancement, in
manner, as far as may be, as that pursued by the National Indian
ion of the United States.



(If not room for all signatures, add a sheet and send to your Senator or Representative in Congress.)

TO THE HONORABLE,

THE CONGRESS OF THE UNITED STATES:--

We, the undersigned, hereby respectfully petition and request that lands in severalty be granted to the landless Indians of Northern California, substantially as suggested by the Northern California Indian Association, and that such further relief be given as may be appropriate.

Names	Occupation	Names	Occupation
Mesis Pem Page	Farmer	B.B. Stevens	Minister
B. C. Stephens	Minister	Mrs Henretta Stevens	House wife
M.A. Brown	Carpenter	M Houralian	Mechanic
Mrs M.A. Brown	Housekeeping duties	Mrs Drucilla Houralian	House Wife
W.V. Baltz	Minister	Miss C.M. Moon	House Keeper
J.F. Ward	Farmer	Mrs P.H. Priax	Garfield Park
H.A.W. Blackburn	Gardner	Mrs L.C. Waggoner	Retired
Mrs K. Blackburn	Housewife	R.M. Davis	Minister
A.A. Norris	Showman	Mrs M.E. Davis	House Keeper
Mrs E.J. Barry	Housekeeper	H.D. Ameny	Educational Work
D.J. Bain	carriage maker	Sarah F. Long	Retired
R.C. Jinning	Housekeeper	A.N. Hedgpeth	mill man
Mrs M. Anderson	Painting	J.A. Hedgpeth	Logging House
D.J. Page	Real Estate	Miss J.L. Beaver	House keeper
W.A. Rice	Retired	W.F. Johnson	Merchant
A.E. Whitaker	Retired Merchant		

Left: The Memorial to Congress from the Northern California Indian Association, 1904 (page two). It notes that, unlike in other states, the California treaties were never ratified and the Indians were never paid for land taken from them.

Bottom: One of the many petitions sent to Congress as requested by the Northern California Indian Association.

The Second Legislative Campaign: What Happened to the Treaties?

In June 1904 Kelsey wrote to Bard, "I hope we may be able to have a short talk with you and explain some features of the Indian situation that have not yet been made prominent." The treaties must have been one such feature, because in July Bard wrote from California to his private secretary, R. Woodland Gates, in Washington and asked him to look for the treaties. He explained that "Kelsey, of San Jose . . . says that they have been unable to find these treaties anywhere in the Interior Department and no one there could tell him where they could be found." Kelsey followed up by sending Gates the information he had about the treaties, which consisted of the statement in the previous summer's letter from Jones to Roosevelt.

Gates took this information to the Indian Office, which could not locate the treaties. He also interviewed the clerk of the Senate Committee on Indian Affairs, who was revising his compilation of Indian treaties, but the clerk had no knowledge of them. His next step was to interview the clerk in the Indian Office who prepared the commissioner's letter to Roosevelt, but the clerk was out of town. Receiving this news, Kelsey warned Gates that the treaties probably never made it to the Indian Office: "I think it likely the treaties are to be found either among the archives of the Senate or of the State Department. The matter has been lost sight of for so long that there is probably no one in Washington who knows anything about it."

Sure enough, when Gates interviewed the Indian Office clerk in August, he had little information. Not giving up, Gates wrote, "I shall now search the files of the Secretary of

the Senate, and also the Departments, in the hope of getting copies of the treaties. I have no doubt but that the treaties were sent to the Senate . . . although just where to get at them after such a lapse of time I do not know."

Gates hit pay dirt in the archives of the Senate in September and reported to Kelsey:

> On June 27, 1852, the treaties were referred to the Senate Committee on Indian Affairs, and ordered printed *in confidence* for the use of the Senate. On June 28, 1852, they were reported without amendment. July 2, 1852, the Senate rejected the treaties.
>
> I am unable to find that the order of secrecy has been rescinded, and they are on file among the executive papers of the Senate. Under the circumstances it is impossible to obtain copies of these treaties.

Working separately, Brosius located the record copies of the treaties in the Indian Office at about the same time. However, he was unable to "prove affirmatively" that they were not ratified because, he wrote Sniffen, that "would involve searching the old records of the Senate Committee rooms of half a century ago, perhaps, and then possibly not be successful." Coupled with the extensive search by Gates, it appears that the Senate's injunction of secrecy was essentially that in 1905—secret.

G

Washington, D C, September 27,1904.

Mr C E KELSEY,
69-70 Auzerais Building,
San Jose, California.

Dear Sir:

After a most thorough search I have located the Indian treaties concerning which we have corresponded. I find that on June 7, 1852,President Fillmore sent to the Senate 18 treaties with Indian tribes in California. (p 390 Ex Journal) On June 27,1852,the treaties were referred to the Senate Committee on Indian Affairs,and ordered printed in confidence for the use of the Senate. On June 28,1852, they were reported without amendment. July 2,1852,the Senate rejected the treaties.

I am unable to find that the order of secrecy has been rescinded, and they are on file among the executive papers of the Senate. Under the circumstances it is impossible to obtain copies of these treaties. This I very much regret.

Yours truly,

R.W. Gates

Private Secretary.

R. Woodland Gates wrote to Kelsey on September 27, 1904, that he had finally found the secret treaties in the executive papers of the Senate. Location of the treaties made possible efforts to lift the injunction of secrecy, and their publication.

A Crack in the Wall
Of Secrecy in the Senate

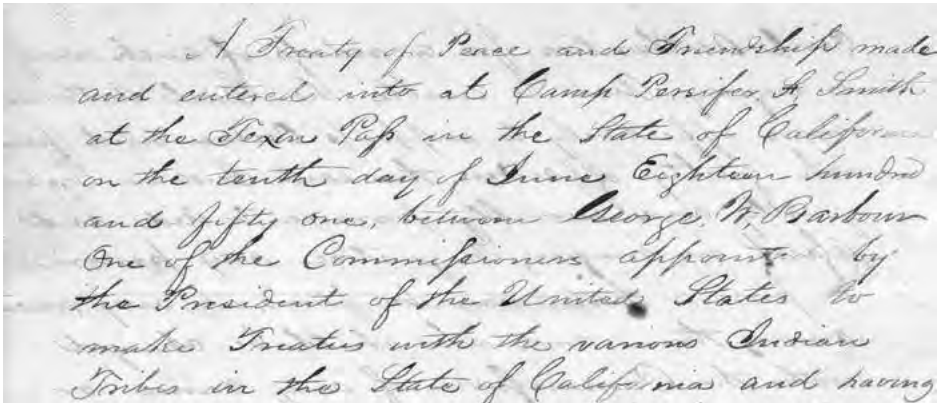
Indeed, several pre-1905 publications that mention the treaties uniformly indicate that they were unratified but do not mention the injunction of secrecy. Thus it may be that the real discovery in 1905 was not of the treaties themselves, but rather the Senate's secrecy, which was sure to have emotional appeal for the public and be a moral spur for senators. As one NCIA director wrote to Sniffen, "I am not surprised that as far as possible the whole matter has been kept secret. Even Congressmen seem to have had some shame."

Meanwhile, the NCIA launched its second public campaign. News reports in the *Indian's Friend* and California newspapers charted its progress. By October, Kelsey had received petitions signed by about 2,000 individuals and organizations representing about 12,000 members. The NCIA "issued thousands of documents in two or three different forms . . . appealed to the National Indian Association and all the Indian associations we could reach, to women's clubs, pastors' associations, and to about all clergymen in California and Indian friends everywhere."

The magazine of the Women's Clubs of California devoted an entire issue to Indians, especially those in Northern California. It also published "The True Story of Fernando," written by an NCIA officer, which described the many defects in Indian land titles. Endorsements grew. The Lake Mohonk Conference of Friends of the Indian and Other Dependent Peoples, "the most important and influential body deliberating on the Indian question in the United States," according to the *San Jose Mercury News*, adopted a resolution of support. Kelsey reported to Sniffen that they had "secured both of the California Senators and a majority of the congressman have responded favorably."

In December, Kelsey notified Bard that the NCIA still had not received copies of the treaties because of the injunction of secrecy. He asked Bard to get them from the "executive archives" and have copies made for the NCIA. However, Brosius wrote to Bard on January 3:

> I was talking to your Mr. Gates regarding the removal of secresy [*sic*] from the matter of the 18 treaties made with those Indians, so that we could secure copies of those that were desired. I find



A Treaty of Peace and Friendship made and entered into at Camp Persifer F. Smith at the Texas Pass in the State of California on the tenth day of June Eighteen hundred and fifty one, between George W. Barbour One of the Commissioners appointed by the President of the United States to make Treaties with the various Indian Tribes in the State of California and having

Felipe his mark (Chief) (seal)
Pedro his mark (seal)
Urbano his mark (seal)
Tomeneo his mark (Chief) (seal)
Tomas his mark (seal)

Signed and sealed in Duplicate after having been read and fully explained in the presence of

H. S. Burton
Interpreter
Att Barbour Secy

The treaty signed at Camp Persifer, Fort Smith, on June 10, 1851, was one of the unratified treaties. Signers included George W. Barbour and the chiefs, captains, and headmen of several tribes.

since my converstation [*sic*] with Mr. Gates, that all the treaties are recorded in the Indian Office and I have access to them. So will not need the order of secresy [*sic*] removed."

To learn more about

- How an Indian chief adjusted to being a ward of the federal government, go to *www.archives.gov/publications/prologue/2008/fall/gall.html.*
- Genealogy articles in *Prologue* on American Indians, go to *www.archives.gov/publications/prologue/genealogy-notes.html#amind.*
- How the Dawes Commission dealt with the Five Civilized Tribes, go to *www.archives.gov/publications/prologue/1997/spring/dawes-commission-1.html.*

Despite this, Bard had the injunction of secrecy removed from the Senate's copies of the treaties on January 18, and on another motion by Bard the next day, their printing was ordered.

After Kelsey received copies, he wrote to Bard:

> We are glad to observe that they substantiate our statements and considerably more. These treaties cover more of the State than we were aware, being signed by 134 bands instead of the 90 we reported. The reservations proposed in the treaties are much more extensive than we knew and also the prices agreed to be paid by the Government. We have been able already to identify a surprising number of the bands and consider that the information gained from the treaties will be of great value.

The Treaties Live On—
Despite Legislative Opposition

It is possible that Bard's motions merely represented an expeditious way to furnish copies to Kelsey, but it seems more likely that they were steps in a shrewd calculation. Bard must have seen the actions as laying a powerful platform on which to propose compensatory legislation, and may have waited until the treaties were printed and distributed to senators before introducing his legislation.

Bard was aware that his colleagues believed responsibility for California Indians lay with the state and therefore their "legal status . . . should be presented in a very forcible way in connection with any appeal that may be made to Congress in their behalf." While short of declaring their legal status as wards of the U.S. government, removing the injunction of secrecy elevated the moral status of California's Indians. According to historian Khal Schneider, this "shamed" the government into taking responsibility.

On January 30, Bard submitted an amendment to the Indian appropriation bill calling for the appointment of a commission "to investigate existing conditions and to report some plan to place the California Indians on small tracts of land of their own, to be purchased for them by the United States." Developed by the new commissioner of Indian affairs, Francis Leupp, the amendment was designed to get congressional authority up front so that Congress would be willing to authorize subsequent action. As Leupp explained to Bard, "Congress would listen more readily to a recommendation from a body it had itself especially created."

At a Senate subcommittee hearing in February, Bard stated his opposition "to spending any large amount of money in furnishing lands to Indians who can get along without," but insisted that the California Indians were "wards of the Government, and have been

recognized as such." Pushed by a colleague who protested any mention of buying land, Bard agreed to remove that reference from the amendment.

When the amendment was opposed by conferees from the House, the commission and an appropriation of $1,000 for its expenses were eliminated. The final language stated, "That the Secretary of the Interior is hereby authorized to investigate through an inspector or otherwise existing conditions of the California Indians and to report to Congress at the next session some plan to improve the same."

The bill went to the President and was signed in March 1905. Kelsey was appointed to perform the survey of conditions. His report, delivered in the spring of 1906, led to an appropriation of $100,000 to purchase the first of what are now known as California's Indian rancherias; another $50,000 followed in 1908. According to a letter from the Indian Office to Representative John Raker, the appropriations were meant "to provide homes for the tribes in Northern California who were without lands as the result of the treaties . . . being unratified."

The treaties became a regular topic of hearings as more legislation involving the California Indians came before Congress in the next two decades. They were at the core of the case heard by the Indian Claims Commission in which the Indians of California, descended from those who had signed the treaties, sought compensation from the government for lands that were taken from them without payment. The case was decided in favor of the Indians.

The secret appellation and its implication of guilt remain in the popular consciousness. "Every school child in California should know now that the U.S. forced the California tribes to sign onto treaties, then concealed the very existence of these treaties without ratifying them in the 1850s," one witness testified before Congress in 1991.

According to a classic article on their legal status, the "California Indians cannot be understood save in the light of . . . the 'lost treaties.'"

It was C. E. Kelsey who initially recognized this and triggered their resurrection. Thanks in no small part to the lubrication the treaties provided in the Senate, the NCIA's legislative campaign succeeded. Without Kelsey and the NCIA, the nonreservation Indians of California probably would not have received any land in the early 1900s. By unearthing the treaties, they made enduring changes to both the cognitive and physical landscape of California Indian country. P

Note on Sources

Because this is an inherently legislative story, the starting sources are those of the Congress, particularly the Senate. The first petition of the Northern California Indian Association (NCIA) to Congress, which was referred to the Senate Committee of Indian Affairs on January 21, 1904, incorporates several key documents, including its memorial to President Roosevelt, responses from the commissioner of Indian affairs and Kelsey, and population schedule. It is the *Memorial of the Northern California Indian Association*, 58th Cong., 2nd sess., 1904, S. Doc. 131. Actions and comments on legislative activities can be followed through the daily accounts published in the *Congressional Record* and *Senate Executive Journal*. Additional comments on the legislation are available in congressional hearings, most notably the statement of Senator Thomas R. Bard to the Senate Committee on Indian Affairs in *Indian Appropriation Bill, 1905, Hearing before a Subcommittee of the Committee on Indian Affairs*, 58th Cong., 3rd sess., January 28–February 10, 1905. These are among the Publications of the U.S. Government, Record Group 287, National Archives, Washington, D.C. Because they are published, they can also be found at many U.S. government depository libraries across the United States.

The unratified California Indian treaties of 1851–1852 are among the series of unratified treaties in the Records of the Bureau of Indian Affairs, Record Group 75, National Archives at College Park, Maryland.

Archivists at the National Archives Center for Legislative Archives, who also consulted with the Senate History Office, did not find any published or unpublished records that shed light on the single-sentence entry in the *Senate Executive Journal* recording the removal of the injunction of secrecy from the treaties on January 18, 1905. The Thomas R. Bard papers at the Huntington Library, San Marino, California, fill much of this gap.

The papers of C. E. Kelsey and the records of the Northern California Indian Association did not survive, so several sources were combined to trace their legislative campaigns. The collaboration with the Indian Rights Association (IRA) is documented in the letters Kelsey sent to IRA leaders. They are among the Indian Rights Association papers at the Historical Society of Pennsylvania. Much of this collection has been published and distributed in microform as the *Indian Rights Association Papers, 1868–1968* (Glen Rock, N.J.: Microfilming Corp. of America, 1974). The newsletter of the NCIA's parent organization, the National Indian Association, is called *The Indian's Friend* (Philadelphia and New Haven, Conn., National Indian Association). It has also been published in microfiche form as part of *American Indian Periodicals in the Princeton University Library* (New York: Clearwater Pub. Co., 1981–). Additional NCIA publications used include Cornelia Taber, *California and Her Indian Children* (San Jose: Northern California Indian Association, 1911) and *Zayante Indian Conference of Friends of Indians 1906* [proceedings] (Mount Hermon, Santa Cruz County, Calif.: July 30–31, 1906).

Only a few secondary sources come into play. They include Khal Schneider's dissertation, "Citizen Lives: California Indian Country, 1855–1940" (Ph.D. diss., University of California, Berkeley, 2006) and Chauncey Shafter Goodrich's classic article on "The Legal Status of the California Indian," *California Law Review* 14, 1926. Several quotes were also taken from the testimony of Allogan Slagle of the Association of American Indian Affairs in hearings before the House Committee on Interior and Insular Affairs in 1991 and 1992.

Several good secondary sources discussing the treaties are George E. Anderson, W. H. Ellison, and Robert F. Heizer, *Treaty Making and Treaty Rejection by the Federal Government in California, 1850–1852* (Socorro, N.M.: Ballena Press, 1978), Robert F. Heizer, *The Eighteen Unratified Treaties of 1851–1852 between the California Indians and the United State Government* (Berkeley: Archaeological Research Facility, Department of Anthropology, University of California, 1972), Harry Kelsey, "The California Indian Treaty Myth," *Southern California Quarterly* 55, no. 3 (Fall 1973). A brief overview of the NCIA and C. E. Kelsey is available in Larisa K. Miller, "Primary Sources on C. E. Kelsey and the Northern California Indian Association," *Journal of Western Archives*, Vol. 4: Iss. 1, Article 8, available at: *http://digitalcommons.usu.edu/westernarchives/vol4/iss1/8.*

Authors

Larisa K. Miller is an associate archivist at the Hoover Institution at Stanford University. Before this she was an archivist at the National Archives at San Francisco, where she provided reference service on the records of the Bureau of Indian Affairs and responded to many inquiries about C. E. Kelsey. She has a B.A. in geography and M.A. in American studies from the University of Minnesota, and an MLIS from San Jose State University.

Shingle Springs Band of Miwok Indians
and
El Dorado County, California

Joint Jurisdictional Court
Founded in 2014

Vision and Mission

- The Court's Vision: One safe, strong community of thriving families created through trust and healing.
- The Court's Mission: Joining together to provide justice through trust, respect, and love by empowering youth and families to create positive change.

Accomplishments 2017

- 5 families successfully completed the program last year
- No new SARB referrals since end of last school year
- Increased Collaboration with County SARB and Probation to provide early intervention
- Re-directing resources to raising awareness and prevention services

Voluntary, Supervised Family Maintenance Cases

- We have had 2 very productive early intervention, voluntary "dependency" cases.
- Both families completed the program within 6 months.
- Children stayed with their parents.
- Have not had any further referrals for the families.

2018 Goals

- To expand to hear more types of cases.
- Considering:
  - Post Adjudication Criminal Supervision – Limited Cases
  - Child Support Contempt Cases

Joint Jurisdictional Court Humboldt Superior Court and Yurok Tribal Court

February 15, 2018
California Judicial Council
Tribal Court-State Court Forum
San Francisco, CA

Agenda

- Context for Our New Court Initiative
- Overview of Planning Process
- Opportunities
- Challenges
- Evaluation

Context

- Common Problem- Opioid Crisis
- Shared Goal- Keep Families Together and Connected to Their Culture and Communities
- Joint Leadership and Commitment
- Two Sovereigns Create New Justice Approach
- Aided by Innovation Grant

Planning Process

- Tribal Engagement
- Stakeholder Meetings
- Trust Building
- Design Framework
- Paradigm Shift

Tribal Engagement

- Grant Application Process- Invited all Tribes to Participate
- Monthly Meetings (Received Grant-August 2017)- Invited all Tribes to Participate in Monthly Meetings
- Court Design Stage Two (September 2017 – June 2018)
  - Tribal Leader Letters Inviting Participation to Stakeholder Meetings and Follow Up Letters After Each Meeting
- Court Becomes Operational (July 2018)
- Tribal Government Options:
  - Its own joint jurisdictional court with its Tribe's tribal court judge and the state court judge presiding over cases jointly (or Tribe can retain and/or designate an existing joint court Tribal Court Judge)
  - Non-joint pilot family dependency treatment court with state court judge only presiding

Stakeholder Meetings and Building Trust

Our vision is a strong, healthy community where children are safe and families thrive because parents are provided a path to recover, heal, and grow.

Our mission is to operate a joint jurisdictional court that empowers families to make healthy decisions and breaks the cycle of addiction and child abuse & neglect through:

- A coordinated team approach;
- Comprehensive, culturally competent services;
- Frequent monitoring; and
- Building a support system for family recovery and child well-being

Decision-Making: Consensus within this Framework

- Judges are leaders
- Judicial Subject Matter Experts for Design Team
- Role of Steering Committee in making recommendations
- Stakeholders- Design Team providing input
- Consultant- primary role is neutral facilitator and secondary role as guide

Paradigm Shift

Current Justice System

- Lack of access to culture/spirituality and to our home communities
- Higher percentage of alcohol and drug related behavior resulting in imprisonment.
- Overreliance on incarceration and lack of a therapeutic approach to justice

We Are Making a Shift and Designing a New Justice System

- Respect for different traditions
- Healing individual and community trauma
- Access to our culture/spirituality in our home communities
- Move away from punishment to healing
- Move away from supporting our families in silos to a coordinated team approach
- Conclusion: We have been facing the wrong way!

Together we Are Moving toward Healing and Wellness

Yurok Values	Native American Approach	Dominant Culture Approach
'Ne-too'mar	Community/Connection/ Relatedness	Individualism/Autonomy
Skuy-ech-son	Heal Oneself	Correct/Fix You

10

Opportunities- Relationships and Resources

- Yurok Tribe
  - Tribal Healing to Wellness Court
  - Expanding Yurok Tribal Social Services
  - Title IV-E Agreement
  - Family Mentors
- Humboldt County
  - Leader in Collaborative Court Approaches
  - Child Welfare Services Committed to Improvement
  - Court Coordinator, Social Worker, Case Manager

11

Challenges

- CA DOJ Audit of Humboldt CWS
- Attorneys Wanted a Diversion Court
- Prioritizing and Referring Families
- Perception Tribes in the Region Were Excluded
- Paradigm Shift is a Journey

12

Evaluation S.M.A.R.T. goals
(specific, measurable, attainable, relevant, and timely)

- Court Evaluation
  - Benchmarks related to **R**ecovery (access to and assessment of treatment-same day), **R**emain at home, **R**eunification, **R**ecidivism (lower rates of recurrence of maltreatment), and **R**e-entry (into out-of-home care), and Family Wellbeing
  - For example, By July 1, 2019, reduce the rate of foster care re-entry for children who are discharged within 12 months of reunification, live with relative or guardianship. (Humboldt County: current reentry rate is higher (13.3%) than national standard (≤ 8.3%))
- Court Participants Evaluation
  - Case plans will have S.M.A.R.T. goals and objectives
  - These will be benchmarks identified during family team meetings
  - These will be tied to family advancement through the court phases
  - Assessment tools will be used to measure progress related to social determinants of health and family wellbeing (economic stability, food, education, health, community/cultural connections etc.)

Thank YOU!

- Questions and Answers
- How to reach us:
  - Hon. Abby Abinanti, aabinanti@yuroktribe.nsn.us
  - Hon. Joyce Hinrichs, jhinrich@humboldtcourt.ca.gov
  - Jenny Walter, jenny@jennywalter.com

Policy Guidance for State, Local, and Tribal Justice Leaders: Advancing Intergovernmental Collaborative Strategies to Improve Public Safety

The following information is one of 12 modules tailored for state, local and tribal justice leaders. These modules provide policy guidance for establishing and maintaining intergovernmental collaborative strategies in various subject areas to improve public safety in Indian country. Each module addresses a different subject area and consists of: an introduction to the topic, background information, practice tips, examples, and a directory of related resources. All modules in the *State-Tribal Collaboration Policy Guide* can be found at http://www.ncjp.org/state-tribal-collaboration.

These issue briefs were developed by the National Criminal Justice Association (NCJA) Center for Justice Planning (NCJP) and the National Congress of American Indians, in partnership with other national tribal training and technical providers and subject matter experts, including: the American Probation and Parole Association; the Center for Court Innovation; the National Criminal Justice Training Center of Fox Valley Technical College; the Tribal Law and Policy Institute; the Western Community Policing Institute; Judge Korey Wahwassuck of Leech Lake Tribal Court; and Judge John Smith of Cass County District Court.

Establishing and Maintaining State and Tribal Joint Jurisdiction Courts

Government entities, including court systems, often operate as though they are separate towers, apart and distinct from other governmental entities. Operating in these "silos" makes cooperation difficult, if not impossible, and prevents the maximum use of resources, inhibiting the ability to provide efficient service to the public. Crisis often creates opportunity, and the creation of the first joint tribal-state Wellness Courts is a good example.

Cass County, Minnesota, is a large rural area in North Central Minnesota. It is one of the poorest counties in Minnesota and has a large Native American population. In the period from 2000–2005, it was also one of the deadliest counties in the state of Minnesota for driving-while-impaired (DWI) deaths. As part of an effort to reduce traffic deaths, the Cass County Probation Department and the Cass County District Court attended drug court training sponsored by the Bureau of Justice Assistance (BJA). The Leech Lake Band of Ojibwe Chief of Police and one of its Tribal Court judges were invited to join the team. After attending the training, it was determined that a DWI court might be helpful in the effort to stop the revolving door for chronic and dangerous DWI offenders. But several logistical problems hindered the potential success of a DWI court. First, Cass County is over 60 miles wide and 100 miles long. Second, participants would have to attend court on a weekly basis and that is difficult for DWI offenders who do not have driver's licenses. Third, there were limited treatment providers and limited services available to participants. Fourth, monitoring participants would be a serious challenge.

In considering these seemingly insurmountable obstacles, Cass County realized it needed help from the tribe to make a DWI court feasible. At the time, relationships between the Cass County District Court and the tribe were strained, to say the least. Despite the mistrust between the systems, Cass County District Court Judge John P. Smith and Cass County Probation Director Reno Wells approached the Leech Lake Tribal Chairman and asked if the Leech Lake Tribe would collaborate with the District Court in establishing a DWI court that would serve both tribal members and nontribal members. After consulting with Tribal Court Judge Korey Wahwassuck, the tribe agreed to participate. Thus, in 2006, Judge Smith and Judge Wahwassuck joined together to combat impaired driving and substance-use related crime in their community by creating the first joint jurisdiction collaboration of its kind in the country. The collaboration has proven successful on many levels. The Joint Jurisdiction Wellness Court reduced recidivism and improved public safety in the community; it facilitated improved relations between the tribe and local communities; and it inspired more joint jurisdiction collaborations, such as a juvenile reentry program and the addition of neighboring Itasca County District Court to the Wellness Court. Tribal flags were even installed at county court houses and chambers of commerce.

The Leech Lake-Cass County-Itasca County Wellness Court is still operational after nearly a decade, despite turnover of the presiding judges and other key team members. And, the programs have won several national awards (Harvard Honoring Nations Award, National Association of Drug Court Professionals Cultural Proficiency Courage Award, and the National Criminal Justice Association Outstanding Tribal Criminal Justice Award, among others). Although Judge Smith and Judge Wahwassuck have moved on (Judge Smith is now a Minnesota Court of Appeals Judge, and Judge Wahwassuck is a Minnesota District Court Judge), they are frequently asked to consult on the creation of joint jurisdiction projects. In 2014, as part of Project T.E.A.M. (Together Everyone Achieves More), Judges Smith and Wahwassuck worked with the Shingle Springs Band of Miwok Indians Tribal Court and the El Dorado County Superior Court in El Dorado County, California, to design a joint jurisdiction court to serve tribal youth and their families identified through delinquency, truancy, or dependency (child protective services) proceedings. The judges of the Superior Court of El Dorado County were cross-sworn in to the Shingle Springs Band of Miwok Indians Tribal Court while the chief judge of the Tribal Court was cross-sworn in to the Superior Court, a first in American history. The court began handling cases jointly in spring 2015, and the collaboration is already showing great success.

The Shingle Springs Band of Miwok-El Dorado County Superior Court collaboration is only one of several joint jurisdiction courts that have modeled themselves after Minnesota's groundbreaking joint jurisdiction courts. A joint jurisdiction wellness court is being formed between the Kenaitze Indian Tribe and the Kenai, Alaska, Court System. Other examples include the St. Regis Mohawk-New York Unified Court System's Joint Jurisdiction Healing to Wellness Court, as well as tribal-state collaborations in Wisconsin and Oklahoma, to name a few. Minnesota's joint jurisdiction courts continue to serve as an example others are following.

The Leech Lake-Cass County Wellness Court was formed to address common goals shared by both the tribe and the state: reducing alcohol-related traffic fatalities and reducing recidivism. This collaboration served the interests of both the Ninth Judicial District Court (Cass County District Court) and the Tribal Court in enhancing public safety. Among other things, the Cass County District Court received a second venue, the tribal courtroom, which served the participants on the north end of the county. The Tribal Court became involved, for virtually the first time, in criminal cases historically handled in Cass County District Court under Public Law 280. No one imagined when this first joint jurisdiction court was formed that it would be the first step in a remarkable change of course in the relationship between the Cass County District Court and the Tribal Court, and between the governments. The Wellness Court has enhanced and made available services to both jurisdictions that were previously only available to one. The systems have been able to leverage scare resources by working together. The recidivism rate for chronic alcohol offenders has dropped to under 10 percent, a remarkable achievement in and of itself. The Wellness Court led to greater cultural understanding and cooperation between the two jurisdictions, and has led to greater trust and confidence in both judicial systems because the collaboration seeks to help people rather than punish them. The establishment of the Wellness Court proved that an approach focused on breaking down barriers rather than creating barriers produces positive results, promotes public safety, and saves resources. Most importantly, it promotes the interests of justice and the public good for all of the people it serves.

Tribal courts and state courts strive for the same things: fewer children in out of home placement, reduced recidivism, and a solution to the scourge of drug and alcohol addiction. Unfortunately neither system has been completely successful on its own, and both systems struggle to meet rising needs with shrinking resources. By working together, outcomes can be improved and lasting system change can be achieved. And the growing number of joint jurisdiction courts throughout the nation is testament to the fact that it is possible to set aside years of animosity to work together toward common goals.

Practice Tips for State. Local and Tribal Criminal Justice Leaders and Policymakers

The following practice tips are provided for state and tribal decision-makers who may be considering a joint jurisdiction program of their own:

- Determine what your goals are. Is the goal to reduce drug offenses? DWI offences? Property crimes? Juvenile delinquency?
- Create a plan for accomplishing your goal. How do you attain your goal? What is the process through which you accomplish your goal? Is it a problem-solving court? Is it a diversion program?
- Determine who or what can help you accomplish your goal. What parties or people can help you accomplish your goal? Is it another judge? A law enforcement entity? A treatment provider?
- Determine how the partner can help you. What do you need from the partner? Is it money? Is it services? Is it facilities?
- Determine the appropriate representative of your partner. Is it the tribal chairperson or tribal council/county board of commissioners? The tribal judge or state judge?
- Determine the appropriate method to approach the representative? Is there a person who should introduce you and set up a meeting? Where should the meeting be held? What format should you use?
- Determine the cultural norms that should be observed. What is the respectful way to greet the representative? Should a gift be presented? In other words, be respectful and understand that there are cultural differences.
- Discuss honestly what your needs are and why you need help. Why are you asking for help? What do you want to accomplish? Why is it a good idea? What are the risks for your partner that you know about?
- Follow up on the meeting. Do you both understand the shared and common vision? Have you developed a process for additional meetings or additional steps? Are your aims and objectives realistic?
- Acknowledge the existence of separate organizational aims and objectives and their connection to jointly agreed aims and objectives.
- Ensure a level of commitment on the part of both partners.
- Develop a process for working out the inevitable conflicts.
- Develop and maintain trust.
- Develop clear partnership working arrangements.
- Recognize the opportunity for learning experiences and sharing good practices.
- Publicize your success.
- Remember that systems don't collaborate, people do—face to face relationships are crucial.
- Acknowledge the challenges faced by both systems, and work together to develop strategies to overcome them.
- Recognize that each partner brings its own strengths and experience, and accept that each faces its own challenges and obstacles.
- Be flexible.
- DON'T BE AFRAID TO TRY SOMETHING NEW!

Examples of State and Tribal Joint Jurisdiction Courts

The Leech Lake Band of Ojibwe Tribal Court and Cass County District Court have collaborated efforts to implement a Wellness Court with the mission to reduce the number of repeat substance dependent and DWI offenders by using a team approach in the court system. Wellness Court coordinates the efforts of the Judge, Tribal Court Judge, prosecutor, defense attorney, law enforcement, social services, probation officers and treatment specialists to quickly identify and intervene with selected non-violent substance-abusing offenders in order to break the cycle of substance abuse, addiction and crime. https://www.facebook.com/Cass-CountyLeech-Lake-Band-of-Ojibwe-Wellness-Court-315280601872486/info/?tab=page_info

The Shingle Springs Band of Miwok-El Dorado County Superior Court collaboration is only one of several joint jurisdiction courts that have modeled themselves after Minnesota's groundbreaking joint jurisdiction courts.
http://www.wellnesscourts.org/files/Shinlge%20Springs%20El%20Dorado%20_FWC_TLPI%20Conference.pdf

Additional Resources on Establishing and Maintaining State and Tribal Joint Jurisdiction Courts

Korey Wahwassuck, "The New Face of Justice: Joint Tribal-State Jurisdiction," 47 Washburn L.J. 733 (2008), http://washburnlaw.edu/publications/wlj/issues/47-3.html

Korey Wahwassuck, John P. Smith, and John R. Hawkinson, "Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction," 36 W. Mitchell L.R. 2 (2010), http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1338&context=wmlr

Christine Folsom-Smith, "" (A Publication of the National Tribal Judicial Center, National Judicial College), Walking on Common Ground: Tribal-State-Federal System Relationships, http://www.judges.org/wp-content/uploads/wocg2-pub1209.pdf

"State and Tribal Courts: Strategies for Bridging the Divide" (A publication of the Center for Court Innovation, 2011).
http://www.courtinnovation.org/sites/default/files/documents/StateAndTribalCourts.pdf

"Promising Strategies: Tribal-State Court Relations," (A publication of the Tribal Law and Policy Institute and the Bureau of Justice Assistance, U.S. Department of Justice, March 2013), https://www.walkingoncommonground.org/files/TLPI%20Promising%20Strategies%20Tribal-State%20Court%20Relations_FINAL_Updated%208-15-13.pdf

"A Circle of Healing for Native Children Endangered by Drugs," Office for Victims of Crime video training series (2014), http://ojp.gov/programs/circleofhealing.htm

Project T.E.A.M. (Together Everyone Achieves More) website:
http://www.ohsu.edu/xd/research/centers-institutes/evidence-based-policy-center/stakeholder-engagement/project-team.cfm

Tribal Justice of the Bureau of Justice Assistance website

Tribal Justice and Safety website of the U.S. Department of Justice

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SESSION 2: JURISDICTION & SAFETY IN TRIBAL COMMUNITIES

a. *Law Enforcement Collaborations and Agreements*

b. *Trafficking in Tribal Communities*

c. *Judicial Council's VAWEP and VOCA Programs*

CALIFORNIA
TRIBAL COURT–STATE COURT
FORUM

May 2015

Jurisdictional Issues in California Regarding Indians and Indian Country

California Indian Tribes and Territory

California currently has approximately 110 federally recognized tribes,[1] with nearly 100 separate reservations or rancherias.[2] In addition there are currently 81 groups petitioning for federal recognition.[3] In the 2010 census roughly 725,000 California citizens identified as American Indian or Alaska Native either alone or in combination with other ethnicities.[4] This represents roughly 14% of the entire American Indian/Alaska Native population of the United States.

General Rules (these rules apply in California unless modified by PL 280)

Tribes are sovereign and have exclusive inherent jurisdiction over their territory and members, but **not** necessarily with jurisdiction over non-Indians even within tribal territory.

Tribes are under the exclusive and plenary jurisdiction of the federal congress, which may restrict or abolish jurisdiction and sovereignty. The federal government has exercised this power a number of times to limit tribal jurisdiction, assume federal jurisdiction over a number of areas, and delegate that jurisdiction to some states. Congress has granted limited jurisdictional authority to the federal courts (under the General Crimes Act 18 USC § 1153 and the Major Crimes Act 18 USC § 1152) and to state courts (for example under Public Law 280). Congress has imposed limits on tribal courts through the Indian Civil Rights Act (ICRA 25 USC § 1301-1303).

Public Law 280

The general jurisdictional scheme was altered in California by Public Law 280 enacted by Congress in 1953. PL 280 transferred federal criminal jurisdiction and conferred some civil jurisdiction on states and state courts in the six mandatory Public Law 280 states, which includes California. Public Law 280 is now codified in federal law as 28

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[1] See http://www.bia.gov/cs/groups/public/documents/text/idc006989.pdf
[2] Note that some tribes remain "landless" meaning they have no land in trust for their members, while other tribes may have more than one reservation or rancheria.
[3] As of November 12, 2013. See http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024418.pdf
[4] See http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf

U.S.C. § 1360 regarding civil jurisdiction and 18 U.S.C. § 1162 regarding criminal jurisdiction.[5]

Per the U.S. Supreme Court in C*alifornia v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, Public Law 280 had the following effect on California's civil and criminal jurisdiction in Indian Country:

> In Pub L. 280, Congress expressly granted six States, including California, jurisdiction over specified areas of Indian country within the States and provided for the assumption of jurisdiction by other States. In § 2 [ie.18 U.S.C. § 1162], California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State. Section 4's [ie. 28 U.S.C. § 1360] grant of civil jurisdiction was more limited. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), we interpreted § 4 to grant States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority. *Id.,* at 385, 388-390. Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280 it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court. (at pp. 207-208)

The "criminal/prohibitory" versus "civil/regulatory" distinction was set out by the Court in *Cabazon* as follows:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Publ. L. 280 does not authorize its enforcement on an Indian reservation. (p. 209)

So, in terms of civil jurisdiction, the effect of PL 280 was merely to grant Indians access to state court forums to resolve disputes. It did not give the state jurisdiction to impose civil regulatory laws on the tribes or tribal territory. Note that the fact that there are misdemeanor criminal penalties for infraction of a law is not sufficient in and of itself to convert it from civil/regulatory into criminal/prohibitory for the purposes of Pub. L. 280. Further, PL 280 applies only to STATE laws of general application, local ordinances do not apply.

The term "Indian Country" is defined in 18 U.S.C. § 1151:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United

[5] See attached statutes.

States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

California Criminal Jurisdiction in Indian Country pursuant to Public Law 280

Offender	**Victim**	**Jurisdiction**
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction unless certain specific federal laws apply.
Non-Indian	Indian	Generally, state has jurisdiction exclusive of federal and tribal jurisdiction. (However, under VAWA[6] can have concurrent tribal, and Federal if interstate provisions (18 U.S.C. 2261, 2261A, 2262 or 922(g)(8) or (9)) apply.) Under VAWA tribes may opt to exercise some jurisdiction over non-Indians for DV offences
Indian	Non-Indian	State has jurisdiction exclusive of federal government (unless federal government has reassumed jurisdiction under the Tribal Law and order Act) but tribe may exercise concurrent jurisdiction. Federal for certain federal offences including interstate DV.
Indian	Indian	Generally, state has jurisdiction exclusive of federal government (unless federal government has reassumed jurisdiction under Tribal Law and Order Act, or unless specific federal crimes are involved) but tribe may exercise concurrent jurisdiction.
Non-Indian	Victimless	State jurisdiction is exclusive unless federal jurisdiction has been reassumed under Tribal Law and order Act.
Indian	Victimless	There may be concurrent state, tribal, and federal jurisdiction if reassumption under Tribal Law and Order Act. There is no state regulatory jurisdiction.

[6] Violence Against Women Act

Full Faith and Credit

While tribes are recognized as sovereign, they are not "states" for the purposes of the full faith and credit requirements of Article IV of the U.S. Constitution. There is general consensus (but no Supreme Court authority on point) that tribes are not encompassed by the federal full faith and credit statute (28 U.S.C. §1738). There are, however, a number of relevant federal and state provisions that mandate full faith and credit for and between tribal courts:

- Indian Child Welfare Act (25 U.S.C. § 1911 (d))
- Violence Against Women Act (18 U.S.C. § 2265)
- Child Support Enforcement Act (28 U.S.C. 1738 B)
- Uniform Child Custody Jurisdiction and Enforcement Act (Family Code §3404)

Where there is no specific statutory mandate for full faith and credit, the general rule is that tribal court orders are entitled to comity

Effect on Dependency and Delinquency Jurisdiction

Under the jurisdictional regime of PL 280, State courts in California generally have jurisdiction over dependency and delinquency cases involving Indians and Indian children, even if the events occur in Indian country. However, this jurisdiction is affected by the requirements of the Indian Child Welfare Act (ICWA) and the fact that tribe's may also exercise jurisdiction over these matters. Pursuant to ICWA (25 U.S.C. § 1911) even in PL-280 state, tribal jurisdiction is exclusive where a child is already the ward of a tribal court. Further, ICWA recognizes presumptive tribal jurisdiction over cases involving Indian children who are not already wards of a tribal court.

Effect on Jurisdiction in DV cases and ability to enforce protective orders

If events take place in Indian country and either the victim or perpetrator or both are Indian, then tribal court may exercise concurrent jurisdiction with the state court. (Note that there may also be federal jurisdiction over some federally defined crimes). Tribal jurisdiction and remedies subject to limitations under the Indian Civil Rights Act and Major Crimes Act.

Civil state protective or restraining orders may be considered civil/regulatory and therefore be unenforceable in Indian country unless registered with the tribe/tribal court. Some county police departments take position that they have no authority to enforce protective orders in Indian country. Restraining orders issued in a criminal case should be enforced/enforceable on tribal lands.

Few California tribes have tribal courts or tribal police departments.

Laws Governing Federal Jurisdiction in Indian Country

General Crimes Act:

18 U.S.C. § 1152. Laws governing

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Major Crimes Act:

18 U.S.C. § 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Embezzlement:

18 U.S.C. § 1163. Embezzlement and theft from Indian tribal organizations

Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization; or

Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied,

receives, conceals, or retains the same with intent to convert it to his use or the use of another--

Shall be fined under this title, or imprisoned not more than five years, or both; but if the value of such property does not exceed the sum of $1,000, he shall be fined under this title, or imprisoned not more than one year, or both.

As used in this section, the term “Indian tribal organization” means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws.

Public Law 280

Public Law 280 (Criminal Provision):

18 U.S.C. § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
aska	l Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
alifornia	l Indian country within the State
innesota	l Indian country within the State, except the Red Lake Reservation
ebraska	l Indian country within the State
regon	l Indian country within the State, except the Warm Springs Reservation
isconsin	l Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General--

(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.

Public Law 280 (Civil Provisions):

28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	l Indian country within the State
California	l Indian country within the State
Minnesota	l Indian country within the State, except the Red Lake Reservation
Nebraska	l Indian country within the State
Oregon	l Indian country within the State, except the Warm Springs Reservation
Wisconsin	l Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Federal Laws Requiring Full Faith and Credit

18 U.S.C. § 2265. Full faith and credit given to protection orders

(a) Full faith and credit.--Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.

(b) Protection order.--A protection order issued by a State, tribal, or territorial court is consistent with this subsection if--

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

(c) Cross or counter petition.--A protection order issued by a State, tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if--

(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

(d) Notification and registration.--

(1) Notification.--A State, Indian tribe, or territory according full faith and credit to an order by a court of another State, Indian tribe, or territory shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State, tribal, or territorial jurisdiction unless requested to do so by the party protected under such order.
(2) No prior registration or filing as prerequisite for enforcement.--Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State, tribal, or territorial jurisdiction.

(3) Limits on Internet publication of registration information.--A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.

(e) Tribal court jurisdiction.--For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1738B. Full faith and credit for child support orders

(a) General rule.--The appropriate authorities of each State--

(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and
(2) shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i).

(b) Definitions.--In this section:

“child” means--

(A) a person under 18 years of age; and

(B) a person 18 or more years of age with respect to whom a child support order has been issued pursuant to the laws of a State.

“child's State” means the State in which a child resides.

“child's home State” means the State in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the 6-month period.

“child support” means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.

“child support order”--

(A) means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and

(B) includes--

(i) a permanent or temporary order; and

(ii) an initial order or a modification of an order.

“contestant” means--

(A) a person (including a parent) who--

(i) claims a right to receive child support;

(ii) is a party to a proceeding that may result in the issuance of a child support order; or
(iii) is under a child support order; and

(B) a State or political subdivision of a State to which the right to obtain child support has been assigned.

“court” means a court or administrative agency of a State that is authorized by State law to establish the amount of child support payable by a contestant or make a modification of a child support order.

“modification” means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.

“State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).

(c) Requirements of child support orders.--A child support order made by a court of a State is made consistently with this section if--

(1) a court that makes the order, pursuant to the laws of the State in which the court is located and subsections (e), (f), and (g)--

(A) has subject matter jurisdiction to hear the matter and enter such an order; and

(B) has personal jurisdiction over the contestants; and

(2) reasonable notice and opportunity to be heard is given to the contestants.

(d) Continuing jurisdiction.--A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order.

(e) Authority to modify orders.--A court of a State may modify a child support order issued by a court of another State if--

(1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

(2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant; or

(B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

(f) Recognition of child support orders.--If 1 or more child support orders have been issued with regard to an obligor and a child, a court shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement:

(1) If only 1 court has issued a child support order, the order of that court must be recognized.

(2) If 2 or more courts have issued child support orders for the same obligor and child, and only 1 of the courts would have continuing, exclusive jurisdiction under this section, the order of that court must be recognized.

(3) If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized, but if an order has not been issued in the current home State of the child, the order most recently issued must be recognized.

(4) If 2 or more courts have issued child support orders for the same obligor and child, and none of the courts would have continuing, exclusive jurisdiction under this section, a court having jurisdiction over the parties shall issue a child support order, which must be recognized.

(5) The court that has issued an order recognized under this subsection is the court having continuing, exclusive jurisdiction under subsection (d).

(g) Enforcement of modified orders.--A court of a State that no longer has continuing, exclusive jurisdiction of a child support order may enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a modification of the order is made under subsections (e) and (f).

(h) Choice of law.--

(1) In general.--In a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply except as provided in paragraphs (2) and (3).

(2) Law of State of issuance of order.--In interpreting a child support order including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order.

(3) Period of limitation.--In an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation.

(i) Registration for modification.--If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.

California State Laws Concerning Recognition and Enforcement of Tribal Court Orders

Under the Uniform Child Custody Jurisdiction and Enforcement Act:

Family Code § 3404. Native American children

(a) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) is not subject to this part to the extent that it is governed by the Indian Child Welfare Act.

(b) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying this chapter and Chapter 2 (commencing with Section 3421).

(c) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognized and enforced under Chapter 3 (commencing with Section 3441).

Under the Uniform Interstate Family Support Act:

Family Code § 4901

The following definitions apply to this chapter:

(s) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term "state" also includes both of the following:

(1) An Indian tribe

Under the Uniform Interstate Enforcement of Domestic Violence Protection Orders:

Family Code § 6401
In this part:

(1) "Foreign protection order" means a protection order issued by a tribunal of another state.

(2) "Issuing state" means the state whose tribunal issues a protection order.
(3) "Mutual foreign protection order" means a foreign protection order that includes provisions in favor of both the protected individual seeking enforcement of the order and the respondent.

(4) "Protected individual" means an individual protected by a protection order.

(5) “Protection order” means an injunction or other order, issued by a tribunal under the domestic violence, family violence, or antistalking laws of the issuing state, to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to, another individual.

(6) “Respondent” means the individual against whom enforcement of a protection order is sought.

(7) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or any branch of the United States military, that has jurisdiction to issue protection orders.

(8) “Tribunal” means a court, agency, or other entity authorized by law to issue or modify a protection order.

Under the Foreign Country Money Judgments Act:

Code of Civil Procedure § 1714. Definitions

As used in this chapter:

(a) “Foreign country” means a government other than any of the following:

(1) The United States.

(2) A state, district, commonwealth, territory, or insular possession of the United States.

(3) Any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the United States Constitution.

(b) “Foreign-country judgment” means a judgment of a court of a foreign country. “Foreign-country judgment” includes a judgment by any Indian tribe recognized by the government of the United States.

Under the Interstate and International Depositions and Discovery Act

Code of Civil Procedure § 2029.200.

In this article:

(a) “Foreign jurisdiction” means either of the following:

(1) A state other than this state.

(2) A foreign nation.

(b) “Foreign subpoena” means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(c) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(d) “State” means a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(e) “Subpoena” means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following:

(1) Attend and give testimony at a deposition.

(2) Produce and permit inspection, copying, testing, or sampling of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.

(3) Permit inspection of premises under the control of the person.

Indian Civil Rights Act

25 U.S.C. § 1301. Definitions

For purposes of this subchapter, the term--

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

25 U.S.C. § 1302. Constitutional rights

(a) In general

No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who--

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-

government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall--

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding--

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant--

(1) to serve the sentence--

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term “offense” means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

25 U.S.C. § 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Legislation Affecting Jurisdiction Over Domestic Violence Cases

25 U.S.C. § 1304. Tribal jurisdiction over crimes of domestic violence

(a) Definitions

In this section:

(1) Dating violence

The term “dating violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(2) Domestic violence

The term “domestic violence” means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

(3) Indian country

The term “Indian country” has the meaning given the term in section 1151 of Title 18.

(4) Participating tribe

The term “participating tribe” means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.

(5) Protection order

The term “protection order”--

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding,

if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

(6) Special domestic violence criminal jurisdiction

The term "special domestic violence criminal jurisdiction" means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(7) Spouse or intimate partner

The term "spouse or intimate partner" has the meaning given the term in section 2266 of Title 18.

(b) Nature of the criminal jurisdiction

(1) In general

Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

(2) Concurrent jurisdiction

The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) Applicability

Nothing in this section--

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) Exceptions

(A) Victim and defendant are both non-Indians

(i) In general

A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) Definition of victim

In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term "victim" means a person specifically protected by a protection order that the defendant allegedly violated.

(B) Defendant lacks ties to the Indian tribe

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant--

(i) resides in the Indian country of the participating tribe;

(ii) is employed in the Indian country of the participating tribe; or

(iii) is a spouse, intimate partner, or dating partner of--

(I) a member of the participating tribe; or

(II) an Indian who resides in the Indian country of the participating tribe.

(c) Criminal conduct

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

(1) Domestic violence and dating violence

An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.

(2) Violations of protection orders

An act that--

(A) occurs in the Indian country of the participating tribe; and

(B) violates the portion of a protection order that--

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of Title 18.

(d) Rights of defendants

In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant--

(1) all applicable rights under this Act;

(2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;

(3) the right to a trial by an impartial jury that is drawn from sources that--

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

(e) Petitions to stay detention

(1) In general

A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title may petition that court to stay further detention of that person by the participating tribe.

(2) Grant of stay

A court shall grant a stay described in paragraph (1) if the court--

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

(3) Notice

An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303 of this title.

(f) Grants to tribal governments

The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)--

(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including--

(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);

(B) prosecution;

(C) trial and appellate courts;

(D) probation systems;

(E) detention and correctional facilities;

(F) alternative rehabilitation centers;

(G) culturally appropriate services and assistance for victims and their families; and

(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;

(3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of Title 18, consistent with tribal law and custom.

(g) Supplement, not supplant

Amounts made available under this section shall supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.

(h) Authorization of appropriations

There are authorized to be appropriated $5,000,000 for each of fiscal years 2014 through 2018 to carry out subsection (f) and to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.

18 U.S.C. § 2261. Interstate domestic violence

(a) Offenses.--
(1) Travel or conduct of offender.--A person who travels in interstate or foreign commerce or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

(2) Causing travel of victim.--A person who causes a spouse, intimate partner, or dating partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

(b) Penalties.--A person who violates this section or section 2261A shall be fined under this title, imprisoned--

(1) for life or any term of years, if death of the victim results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;

(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;

(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and

(5) for not more than 5 years, in any other case,

(6) Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment for not less than 1 year.

or both fined and imprisoned.

18 U.S.C. § 2261A. Stalking

Whoever--

(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that--

(A) places that person in reasonable fear of the death of, or serious bodily injury to--

(i) that person;

(ii) an immediate family member (as defined in section 115) of that person; or

(iii) a spouse or intimate partner of that person; or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or

(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title.

18 U.S.C. § 2262. Interstate violation of protection order

(a) Offenses.--

(1) Travel or conduct of offender.--A person who travels in interstate or foreign commerce, or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States, with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, and subsequently engages in such conduct, shall be punished as provided in subsection (b).

(2) Causing travel of victim.--A person who causes another person to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, as a result of, or to facilitate such conduct or travel engages in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, shall be punished as provided in subsection (b).

(b) Penalties.--A person who violates this section shall be fined under this title, imprisoned--

(1) for life or any term of years, if death of the victim results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;

(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;

(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and

(5) for not more than 5 years, in any other case,

or both fined and imprisoned.

18 U.S.C. § 922. Unlawful acts

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(g) It shall be unlawful for any person—

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(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Policy Guidance for State, Local, and Tribal Justice Leaders: Advancing Intergovernmental Collaborative Strategies to Improve Public Safety

The following information is one of 12 modules tailored for state, local and tribal justice leaders. These modules provide policy guidance for establishing and maintaining intergovernmental collaborative strategies in various subject areas to improve public safety in Indian country. Each module addresses a different subject area and consists of: an introduction to the topic, background information, practice tips, examples, and a directory of related resources. All modules in the *State-Tribal Collaboration Policy Guide* can be found at http://www.ncjp.org/state-tribal-collaboration.

These issue briefs were developed by the National Criminal Justice Association (NCJA) Center for Justice Planning (NCJP) and the National Congress of American Indians, in partnership with other national tribal training and technical providers and subject matter experts, including: the American Probation and Parole Association; the Center for Court Innovation; the National Criminal Justice Training Center of Fox Valley Technical College; the Tribal Law and Policy Institute; the Western Community Policing Institute; Judge Korey Wahwassuck of Leech Lake Tribal Court; and Judge John Smith of Cass County District Court.

Building Intergovernmental Law Enforcement Collaborations

Tribal law enforcement agencies function within a complex and complicated jurisdictional environment, answer to multiple authorities, operate with limited resources, and patrol some of the most remote areas in the country, often without assistance from non-tribal law enforcement agencies. These agencies deal with crime rates for Native Americans that are far greater than the general population as well as visiting populations, or transient non-Indian populations that can outnumber tribal residential populations by 10-to-1.[1] The federal government limits the jurisdiction of tribal governments to address crime committed on tribal land by both native and non-native perpetrators in key ways. Tribally operated law enforcement agencies provide a broad range of public safety services such as responding to calls for service, investigating crimes, enforcing traffic laws, executing arrest warrants, serving process, providing court security, and conducting search and rescue operations.[2]

- As of September 2008, American Indian tribes operated 178 law enforcement agencies that employed the equivalent of at least one full-time sworn officer with general arrest powers. In addition, the Bureau of Indian Affairs (BIA) operated 42 agencies providing law enforcement services in Indian country.
- A total of 157 tribally operated law enforcement agencies were general purpose police departments, and the remainder were special jurisdiction agencies responsible for enforcing natural resources laws.

[1] Written Testimony before the Indian Law and Order Commission, 2/16/12, William Denke, Chief of Police.
[2] Findings based on the 2008 Census of State and Local Law Enforcement Agencies.

- Tribally operated agencies employed more than 4,500 full-time personnel, including about 3,000 sworn officers.
- Eleven of the 25 largest tribal law enforcement agencies served jurisdictions covering more than 1,000 square miles.
- The largest tribal law enforcement agency, the Navajo Police Department, employed 393 full-time sworn personnel in Arizona, New Mexico, and Utah.
- More than half of tribal police departments used community policing officers, and more than a third used school resource officers.
- About 4 in 5 tribal police departments participated in 1 or more multi-agency task forces. Departments were most likely to participate in drug task forces (66 percent).

Data also indicate that tribal law enforcement agencies have between 55 and 75 percent of the resource base available to non-Indian communities.[3] According to the National Congress of American Indians (NCAI):

- On tribal lands, 1.3 officers must serve every 1,000 citizens, compared to 2.9 officers per 1,000 citizens in non-Indian communities with populations under 10,000.
- A total of at least 4,290 sworn officers are needed in Indian Country to provide the minimum level of coverage enjoyed by most communities in the United States.
- Among the most important challenges facing these officers and departments is providing around-the-clock police coverage to their communities.
- Tribal officers often work without adequate backup.

Most tribal law enforcement services in Indian Country are administered by tribal nations through the Indian Self-Determination and Education Assistance Act of 1975, also known as Public Law 93–638 (PL 93–638). This law enables tribes to contract with the federal government to administer services, including law enforcement and courts that had been provided as a direct service by the federal government. Officers and non-sworn staff of these departments are tribal employees. “638 funding” typically supports basic services and is matched with other tribally-generated revenue sources to support justice functions. Police departments are the second most common type of tribal police agencies that are entirely administered by the BIA. The BIA was established in 1824 to manage lands held in trust by tribes and oversee the education of Native Americans. Staff of these agencies are federal employees. In either case, there is a BIA Division of Law Enforcement special agent in charge in each of the nine BIA districts[4] who is responsible for overseeing activities and responding to needs in that district.

Jurisdictional Challenges

As a result of the Dawes Act of 1887, American Indian land holdings are often located in remote geographic regions and made up of a patchwork of reservation and non-reservation land,

[3] https://www.ncjrs.gov/pdffiles1/nij/188095.pdf.
[4] http://www.bia.gov/WhoWeAre/BIA/OJS/ojs-contact/index.htm.

known as "checkerboard" areas. Reservations also typically overlap or are adjacent to different state, county, and city jurisdictions. For this reason, intergovernmental collaboration among federal, state, and tribal law enforcement is necessary to enhance public safety services in and around Indian Country. As an example, *The Nez Perce Indian Reservation is 1,200 square miles within the exterior boundaries of the 1863 Treaty. The Dawes Act ultimately reduced tribal land ownership within the boundaries to approximately 144 square miles and opened the remaining 1,056 square miles to non-tribal settlement. Tribal lands and communities are scattered throughout the region in five counties including Nez Perce, Lewis, Latah, Idaho, and Clearwater.*

Cooperative Agreements

Formal arrangements and partnerships among governmental stakeholders can enable them to more effectively and efficiently coordinate law enforcement activities. Such mechanisms allow tribal, state, and local agencies to maintain their respective governmental roles and responsibilities and to collaborate when appropriate. Cooperative agreements can take the form of cross-deputization, mutual aid (MOA) and intergovernmental agreements (IGA) or memorandums of understanding (MOUs). Many law enforcement agencies have entered into cooperative agreements with state and surrounding jurisdictional agencies to address a variety of response strategies including cross-deputization, community policing based initiatives and enhanced information sharing capabilities. Cooperative agreements spread costs, pool resources, distribute risk. Terms of cooperative agreements vary depending on challenges and needs of each jurisdiction but all expand authority of officers and address:

- The purpose
- Duties and obligations
- Jurisdiction
- Geographic areas
- Incarceration and prosecution
- Exchange of information
- Personnel and equipment
- Indemnification
- Liability
- Dispute resolution
- Sovereign immunity
- Severability

Cooperative agreements are often the result of intense and complicated negotiations between involved intergovernmental authorities to overcome adversarial elements and address barriers that arise. Barriers can include philosophical and cultural differences between agencies, historical abuse of power and neglect, or differences or inaccessibility of training.[5] Successful negotiations take into account several areas of understanding and cooperation such as:

- Use of cooperative agreements that facilitate intergovernmental relationships to allow the states and tribes to maintain their respective government roles and responsibilities and collaborate when appropriate.
- Working in intergovernmental collaborative partnerships that require each stakeholder to treat each other with mutual respect; stakeholders must support each other, keep an

[5] Criminal Jurisdiction in Indian Country: The Solution of Cross Deputization, Michigan State University College of Law, Indigenous Law and Policy Center, Occasional Paper Series 2008-01.

open mind, and give others an opportunity to openly and honestly communicate and gain trust.

- Past history and working relationships have been influenced by rivalries. In order for intergovernmental partnerships to be successful, all rivalries must give way to reciprocal cooperation and mutual trust and respect.
- The development of a shared vision or purpose and guiding principles is important to provide focus and keep stakeholders engaged.
- Each party involved represents an independent government that works for respective constituencies; each tribal government is a sovereign entity. It is important to recognize the expectations and sovereignty of each governmental entity involved.
- Recognize that relationships are unique, not only because all tribal citizens are state citizens and legislative constituents, but also because of the nature of the tribal-federal relationship. When opportunities arise, share information on organization history and culture, political structures, community values, and expectations.
- Traditional justice organizations are heavily entrenched in routine type environments that require adherence to strict policies and procedures, laws, rules, and regulations. Collaborative

  justice organizations will need to develop the capacity to more effectively adopt new and innovative approaches and create opportunities for staff to learn new skills.
- Each involved government tries to reach agreement on common issues, but recognizes that there will always be some areas of conflict that should not be allowed to influence the entire intergovernmental relationship.[6]

Building Trust through Lasting Leadership

The most important component to building law enforcement intergovernmental collaboration is the establishment and maintenance of trust. Establishing trusting relationships is achieved through exhibiting professional and ethical leadership, demonstrating integrity, showing mutual respect and maintaining open and honest communication over time. In all jurisdictions where successful collaborations have been established, there is a respected tribal police chief who has navigated the political landscape and worked with other government leaders to overcome barriers to collaboration. Changes in state, local or tribal leadership can either enhance or undermine progress toward intergovernmental collaboration. Establishing an agency vision, mission, and guiding principles congruent with the government agency and citizens being served can help ensure selection of leaders who are in sync and maintain momentum toward collaboration.

It is important that state, local and tribal leaders conduct succession planning and hire professional leaders who have credibility and negotiating skills, and are knowledgeable,

[6] Government to Government Models of Cooperation Between States and Tribes, National Congress of State Legislators, April, 2009, Chapter 2. Guiding Principles in State-Tribal Relations, p. 6.

supportive and know how to navigate sensitive political environments. The International Association of Chiefs of Police has developed a set of 22 essential qualities in a chief.[7]

> *The skills required of a police chief are… significantly different from those required of new recruits or lower ranking supervisors. The chief not only maintains general control over the department, but also serves as a representative in dealing with other municipal agencies, other police agencies, and elected officials.*[8]

While achieving intergovernmental law enforcement collaboration may be difficult and require new ways of transcending traditional challenges such as politics, culture, tradition, and historical approaches, creating a sustainable environment that fosters openness and transparency in operations will provide a means for expanding efforts in forming collaborative partnerships.

[7] Police Chiefs Desk Reference, a Guide for Newly Appointed Police Leaders, IACP & BJA, Page 12.
[8] Recruitment and Selection of Police Officers, https://us.sagepub.com/sites/default/files/upm-binaries/53256_ch_4.pdf.

Practice Tips for State and Local Criminal Justice Leaders and Policymakers

Relationship Building

- Have a genuine commitment to relationship building and cooperation to advance public safety.
- Coordinate among the various state and tribal branches, agencies and entities, including legislative representatives and state chiefs and sheriffs associations.
- Convene regularly scheduled multidisciplinary groups of state, local, and tribal justice leaders to discuss problems, share information and focus on collaborative cross-jurisdictional solutions; and foster relationship building and increase the likelihood of successful intergovernmental collaboration:
    - In-person communications are especially helpful; meeting one-on-one can help in understanding perspectives, views and personal values important to collaboration.
    - Maintain points of contact and be aware that many stakeholders have limited electronic communication capabilities and written communication can be misconstrued.
    - Create an environment that fosters openness and transparency.
- Research model intergovernmental initiatives and encourage all law enforcement officers to receive specialized training about Indian Country.
- Recognize officers for commendable participation in intergovernmental collaborations.
- Review and assess policies on public safety provision of services and how they impact tribal-state relations including cross-deputization, training, crime trends, information sharing, etc., and recommend improvements.
- Understand that there are wide differences among tribes in their priorities, cultures, and resources that prevent generic solutions.
- Establish and follow guiding principles that guide good working relationships inclusive of:
    - A commitment to cooperation.
    - Mutual understanding and respect.
    - Consistent and early communication.
    - Processes (and accountability) for addressing issues.
    - Formalization of relationships.
- Clarify your particular role and authority within your agency to avoid creating unrealistic expectations.
- Like other governments, be aware that a tribe's priorities and staff may change with a change in administration. Educate yourself regarding tribal elections and update points of contact.

History & Background

- Understand that historic federal and state policies, abuse of power and neglect toward American Indians/Alaska Natives have resulted in an inherent distrust of government officials and non-tribal authorities.
- Familiarize yourself with the agency's prior dealings with the tribe.
- Make an effort to learn about a particular tribe's history, culture, and political structure.

Mutual Respect

- Ask a tribal representative if there are tribal customs you need to be aware of, especially before in-person meetings, e.g., in some Native cultures pointing or making eye contact is considered disrespectful.
- Listen attentively and do not interrupt; be comfortable with long pauses; understand that tribal representatives may illustrate their points through humor or storytelling.

Practice Tips for Tribal Justice Leaders and Government Officials

Relationship Building

- Establish agency mission and guiding principles based on government and community expectations.
- Develop succession planning and hiring criteria to prepare for law enforcement leadership changes and ensure sustainability of collaborative efforts.
- Participate in meetings and activities and communicate with the branches and agencies of the state and other governments, coalitions, and associations as appropriate.
- Make recommendations for improvements regarding issues related to tribal-state relations and provision of public safety and justice services.
- Host and support cross-training for public safety officers.
- Convene regularly scheduled multidisciplinary groups of state and tribal justice leaders to discuss problems, share information and focus on collaborative cross-jurisdictional solutions.
- When opportunities arise, inform state and local leaders about tribal history, culture, and political structures, and customs.
- Where appropriate, invite state and local leaders to attend and participate in community and cultural events.
- Recognize that incorporating a formalized structure or relationship method affects the ability of the intergovernmental relationships to withstand changes in tribal and state leadership and in political parties; support mechanisms to preserve positive relationships.
- Research and share model cooperative agreements and participate in collaborative justice planning.
- Seek and provide input into the development of guiding principles that contribute to good working relationships inclusive of:
    - A commitment to cooperation.
    - Mutual understanding and respect.
    - Consistent and early communication.
    - Processes (and accountability) for addressing issues.
    - Formalization of relationships.
- Seek and maintain state and federal tribal recognition.

History & Background

- Know and understand the historical context of sovereignty generally, as well as how your particular tribe exercises its sovereign authority in the area of public safety.
- Maintain and share a working knowledge of sovereignty as it applies to your jurisdictional power and authority in the area of justice and public safety.
- When possible, provide opportunities for healing from historical trauma.
- Build on positive strategies that foster and enhance intergovernmental collaboration and trust.

Mutual Respect

- Recognize sovereignty as an asset and exercise sovereign rights.
- Seek to understand state bureaucracy and inherent limitations.

Examples of Law Enforcement Intergovernmental Collaboration

Oregon, Senate Bill 412 – Provides authorized tribal police officers with certain powers and protections provided to Oregon law enforcement officers. This bill, signed by Gov. John Kitzhaber on July 28, 2011, changed the definition of "police officer" based on training.

Intergovernmental Agreement for Law Enforcement Cooperation between the State of Michigan and the Grand Traverse Band of Ottawa and Chippewa Indians & other agreements with local police agencies. The Grand Traverse Band of Ottawa and Chippewa Indians have established intergovernmental agreements to provide comprehensive public safety services in and around tribal land. Parties agree that all people, Indian and non-Indian alike, who reside and enter into GTB's Indian County within Grand Traverse County are entitled to feel safe and secure and equal protection by law enforcement. They have recently signed a Law Enforcement Agreement with the State of Michigan and have established agreements with Sheriffs from Antrim, Benzie, Charlevoix ,and Leelanau Counties.

Salt River Police Department Inter-Governmental Agreement (IGA) with East Valley Gang and Criminal Information Fusion Center (EVGCIFC) – EVGCIFC IGA signed version to AZ Secretary of State (dated 04-08-09) & EVGCIFC most recent amended IGA (dated 01-30-15). – The Salt River Police Department is a full partner member of the East Valley Gang and Criminal Information Fusion Center (EVGCIFC), established in 2007, who provide service to all East Valley Phoenix Police Departments (1.5 million population in the East Valley) and was and remains today as the first and only Fusion Center in the USA to have full-time tribal, local, state, and federal representation.

EVGCIFC Highlights:

- The best example of United Teamwork is evidenced by the measurable results of the EVGCIFC who disseminate local, real-time actionable information 24/7 to police in their vehicles, resulting in rapid response, identification, and apprehensions.
- EVGCIFC partners include: Apache Junction Police Department (PD), Chandler PD, Gilbert PD, Mesa PD, Salt River PD, Scottsdale PD, and Tempe PD.
- EVGCIFC governance by all seven (07) Arizona East Valley Chiefs of Police. Meet quarterly to ensure strategic planning, budget, and operations are on-track and meeting needs.
- EVGCIFC shares information between all member agencies and others rather than a center that stores all data. Therefore, each member maintains possession and complete control of their own original data.
- The Universal Fusion Center Concept (Bottom to Top Model), the East Valley Fusion Center, has delivered measurable and sustainable results the last five years.

- SRPD has been able to utilize actionable intelligence to rapidly solve crimes, thereby protecting and enhancing sovereignty in a way never before possible.
- Sharing of information with surrounding agencies is resulting in numerous felony arrests and solved crimes within Indian Country and other local jurisdictions.

Crow Creek Sioux Tribe and the South Dakota Highway Patrol (SDHP) Memorandum of Understanding Regarding Mutual Aid between the Crow Creek Sioux Tribe and the South Dakota Highway Patrol enacted 2013. **–** This Memorandum of Understanding between the Tribe and SDHP is intended "to provide mutual aid and assistance to each other for the safety and protection of the citizens…whether Indian or non-Indian." Key provisions include:

- Effective for five years.
- Either party may request assistance.
- Jurisdictional authority begins with receipt of request for aid and ends when terminated.
- Once assistance requested, SDHP has authority to enforce:
    - Crow Creek Sioux Tribal Law.
    - Major crimes under Federal Criminal Code.
- SDHP will not attempt to enforce state law while assisting tribal law enforcement on the Crow Creek Reservation.

State and Tribal Intergovernmental Collaboration Series Webinar: Enhancing Collaboration: Tribal-State Public Safety Agreements – In 2013, the National Congress of American Indians (NCAI) and the National Criminal Justice Association (NCJA) hosted this webinar, with support by the Bureau of Justice Assistance (BJA), which focused on tribal-state public safety agreements. These agreements include memoranda of understanding, cross-deputization agreements, and mutual-aid agreements. The discussion focused on the importance of tribes, states, and localities working together on public safety issues; addressed obstacles to cooperation; and highlighted best practices the Navajo Nation has used in forging these agreements in multiple states.

View the webinar (https://ncja.webex.com/ncja/lsr.php?RCID=6beb46a36d61df344bbb256048b9bcde) and download the Powerpoint slideshow (http://www.ncja.org/sites/default/files/documents/EnhancingCollaberation.pdf) and supporting materials:

- **Law Enforcement Agreement Between the Navajo Nation and the Arizona Department of Public Safety**
- **Mutual Aid Agreement Between the Arizona Department of Public Safety and the Fort McDowell Yavapai Nation**

- **Intergovernmental Agreement LEVEL B: The AZ Counter Terrorism Information Center and The Navajo Nation**
- **Intergovernmental Agreement LEVEL C: The AZ Counter Terrorism Information Center and The Tribal Nation for Statewide Terrorism Liaison Officer Program**

Additional Resources on Building Intergovernmental Law Enforcement Collaborations

The U.S. DOJ provides resources to support public safety efforts in tribal communities:

- U.S. Department of Justice, Office of Tribal Justice (https://www.justice.gov/otj)
- Bureau of Justice Assistance (BJA) supports national training and technical assistance. For more information, please click here or go to: https://www.bja.gov/Topic.aspx?Topic_ID=9

Walking on Common Ground hosts a collection of resources related to tribal, state, and federal collaborations and Cooperative Law Enforcement Agreements. This site is searchable by state and highlights tribal-state collaborations in the following areas:

- Judicial
- Law Enforcement
- Community Corrections/Detention
- Multiple Agency Agreements
- Child Welfare

Western Community Policing Institute (http://www.tribaltraining.com/2013/01/05/western-community-policing-institute/) offers a no-cost, two-day training course, "Strategic Community Policing & Problem Solving," which is designed to challenge participants as they apply strategic approaches to community policing and problem solving. Participants interact within the course materials while exploring and examining strategies in developing their own community policing projects.

This two-day interactive training course consists of two separate but connected training deliveries that will provide participants with the information and structure needed to develop or strengthen collaborative partnerships between the community and police. Training will incorporate the unique considerations facing communities in addressing crime, violence, and safety issues that require specific skills and capabilities in collaboration, including problem identification, information sharing, sharing resources, spreading costs, and helping communities explore community policing collaboration initiatives.

The target audiences for this program are participants representing a broad spectrum of federal, state, and local law enforcement jurisdictions, including the following established disciplines:

- Law enforcement, Tribal and Non-Tribal.
- Community Partners/Stakeholders.

- Faith-Based Organizations.

Bureau of Indian Affairs Office of Justice Services (BIA- OJS)

The Bureau of Indian Affairs Office of Justice Services (BIA-OJS) is responsible for the protection of lives, resources, and property which lies at the heart of the BIA's law enforcement effort. BIA-OJS fully supports the Secretary's ongoing commitment to safe and healthy Indian communities. Under the direction of the Deputy BIA Director, OJS is responsible for the overall management of the Bureau's law enforcement program. Its main goal is to uphold the constitutional sovereignty of the federally recognized tribes and preserve peace within Indian country.

The OJS has primary responsibility for the investigation of crimes that occur in Indian country. Currently the office:

- Develops standards, policies, and procedures for BIA-wide implementation
- Operates the Indian Police Academy
- Monitors tribally contracted justice services programs
- Directly operates law enforcement programs for tribes who do not run their own programs
- Conducts inspections and evaluation of BIA and Tribal Justice Services programs.
- Conducts internal investigations of misconduct by law enforcement officers
- Provides emergency tactical response teams to reservations requiring assistance, or threatened with disruptions or civil disorder
- Conducts criminal investigations into criminal violations committed on reservations involving federal, state, county, local and tribal codes

Working Effectively with Tribal Governments

This short, interactive course provides a basic overview of the history of tribes in the United States, American Indian culture, and tips on how to establish an effective working relationship with tribal governments. The course is designed for those with little prior knowledge of Indian tribes and emphasizes respect and how to successfully engage in cross-cultural communication. Key modules include:

- Introduction to Tribal Concepts
- Federal Indian Law and Policy
- Cultural Orientation and Working with Tribal Governments

The Wellbriety Journey to Forgiveness Documentary: This documentary discusses the intergenerational trauma of native communities and forges a way to healing. Posted on YouTube by Don Coyhis.

When developing intergovernmental collaborative relationships it is important to understand history and the inter-generational trauma that contributes to barriers and issues today. One of the most controversial policies of the BIA was the late 19th to early 20th century decision to

educate native children in separate boarding schools, with an emphasis on assimilation that prohibited them from using their indigenous languages, practices, and cultures. Children in boarding schools faced physical, sexual and mental abuse which contributes to the inter-generational trauma and resulting disproportionate criminal justice and social problems such as alcohol and drug abuse, sexual and physical assault, and child abuse and neglect that many tribal nations face today.

This project is supported by Cooperative Agreement #2010-IC-BX-K054, awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the authors and do not represent the official position or policies of the United States Department of Justice.

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BOS AGREEMENT # 07-221

INTERGOVERNMENTAL AGREEMENT BETWEEN THE HOPLAND BAND OF POMO INDIANS AND THE MENDOCINO COUNTY SHERIFF'S DEPARTMENT FOR THE REIMBURSEMENT OF COUNTY EXPENSES INCURRED FOR THE BOOKING AND DETAINING OF PERSONS ARRESTED BY THE HOPLAND POLICE DEPARTMENT.

This Agreement ("Agreement") is entered into on this 16th day of October, 2007, by and between the Hopland Band of Pomo Indians ("Tribe"), a federally recognized Indian tribe, whose principal place of business is located at 3000 Shanel Road, Hopland, California, 95449, and the Mendocino County Sheriff's Department ("Department"), with its principal place of business located at 589 Low Gap Road, Ukiah, California, 95482. The Tribe and the Department shall be collectively referred to in this Agreement as the "Parties."

RECITALS

The Parties have entered into this Agreement in light of the following facts:

1. The Tribe is a federally recognized Indian tribe organized under a written Constitution, with the Hopland Tribal Council ("Council") as the governing body of the Tribe.

2. The Tribe is the beneficial owner of the Hopland Indian Reservation ("Reservation"), which comprises approximately 2,070 acres of land located approximately ten miles east of the unincorporated area of the town of Hopland in Mendocino County, California. Title to the Tribe's Reservation trust lands is owned by the United States of America in trust for the Tribe.

3. Pursuant to the Indian Law Enforcement Reform Act, 25 U.S.C. §2801, et seq., the Tribe has entered into a Deputation Agreement dated January 26, 2005 ("Deputation Agreement"), with the United States Department of the Interior to provide law enforcement services to all persons who reside, work, or visit the Reservation.

4. Pursuant to the Deputation Agreement, the Secretary of the Interior has issued Special Law Enforcement Commissions to officers of the Hopland Tribal Police Department authorizing the Special Law Enforcement Commissioned officers ("SLEC Officers") to enforce federal laws on the Reservation and under certain circumstances off of the Reservation.

5. Under the Deputation Agreement, the Tribe's SLEC Officers also have the authority to enforce tribal law and lawful orders issued by the Hopland Tribal Court.

6. In addition, as federal law enforcement officials, Hopland's SLEC Officers have the authority, pursuant to California Penal Code §830.8, to enforce and make arrests under certain circumstances for violations of California's criminal laws.

7. The Tribe does not own or operate a tribal jail and therefore has no place detain persons who are arrested by the Tribe's SLEC Officers in the evening or on the weekends when

the United States district courts are closed for business to the general public.

8. Any person whom a SLEC Officer arrests for a violation of federal law who can not be cited and released, who was not arrested pursuant to a warrant issued by a United States district court and who cannot be transported the same day of the arrest to federal court for arraignment, would have to be detained by the SLEC Officer in a vehicle until the arrestee could be brought before the appropriate magistrate for arraignment.

9. In addition, any person arrested by a SLEC Officer for a violation of state law, who cannot be cited and released, would have to be brought to the Mendocino County Jail for incarceration.

10. The Tribe, therefore, desires to enter into a contract with the Mendocino County Sheriff's Department which would allow it to bring its arrestees who have been arrested for violations of state and federal law, for whom a federal arrest warrant has not been issued by a district court, to the Mendocino County Jail for detention until the arrestee can be transported to the appropriate federal or state court for arraignment.

11. The Sheriff desires to enter into an agreement with the Tribe to accept the SLEC Officers' arrestees, provided that the Tribe reimburses the County for the expenses that it would incur in booking and detaining the arrestees and provided further that the federal arrestees are picked up from the County Jail and transported by a SLEC Officer to the appropriate federal court for arraignment as soon as practical after the initial detention.

12. The Tribe is willing to reimburse the County for the expenses that it incurs to book and detain SLEC Officers' arrestees in an amount equal to what the County charges incorporated cities for the same services under Government Code §29550, et seq., that was in effect on December 31, 2006.

13. The Parties agree that the most effective method of establishing a procedure for the booking and detention of the SLEC Officers arrestees and for reimbursing the County for these booking and detention expenses would be to enter into this Intergovernmental Agreement.

AGREEMENT

In consideration of the above recited facts, and the mutual promises contained herein, the Parties hereby agree as follows:

1. **Agreement To Book And Detain SLEC Officers' Arrestees**. The Department agrees, pursuant to the terms and conditions of this Agreement, that it shall accept, book, and detain any person arrested by an employee of the Tribe, who has been commissioned as a Special Law Enforcement Officer by the United States Department of the Interior, when the arrested person is brought by a SLEC Officer to the Mendocino County Jail ("Jail") for booking and detention. All arrestees shall be booked and detained in accordance with the procedures set forth in Paragraph 10 below, including but not limited to the following: (1) any property of a

SLEC Officer arrestee shall be removed from the arrestee, inventoried and stored at the Tribe's Police Department property storage, and (2) no SLEC Officer arrestee shall be booked or detained at the Jail unless the arrestee is determined by the Jail's medical staff not to be in need of medical treatment. If the Jail's medical staff determines that the arrestee is in need of medical treatment, then the Department will not accept the arrestee for booking and detention unless the SLEC Officer transports the arrestee to a hospital or doctors office and provides the arrestee with appropriate medical treatment that will allow the Department to accept the arrestee at the Jail. Any arrestee presented at the Jail for booking and detention who previously was found to be physically unfit by the Jail's medical staff to be accepted for detention at the Jail shall not be subsequently accepted at the Jail for booking and detention unless the SLEC Officer who is subsequently transporting the arrestee to the Jail provides the Jail's medical staff with a medical clearance, that, in his/her sole discretion, is acceptable to the Jail's medical staff.

2. **Detention of Federal Arrestees**. Any person arrested by a SLEC Officer solely for a violation of federal law and for whom no federal arrest warrant has been issued ("Federal Arrestee"), and who is detained at the Jail, shall be released to the custody of a SLEC Officer for transportation to and arraignment at a United States district court as soon as it is practical for a SLEC Officer to do so, but in no event shall the arrested person be detained at the Jail for more than 96 hours.

It is the intent of the Parties that Federal Arrestees will be detained at the Jail only for as long as it takes the Tribe to make a SLEC Officer available to transport the Federal Arrestee to the appropriate United States district court for arraignment on a day and at a time that the district court is open for business to the general public.

3. **Detention Of State Arrestee**. Any person arrested by a SLEC Officer pursuant to California Penal Code §830.8, for a violation of state law ("State Arrestee") and who has been booked and/or detained at the Jail, shall be transported to the appropriate California Superior Court for arraignment by the appropriate law enforcement officer for the County. The Tribe shall not be liable for the payment of any booking or detention fees incurred by the County for the State Arrestee, after the State Arrestee has been arraigned.

4. **Fee For Booking Or Detention Services**. The Tribe shall pay to the Sheriff's Office a fee for the booking and detention services that it shall provide to the Tribe under this Agreement. The amount of the fee shall not exceed the County's actual administrative costs, including applicable overhead costs, as permitted by Federal Circular A-87 standards, as defined in subdivision (d) of §29550 of the California Government Code that was in effect on December 31, 2006, incurred in the booking or other processing of an arrested person covered by this Agreement. The County shall submit a monthly invoice to the Tribe for the booking and detention expenses incurred by the County setting forth the date that the expenses were incurred, the name of the arrestee for whom the expenses were incurred, the name of the SLEC Officer requesting the services, a description of the services, and the amount or cost to perform each service. The County shall fully disclose the costs allocated as Federal Circular A-87 overhead. The Tribe shall pay the invoice within thirty (30) days of receipt.

5. **Increase In Fee Charge**. The County may, during the term of this Agreement, increase any fee charged pursuant to this Agreement prior to the beginning of its fiscal year and may adopt the increase in the fee schedule provided that: (1) the amount of the fees charged to the Tribe do not exceed the amount of booking or detention fees charged by the County to any incorporated city within the County under applicable law, minus any reimbursement or payment that the County receives from the State of California and (2) the County gives the Tribe forty-five days advance written notice of its intent to hold a public hearing held on the fee increase, and the County conducts a public hearing on the fee increase at which the Tribe is allowed to provide written comments and make a oral presentation to the County Board of Supervisors on the fee increase. The County shall consider the Tribe's written comments and presentation, if any are submitted, prior to approving any fee increase.

6. **Arrests Exempted From Fee**. Notwithstanding Paragraph 4 above, the Tribe shall not be charged fees for: (1) arrests made on any bench warrant issued by a California Superior Court for failure to appear in court, nor on any arrest warrant issued in connection with a crime not committed within the Reservation; (2) a person who is ordered by a California Superior Court to be remanded to the County Jail except that the County may charge a fee to recover those direct costs for those functions required to book a person pursuant to subdivision (g) of §853.6 of the California Penal Code; (3) arrests made pursuant to arrest warrants originating outside of the County's jurisdiction; (4) arrests for violation of a person's parole or probation-ordered returns to custody, unless a new charge has been filed for a crime committed on the Reservation; (5) arrests made in response to any mutual aid agreement entered into between the Tribe and the County; (6) in the event that the Governor of the State of California declares a state of emergency, the Tribe shall not be charged fees for any arrest made during any riot, disturbance, or event that is subject to the Governor's declaration, unless the Governor issues the declaration in response to the acts or omissions of the Tribe, its officers, agents or employees; (7) an arrest of a prisoner who has escaped from a county, state, or federal detention or corrections facility; (8) arrestees held in temporary detention at a court facility for purposes of arraignment when the arrestee has been previously booked at another state or county detention facility; (9) an arrest made by a SLEC Officer assigned to a formal multi-agency task force in which the County is a participant, and (10) arrests made pursuant to any warrants issued by a United States district court. For purposes of this Paragraph 6, the phrase "formal multi-agency task force" means a task force that has been established by written agreement of the participating agencies.

7. **Assignment Of Right Of Collection**. The County hereby assigns all of its right, title, and interest to the Tribe to any booking or detention fees that are paid by the Tribe to the County under this Agreement. The Tribe shall have the right to sue any person for whom booking or detention fees were paid by the Tribe to the County to recover the payment of fees for booking, detention, or other processing incurred by the Tribe under this Agreement.

8. **Booking And Detention Fees Defined**. As used in this Agreement, the term "booking and detention fees" shall have the same meaning as the phrase "actual administrative costs" as defined in California Government Code §29550 that was in effect on December 31, 2006.

9. **Training.** In delivering any arrestee to the Jail for booking or detention, all SLEC Officers shall follow the procedures ("Procedures") established by the Department for that purpose. All SLEC Officers shall participate in and receive training on the Procedures from Field Training Officers of the Department. The Department shall provide such training to the SLEC Officers on an as needed basis, at a day and time that is mutually convenient to the Parties. All costs associated with the training shall be paid for by the Tribe.

10. **Future, Additional Agreements.** The Parties acknowledge that additional agreements between them will be to their mutual benefit with respect to issues that may arise between the Parties in the implementation of this Agreement that where not contemplated by the Parties at the time that they entered into this Agreement. When such issues arise, the Parties agree to meet and confer in good faith in an effort to resolve those issues by reaching such agreements, although the remedies set forth in Section 11 of this Agreement, shall not be applicable to any breach of this Section.

11. **Dispute Resolution.** Whenever, during the term of this Agreement, any disagreement or dispute arises between the Parties as to the interpretation of this Agreement, or any rights or obligations arising hereunder, all such matters shall be resolved, whenever possible, by meeting and conferring. Any Party may request such a meeting by giving notice to the other, in which case such other Party shall make itself available within seven (7) days thereafter. If such matters cannot be so resolved within ten (10) days after the longer of giving such notice to confer or conferring which has commenced within seven (7) days of giving such notice, either Party may seek judicial enforcement of this Agreement, if applicable, as provided below.

12. **Limited Waivers of Immunity**. The Tribe's status as a federally recognized Indian Tribe provides it immunity from uncontested suit unless it agrees to waive its sovereign immunity. In order to provide for a reliable method of dispute resolution for any controversies arising out of, or relating to, this Agreement, as amended from time to time, and as a material inducement to the County to enter into this Agreement, the Tribe agrees to a limited waiver of its sovereign immunity. By this Agreement, the Tribe does not waive, limit, or modify its sovereign immunity from unconsented suit, except as expressly provided herein. The Tribe expressly waives for the County only, in a limited manner, its immunity from suit as provided for herein, provided the scope of any claim is limited to controversies arising out of or relating to this Agreement and any amendments thereto. The County expressly waives for the Tribe only, in a limited manner, any governmental immunity from suit it may possess, as provided for herein, provided the scope of any claim is limited to controversies arising out of or relating to the Agreement and any amendments thereto. Both the County and the Tribe are subject to the terms of the waiver and neither may commence any action except in conformity with the terms and conditions of the waiver. The Parties intend that the terms of this Paragraph shall provide the exclusive remedy to either party. Either Party may commence an action or counterclaim against the other in the United States District Court for the Northern District of California. In addition, the County may sue the Tribe in the Hopland Tribal Court and the Tribe may sue the County in the Mendocino County Superior Court with respect to disputes arising out of or relating to this Agreement. The waiver includes any appeals taken from either court through the last level of legally available appellate review. The Parties' waiver of sovereign or governmental immunity

provided herein is specifically limited to the following actions and judicial remedies: (1) declaratory relief to determine whether either Party, or both, are violating any of the terms of this Agreement; (2) equitable relief to compel the Party or Parties to specifically perform their obligations under this Agreement, including, but not limited to, consent to enforcement of any judgment or order of said courts by any means available under the laws of the State of California or the Tribe; and (3) monetary relief, limited to the award of any sums that may be due and owing under the terms of this Agreement. A prevailing party shall Indemnification be entitled to an award and judgment of its reasonable costs and attorney fees, to enforce any equitable relief granted by court order or injunction, and to enforce, execute upon and obtain satisfaction of any resulting monetary judgment through any remedy which that party would be able to invoke if the other party were an entity that did not enjoy sovereign or governmental immunity (including, but not limited to the remedies of attachment and foreclosure), provided that nothing in this waiver shall authorize the imposition of any encumbrances upon any of the Tribe's real property owned by the United States of America in trust for the Tribe and any improvements or personal property located thereon. Payment of any monetary judgment shall be limited to revenues derived from Class III gaming generated from the operation of the Tribe's gaming facility.

In addition to the limited waiver of immunity stated above, the County and the Tribe irrevocably waive: (1) any right to claim it is entitled to a jury trial of any claim arising out of or relating to this Agreement or any amendment thereto, whether the claim is made in contract, tort, breach of duty or any other common law or statutory claim. In the event an action is commenced, this waiver may be filed with the court as a written stipulation of consent to a trial by the court, and (2) any right that either party may have under applicable law or any amendment thereto to arbitrate any disputes arising under this Agreement.

13. **Indemnification**. The Parties shall indemnify and save each other harmless, and defend each other, their officers, agents and employees, assigns and successors in interest from all suits, actions, damages, claims, or loss of every name and description to which either of the Parties may be subjected or put to because of or arising from the performance of, or failure to perform, the other Party's obligations under this Agreement. The term "defend" shall include the cost of all necessary legal defense, including, but not limited to, expert witness fees, other litigation expenses, and attorney's fees incurred in defending any claim, whether actually filed in any court or not.

14. **Notices.** Any notices, requests, demands, or other communications required or permitted hereunder shall be sufficient if made in writing and: (1) delivered personally or (2) sent by certified mail, postage prepaid, return receipt requested and addressed to the appropriate party at its address set forth above, or such other addresses as a party may specify to the other in a notice given pursuant to this Paragraph.

15. **Construction.** To the extent state law applies, this Agreement shall be governed in accordance with the laws of the State of California. The descriptive headings of the sections of this Agreement are for convenience only and are not to be used in the construction of the contents of this Agreement. This Agreement may be executed in multiple counterparts, each of which will be an original instrument, but all of which will constitute one agreement.

16. **Costs and Attorneys' Fees.** If either party has to bring an action to enforce the

provisions of this Agreement, the prevailing party shall be entitled to an award of its costs and actual attorneys' and expert witness fees.

17. **Term.** This Agreement shall become effective on the date that it is executed by the both parties and shall remain in effect until: (a) it is rescinded or superseded pursuant to a written agreement between the Parties or (b) either party gives the other party One Hundred Eighty (180) days advance written notice of its intent to terminate this Agreement. In the event that either party serves the other with notice of its intent to terminate this Agreement under provisions of subsection (b) of this Paragraph, the other party may then initiate meet-and-confer proceedings under Paragraph 11 of this Agreement to address any issue or disagreement it may have regarding the termination of this Agreement.

18. **Federal Approvals.** The Parties agree that the Tribe shall, within one week of its execution by the Parties, submit this Agreement to the Bureau of Indian Affairs ("BIA") for a determination as to whether or not this Agreement needs the approval of the BIA, pursuant to 25 U.S.C. Section 81 If the BIA determines that its approval is necessary, the Parties shall do all things reasonably necessary, in an expeditious and continuously diligent manner, to obtain BIA approval of this Agreement. If the BIA determines that its approval is necessary, but that it will not approve this Agreement unless modifications are made to this Agreement, the Parties shall immediately commence negotiations for a reasonable period of time, not to exceed sixty (60) days, for the purpose of negotiating language that is mutually agreeable to the Parties that can be substituted for the objectionable language in this Agreement, and which would result in the Parties obtaining the BIA approval necessary to make this Agreement a binding and legally enforceable contract.

19. **Authorization.** Chairperson, Wanda D. Balderama, has been authorized by an appropriate resolution of the Hopland Tribal Council to execute this Agreement pursuant to the Tribe's Constitution, which authorizes the Tribal Council to enter into agreements with local governments to promote the health and general welfare of the Tribe. The County warrants that Tom Allman, Sheriff of Mendocino County, by appropriate resolution of the Board of Supervisors for the County of Mendocino, has been authorized to execute this Agreement on behalf of the County.

Executed and delivered as of the date first written above in Ukiah, California.

HOPLAND BAND OF POMO INDIANS

By: _____
Wanda D. Balderama, Chair

COUNTY OF MENDOCINO

By: _____
Tom Allman, Sheriff

APPROVED AS TO FORM:

_____
Lester J. Marston, Tribal Attorney

_____
Jeanine Nadel, County Counsel

By: Kendall Smith
KENDALL SMITH, CHAIR
BOARD OF SUPERVISORS

Date: 10-16-07

I hereby certify that according to the provisions of Government Code Sections 25103, delivery of this document has been made.

KRISTI FURMAN
Clerk of the Board

By: _____

ATTEST:
Kristi Furman, Clerk of the Board
Mendocino County Board of Supervisors

_____

57.19.11.2

BOS AGREEMENT # 10-113

INTERGOVERNMENTAL AGREEMENT BETWEEN THE HOPLAND BAND OF POMO INDIANS AND THE MENDOCINO COUNTY DISTRICT ATTORNEY'S OFFICE

This Agreement ("Agreement") is entered into on this 27th day of July, by and between the Hopland Band of Pomo Indians ("Tribe"), a federally recognized Indian tribe, whose principal place of business is located at 3000 Shanel Road, Hopland, California, 95449, and the Mendocino County District Attorney's Office ("District Attorney"), with its principal place of business located at 100 North State Street, Ukiah, California, 95482. The Tribe and the District Attorney shall be collectively referred to in this Agreement as the "Parties."

RECITALS

The Parties have entered into this Agreement in light of the following facts:

1. The Tribe is a federally recognized Indian tribe organized under a written Constitution, with the Hopland Tribal Council ("Council") as the governing body of the Tribe.

2. The Tribe is the beneficial owner of the Hopland Indian Reservation ("Reservation"), which comprises approximately 2,070 acres of land located approximately ten miles east of the unincorporated area of the town of Hopland in Mendocino County, California. Title to the Tribe's Reservation trust lands is owned by the United States of America in trust for the Tribe.

3. Pursuant to the Indian Law Enforcement Reform Act, 25 U.S.C. §2801, et seq., the Tribe has entered into a Deputation Agreement, dated January 26, 2005, with the United States Department of the Interior, to provide law enforcement services to all persons who reside, work, or visit the Reservation ("Deputation Agreement").

4. Pursuant to the Deputation Agreement, the Secretary of the Interior has issued Special Law Enforcement Commissions to officers of the Hopland Tribal Police Department ("Department") authorizing the Special Law Enforcement Commissioned officers ("SLEC Officers") to enforce federal laws on the Reservation and, under certain circumstances, off of the Reservation.

5. As federal law enforcement officers, Hopland's SLEC Officers have the authority, pursuant to California Penal Code §830.8, to make arrests, under certain circumstances, for violations of California's criminal laws. The Department acknowledges offenses listed in the Major Crimes Act [18 USC 1153] are outside federal jurisdiction and not applicable on the Reservation and prosecution of these offenses rests solely with the State. At all times, the Department acknowledges that the Mendocino County Sheriff's Office ("MCSO") has jurisdiction over prohibitory offenses committed on the Reservation (Pub. L. 280 [18U.S.C.,§ 1162 et seq.) [California v. Cabazon Band of Mission Indians 480 US 202 (1987)]

6. The Parties agree that the most effective method of evaluating whether: (1) a person arrested by the Department should be prosecuted under State law and (2) the prosecution

of those arrested by the Department pursuant to State law, would be for the District Attorney to accept the SLEC Officer's arrest reports directly from the Department and for the Department to make the SLEC Officers available for testimony without the necessity for the issuance of subpoenas.

AGREEMENT

In consideration of the above recited facts, and the mutual promises contained herein, the Parties hereby agree as follows:

1. **Acceptance of Police Reports and Issuance of Citations**. The District Attorney agrees to accept arrest reports prepared by the Department's SLEC Officers directly from the Department, to be used by the District Attorney in determining whether to prosecute a person, and as evidence in the prosecution of the persons arrested by the SLEC Officers if the District Attorney determines that prosecution is warranted. In addition, SLEC Officers may in their discretion:(1) issue a written citation ("Citation(s)") to a person to appear in the Mendocino County Superior Court ("State Court") for a misdemeanor violation(s) of California State law, and release the person, rather than arrest them, when the person cited signs a promise to appear in State Court on the Citation; (2) appear in State Court to prosecute the Citation(s) and (3) serve and execute State Court arrest warrants on persons who have failed to appear in State Court, as promised, on the Citation(s).

2. **Notification of the Sheriff's Department**. The MCSO will be contacted and advised, in a timely manner, regarding all criminal offenses committed on the Reservation. This will be accomplished by making sure MCSO Dispatch is aware of all felony calls for service, as well as the delivery of the Department's daily crime log to the Sheriff or his/her designee. It is the intent of this agreement to allow MCSO primary investigative responsibility for all felony crimes should they choose to do so. At no time will the Department's officers interfere with a MCSO investigation, but may assist where needed.

3. **Format of Reports; Training**. The Department shall prepare the reports in the same format as those of the Mendocino County Sheriff's Department or in any other format requested by the District Attorney. If requested to do so by the District Attorney's Office, all SLEC Officers shall participate in and receive training on the preparation of arrest reports in the format requested by the District Attorney from an employee of the District Attorney's office or the Mendocino County Sheriff's Department, appointed by the District Attorney for that purpose. Such training shall be provided to the SLEC Officers at a day and time that is mutually convenient to the Parties.

4. **Availability of SLEC Officers for Testimony**. The Department shall make SLEC Officers available to the District Attorney for testimony when required by the District Attorney. All SLEC Officers shall be eligible under the provisions of Proposition 115, the "Crimes Victims Justice Reform Act," codified in Penal Code § 872(b), to testify at any hearing that a SLEC officer has been requested by the District Attorney to attend. The Department shall not require the District Attorney to issue subpoenas for the testimony, but shall make SLEC officers available upon request of the District Attorney. The District Attorney shall make its best efforts to schedule such testimony at a time that is convenient to the Department and the SLEC

Officers. In the alternative, the District Attorney may subpoena any SLEC officer to testify at any hearing, which in the discretion of the District Attorney, requires the Officer subpoenaed to testify. The District Attorney shall cause the subpoena to be served on the Officer by faxing the subpoena to the Chief of the Department, or any person designed by the Chief in writing. The Chief, or the Chief's designee, shall cause the subpoena to be personally served upon the Officer and shall complete a proof of service on a form provided to the Department by the District Attorney for that purpose, and within no less than twenty-four (24) hours, cause the completed proof of service to be faxed and the original to be mailed to the District Attorney. Upon execution of this Agreement by the Parties, the Chief of the Department shall provide in writing to the District Attorney the fax number that the District Attorney shall use to fax subpoenas to the Chief under this Paragraph. The Department shall notify the District Attorney in writing, within twenty-four (24) hours, of any change of the fax number designed under this Paragraph.

5. ***Pitchess* Motions**. The District Attorney shall not defend or otherwise respond to any *Pitchess* Motions filed by any defense attorney to obtain copies of any records from any SLEC Officers personnel files. All *Pitchess* Motions shall be defended or responded to by the Tribe's Tribal Attorney.

6. **Judgment Of Conviction Imposition Of Fees**. The District Attorney shall file with the Superior Court, a "Booking Fee Reimbursement" request, submitted by the Department in the form attached hereto as **Exhibit A,** for an order, as part of the judgment of conviction of any person arrested by SLEC Officers, that the convicted defendant pay the amount of all booking and detention fees incurred by the Tribe.

7. **Assignment Of Right Of Collection**. By executing this Agreement, the District Attorney hereby assigns to the Tribe the right to sue any person for whom booking or detention fees were paid by the Tribe, as part of any arrest of the person by SLEC Officers, to Mendocino County to recover the payment of any booking and detention fees incurred by the Tribe.

8. **Booking And Detention Fees Defined**. As used in this Agreement, the term "booking and detention fees" shall have the same meaning as the phrase "actual administrative costs" as defined in California Government Code §29550 in effect as of December 31, 2006.

9. **Future, Additional Agreements.** The Parties acknowledge that additional agreements with respect to issues that may arise between the Parties in the implementation of this Agreement may become necessary. When such issues arise, the Parties agree to meet and confer in good faith in an effort to resolve those issues by reaching such agreements, although the remedies set forth in Paragraphs 8 and 9 of this Agreement shall not be applicable to any breach of this Paragraph.

10. **Dispute Resolution.** Whenever, during the term of this Agreement, any disagreement or dispute arises between the Parties as to the interpretation of this Agreement, or any rights or obligations arising hereunder, all such matters shall be resolved, whenever possible, by meeting and conferring. Either Party may request such a meeting by giving notice to the other, in which case such other Party shall make itself available within seven (7) days thereafter. If such matters cannot be so resolved within ten (10) days after the longer of the giving of such

notice to confer or of the Parties conferring that commenced within seven (7) days of giving such notice, either Party may seek declaration and/or injunctive relief in any court of competent jurisdiction to enforce the provisions of this Agreement. The Parties expressly agree to waive any right that either party may have for any cause of action for money damages against the other arising from a breach of any provision of this Agreement.

11. **Notices.** Any notices, requests, demands, or other communications required or permitted hereunder shall be sufficient if made in writing and: (1) delivered personally or (2) sent by certified mail, postage prepaid, return receipt requested, and addressed to the appropriate party at its address set forth above, or such other addresses as a Party may specify to the other in a notice given pursuant to this Paragraph.

12. **Construction.** To the extent state law applies, this Agreement shall be governed in accordance with the laws of the State of California. The descriptive headings of the paragraphs of this Agreement are for convenience only and are not to be used in the construction of the contents of this Agreement. This Agreement may be executed in multiple counterparts, each of which will be an original instrument, but all of which will constitute one agreement.

13. **Term.** This Agreement shall become effective on the date that it is executed by the both Parties and shall remain in effect until: (a) it is rescinded or superseded pursuant to a written agreement between the Parties or (b) either Party gives the other party Ninety (90) days advance written notice of its intent to terminate this Agreement. Subject to the provisions of this paragraph 11, each party shall have the right to terminate this Agreement without cause. In the event that either Party serves the other with notice of its intent to terminate this Agreement under provisions of subsection (b) of this Paragraph, the other Party may then initiate meet-and-confer proceedings under Paragraph 9 of this Agreement to address any issue or disagreement it may have regarding the termination of this Agreement.

14. **Federal Approvals.** The Parties agree that the Tribe shall, within one week of its execution by the Parties, submit this Agreement to the Bureau of Indian Affairs ("BIA") for a determination as to whether this Agreement needs the approval of the BIA, pursuant to 25 U.S.C. Section 81. If the BIA determines that its approval is necessary, the Parties shall do all things reasonably necessary, in an expeditious and continuously diligent manner, to obtain BIA approval of this Agreement. If the BIA determines that its approval is necessary, but that it will not approve this Agreement unless modifications are made to this Agreement, the Parties shall immediately commence negotiations for a reasonable period of time, not to exceed sixty (60) days, for the purpose of negotiating language that is mutually agreeable to the Parties that can be substituted for the objectionable language in this Agreement and that would result in the Parties obtaining the BIA approval necessary to make this Agreement a binding and legally enforceable contract.

15. **Authorization.** Chairman, Roman Carrillo, has been authorized by an appropriate resolution of the Hopland Tribal Council to execute this Agreement pursuant to the Tribe's Constitution, which authorizes the Tribal Council to enter into agreements with local governments to promote the health and general welfare of the Tribe. The District Attorney warrants that Meredith J. Lintott, District Attorney of Mendocino County and Carre Brown,

Chair for the Board of Supervisors for the County of Mendocino, by appropriate resolution of the Board of Supervisors of the County of Mendocino, has been authorized to execute this Agreement on behalf of the District Attorney and the County of Mendocino.

Executed and delivered as of the date first written above in Ukiah, California.

HOPLAND BAND OF POMO INDIANS

By: _____

Roman Carrillo, Chairman

MENDOCINO COUNTY DISTRICT ATTORNEY

By: _____

Meredith J. Lintott, District Attorney

MENDOCINO COUNTY BOARD OF SUPERVISORS

By: _____

JUL 27 2010

Carre Brown, Chair

ATTEST:
CARMEL J. ANGELO
Clerk of the Board

By: _____
Deputy

APPROVED AS TO FORM:

_____
Lester J. Marston, Tribal Attorney

_____
Jeanine B. Nadel, County Counsel

I hereby certify that according to the provisions of Government Code sections 25103, delivery of this document has been made.

CARMEL J ANGELO
Clerk of the Board

By: _____
DEPUTY

BOOKING FEE REIMBURSEMENT

MUNICIPAL/SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MENDOCINO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff

No. _____

ORDER FOR REIMBURSEMENT OF FEES

V.

_____

.

Following the arrest of Defendant _____

By the Ukiah Police Department. Case _____ _____

Fees in the amount of $187.00 were expended for booking into the County Jail.

Having been convicted of an offense related to the arrest. Defendant is liable.

Persuant to Government Code Section 29550.1. for the reimbursement to the City

Of Ukiah of costs expended in booking Defendant into the County Jail.

IT IS THEREFORE. ORDERED that

Defendant _____ now

Make payment to the CITY OF UKIAH. 300 Seminary Avenue. in the amout of

$187.00

_____

Dated

_____

JUDGE OF THE MUNICIPAL

SUPERIOR COURT

Exhibit A

RESOLUTION NO. 10-115

RESOLUTION OF THE MENDOCINO COUNTY BOARD OF SUPERVISORS AUTHORIZING THE MODIFICATION OF THE INTERGOVERNMENTAL AGREEMENT BETWEEN THE HOPLAND BAND OF POMO INDIANS AND THE MENDOCINO COUNTY DISTRICT ATTORNEY'S OFFICE

WHEREAS, on October 14, 2008 the Parties entered into an agreement entitled: Intergovernmental Agreement Between The Hopland Band of Pomo Indians and The Mendocino County District Attorney's Office ("Agreement"), which provided, among other things, that the District Attorney would accept arrest reports prepared by the Tribe's United states Department of the Interior, Specially Commissioned Law Enforcement Officers ("SLEC Officers"); and

WHEREAS, the Parties now desire to modify the provisions of the Agreement, as set forth in this resolution, to allow SLEC Officers to: (1) issue a written citation ("Citation(s)") to a person to appear in the Mendocino County Superior Court ("State Court") for a misdemeanor violation(s) of California State law, and release the person, rather than arrest them, when the person cited signs a promise to appear in State Court on the Citation; (2) appear in State Court to prosecute the Citation(s) and (3) serve and execute State Court arrest warrants on persons who have failed to appear in State Court, as promised, on the Citation(s); and

WHEREAS, the Hopland Tribal Police Department ("Department") acknowledges offenses listed in the Major Crimes Act [18 USC 1153] are outside federal jurisdiction and not applicable on the Reservation and prosecution of these offenses rests solely with the State. At all times, the Department acknowledges that the Mendocino County Sheriff's Office ("MCSO") has jurisdiction over prohibitory offenses committed on the Reservation (Pub. L. 280 [18U.S.C.,§ 1162 et seq.) [California v. Cabazon Band of Mission Indians 480 US 202 (1987)].

NOW, THEREFORE, BE IT RESOLVED that the Chair to the Mendocino County Board of Supervisors, by appropriate resolution of the Board of Supervisors of the County of Mendocino, is hereby authorized to execute this Agreement on behalf of the District Attorney and the County of Mendocino.

The foregoing Resolution introduced by Supervisor McCowen, seconded by Supervisor Pinches, and carried this 27th day of July 2010, by the following vote:

AYES: Supervisors Brown, McCowen, Pinches, Smith, and Colfax
NOES: None
ABSENT: None

WHEREUPON, the Chair declared said Resolution adopted and SO ORDERED.

ATTEST: CARMEL J. ANGELO
Clerk of the Board

Deputy

CARRE BROWN, Chair
Mendocino County Board of Supervisors

I hereby certify that according to the provisions of Government Code Section 25103, delivery of this document has been made.

BY: CARMEL J. ANGELO
Clerk of the Board

Deputy

APPROVED AS TO FORM:
JEANINE B. NADEL, County Counsel

INTERGOVERNMENTAL AGREEMENT BETWEEN THE COYOTE VALLEY BAND OF POMO INDIANS AND THE MENDOCINO COUNTY SHERIFF'S OFFICE

This Agreement ("Agreement") is entered into on this May 1, 2014, by and between the Coyote Valley Band of Pomo Indians ("Tribe"), a federally recognized Indian tribe, whose principal place of business is located at 7651 North State St, Redwood Valley, California, 95470, and the Mendocino County Sheriff's Office ("MCSO"), with its principal place of business located at 951 Low Gap Road, Ukiah, California, 95482. The Tribe and the MCSO shall be collectively referred to in this Agreement as the "Parties."

RECITALS

The Parties have entered into this Agreement in light of the following facts:

1. The Tribe is a federally recognized Indian tribe organized under a written Constitution, with the Coyote Valley Tribal Council ("Council") as the governing body of the Tribe.

2. The Tribe is the beneficial owner of the Coyote Valley Indian Reservation ("Reservation"), which comprises approximately 70 acres of land located approximately seven miles North of Ukiah in Mendocino County, California. Title to the Tribe's Reservation trust lands is owned by the United States of America in trust for the Tribe.

3. Pursuant to the Indian Law Enforcement Reform Act, 25 U.S.C. §2801, et seq., the Tribe has entered into a Deputation Agreement, dated December 4, 2013, with the United States Department of the Interior, to provide law enforcement services to all persons who reside, work, or visit the Reservation ("Deputation Agreement").

4. Pursuant to the Deputation Agreement, the Secretary of the Interior has issued Special Law Enforcement Commissions to officers of the Coyote Valley Reservation Police Department ("CVRPD") authorizing the Special Law Enforcement Commissioned officers ("SLEC Officers") to enforce federal laws on the Reservation and, under certain circumstances, off of the Reservation.

5. As federal law enforcement officers, CVRPD's SLEC Officers have the authority, pursuant to California Penal Code §830.8, to make arrests, under certain circumstances, for violations of California's criminal laws. The CVRPD acknowledges offenses listed in the Major Crimes Act [18 USC 1153] are outside federal jurisdiction and not applicable on the Reservation and prosecution of these offenses rests solely with the State. At all times, the CVRPD acknowledges that the MCSO has jurisdiction over prohibitory offenses committed on the Reservation (Pub. L. 280 [18U.S.C.,§ 1162 et seq.) [California v. Cabazon Band of Mission Indians 480 US 202 (1987)].

6. The Parties agree that the most effective method of communication and information sharing between MCSO and CVRPD, would be for the MCSO to dispatch directly for CVRPD.

AGREEMENT

In consideration of the above recited facts, and the mutual promises contained herein, the Parties hereby agree as follows:

7. This agreement is regarding the information sharing agreement between the MCSO and the CVRPD as discussed by the Parties in November 2013. The information that will be shared under the terms of this Agreement will include only local information, defined as local probation, local warrants, BOLO's, and any other local information allowed by law.

8. In an effort to share information to the extent allowed by law, and to show the cooperative working relationship between the two agencies the MCSO has agreed to an information sharing agreement including limited dispatch services.

9. CVRPD will pay the MCSO $30,000 for 36 months of information sharing. After this agreement has been signed by all Parties, MSCO will send a bill for the full amount of the agreement, $30,000. CVRPD will pay to MCSO the amount billed, within 30 days of receipt of the bill.

10. MCSO will not dispatch calls received on their business or emergency lines to the CVRPD, nor will the MCSO ask CVRPD Officers to handle such calls. MCSO will not ask CVRPD to provide any other services to the MCSO regarding calls for service. MCSO will dispatch a deputy to provide assistance to CVRPD when such assistance is requested.

11. Currently MCSO is unable to provide access to CLETS information, until the legal requirements have been met. Once this access has been approved this Agreement may be restructured to include CLETS information being shared with CVRPD.

12. This information sharing and cooperative agreement is made possible by the conformation of both CVRPD's and CVRPD Officers' adherence to the SLEC officer program and Deputation Agreement. Any deviation may void further assistance, based on current state laws.

13. When asked by CVRPD, MCSO's dispatch center will provide local information only, without the use of CLETS.

14. CVRPD will have the ability to utilize the MCSO radio frequency via MCSO dispatch to notify MCSO of traffic enforcement stops by CVRPD officers as well as police related calls for service received directly by CVRPD.

15. CVRPD is authorized to communicate with MCSO staff using the MCSO radio frequencies, for the above listed services and assistance. Any abuse of the channels will be brought to the attention of the CVRPD Chief of Police for immediate remedy.

16. **Future, Additional Agreements.** The Parties acknowledge that additional agreements with respect to issues that may arise between the Parties in the implementation of this Agreement may become necessary. When such issues arise, the Parties agree to meet and

confer in good faith in an effort to resolve those issues by reaching such agreements.

17. **Dispute Resolution.** Whenever, during the term of this Agreement, any disagreement or dispute arises between the Parties as to the interpretation of this Agreement, or any rights or obligations arising hereunder, all such matters shall be resolved, whenever possible, by meeting and conferring. Either Party may request such a meeting by giving notice to the other, in which case such other Party shall make itself available within seven (7) days thereafter. If such matters cannot be so resolved within ten (10) days after the longer of the giving of such notice to confer or of the Parties conferring that commenced within seven (7) days of giving such notice, either Party may seek declaration and/or injunctive relief in any court of competent jurisdiction to enforce the provisions of this Agreement. The Parties expressly agree to waive any right that either party may have for any cause of action for money damages against the other arising from a breach of any provision of this Agreement.

18. **Notices.** Any notices, requests, demands, or other communications required or permitted hereunder shall be sufficient if made in writing and: (1) delivered personally or (2) sent by certified mail, postage prepaid, return receipt requested, and addressed to the appropriate party at its address set forth above, or such other addresses as a Party may specify to the other in a notice given pursuant to this Paragraph.

19. **Construction.** To the extent state law applies, this Agreement shall be governed in accordance with the laws of the State of California. The descriptive headings of the paragraphs of this Agreement are for convenience only and are not to be used in the construction of the contents of this Agreement. This Agreement may be executed in multiple counterparts, each of which will be an original instrument, but all of which will constitute one agreement.

20. **Term.** This Agreement shall become effective on May 1, 2014 and shall remain in effect until: (a) May 1, 2017 or (b) it is rescinded or superseded pursuant to a written agreement between the Parties.

21. **Authorization.** The Tribe warrants that Chairman Michael Hunter, has been authorized by an appropriate resolution of the Coyote Valley Tribal Council to execute this Agreement pursuant to the Tribe's Constitution, which authorizes the Tribal Council to enter into agreements with local governments to promote the health and general welfare of the Tribe. The MCSO warrants that Thomas Allman, Sheriff of Mendocino County and John Pinches, Chair for the Board of Supervisors for the County of Mendocino, by appropriate resolution of the Board of Supervisors of the County of Mendocino, have been authorized to execute this Agreement on behalf of the MCSO and the County of Mendocino.

Executed and delivered as of the date first written above in Ukiah, California.

COYOTE VALLEY

By: _____

Michael Hunter, Chairman

MENDOCINO COUNTY SHERIFF

By: _____

Thomas Allman, Sheriff

MENDOCINO COUNTY
BOARD OF SUPERVISORS

By: _____ AUG 12 2014

John Pinches, Chair

APPROVED AS TO FORM:

_____
Alex Cleghorn, Tribal Attorney

_____
Doug Losak, Acting County Counsel

I hereby certify that according to the provisions of Government Code sections 25103, delivery of this document has been made.

CARMEL J ANGELO
Clerk of the Board

By: _____
Deputy

ATTEST:
Carmel J. Angelo, Clerk of the Board
Mendocino County Board of Supervisors

_____
DEPUTY

COYOTE VALLEY
Band of Pomo Indians

COYOTE VALLEY BAND OF POMO INDIANS TRIBAL COUNCIL
RESOLUTION NO. CV-TC-05-01-14-02
A RESOLUTION OF THE COYOTE VALLEY BAND OF POMO INDIANS TO ENTER AN INTERGOVERNMENTAL AGREEMENT BETWEEN THE COYOTE VALLEY BAND OF POMO INDIANS AND THE MENDOCINO COUNTY SHERIFF'S OFFICE

WHEREAS, the Coyote Valley Band of Pomo Indians of California ("Tribe") is a federally recognized Indian Tribe, recognized by the United States of America through the Secretary of the Interior as a sovereign Indian Tribe possessed with inherent powers of tribal self-government; and

WHEREAS, among the powers of inherent sovereignty vested in the Coyote Valley Band of Pomo Indians General Council is the power to determine its own form of government, interpret its own laws and be governed by those laws; and

WHEREAS, on October 4, 1980, the General Council enacted the Document Embodying the Laws, Customs and Traditions of the Coyote Valley Band of Pomo Indians ("Tribal Constitution") to serve as the governing document of the Tribe; and

WHEREAS, under Article VI, Section 1, the General Council elects a Tribal Council to serve as the Tribe's governing body; and

WHEREAS, the Tribal Council exercises, concurrently with the General Council, all powers delegated to it by the General Council in Article VII of the Tribal Constitution and otherwise vested in the Tribal Council by the Tribal Constitution; and

WHEREAS, Article VII, Section 1, Subpart (a) of the Tribal Constitution states that the General Council delegated to the Tribal Council the power to consult, negotiate, contract or conclude agreements with federal, state, local and tribal governments and with private persons and organizations; and

WHEREAS, pursuant to the forgoing power, the Tribal Council desires to enter an Intergovernmental Agreement ("Agreement") between the Coyote Valley Band of Pomo Indians and the Mendocino County Sherriff's Office ("MCSO") for the purpose of sharing information between MCSO, a local government agency, and the Coyote Valley Reservation Police Department ("CVRPD"); and

(CERTIFICATION PAGE TO FOLLOW)

NOW, THEREFORE, BE IT RESOLVED that the Tribal Council hereby approves of the Agreement and authorizes its Chairman to execute the Agreement in a form substantially similar to that attached as Exhibit A.

CERTIFICATION

This is to certify that the foregoing resolution and action was approved by the Coyote Valley Band of Pomo Indians Tribal Council at a duly noticed and convened meeting held on May 1, 2014, and was approved by a vote of 7 For 0 Against with 0 Abstaining, and that this resolution has not been amended or rescinded in any way.

Michael Hunter, Chairman
Coyote Valley Tribal Council

Candace Gonzalez, Secretary
Coyote Valley Tribal Council

EXHIBIT A

Attached
Intergovernmental Agreement between the Coyote Valley Band of Pomo Indians and the Mendocino County Sherriff's Office

INTERGOVERNMENTAL AGREEMENT BETWEEN THE COYOTE VALLEY BAND OF POMO INDIANS AND THE MENDOCINO COUNTY SHERIFF'S OFFICE

This Agreement ("Agreement") is entered into on this Date Signed, 2014, by and between the Coyote Valley Band of Pomo Indians ("Tribe"), a federally recognized Indian tribe, whose principal place of business is located at 7651 North State St, Redwood Valley, California, 95470, and the Mendocino County Sheriff's Office ("MCSO"), with its principal place of business located at 951 Low Gap Road, Ukiah, California, 95482. The Tribe and the MCSO shall be collectively referred to in this Agreement as the "Parties."

RECITALS

The Parties have entered into this Agreement in light of the following facts:

1. The Tribe is a federally recognized Indian tribe organized under a written Constitution, with the Coyote Valley Tribal Council ("Council") as the governing body of the Tribe.

2. The Tribe is the beneficial owner of the Coyote Valley Indian Reservation ("Reservation"), which comprises approximately 70 acres of land located approximately seven miles North of Ukiah in Mendocino County, California. Title to the Tribe's Reservation trust lands is owned by the United States of America in trust for the Tribe.

3. Pursuant to the Indian Law Enforcement Reform Act, 25 U.S.C. §2801, et seq., the Tribe has entered into a Deputation Agreement, dated December 4, 2013, with the United States Department of the Interior, to provide law enforcement services to all persons who reside, work, or visit the Reservation ("Deputation Agreement").

4. Pursuant to the Deputation Agreement, the Secretary of the Interior has issued Special Law Enforcement Commissions to officers of the Coyote Valley Reservation Police Department ("CVRPD") authorizing the Special Law Enforcement Commissioned officers ("SLEC Officers") to enforce federal laws on the Reservation and, under certain circumstances, off of the Reservation.

5. As federal law enforcement officers, CVRPD's SLEC Officers have the authority, pursuant to California Penal Code §830.8, to make arrests, under certain circumstances, for violations of California's criminal laws. The CVRPD acknowledges offenses listed in the Major Crimes Act [18 USC 1153] are outside federal jurisdiction and not applicable on the Reservation and prosecution of these offenses rests solely with the State. At all times, the CVRPD acknowledges that the MCSO has jurisdiction over prohibitory offenses committed on the Reservation (Pub. L. 280 [18U.S.C..§ 1162 et seq.) [California v. Cabazon Band of Mission Indians 480 US 202 (1987)].

6. The Parties agree that the most effective method of communication and information sharing between MCSO and CVRPD, would be for the MCSO to dispatch directly for CVRPD.

AGREEMENT

In consideration of the above recited facts, and the mutual promises contained herein, the Parties hereby agree as follows:

7. This agreement is regarding the information sharing agreement between the MCSO and the CVRPD as discussed by the Parties in November 2013. The information that will be shared under the terms of this Agreement will include only local information, defined as local probation, local warrants, BOLO's, and any other local information allowed by law.

8. In an effort to share information to the extent allowed by law, and to show the cooperative working relationship between the two agencies the MCSO has agreed to an information sharing agreement including limited dispatch services.

9. CVRPD will pay the MCSO $30,000 for 36 months of information sharing. After this agreement has been signed by all Parties, MSCO will send a bill for the full amount of the agreement, $30,000. SVRPD will pay to MCSO the amount billed, within 30 days of receipt of the bill.

10. MCSO will not dispatch calls received on their business or emergency lines to the CVRPD, nor will the MCSO ask CVRPD Officers to handle such calls. MCSO will not ask CVRPD to provide any other services to the MCSO regarding calls for service. MCSO will dispatch a deputy to provide assistance to CVRPD when such assistance is requested.

11. Currently MCSO is unable to provide access to CLETS information, until the legal requirements have been met. Once this access has been approved this Agreement may be restructured to include CLETS information being shared with CVRPD.

12. This information sharing and cooperative agreement is made possible by the conformation of both CVRPD's and CVRPD Officers' adherence to the SLEC officer program and Deputation Agreement. Any deviation may void further assistance, based on current state laws.

13. When asked by CVRPD, MCSO's dispatch center will provide local information only, without the use of CLETS.

14. CVRPD will have the ability to utilize the MCSO radio frequency via MCSO dispatch to notify MCSO of traffic enforcement stops by CVRPD officers as well as police related calls for service received directly by CVRPD.

15. CVRPD is authorized to communicate with MCSO staff using the MCSO radio frequencies, for the above listed services and assistance. Any abuse of the channels will be brought to the attention of the CVRPD Chief of Police for immediate remedy.

16. **Future, Additional Agreements.** The Parties acknowledge that additional agreements with respect to issues that may arise between the Parties in the implementation of this Agreement may become necessary. When such issues arise, the Parties agree to meet and

confer in good faith in an effort to resolve those issues by reaching such agreements.

17. **Dispute Resolution.** Whenever, during the term of this Agreement, any disagreement or dispute arises between the Parties as to the interpretation of this Agreement, or any rights or obligations arising hereunder, all such matters shall be resolved, whenever possible, by meeting and conferring. Either Party may request such a meeting by giving notice to the other, in which case such other Party shall make itself available within seven (7) days thereafter. If such matters cannot be so resolved within ten (10) days after the longer of the giving of such notice to confer or of the Parties conferring that commenced within seven (7) days of giving such notice, either Party may seek declaration and/or injunctive relief in any court of competent jurisdiction to enforce the provisions of this Agreement. The Parties expressly agree to waive any right that either party may have for any cause of action for money damages against the other arising from a breach of any provision of this Agreement.

18. **Notices.** Any notices, requests, demands, or other communications required or permitted hereunder shall be sufficient if made in writing and: (1) delivered personally or (2) sent by certified mail, postage prepaid, return receipt requested, and addressed to the appropriate party at its address set forth above, or such other addresses as a Party may specify to the other in a notice given pursuant to this Paragraph.

19. **Construction.** To the extent state law applies, this Agreement shall be governed in accordance with the laws of the State of California. The descriptive headings of the paragraphs of this Agreement are for convenience only and are not to be used in the construction of the contents of this Agreement. This Agreement may be executed in multiple counterparts, each of which will be an original instrument, but all of which will constitute one agreement.

20. **Term.** This Agreement shall become effective on Date Signed, 2014 and shall remain in effect until: (a) Date Signed, of 2017 or (b) it is rescinded or superseded pursuant to a written agreement between the Parties.

21. **Authorization.** The Tribe warrants that Chairman Michael Hunter, has been authorized by an appropriate resolution of the Coyote Valley Tribal Council to execute this Agreement pursuant to the Tribe's Constitution, which authorizes the Tribal Council to enter into agreements with local governments to promote the health and general welfare of the Tribe. The MCSO warrants that Thomas Allman, Sheriff of Mendocino County and John Pinches, Chair for the Board of Supervisors for the County of Mendocino, by appropriate resolution of the Board of Supervisors of the County of Mendocino, have been authorized to execute this Agreement on behalf of the MCSO and the County of Mendocino.

Executed and delivered as of the date first written above in Ukiah, California.

COYOTE VALLEY

By: _____

Michael Hunter, Chairman

MENDOCINO COUNTY SHERIFF

By: _____

Thomas Allman, Sheriff

MENDOCINO COUNTY
BOARD OF SUPERVISORS

By: _____

John Pinches, Chair

APPROVED AS TO FORM:

_____
Alex Cleghorn, Tribal Attorney

_____
Doug Losak, County Counsel

MENDOCINO COUNTY BOARD OF SUPERVISORS
ONLINE AGENDA SUMMARY

BOARD AGENDA # 4(q)

-Arrangements for public hearings and timed presentations must be made with the Clerk of the Board in advance of public/media noticing
-Note: If individual supporting document(s) exceed 25 pages each, or are not easily duplicated, please provide 7 hard-copy sets)
-Transmittal of electronic Agenda Summaries, records, and supporting documentation must be emailed to: bosagenda@co.mendocino.ca.us
-Electronic Transmission Checklist: ☐ Agenda Summary ☐ Records ☐ Supp. Doc. ☐ If applicable, list other online information below
-Executed records will be returned to the department within one week. *Arrangements for expedited processing must be made in advance*

TO: Board of Supervisors **DATE:** July 28, 2014

FROM: Sheriff's Office **MEETING DATE:** August 12, 2014

DEPARTMENT RESOURCE/CONTACT: Captain Johnson **PHONE:** 463-5416 Present ☐ On Call ☒

Consent Agenda ☒ Regular Agenda ☐ Noticed Public Hearing ☐ Time Allocated for Item: N/A

■ **AGENDA TITLE: Approval of an Intergovernmental Agreement for the Mendocino County Sheriff's Office to Provide Dispatch Services for Three Years to the Coyote Valley Band of Pomo Indians**

■ **PREVIOUS BOARD/BOARD COMMITTEE ACTIONS:**

■ **SUMMARY OF REQUEST:** The Mendocino County Sheriff's Office would like to enter into an intergovernmental agreement with the Coyote Valley Band of Pomo Indians. The agreement would allow the Coyote Valley Reservation Police Department to utilize the Mendocino County Sheriff's Office dispatch services for three years at the cost of $30,000. Dispatch services would include local information sharing such as local probation, local warrants, BOLO's and any other local information allowed by law. The Coyote Valley Band of Pomo Indians Tribal Council requires the approval of this agreement by the Mendocino County Board of Supervisors; as such the approval of the Board is requested for this agreement.

■ **SUPPLEMENTAL INFORMATION AVAILABLE ONLINE AT:**

■ **ADDITIONAL INFORMATION ON FILE WITH THE CLERK OF THE BOARD (CHECKED BY COB IF APPLICABLE):** ☐

FISCAL IMPACT:			
Source of Funding	**Current F/Y Cost**	**Annual Recurring Cost**	**Budgeted in Current F/Y**
Revenue Contract	($30,000)	N/A	Yes ☐ No ☒

■ **SUPERVISORIAL DISTRICT:** 1☐ 2☐ 3☐ 4☐ 5☐ All☐ ■ **VOTE REQUIREMENT:** Majority☒ 4/5ths☐

■ **RECOMMENDED ACTION/MOTION:** Approve the intergovernmental agreement for the Mendocino County Sheriff's Office to provide dispatch services for three years to the Coyote Valley Band of Pomo Indians.

■ **ALTERNATIVES:** Return to the Sheriff's Office with further instruction.

■ **CEO REVIEW (NAME):** Heidi Dunham, DCEO **PHONE:** 463-4441

RECOMMENDATION: Agree ☒ Disagree ☐ No Opinion ☐ Alternate ☐ Staff Report Attached ☐

BOARD ACTION (DATE: 8-15-14 **):** ☑ Approved ☐ Referred to _____ ☐ Other _____

RECORDS EXECUTED: ☑ Agreement: 14-062 ☐ Resolution: _____ ☐ Ordinance: _____ ☐ Other _____

Revised-01/09

Exception to Bid# _____
Revenue Contract: XXYes ☐No

MENDOCINO COUNTY
CONTRACT SUMMARY/ROUTING SHEET

Signatory authority:
$0-25,000 – Department; $25,001 – 50,000– Purchasing Agent; $50,001 – up – Board of Supervisors

<u>All</u> contracts require County Executive Office *(sign as to review only-no signature on actual contract)*, County Counsel, and Risk Management review, signature, and approval.

Signatures are to be obtained in the following order (dependant upon signatory authority and contract amount): Contractor, Department, County Executive Office, County Counsel, Risk Management/General Services Agency (Purchasing Agent), Board of Supervisors.

Following signature, contracts are to be forwarded to the next office by the office that the contract is located (unless department requests otherwise); the final document is to be transmitted to the requesting department upon completion of processing.

RECEIVED
JUL 02 2014
MENDOCINO COUNTY
TIME: INITIALS:

Contract Detail:			
Submitting Department		Sheriff's Office	
Contact Name and Phone No. & email:		Capt. Randy Johnson, (707) 463-5416	
Contractor Name:	Coyote Valley Band of Pomo Indians	Contractor Vendor No. *(via Finance System)*:	5777
Start Date of Contract:	May 1, 2014	End Date of Contract:	April 30, 2017
Contract Amount: **(For contracts over $10,000, please see competitive bidding section below)*	$30,000	Funding Source(s):	Revenue Contract
Was this budgeted for in this FY?	☐ Yes ☒ No *(Provide explanation)*	Budgetary Explanation:	
Is the contract related to a grant?	☐ Yes *(Provide explanation)* ☐ No	If yes, what is the grant no.?	
Contract Amendments:			
Is this an amendment to a previous contract?	☐ Yes ☒ No *(Provide explanation)*	Previous Contract No.:	
Date of original Contract award		Approving authority on original contract:	
NOTE: The 'equal dignity' rule requires that the original signatory authority be the approval of all subsequent amendments, regardless of dollar amount			

Competitive Bidding (For services over $10,000) *(Contact the General Services Agency/Central Services Division for more information regarding competitive bidding mandates)*		
Is this a new service/contract? ☐ Yes ☐ No	If yes, did you obtain at least three bids? ☐ *Yes ☐ **No (*Attach bids to this form)	**If no, please complete an 'Exception to Competitive Bidding Form' and attach to this prior to submitting for signature and approval.
Contract renewals	When was the last contract renewal date? _____	When was the last time that the contract/services were competitively bid? _____ *(If greater than one year, please contact the GSA for information regarding competitive bidding)*

IF CONTRACT PROCESSING CANNOT BE APPROVED:

Check Appropriate Processing Step:

Signatory Authority:
☐ County Executive Officer
☐ County Counsel
☐ Risk Management
☐ General Services Agency/Purchasing Agent

Why Can't Contract Step Be Approved?

_____

_____

_____

Proposed Corrective Action:

_____

_____

_____

SIGNATURES
(Sign Both Routing Form And Contracts)

7/8/14	Randy Johnson Department Director	Date logged out to CEO
7/8/14	No Signature for CEO. (HR) County Executive Officer	7/8/14 Date logged out to CoCo
6/30/14	 County Counsel	6/30/14 Date logged out to Risk Management
7/2/14	Kristine McMenomey Risk Manager	Date logged out to GSA/ Purchasing Agent
Date Logged In:	Kristine McMenomey Purchasing Agent Signature *(Contracts between $25,001 and $50,000)*	7/3/14 Date logged out *(refer to return routing below)*

GSA Routing:	Date:
☐ Transmitted back to requesting Department	
☐ Transmitted to Auditor	

MENDOCINO COUNTY EXECUTIVE OFFICE
CONTRACT SUMMARY/ROUTING SHEET

GENERAL INFORMATION

Signatory authority:
$0-25,000 – Department; $25,001 – 50,000– Purchasing Agent; $50,001 – up – Board of Supervisors

All contracts require County Counsel, Executive Office-Fiscal, and Executive Office-Risk Management (only if standard boiler plate Exhibit C "Insurance Provisions" is not used), review, approval and signature.

Signatures are to be obtained in the following order (dependant upon signatory authority and contract amount): County Counsel, Executive Office (Fiscal, Risk Management and/or Purchasing Agent), Contractor, and Department Head/ /BOS.

Following signature, contracts are to be forwarded to the next office by the office that the contract is located (unless department requests otherwise); the final document is to be transmitted to the requesting department upon completion of processing.

Once a contract is entered into, the department needs to forward all certificates of insurance to the Executive Office, Risk Management Division.

Contract Detail:			
Submitting Department		Sheriff-Coroner	
Contact Name and Phone No. & email:		Dora Briley 463-4408, brileyd@co.mendocino.ca.us	
Contract Boilerplate:	☐ Yes ☒ No *(Provide explanation)*	Please describe the variance from the Boilerplate:	MOU
Contractor Name:	Cahto Tribe of Laytonville Rancheria	Contractor Vendor No. *(via Finance System)*:	
Description of Services:	Revenue: MCSO to provide limited dispatch and assist services to Cahto Tribe		
Start Date of Contract:	November 1, 2016	End Date of Contract:	October 31, 2019
Contract Amount: **(For contracts over $25,000, please see competitive bidding section)*	$30,000	Funding Source(s):	2310 862189
Was this budgeted for in this FY?	☒ Yes ☐ No *(Provide explanation)*	Budgetary Explanation:	Revenue
Is the contract related to a grant?	☐ Yes *(Provide explanation)* ☒ No	If yes, what is the grant no.?	
Contract Amendments:			
Is this an amendment to a previous contract?	☐ Yes *(Provide explanation)* ☒ No	Previous Contract No.:	
Date of original Contract award		Approving authority on original contract:	
NOTE: The 'equal dignity' rule requires that the original signatory authority be the approval of all subsequent amendments, regardless of dollar amount			

Competitive Bidding (For services over $25,000) *(Contact the Executive Office/Central Services/Purchasing Agent for more information regarding competitive bidding mandates)*		
Is this a new service/contract? ☐ Yes ☐ No	If yes, did you obtain at least three bids? ☐ *Yes ☐ **No (*Attach bids to this form)	**If no, please complete an 'Exception to Competitive Bidding Form' and attach to this prior to submitting for signature and approval.
Contract renewals	When was the last contract renewal date? _Revenue for services we provide to partner	When was the last time that the contract/services were competitively bid? _____ *(If greater than one year, please contact the Executive Office for information regarding competitive bidding)*

REQUIRED EXECUTABLE SIGNATURES (FOR EXECUTIVE OFFICE USE ONLY)		
Department Contracts: *($0-25,000)*	Purchasing Agent Contracts: *($25,001 – 50,000 or 175,000 for public projects)*	Board of Supervisor Contracts: *($50,001 and up or $175,001 and up for public projects)*
☐ Executive Office/Policy	☐ Executive Office/Policy	☐ Executive Office/Policy
☐ Executive Office/Fiscal	☐ Executive Office/Fiscal	☐ Executive Office/Fiscal
☐ Executive Office/Risk Management	☐ Executive Office/Risk Management	☐ Executive Office/Risk Management
	☐ Executive Office/Purchasing Agent	☐ Board of Supervisors and Clerk of the Board *(to be executed following Board of Supervisors approval)*

SIGNATURES (*Signatures will be affixed to the routing form, as well as the original contracts)*

Dates Logged In:	**Signatures:**	**Dates Logged Out:**
Date contract initiated:	Department Director Signature	Date logged out to County Counsel
Date Logged In:	County Counsel Signature	Date logged out to CEO
Date Logged In:	Executive Office/Fiscal/Risk Management *(NOTE: Risk Management review is required only if the boiler plate Exhibit C has been revised)*	Date logged out to Executive Office/ Purchasing Agent or Department *(If applicable)*
Date Logged In:	Executive Office/ Purchasing Agent Signature *(Contracts between $25,001 and $50,00 or public projects/contacts up to $175,000)*	Date logged out/ Returned to Department

Originating Department	**Date:**
☐ Transmitted to Auditor	

Resources documents:
Mendocino County Policy No. 1
Exception to Bid Form
Contract Processing Guidelines

MOU# _____

MEMORANDUM OF UNDERSTANDING (MOU)
Between the Mendocino County Sheriff's Office
and
COYOTE VALLEY BAND OF POMO INDIANS

This memorandum of Understanding is entered into on the day of , 2017, by and between the Mendocino County Sheriff-Coroner Office, hereinafter referred to as the "COUNTY" and the Coyote Valley Band of Pomo Indians, hereinafter referred to as "PARTNER".

Whereas, COUNTY desires to work with PARTNER and their Coyote Valley Tribal Police Department (CVTPD) in a cooperative law enforcement resources understanding; and

Whereas, COUNTY and PARTNER agree upon a cooperative understanding; and

Whereas, COUNTY and PARTNER wish to share information to the extent permitted by law and to continue a cooperative working relationship between the two agencies with information sharing and uniform crime reporting;

NOW, THERFORE, BASED ON THE FOREGOING RECITALS, THE PARTIES HERETO AGREE AS FOLLOWS:

1. COUNTY will provide limited dispatch services:

    a. COUNTY will dispatch a deputy to provide assistance to PARTNER when such assistance is requested by PARTNER if available.

    b. PARTNER's CVTPD status as Special Law Enforcement Commissioned (SLEC) agency allows for information sharing with the COUNTY. Any deviation from the SLEC policy may void further assistance from COUNTY based on current State laws. PARTNER will notify COUNTY immediately if their SLEC status changes or is terminated.

    c. When requested COUNTY dispatch center will provide local information only, without the use of the California Law Enforcement Telecommunication System (CLETS). This information will include local probation, local warrants, BOLO's and any other local information allowed by law. PARTNER CVTPD will work to fulfill the legal requirements to become a CLETS approved agency, until the requirements are met, no CLETS information can be shared.

2. PARTNER CVTPD will have the ability to utilize the COUNTY (Mendocino County) Sheriff Office (MCSO) radio frequency via COUNTY dispatch to notify MCSO of traffic enforcement stops by PARTNER CVTPD officers as well as police related calls for service received directly by PARTNER CVTPD. COUNTY will provide back up support and officer safety for PARTNER CVTPD if available.

    a. PARTNER CVTPD is authorized to communicate with COUNTY MCSO staff using the MCSO radio frequencies for the above listed services and assistance.

    b. Any abuse of the channels will be brought to the attention of PARTNER CVTPD for an immediate remedy.

    c. PARTNER CVTPD will supply COUNTY MCSO with locations of tribal police on duty.

3. Both parties will cooperate with information regarding staffing and shifts.

4. COUNTY MCSO will offer certain training opportunities to PARTNER CVTPD and will communicate those opportunities to PARTNER CVTPD on a timely basis. PARTNER CVTPD will respond in a timely manner.

5. PARTNER CVTPD will operate within the Peace Officer Standards and Training (POST) guidelines to create consistency of operating standards between the two agencies.

6. Term Dates:

    This MOU will become effective on June 1, 2017 and continue through May 31, 2020.

7. Payment Terms:

    a. This MOU shall not exceed a total cost of Thirty Thousand Dollars ($30,000) over the three year term.

    b. PARTNER shall pay COUNTY in one payment for the term in the amount of Thirty Thousand Dollars ($30,000). At the final execution of the MOU, the COUNTY shall invoice the PARTNER in the amount of $30,000. The PARTNER shall remit to COUNTY within 30-days of receipt of the invoice.

8. Indemnification:

PARTNER shall indemnify, defend, and hold harmless the COUNTY, its officers, agents, and employees, from and against any and all claims, liabilities, and losses whatsoever including damages to property and injuries to, or death of persons, reasonable attorney's fees, expert fees and court costs occurring or resulting, or alleged to be occurring or resulting, to any and all persons, firms or corporations furnishing or supplying work, services, materials, or supplies in connections with the PARTNER'S performance or its obligations under this MOU, and from any and all claims, liabilities, and losses occurring or resulting, or alleged to be occurring or resulting, to any person, firm, or corporation for damage, injury, or death arising out of or connected with the PARTNER'S performance of its obligations under this MOU, unless such claims, liabilities, or losses arise out of the sole negligence or willful misconduct of COUNTY. "PARTNER 'S performance" includes PARTNER'S action or inaction and the action or inaction of PARTNER'S officers, employees, agents and subcontractors.

9. Dispute Resolution:

Whenever, during the term of this Agreement, any disagreement or dispute arises between COUNTY and PARTNER as to the interpretation of this memorandum of understanding, or any rights or obligations arising hereunder, all such matters shall be resolved, whenever possible, by meeting and conferring. Either party may request such a meeting by giving prior written notice to the other, in which case such other party shall make itself available within seven (7) business days thereafter. If such matters cannot be resolved within ten (10) business days after the longer of the giving of such notice to confer or of the parties conferring that commenced within seven (7) days of giving such notice, either party may seek declaration and/or injunctive relief in any court of competent jurisdiction to enforce the provisions of this memorandum of understanding. The parties expressly agree to waive any right that either party may have for any cause of action for money damages against the other arising from a breach of any provision of this Agreement. This Section 9 does not apply to termination of this Agreement pursuant to Section 10 herein, except insofar as PARTNER seeks to compel COUNTY’s repayment of pro-rated amount of funds under such Section, and does not limit the ability of either party to terminate this Agreement pursuant to that Section. Nor does this Section 9 limit the indemnification requirements provided by Section 8 of this Agreement.

10. Termination:

Either party to this MOU may terminate the execution of any work without cause at any time upon giving the other party written notice. The COUNTY shall refund the PARTNER a pro-rated amount from the date of termination through the end of agreement.

11. Insurance:

Insurance coverage in a minimum amount set forth herein shall not be construed to relieve PARTNER for liability in excess of such coverage, nor shall it preclude COUNTY from taking such other action as is available to it under any other provisions of this Agreement or otherwise in law.

PARTNER agrees to indemnify and hold harmless COUNTY, its elected or appointed officials, employees or volunteers against any claims, actions, or demands against them, or any of them, and against any damages, liabilities or expenses, including costs of defense and attorney's fees, for personal injury or death, or for the loss or damage to the property, or any or all of them, to the extent arising out of the performance of this Agreement by PARTNER.

PARTNER affirms that s/he is aware of the provisions of Section 3700 of the California Labor Code which requires every employer to be insured against liability for the Workers' Compensation or to undertake self-insurance in accordance with the provisions of the Code and PARTNER further assures that s/he will comply with such provisions before commencing the performance of work under this Agreement. PARTNER shall furnish to COUNTY certificate(s) of insurance evidencing Worker's Compensation Insurance coverage to cover its employees, and PARTNER shall require all subcontractors similarly to provide Workers' Compensation Insurance as required by the Labor Code of the State of California for all of PARTNER'S and subcontractors' employees.

PARTNER shall furnish to COUNTY certificates of insurance with Automobile Liability/General Liability Endorsements evidencing at a minimum the following:

a. Combined single limit bodily injury liability and property damage liability - $1,000,000 each occurrence.

b. Vehicle/ Bodily Injury combined single limit vehicle bodily injury and property damage liability - $500,000 each occurrence.

// END OF TERMS //

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

DEPARTMENT NAME:_____ **BY:** _____ DEPARTMENT HEAD DATE Budgeted: ☐ Yes ☐ No Budget Unit: Line Item: Grant: ☐ Yes ☐ No Grant #:		**PARTNER/COMPANY NAME** **BY:**_____ NAME & ADDRESS OF PARTNER: _____ _____ _____ PH: EMAIL:
INSURANCE REVIEW: **RISK MANAGER** By:_____ ALAN D. FLORA, Risk Manager		By signing above, signatory warrants and represents that he/she executed this Agreement in his/her authorized capacity and that by his/her signature on this Agreement, he/she or the entity upon behalf of which he/she acted, executed this Agreement.
EXECUTIVE OFFICE REVIEW: APPROVAL RECOMMENDED: By:_____ CARMEL J. ANGELO, CEO		**COUNTY COUNSEL REVIEW:** APPROVED AS TO FORM: _____ Katharine L. Elliott County Counsel By:_____ Deputy
		FISCAL REVIEW: By:_____ Deputy CEO/Fiscal

Signatory Authority: $0-$25,000 Department; $25,001-$50,000 Purchasing Agent; $50,001+ Board of Supervisors.

Exception to Bid Process Required/Completed: ☐ #_____

MEMORANDUM OF UNDERSTANDING (MOU)
Between the Mendocino County Sheriff's Office
and
HOPLAND BAND OF POMO INDIANS

This memorandum of Understanding is entered into on the 6th day of December, 2016, by and between the Mendocino County Sheriff-Coroner Office, hereinafter referred to as the "COUNTY" and the Hopland Band of Pomo Indians, hereinafter referred to as "PARTNER".

Whereas, COUNTY desires to work with PARTNER and their Hopland Tribal Police Department (HTPD) in a cooperative law enforcement resources understanding; and

Whereas, COUNTY and PARTNER agree upon a cooperative understanding; and

Whereas, COUNTY and PARTNER wish to share information to the extent permitted by law and to continue a cooperative working relationship between the two agencies with information sharing and uniform crime reporting;

NOW, THERFORE, BASED ON THE FOREGOING RECITALS, THE PARTIES HERETO AGREE AS FOLLOWS:

1. COUNTY will provide limited dispatch services:

    a. COUNTY will dispatch a deputy to provide assistance to PARTNER when such assistance is requested by PARTNER if available.

    b. PARTNER's HTPD status as Special Law Enforcement Commissioned (SLEC) agency allows for information sharing with the COUNTY. Any deviation from the SLEC policy may void further assistance from COUNTY based on current State laws

    c. When requested COUNTY dispatch center will provide local information only, without the use of the California Law Enforcement Telecommunication System (CLETS). This information will include local probation, local warrants, BOLO's and any other local information allowed by law. PARTNER HTPD will work to fulfill the legal requirements to become a CLETS approved agency, until the requirements are met, no CLETS information can be shared

2. PARTNER HTPD will have the ability to utilize the COUNTY (Mendocino County) Sheriff Office (MCSO) radio frequency via COUNTY dispatch to notify MCSO of traffic enforcement stops by PARTNER HTPD officers as well as police related calls for service received directly by PARTNER HTPD. COUNTY will provide back up support and officer safety for PARTNER HTPD if available.

    a. PARTNER HTPD is authorized to communicate with COUNTY MCSO staff using the MCSO radio frequencies for the above listed services and assistance.

    b. Any abuse of the channels will be brought to the attention of PARTNER HTPD for an immediate remedy.

    c. PARTNER HTPD will supply COUNTY MCSO with locations of tribal police on duty.

3. Both parties will cooperate with information regarding staffing and shifts.

4. COUNTY MCSO will offer certain training opportunities to PARTNER HTPD and will communicate those opportunities to PARTNER HTPD on a timely basis. PARTNER HTPD will respond in a timely manner.

5. PARTNER HTPD will operate within the Peace Officer Standards and Training (POST) guidelines to create consistency of operating standards between the two agencies.

6. Term Dates:

    a. This MOU will become effective on October 1, 2016 and continue through September 30, 2019.

7. Payment Terms:

    a. This MOU shall not exceed a total cost of Thirty Thousand Dollars ($30,000) over the three year term.

    b. PARTNER shall pay COUNTY three (3) annual installments of Ten Thousand Dollars ($10,000). At the final execution of the MOU, the COUNTY shall invoice the PARTNER for the first installment in the amount of $10,000. The COUNTY shall invoice the PARTNER the second installment in the amount of

$10,000 in September 2017. The COUNTY shall invoice the PARTNER the third installment in the amount of $10,000 in September 2018. The PARTNER shall remit to COUNTY within 30-days of receipt of each invoice.

8. Indemnification:

   a. PARTNER shall indemnify, defend, and hold harmless the COUNTY, its officers, agents, and employees, from and against any and all claims, liabilities, and losses whatsoever including damages to property and injuries to, or death of persons, reasonable attorney's fees, expert fees and court costs occurring or resulting, or alleged to be occurring or resulting, to any and all persons, firms or corporations furnishing or supplying work, services, materials, or supplies in connections with the PARTNER'S performance or its obligations under this MOU, and from any and all claims, liabilities, and losses occurring or resulting, or alleged to be occurring or resulting, to any person, firm, or corporation for damage, injury, or death arising out of or connected with the PARTNER'S performance of its obligations under this MOU, unless such claims, liabilities, or losses arise out of the sole negligence or willful misconduct of COUNTY. "PARTNER'S performance" includes PARTNER'S action or inaction and the action or inaction of PARTNER'S officers, employees, agents and subcontractors.

9. Termination:

   a. Either party to this MOU may terminate the execution of any work without cause at any time upon giving the other party written notice. The COUNTY shall refund the PARTNER a pro-rated amount from the date of termination through the end of agreement.

10. Insurance:

Insurance coverage in a minimum amount set forth herein shall not be construed to relieve PARTNER for liability in excess of such coverage, nor shall it preclude COUNTY from taking such other action as is available to it under any other provisions of this Agreement or otherwise in law.

PARTNER agrees to indemnify and hold harmless COUNTY, its elected or appointed officials, employees or volunteers against any claims, actions, or demands against them, or any of them, and against any damages, liabilities or expenses, including costs of defense and attorney's fees, for personal injury or death, or for the loss or damage to the property, or any or all of them, to the extent arising out of the performance of this Agreement by PARTNER.

PARTNER affirms that s/he is aware of the provisions of Section 3700 of the California Labor Code which requires every employer to be insured against liability for the Workers'

Compensation or to undertake self-insurance in accordance with the provisions of the Code and PARTNER further assures that s/he will comply with such provisions before commencing the performance of work under this Agreement. PARTNER shall furnish to COUNTY certificate(s) of insurance evidencing Worker's Compensation Insurance coverage to cover its employees, and PARTNER shall require all subcontractors similarly to provide Workers' Compensation Insurance as required by the Labor Code of the State of California for all of PARTNER'S and subcontractors' employees.

PARTNER shall furnish to COUNTY certificates of insurance with Automobile Liability/General Liability Endorsements evidencing at a minimum the following:

a. Combined single limit bodily injury liability and property damage liability - $1,000,000 each occurrence.

b. Vehicle / Bodily Injury combined single limit vehicle bodily injury and property damage liability - $500,000 each occurrence.

DEPARTMENT NAME: Sheriff-Coroner

By: _____
DEPARTMENT HEAD DATE

Budgeted: ☒ Yes ☐ No

Budget Unit: 2310

Line Item: SO 862189

Grant: ☐ Yes ☒ No

Grant No.:n/a

INSURANCE REVIEW:
RISK MANAGER

By:_____
ALAN D. FLORA, Risk Manager

EXECUTIVE OFFICE REVIEW:
APPROVAL RECOMMENDED:

By: _____
CARMEL J. ANGELO, Chief Executive Officer

PARTNER/COMPANY NAME

By:_____

NAME AND ADDRESS OF PARTNER:

Hopland Band of Pomo Indians

3000 Shannel Road

Hopland, Ca. 95449

Ph: 707-472-2100 x1303
Email: dgiovannini@hopland.com

By signing above, signatory warrants and represents that he/she executed this Agreement in his/her authorized capacity and that by his/her signature on this Agreement, he/she or the entity upon behalf of which he/she acted, executed this Agreement

COUNTY COUNSEL REVIEW:

APPROVED AS TO FORM:

KATHARINE L. ELLIOTT
County Counsel

By: _____
Deputy

FISCAL REVIEW:

By: _____
Deputy CEO/Fiscal

Signatory Authority: $0-25,000 Department; $25,001 -50,000 Purchasing Agent, $50,001 + Board of Supervisors.
Exception to Bid Process Required/Completed ☐ _____N/A_____

GAO Highlights

Highlights of GAO-17-624, a report to congressional requesters

July 2017

HUMAN TRAFFICKING

Information on Cases in Indian Country or that Involved Native Americans

Why GAO Did This Study

Human trafficking—the exploitation of a person typically through force, fraud, or coercion for such purposes as forced labor, involuntary servitude or commercial sex—is occurring in the United States and involves vulnerable populations. Native Americans are considered a vulnerable population because of high rates of poverty and abuse, and other factors. GAO was asked to research human trafficking taking place in Indian country and trafficking of Native American persons regardless of where they are located in the United States.

This report addresses (1) the extent to which tribal and major city LEAs have encountered human trafficking in Indian country or of Native Americans, (2) factors affecting the ability of LEAs to identify and investigate this specific human trafficking, and (3) availability of services to Native American victims of human trafficking. GAO conducted surveys of all known tribal LEAs (203) as identified by the Bureau of Indian Affairs; 86 major city LEAs; and 315 victim service provider organizations that received fiscal year 2015 Department of Justice or Department of Health and Human Services grants that could be used to assist human trafficking victims. Survey response rates for tribal LEAs, major city LEAs, and victim service providers were 65 percent, 71 percent, and 51 percent, respectively. The web-based surveys were deployed in September 2016 and asked about human trafficking investigations initiated or services provided from 2014 to 2016.

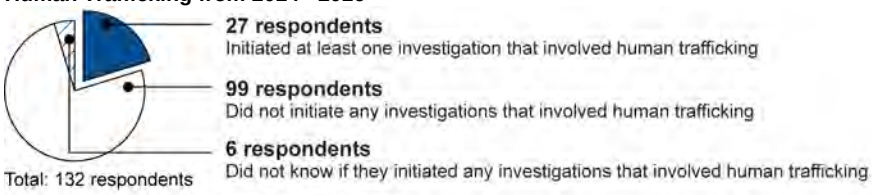
GAO is not making recommendations in this report.

View GAO-17-624. To view the supplemental material online, click on GAO-17-626SP. For more information, contact Gretta L. Goodwin at (202) 512-8777 or goodwing@gao.gov.

What GAO Found

In a survey GAO conducted, 27 of the 132 responding tribal law enforcement agencies (LEAs) reported initiating investigations that they considered to have involved human trafficking from 2014 to 2016.

Number of Tribal Law Enforcement Agencies that Reported Initiating Investigations Involving Human Trafficking from 2014 - 2016[a]

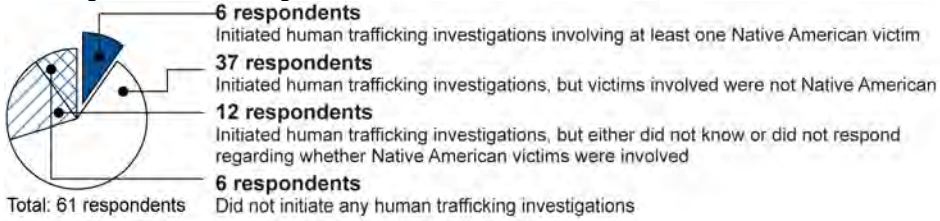


Source: GAO analysis of survey results. | GAO-17-624

[a]Surveys were deployed in September 2016. Investigations initiated between survey completion and December 31, 2016 would not be captured.

Of the 61 major city LEAs that responded to the survey, 6 reported initiating human trafficking investigations that involved at least one Native American victim during the same period.

Number of Major City Law Enforcement Agencies that Reported Initiating Investigations Involving Human Trafficking of Native Americans or Others from 2014 - 2016[a]



Source: GAO analysis of survey results. | GAO-17-624

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Tribal and major city LEA respondents indicated that unreported incidents and victims' reluctance to participate in investigations are barriers to identifying and investigating human trafficking in Indian country or of Native Americans. Nearly half of tribal LEA respondents believe that more human trafficking is occurring in their jurisdictions than is reported. Federal agencies offer training resources to assist with identifying and addressing human trafficking, some of which are specific to tribal LEAs and Native American victims.

Tribal and major city LEAs and victim service providers reported services that are available to Native American victims of human trafficking, including shelter, substance abuse treatment, and medical and mental health services. However, they also reported that victims' feelings of shame and lack of service provider resources can make it difficult for victims to obtain those services. Federal agencies offer at least 50 grant programs for which addressing human trafficking or assisting Native American crime victims is an allowable use of the funding.

United States Government Accountability Office

Report to Congressional Requesters

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Information on Cases in Indian Country or that Involved Native Americans

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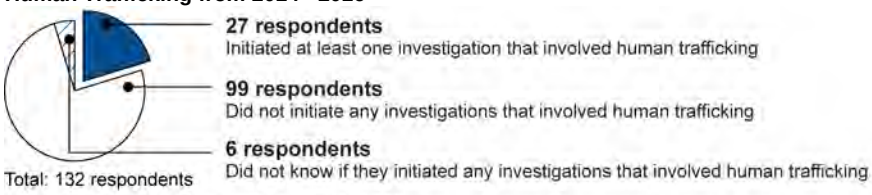

Source: GAO analysis of survey results. | GAO-17-624

[a]Surveys were deployed in September 2016. Investigations initiated between survey completion and December 31, 2016 would not be captured.

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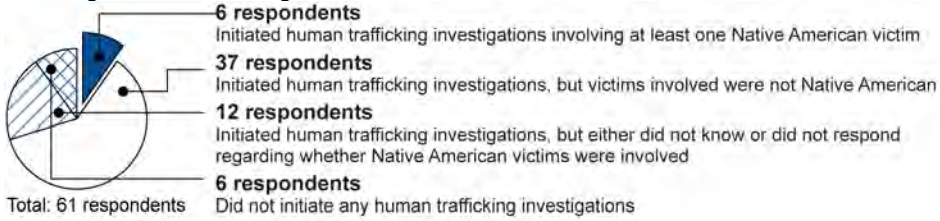

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Contents

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

July 24, 2017

The Honorable John Hoeven
Chairman
The Honorable Tom Udall
Vice Chairman
Committee on Indian Affairs
United States Senate

The Honorable John Barrasso
United States Senate

The Honorable Jon Tester
United States Senate

Human trafficking—the exploitation of a person typically through force, fraud, or coercion for such purposes as forced labor, involuntary servitude, or commercial sex—is occurring in the United States.[1] According to the Attorney General's fiscal year 2015 annual report to Congress on human trafficking, traffickers seek out persons perceived to be vulnerable.[2] Vulnerability comes in many forms, including age (minors), poverty, homelessness, chemical dependency, prior experiences of abuse, involvement in foster care programs, and lack of resources or support systems. Native Americans are a vulnerable

[1]Federal law generally recognizes two forms of human trafficking—sex trafficking and labor trafficking. The Trafficking Victims Protection Act of 2000 (TVPA), as amended, defines human trafficking under the term "severe forms of trafficking in persons," which means: (1) sex trafficking involving the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for a commercial sex act through force, fraud, or coercion, or where the victim has not attained 18 years of age; or (2) labor trafficking involving the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. See Pub. L. No. 106-386, div. A, § 103, 114 Stat. 1464, 1469-70 (classified, as amended, at 22 U.S.C. § 7102(4), (9), (10)).

[2]Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons, Fiscal Year 2015.

population.[3] For example, according to U.S. Census Bureau statistics, in 2010, 28 percent of Native Americans were living in poverty, compared to 15 percent of the general population. Also, according to the 2010 National Intimate Partner and Sexual Violence Survey, conducted by the Centers for Disease Control and Prevention, an estimated 27 percent of Native American women had been raped in their lifetime compared to 18 percent of American women, overall.[4] In addition, Indian children enter foster care at twice the rate of all American children.[5]

You asked us to research human trafficking in Indian country and of Native Americans, including the extent to which law enforcement agencies have encountered it and the services that are available to victims.[6] This report focuses on the perspectives of law enforcement agencies and victim service providers that have encountered human trafficking in Indian country or of Native Americans regardless of location. We issued a companion report in March 2017 that focused on federal

[3]Throughout this report, we generally use the term "Native American" in reference to an American Indian or Alaska Native, including persons who have identified themselves as Native American or individuals whom federal agencies have identified as Native American based on relevant legal authorities and agency procedures. The terms "Indian" and "Alaska Native" are defined under federal law for various purposes. See, e.g., 16 U.S.C. § 3102(16); 20 U.S.C. § 1059c(b)(1); 25 U.S.C. §§ 1301(4), 1903(3), 2201(2), 4103(10), 5129; 42 U.S.C. § 13925(a)(13); 43 U.S.C. § 1602(b). The U.S. Census Bureau has noted that "American Indian or Alaska Native" refers to a person having origins in any of the original peoples of North and South America (including Central America) and who maintains tribal affiliation or community attachment. The Census Bureau collects race data according to U.S. Office of Management and Budget guidelines, and these data are based on self-identification. People may choose to report more than one race group. People of any race may be of any ethnic origin.

[4]Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., and Stevens, M.R. (2011). The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.

[5]GAO, *Foster Care: HHS Needs to Improve the Consistency and Timeliness of Assistance to Tribes,* GAO-15-273 (Washington, D.C.: Feb. 25, 2015).

[6]Federal law defines the term "Indian country" as all land within the limits of any Indian reservation under the jurisdiction of the U.S. government, all dependent Indian communities within U.S. borders, and all existing Indian allotments, including any rights-of-way running through an allotment. See 18 U.S.C. § 1151.

efforts to address human trafficking in the same population.[7] This report addresses the following questions:

(1) To what extent have tribal and major city law enforcement agencies encountered human trafficking in Indian country or of Native Americans?

(2) What factors affect the ability of tribal and major city law enforcement agencies to identify and investigate human trafficking in Indian country or of Native Americans?

(3) What are the perspectives of tribal and major city law enforcement agencies and selected victim service providers regarding the availability and accessibility of services for Native American human trafficking victims?

For the purposes of this review, our discussion of human trafficking relates to: (a) human trafficking that occurs in Indian country (regardless of whether the victim is Native American); and (b) human trafficking of individuals who are Native American (regardless of whether they were trafficked in Indian country or elsewhere).

To address each objective, we conducted surveys of three groups:

- All known tribal law enforcement agencies (LEA) – consisting of 203 agencies, based on information provided by the Bureau of Indian Affairs (BIA) within the Department of the Interior (DOI). The survey response rate was 65 percent (132 of 203);
- Major city LEAs – consisting of the 68 U.S. police departments that are members of the Major City Chiefs Association (MCCA) and 18 police departments that are not members of the MCCA, but are from the most populous cities in their states.[8] The survey response rate was 71 percent (61 of 86); and

[7]GAO, *Human Trafficking: Action Needed to Identify the Number of Native American Victims Receiving Federally-funded Services*, GAO-17-325 (Washington, D.C.: Mar. 30, 2017).

[8]MCCA membership is comprised of police departments from: (a) the largest 50 cities in the United States based on population as determined by the latest annual census update; (b) the largest 7 cities in Canada based on population as determined by the latest annual census update; and (c) "major metropolitan areas," meaning those metropolitan areas with a residential population of at least 1.5 million, and whose largest law enforcement agency is comprised of at least 1,000 sworn law enforcement officers. We did not include police departments from Canadian cities in our survey.

- Victim service providers – consisting of 315 organizations that received one or more fiscal year 2015 Department of Justice (DOJ) or Department of Health and Human Services (HHS) grants that could be used to address human trafficking.[9] The survey response rate was 51 percent (162 of 315).

We selected these three groups to survey because academic literature suggested that trafficking of Native Americans tends to occur in Indian country or major cities. In our surveys, we asked about the extent to which respondents had encountered human trafficking in Indian country or of Native Americans, the factors that affect their ability to identify and investigate human trafficking crimes, and the services available to Native American human trafficking victims, among other things. The surveys and a comprehensive tabulation of the results can be viewed in the supplemental material for this report, GAO-17-626SP.[10]

After the respondents completed the surveys, we identified two tribes where both the tribal LEA reported initiating human trafficking investigations and a tribally-affiliated service provider reported providing services to Native American victims of human trafficking. We held in-person meetings with law enforcement representatives and victim service providers from those tribes to gather additional information on their experiences in those cases. We also spoke with three county LEAs near the tribes we visited that were not part of our major city survey population to discuss their interactions with the nearby Native American population. Further, we spoke with officials from an additional tribal LEA that reported initiating human trafficking investigations. Finally, we met with officials from the major city LEA (Minneapolis) that reported conducting the majority of the investigations of human trafficking cases involving Native American victims. We shared aggregate survey results with officials from the Department of Homeland Security (DHS), DOJ, HHS, and DOI to obtain their perspectives on issues where survey respondents reported an interest in receiving additional assistance from the federal government.

[9]The service provider population included the three organizations that received Project Beacon grants in fiscal year 2016 awarded by DOJ's Office for Victims of Crime. Fiscal year 2016 was the first year in which the grants were awarded. Since these grants are specifically intended to increase the quantity and quality of services available to Native American victims of sex trafficking who live in urban areas, we included them in our scope.

[10]GAO, *SUPPLEMENTAL MATERIAL FOR* GAO-17-624*: Survey Results for Selected Tribal and Major City Law Enforcement Agencies and Victim Service Providers on Human Trafficking*, GAO-17-626SP (Washington, D.C.: July 24, 2017).

To develop our surveys, we designed draft questionnaires in close collaboration with a GAO social science survey specialist and conducted pretests with at least three potential respondents from each survey group to help further refine our questions, develop new questions, clarify any ambiguous portions of the survey, and identify any potentially biased questions. We launched our web-based surveys between September 6, 2016 and September 28, 2016 and received all responses by January 31, 2017. The survey results reflect information that the respondents had at the time they completed the survey. In particular, results for 2016 reflected the respondents' experiences to date, and may not include all of 2016. Login information for each web-based survey was e-mailed to all participants, and we sent two follow-up e-mail messages to all nonrespondents and subsequently attempted to contact the remaining nonrespondents by telephone or e-mail at least twice. Not all survey respondents provided answers to all survey questions.

With any survey, error can be introduced with respect to both data entry and analysis and we took steps to minimize these errors. For example, we used a web-based survey, which enabled respondents to enter their answers directly into the electronic questionnaire, eliminating the need to key data into a database and minimizing the potential for error. We also examined the survey results and performed computer analyses to identify inconsistencies and other indications of error. A second independent analyst checked the accuracy of all computer analyses.

Variability in the survey results can be introduced by differences among the respondents that completed the survey, as well as whether particular segments of the population responded to the survey at all. Variability could also occur if respondents differed in their interpretation of a particular question or in the sources of information available to them to answer the question. We included steps in both the data collection and data analysis stages to minimize such variability. For example, we conducted pretests with law enforcement agencies and victim service providers that were part of the survey population to help ensure the survey questions were clearly defined. We also followed-up with nonrespondents to encourage them to complete the survey, and we contacted some respondents to obtain clarity on their answers. In addition, we conducted a nonresponse bias analysis to determine whether certain segments of the population might have been more or less likely to respond to the surveys. In the tribal LEA survey, for example, we found that the BIA agencies that provide law enforcement services for tribes were less likely to respond than LEAs operated by tribal governments. In addition, we looked at the BIA region in which each tribal

LEA was located and found that the LEAs in the Eastern Oklahoma and Midwest regions, for example, were more likely to respond to the survey than those located within the Great Plains and Southwest regions.[11] For the major city LEA survey, respondents whose jurisdictions had larger Native American populations were more likely to respond to the survey than those with smaller Native American populations. Among victim service providers, organizations that received grants for which serving human trafficking victims was an allowable use were more likely to respond than those that received grants to serve Native American victims of any type of crime. Despite the possible limitations of the three surveys, the responses still provide insights into the perspectives of the tribal LEAs, major city LEAs, and victim service providers that did respond. Our results represent only respondents that participated in these surveys. Our survey results are not generalizable to the overall population of tribal LEAs, major city LEAs, or victim service providers.

Each survey included open-ended questions for respondents to share additional information not captured by the answer options that were included in the survey. We selected a subset of the open-ended questions for a content analysis, a process in which we determined categories that reflected the themes present in the open-ended responses and tabulated the number of responses that expressed each theme. After an analyst completed the initial categorizations for each open-ended response, a second independent analyst reviewed those categorizations. The reviewing analyst then either confirmed the appropriateness of each categorization or discussed the assignment with the first analyst and reached an agreement about the appropriate categorization.

We conducted this performance audit from June 2016 to July 2017 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings based on our audit objectives.

[11]The BIA regions are: Alaska, Eastern, Eastern Oklahoma, Great Plains, Midwest, Navajo, Northwest, Pacific, Rocky Mountain, Southern Plains, Southwest, and Western.

Background

Indian Country and the Native American Population

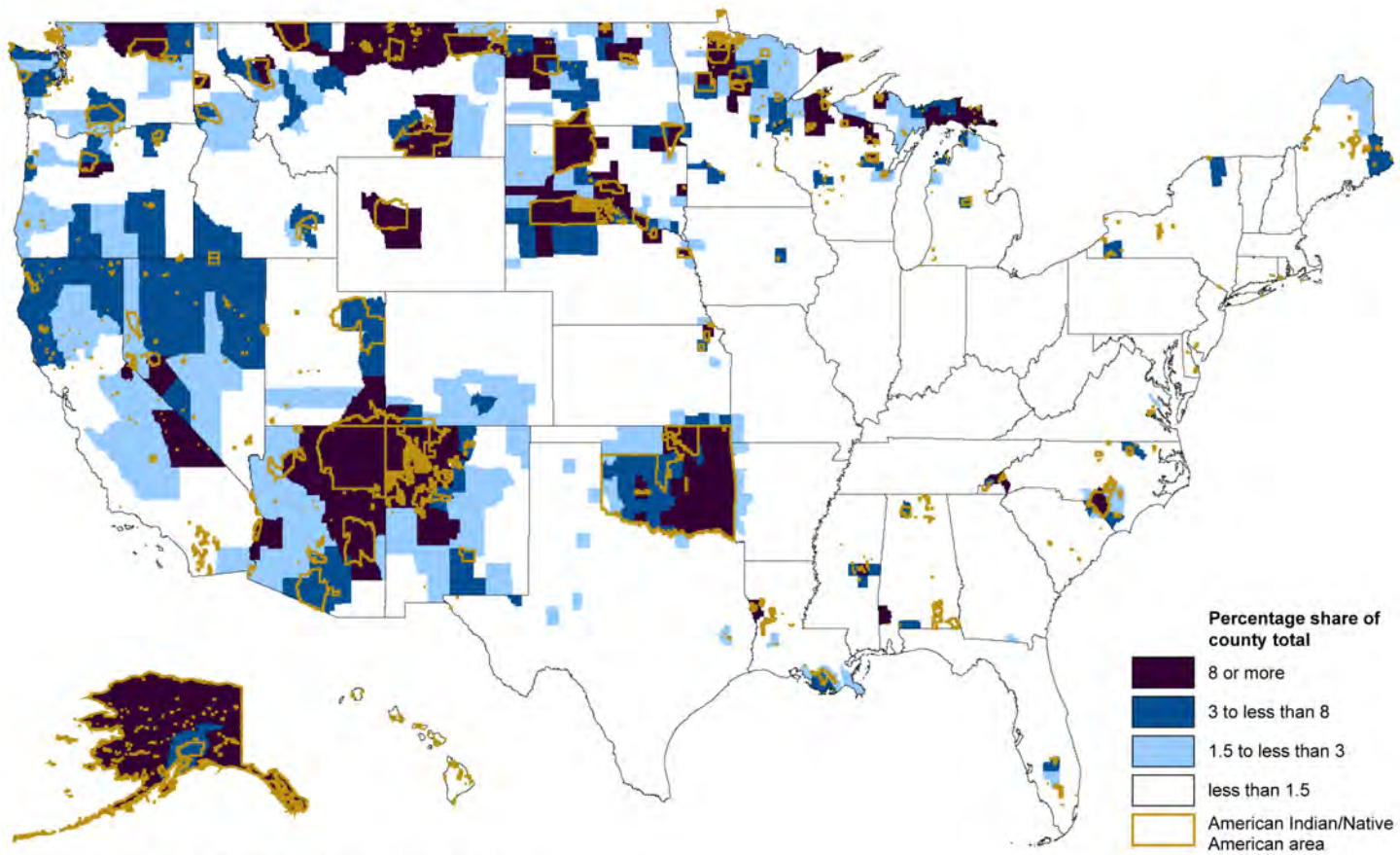
As of January 2017, there were 567 federally recognized American Indian and Alaska Native tribes and villages. According to BIA, there are approximately 326 Indian land areas in the United States that are administered as federal Indian reservations or other tribal lands (e.g., reservations, pueblos, rancherias, missions, villages, or communities). These land areas can generally be referred to as Indian country, which spans more than 56 million acres and 36 states, and varies in size, demographics, and location.[12] Indian country is often in remote, rural locations, but may also be located near urban areas. Indian country may have a mixture of Native American and non-Native American residents.

According to the 2010 Census, 5.2 million people in the United States self-identified as Native American, either alone or in combination with one or more other races. Out of this total, 2.9 million people—0.9 percent of the U.S. population at the time—identified as Native American alone. At the time of the 2010 Census, more than 1.1 million Native Americans resided on tribal lands.[13] Figure 1 shows where Native Americans resided in the United States at the time of the 2010 Census.

[12]Federal law defines the term "Indian country" as all land within the limits of any Indian reservation under the jurisdiction of the U.S. government, all dependent Indian communities within U.S. borders, and all existing Indian allotments, including any rights-of-way running through an allotment. See 18 U.S.C. § 1151. With certain exceptions, there is generally not Indian country in Alaska. In a 1998 decision, the Supreme Court stated that the Alaska Native Claims Settlement Act (Pub. L. No. 92-203, 85 Stat. 688 (1971) (classified, as amended, at 43 U.S.C. §§ 1601-1629h)) "revoked 'the various reserves set aside…for Native use' by legislative or executive action, except for the Annette Island Reserve inhabited by the Metlakatla Indians, and completely extinguished all aboriginal claims to Alaska land." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 523-24 (1998) (citing 43 U.S.C. §§ 1603, 1618(a)). The court held that the "approximately 1.8 million acres of land in northern Alaska, owned in fee simple by the Native Village of Venetie Tribal Government pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq., is [not] 'Indian country.'" Id. at 523. In December 2014, the Department of the Interior amended its land-into-trust regulations to allow applications for land to be taken into trust in Alaska outside of the Metlakatla Indian Community of the Annette Island Reserve. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888 (Dec. 23, 2014) (to be codified at 25 C.F.R. pt. 151). Department of the Interior treats land held in trust by the United States on behalf of a federally recognized Indian tribe as Indian country. 79 Fed. Reg. at 76,893.

[13]United States Census Bureau, www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

Figure 1: Map of Native American Population in the United States, according to the 2010 Census



Source: United States Census Bureau; MapInfo (map). | GAO-17-624

Federal, State, and Tribal Law on Human Trafficking

Federal law generally recognizes two forms of human trafficking—sex trafficking and labor trafficking.[14] The Trafficking Victims Protection Act of 2000 (TVPA), as amended, defines human trafficking under the term "severe forms of trafficking in persons."[15] Pursuant to the TVPA, as

[14]See GAO, *Human Trafficking: Action Needed to Identify the Number of Native American Victims Receiving Federally-funded Services*, GAO-17-325 (Washington, D.C.: March 2017); GAO, *Human Trafficking: Agencies Have Taken Steps to Assess Prevalence, Address Victim Issues, and Avoid Grant Duplication*, GAO-16-555 (Washington, D.C.: June 2016).

[15]Pub. L. No. 106-386, div. A, § 103, 114 Stat. at 1470 (classified, as amended, at 22 U.S.C. § 7102(9)).

amended, sex trafficking is the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.[16] Sex trafficking is a "severe" form of trafficking when it involves force, fraud, or coercion, or where the victim has not attained 18 years of age, in which case force, fraud or coercion are not necessary elements.[17] The TVPA, as amended, defines labor related trafficking generally as the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[18]

In addition to federal law, state and tribal-level statutes on human trafficking also exist. All 50 states plus the District of Columbia have criminal statutes targeting human trafficking.[19] State laws differ and may include various features that criminalize sex or labor trafficking, or both, or lower the burden of proof for sex trafficking of minors by not requiring force, fraud, or coercion as elements of the offense, among other things. Some tribal governments have also enacted tribal laws that can be used to address human trafficking or related criminal acts that could form the basis of a human trafficking offense. For example, the criminal code of the Snoqualmie Indian Tribe states that "[a] person is guilty of sex trafficking when they are knowingly involved in the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act, in which the commercial sex act is induced by force,

[16]22 U.S.C. § 7102(10). Under section 7102(4), the term "commercial sex act" means any sex act on account of which anything of value is given to or received by any person.

[17]See id. § 7102(9)(A). The TVPA, as amended, criminalizes the knowing or reckless use of force, fraud, or coercion to recruit, entice, harbor, transport, provide, obtain, advertise, maintain, patronize, or solicit any person to engage in a commercial sex act. See 18 U.S.C. § 1591(a). It is also illegal to take such actions, causing a person less than 18 years of age to engage in a commercial sex act, with or without the use of force, fraud, or coercion. Id.

[18]22 U.S.C. § 7102(9)(B). The TVPA makes it a crime to knowingly provide or obtain persons for any labor or services through various means, including force, threats of force, physical restraint, or serious harm or threats of such harm. 18 U.S.C. § 1589(a). Further, it is a criminal act to knowingly recruit, harbor, transport, provide, or obtain by any means, any person for labor or services in violation of chapter 77 of title 18, U.S. Code. Id. at § 1590(a).

[19]For more detail on states' efforts to establish a legal framework for combating human trafficking, see Polaris Project, *A Look Back: Building a Human Trafficking Legal Framework*, accessed Mar. 27, 2017, https://polarisproject.org/sites/default/files/2014-Look-Back.pdf .

fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age."[20] Other tribes that do not have a statute specific to human trafficking could seek to address such offenses under other statutory provisions covering crimes that may be associated with human trafficking such as prostitution, child sex abuse, or sexual assault.[21]

Some Law Enforcement Agencies Reported Encountering Human Trafficking in Indian Country or of Native Americans, and Some Believe It Is Occurring More Often than Reported

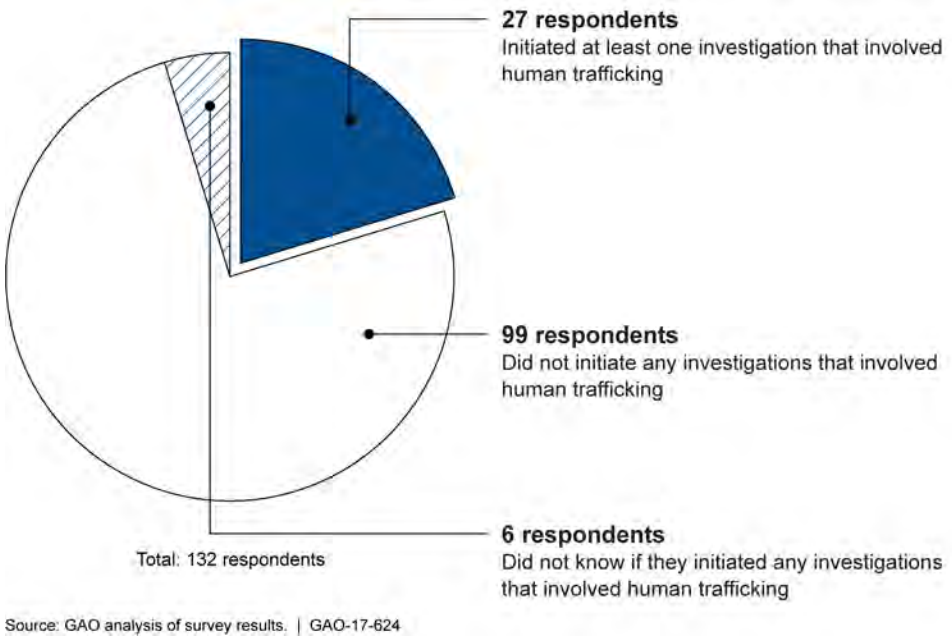
[20]Snoqualmie Tribal Criminal Code § 7.21(a) (2012), *available at* http://www.snoqualmietribe.us/sites/default/files/criminal_code_7.1_compresses.pdf.

[21]In our survey, tribal LEA respondents were asked about crimes that they consider to be human trafficking, whether or not their tribe has a statute that specifically addresses human trafficking.

Tribal and Major City Law Enforcement Agencies Reported Encountering Human Trafficking in Indian Country or of Native Americans

Of the 132 tribal LEAs that responded to our survey, 27 reported that they initiated investigations they considered to have involved human trafficking from 2014 to 2016, as shown in figure 2.[22]

Figure 2: Number of Tribal Law Enforcement Agencies that Reported Initiating Investigations Involving Human Trafficking from 2014 – 2016



Source: GAO analysis of survey results. | GAO-17-624

Note: Surveys were deployed in September 2016. Investigations initiated between survey completion and December 31, 2016 would not be captured.

Of the 27 tribal LEAs that reported initiating investigations involving human trafficking from 2014 to 2016, 24 provided the number of investigations that they conducted during that period. Those 24 reported a total of 70 human trafficking investigations from 2014 to 2016, ranging

[22]We did not ask tribal and major city LEAs to use a specific definition of human trafficking when responding to our survey; rather, we asked that they respond based on what they considered to be human trafficking. We found variation in how LEAs define "human trafficking." Because of that variation, a crime reported as human trafficking by one respondent, may not have been reported as such by another. For example, 13 of the 27 tribal LEA respondents that reported initiating investigations they consider to have involved human trafficking included prostitution as a criminal activity they consider to be human trafficking while other respondents did not report including prostitution. In addition, 4 of the 27 tribal LEA respondents included kidnapping as a criminal activity they consider to be human trafficking.

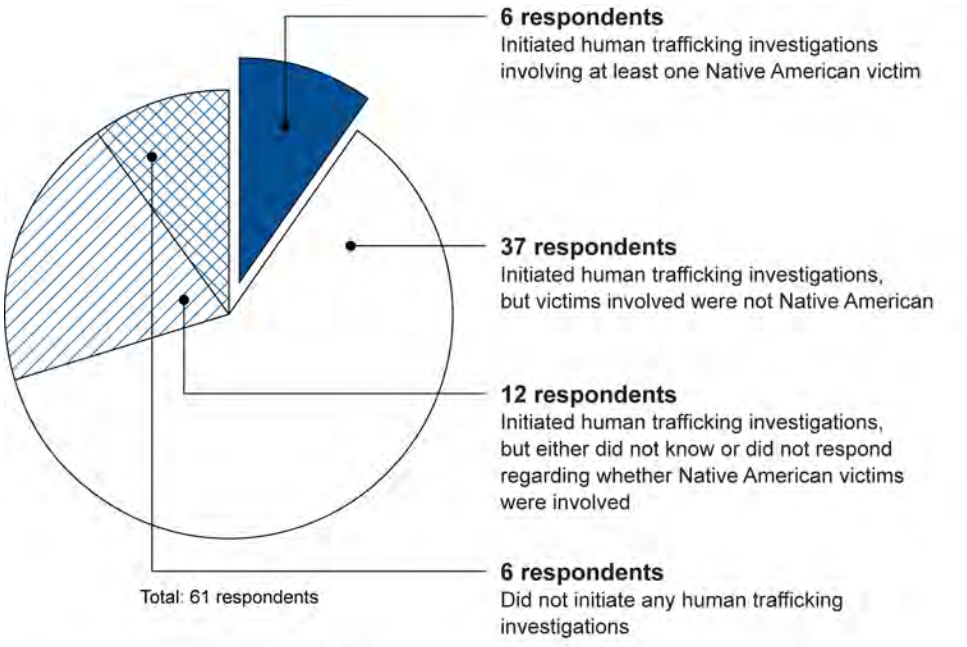
from 0 to 8 investigations for each tribal LEA in each year. Additionally, 22 of the 24 tribal LEAs reported a total of 58 victims from 2014 to 2016.[23] The number of victims encountered by each LEA ranged from 0 to 7 victims in each investigation. [24]

Whereas we asked tribal LEAs about the number of human trafficking investigations they conducted in Indian country, regardless of whether the victims were Native American, we asked major city LEAs specifically about human trafficking investigations that involved Native American victims. Few major city LEAs reported they encountered human trafficking from 2014 to 2016 that involved Native American victims. Specifically, 6 of the 61 major city LEAs that responded to the survey reported initiating human trafficking investigations that involved at least one Native American victim during that period, as shown in figure 3.

[23]Three of these 22 reported 0 victims. The remaining 5 of the total 27 tribal LEAs did not report the number of victims from 2014 to 2016.

[24]Tribal LEAs may have reported an investigation with zero victims if, for example, they conducted a sting operation where law enforcement officials posed as traffickers to persons seeking to engage in a commercial sex act, but where victims did not actually exist.

Figure 3: Number of Major City Law Enforcement Agencies that Reported Initiating Investigations Involving Human Trafficking of Native Americans or Others from 2014 – 2016



Source: GAO analysis of survey results. | GAO-17-624

Note: Surveys were deployed in September 2016. Investigations initiated between survey completion and December 31, 2016 would not be captured.

Of the 6 major city LEAs that reported initiating any human trafficking investigations involving Native American victims, 5 also identified the number of investigations and victims. Those 5 LEAs reported a total of 60 investigations involving 81 Native American victims from 2014 to 2016. For each investigation, the number of Native American victims ranged from 0 to 31. Of those 5 LEAs, one respondent—the Minneapolis Police Department—reported the majority of investigations and victims. Specifically, the Minneapolis Police Department reported 49 of the 60 total investigations and 70 of the 81 total victims from 2014 to 2016. In meetings with officials from the Minneapolis Police Department, they stated that they made a concerted effort, starting in 2012, to meet with tribal elders and service providers who worked with the Native American population to demonstrate their willingness to investigate human trafficking crimes. The officials stated that, following those meetings, the number of human trafficking crimes involving Native American victims that were reported to the department increased.

Some Tribal LEA Respondents Believe More Human Trafficking Is Occurring but Is Not Being Reported

Nearly half of tribal LEA respondents (60 of 132) reported that they believe human trafficking is occurring on tribal land in their jurisdictions beyond what had been brought to their attention.[25] Officials from two tribal LEAs told us during in-person meetings that in their experience some victims do not come forward to report their victimization because they are embarrassed or feel ashamed. Several survey respondents also indicated that they suspect there is more human trafficking than what has been reported to them because of the presence of casinos on their land (14 of 60). For example, officials from one tribal LEA explained that the tribal casino hotel may be used as a venue for sex trafficking. Some respondents (13 of 60) suspect that sex trafficking may be occurring as part of some of the drug crimes that they investigate. Officials from one county LEA we visited near a tribal community told us that officers may not recognize that human trafficking is taking place, particularly when it occurs alongside another crime like drug trafficking.

Most major city LEA respondents (51 of 61) indicated that they did not suspect or did not know whether more human trafficking of Native Americans is occurring in their jurisdiction, beyond what has been reported to them. Of those 51 that responded, 24 explained that this was the consequence of having few, if any, Native Americans in their jurisdiction. Ten of the 61 major city LEAs reported that they believe more human trafficking of Native Americans is occurring and cited possible reasons for the lack of reporting. For example, one noted that human trafficking is underreported for all kinds of victims, regardless of ethnicity. Another major city LEA with a high concentration of Native American constituents reported that there is a social stigma associated with reporting crimes to the police among Native Americans. A third major city respondent cited the poor relationship between the Native American community and police department as a reason for the lack of referrals of human trafficking crimes.

[25]Of the remaining survey respondents, 43 of 132 reported that they did not suspect more human trafficking was occurring on tribal land in their jurisdictions and 29 of 132 reported that they did not know.

Law Enforcement Agencies Cited Victim Reluctance to Participate in Investigations and Other Factors as Barriers to Investigating and Prosecuting Human Trafficking

We asked survey respondents about barriers to investigating human trafficking cases. Of the 27 tribal LEAs that reported initiating investigations involving human trafficking, 18 indicated that they believe victims are reluctant to participate in the investigation or prosecution of their case. These respondents cited the following reasons for victims' reluctance to participate in investigations or prosecutions as "somewhat common" or "very common":[26]

- The victim fears retaliation from the trafficker (17 of 18),
- The victim is traumatized (16 of 18),
- The victim does not see herself or himself as a victim (16 of 18),
- The victim distrusts law enforcement (14 of 18),
- The victim is sentimentally attached to the trafficker (13 of 18),
- The victim is underage and does not want to return home (10 of 18), and
- The victim is addicted to drugs (17 of 18). [27]

In addition, one of the tribal LEA respondents told us during an interview that, in his experience, drugs are always associated with crimes involving human trafficking. On our survey, when asked how frequently tribal LEA survey respondents identified other crimes when investigating possible human trafficking, 21 of 27 tribal LEAs that initiated human trafficking investigations also reported encountering drug distribution and drug trafficking "sometimes" or "frequently."[28]

[26]We asked respondents whether seven reasons that we provided were "very common," "somewhat common," "not at all common," or "don't know." We compiled the list of reasons that victims may be reluctant to participate in an investigation based on GAO's previous work and interviews with potential survey respondents. (See, GAO, *Human Trafficking: Agencies Have Taken Steps to Assess Prevalence, Address Victim Issues, and Avoid Grant Duplication,* GAO-16-555 (Washington, D.C.: June 28, 2016).) We also provided an opportunity for survey respondents to add additional reasons.

[27]For additional responses, see the supplemental material for this report: GAO, *SUPPLEMENTAL MATERIAL FOR* GAO-17-624*: Survey Results for Selected Tribal and Major City Law Enforcement Agencies and Victim Service Providers on Human Trafficking*, GAO-17-626SP (Washington, D.C.: July 24, 2017).

[28]Other types of crimes that tribal LEAs reported identifying at least sometimes when investigating human trafficking include rape or sexual assault (13 of 27), domestic violence (12 of 27), and gang activity (12 of 27)

Of the 6 major city LEAs that reported having human trafficking investigations that involved Native American victims, 5 provided reasons that Native American human trafficking victims were reluctant to participate in an investigation. These included the victim's fear of retaliation from the trafficker, the victim's traumatization, or that the victim may be discouraged by family from cooperating with an investigation or prosecution.

We asked tribal LEAs to identify factors other than the victims' reluctance to participate in an investigation or prosecution that make it difficult for them to investigate human trafficking. They provided the following narrative responses:

- A lack of resources, such as necessary training, equipment, and funding for sex crime investigations (8 of 27);
- Inter-agency cooperation is absent or deficient (6 of 27). For example, one respondent reported that there is a lack of cooperation between tribal law enforcement and state law enforcement;
- A lack of appropriate laws in place (2 of 27).[29]

One major city LEA cited a general lack of trust of law enforcement, poor police response to reported incidents, and the lack of referrals to police as factors that have made it difficult to investigate human trafficking.

Federal Agencies Have Efforts Underway to Help Tribal and Major City Law Enforcement Agencies Identify and Address Human Trafficking in Indian Country or of Native Americans

Over half of the tribal LEAs that responded to our survey (72 of 132) identified one or more types of assistance that they would like to receive to help identify and address human trafficking in their jurisdiction.[30] These were:

- *Additional training or technical assistance* (50 of 72 respondents). For example, officials from one tribal LEA we interviewed expressed interest in training that focuses on building trust between tribal and non-tribal representatives and helps make tribal law enforcement and community members aware of existing federal resources. These

[29]Some tribal LEAs reported that they have the authority to use a tribal statute that specifically addresses human trafficking. However, when we prompted these tribal LEAs to provide the tribal human trafficking statute, several provided state or federal codes.

[30]Of the remaining 60 survey respondents, 33 did not respond or responded that they did not know, and 25 responded that they were not interested in federal assistance or the question was not applicable to them.

officials also noted that they wanted training materials that included examples of cases that involved Native Americans so as to be more relatable to tribal community members and to help build awareness in the tribal community.

- *Additional funding* (28 of 72). For example, several tribal LEAs reported an interest in receiving additional federal funding to add staff support, including officers in some instances, to assist in investigations.

In our discussions with investigative, prosecutorial, and grant-making officials from DHS, DOJ, HHS, and DOI, they told us there are a number of training resources available that may help LEAs and other members of the community identify and address human trafficking of Native Americans. They did not, however, identify any sources of funding dedicated specifically to supporting additional law enforcement personnel to handle human trafficking cases involving Native Americans or victims in Indian country.[31] We previously reported that federal agencies have training initiatives underway to help law enforcement agencies combat human trafficking. [32] More recently, federal agency officials we interviewed told us about online and in-person training resources that are available to tribal LEAs and others. These include:

Online resources

- A web-based human trafficking training course offered by the Federal Law Enforcement Training Center (FLETC) that teaches law enforcement officers how to recognize human trafficking encountered during routine duties; how to protect victims; and how to initiate human trafficking investigations. [33]
- A scenario-based video also available from FLETC that presents indicators of human trafficking and focuses on Native American

[31]Officials at the BIA noted that tribes that receive support through self-determination contracts or self-governance compacts may elect to designate some of that money specifically to combating human trafficking, but the money provided through the contract or compact is not limited to that use. For more information on self-determination contracts and self-governance compacts, see GAO-17-325, 14.

[32]GAO, *Human Trafficking: Agencies Have Taken Steps to Assess Prevalence, Address Victim Issues, and Avoid Grant Duplication*, GAO-16-555 (Washington, D.C.: June 28, 2016), 24-26.

[33]This web-based human trafficking training course is law enforcement sensitive and available on the FLETC Electronic Learning Portal for law enforcement officials, see *Human Trafficking Training Program*, accessed June 8, 2017, https://www.fletc.gov/human-trafficking-training-program.

victims.[34] This video is included in the U.S. Indian Police Academy's basic police officer training program.[35]

- A video produced by Office for Victims of Crime (OVC), Office on Violence Against Women, and the Executive Office for United States Attorneys and available online that introduces the issue of human trafficking of Alaska Natives.[36]
- An online manual for hospitality industry employees to provide information on how to recognize and report suspected incidents of human trafficking. [37]

In-person training resources

- The U.S. Indian Police Academy offers a two-hour advanced training on human trafficking as part of its annual in-service training program for current law enforcement officers. The training addresses indicators of human trafficking, specific Indian country examples of human trafficking, and information on victims' rights. It is announced on the Academy's e-mail distribution list and is intended for BIA or tribal law enforcement officers and victim specialists.
- Human Trafficking in Indian Country course for law enforcement, prosecutors, and tribal leaders developed by the Upper Midwest Community Policing Institute, with input from a panel of subject matter experts that included tribal law enforcement officers, and members of tribal victim support organizations, with grant funding from DOJ. DOJ officials told us that the course focuses on increasing awareness of human trafficking among tribal law enforcement personnel.[38] The

[34]Federal Law Enforcement Training Center, *FLETC Human Trafficking Video – Native American,* accessed Mar. 27, 2017, https://www.youtube.com/watch?v=wf2L_OgOybg.

[35]The U.S. Indian Police Academy designs and delivers training specific to Indian Country Justice Services needs for police officers, criminal investigators, correctional officers, and tribal court staff. See also, *The U.S. Indian Police Academy*, accessed June 7, 2017, https://bia.gov/WhoWeAre/BIA/OJS/ojs-training/index.htm.

[36]Office for Victims of Crime Tribal Multimedia Resources, *A Healing Journey for Alaska Natives, Video 5: Federal Responses to Sex Trafficking in Alaska*, accessed June 8, 2017, https://www.ovc.gov/library/healing-journey.html.

[37]DHS Blue Campaign, *Hospitality Toolkit*, accessed June 8, 2017, https://www.dhs.gov/sites/default/files/publications/blue-campaign/toolkits/hospitality-toolkit.pdf.

[38]Upper Midwest Community Policing Institute (UMCPI), *Human Trafficking in Indian* Country, accessed June 8, 2017, http://umcpi.org/services/anti-human-traffic/human-trafficking-in-native-american-communities/. See also, *Anti Human Trafficking Courses*, accessed June 8, 2017, http://umcpi.org/services/anti-human-traffic/.

Institute offers both grant-funded and fee-for-service training on human trafficking, and LEAs may contact them directly to host a course.

- Human Trafficking in Indian Country Seminar offered by DOJ's National Advocacy Center in Columbia, South Carolina. The training was offered in 2015 and 2017 and, according to DOJ officials, may be offered again in the future.[39] The training included both law enforcement personnel and service providers and addressed identifying victims, investigating trafficking cases, and effectively working with Native American victims. To advertise the course, DOJ officials sent invitations and applications to colleagues with tribal contacts.

Respondents Reported an Array of Services Available to Native American Human Trafficking Victims, but Cited Victims' Feelings of Shame and Lack of Resources as Barriers to Obtaining Them

[39]DOJ's National Indian Country Training Initiative together with the FBI held this seminar in February and March 2017.

Service Providers and Tribal and Major City LEAs Reported that Shelter, Substance Abuse Treatment, Health, and Other Services Are Available to Native American Victims of Human Trafficking

We asked the 42 service providers that reported providing services to Native American victims of human trafficking from 2014 to 2016 about the services that they provide to trafficking victims or assist victims in obtaining. We also asked all of the tribal and major city LEA survey respondents about the types of services available to Native American human trafficking victims in their jurisdictions. As shown in table 1, services that were frequently cited as available by all three survey groups were shelter, substance abuse treatment, and medical and mental health services.[40]

Table 1: Services Cited by Survey Respondents as Available to Human Trafficking Victims in Indian Country or Who Are Native American

Service	Number of service providers that reported that they directly provide or assist in obtaining the service (out of 42)	Number of tribal law enforcement agencies that reported the service is available to victims in their jurisdiction (out of 132)	Number of major city law enforcement agencies that reported the service is available to victims in their jurisdiction (out of 61)
Emergency shelter	41	95	57
Medical health services	40	111	55
Transportation	40	97	49
Accompanying victims to appointments or hearings	40	93	48
Relocation assistance	40	43	34
Substance abuse treatment services	39	111	52
Legal services	39	86	50
Mental health service	38	108	53
Native American healing methods	37	83	5
Life skills training	37	77	38
Employment assistance	35	78	36
Job training	35	71	34
Long term housing/shelter	35	46	42
Literacy education	33	68	31

Source: GAO analysis of survey data. | GAO-17-624

[40]We compiled the list of potential services for human trafficking victims based on interviews with potential survey respondents and our review of related research on human trafficking of Native Americans.

According to a Trafficking in Indian country brief released by the National Congress for American Indians, many Native American human trafficking victims felt they owed their survival to Native cultural practices and they wished for Native healing approaches to be integrated with mainstream services.[41] HHS's Administration for Native Americans also reported that there is a need for culturally relevant and trauma-informed approaches when assisting victims.[42] We asked the survey respondents about the availability of Native American healing methods and 37 of the 42 victim service providers reported that they directly provide or assist victims in obtaining them.[43] Similarly, a majority of responding tribal LEAs (83 of 132) reported that traditional Native American healing methods are available to trafficking victims in their jurisdictions. In addition, 5 of the 61 major city LEAs that responded to the survey reported that Native American healing methods were available in their jurisdiction; 48 of the 61 did not know whether those healing methods would be available.

When asked about the health impacts that they observe among Native American human trafficking victims, the 42 service providers that reported providing services to that population most frequently cited:

- substance abuse (35 of 42) and
- mental health issues (35 of 42).

Some of the victim service providers also cited specific examples of these, including "drug and alcohol addiction," "drug use withdrawal," "hopelessness," "depression," "suicidal tendencies," and "post-traumatic stress disorder (PTSD)." The services that were cited by survey respondents as available to trafficking victims do appear to align with these health impacts.

[41]National Congress of American Indians Policy Research Center, Human Trafficking: Trends and Responses across Indian Country, Tribal Insights Brief, Spring 2016.

[42]Department of Health and Human Services, Administration for Native Americans, Recognizing and Responding to Human Trafficking among American Indian, Alaska Native and Pacific Islander Communities. (Jan. 29, 2015) (Revised Nov. 18, 2015).

[43]Some of the Native American healing methods cited by survey respondents included talking circles, sweat lodges, drum circles, smudging, spiritual counseling, traditional medicine, and mentoring by tribal elders and spiritual leaders.

Service Providers and Tribal and Major City LEAs Most Frequently Reported Shame Felt by Victims as a Barrier to Obtaining Needed Services

Shame felt by victims at seeking services was the most frequently cited barrier by tribal and major city LEAs and by victim service providers that had encountered Native American human trafficking victims. Specifically, 35 of the 42 victim service providers, 9 of the 27 tribal LEAs, and 4 of the 6 major city LEAs cited "victims felt ashamed to seek services" as a "major barrier."[44] One tribal LEA respondent noted that their tribe "has a very private culture." This respondent also stated that, "[k]eeping things quiet is very common and children are often taught to not tell about situations such as sexual assault and trafficking." This sentiment was repeated during our interviews with tribal officials, who noted that victims frequently feel pressure to not report crimes or seek services in the interest of keeping family and personal matters private.

Survey respondents and tribal officials also reported additional barriers for victims in obtaining services. These included:

- *Victims see their circumstances as an acceptable or inevitable lifestyle* - 8 of 27 tribal LEA respondents, 3 of 6 major city LEA respondents, and 27 of 42 victim service providers indicated that this was a "major barrier" to accessing services for Native American human trafficking victims.
- *Drug addiction* – Although our survey did not include drug addiction in the list of barriers to obtaining services, tribal and major city law enforcement officials and service providers with whom we met told us that drug addiction also keeps victims from seeking assistance. One major city LEA official also told us that Native American perpetrators tend to use drugs as a tool to control Native American victims. Representatives of one tribal victim service provider stated that they try to provide drug treatment assistance to individuals who seek it but ultimately cannot force them to pursue it.

[44]Each survey group was presented a set of potential barriers to obtaining services and asked to indicate whether each was a "major barrier," "minor barrier,", or "not a barrier."

Service Providers Cited Lack of Resources as a Barrier to Providing Victim Services; Federal Agencies Offer Resources and Training to Support Services to Trafficking Victims

The barrier to providing services to human trafficking victims that service providers identified most frequently was inadequate funding or resources, which was reported by 15 of the 42 service providers that reported assisting Native American trafficking victims. In addition to insufficient funding, tribal service providers cited a lack of personnel, emergency shelter, and legal aid resources to meet the needs of the trafficking victims that they wished to serve.

When asked whether the federal government could support their efforts to serve Native American human trafficking victims, service providers most frequently cited two areas in which the federal government could support them. Those areas were:

- *Additional funding for service provider programs* (19 of 42 respondents) – respondents cited a need for funding for additional staff and funding specifically targeted to tribal programs;
- *Additional information to increase public awareness and training for service providers and LEAs* (12 of 42) – respondents cited the need for training focused on identifying victims for both service providers and tribal LEAs, how to develop tribal trafficking statutes, and training on how to work with Native American populations effectively.

In our companion report, we reported on several federal funding and training initiatives intended to support law enforcement and victim service provider efforts to combat human trafficking.[45] At least 50 DOJ, HHS, and DHS grant programs mention addressing human trafficking or assisting Native American crime victims as an allowable use of funding. The grant programs also identify tribal entities as eligible recipients. These grant programs provide funds for activities including collaboration, victim services, public awareness, and training or technical assistance. For example, in fiscal year 2016, OVC established the Project Beacon grant programs that exclusively address human trafficking of Native Americans. These grants are intended to increase the quantity and quality of services available to Native American victims of sex trafficking who live in urban areas. In addition, HHS awarded Domestic Victims of Human Trafficking grants to organizations, including those assisting Native American victims

[45]GAO, *Human Trafficking: Action Needed to Identify the Number of Native American Victims Receiving Federally-funded Services*, GAO-17-325 (Washington, D.C.: Mar. 30, 2017).

of human trafficking, to assist them in delivering trauma-informed, culturally relevant services.[46]

Federal agencies have also developed training programs designed to help service providers identify and work with trafficking victims. These programs include:

- *National Indian Nations Conference* –This biennial conference focuses on developing programs that serve the needs of crime victims in Indian country, including human trafficking victims. It is intended for victim service providers, judicial and law enforcement personnel, and others who work with crime victims. Past conferences have included sessions on working with Native American human trafficking victims and developing tribal human trafficking laws.[47]
- *Trainings for tribal health care providers related to domestic and sexual violence* – HHS's Indian Health Service (IHS) provides these trainings through its Tribal Forensic Health Care web site.[48] IHS officials told us that they are also planning to offer a webinar for victim service providers specifically related to working with Native American human trafficking victims in the fourth quarter of 2017.[49]
- *Stop. Observe. Ask. Respond. (SOAR) to Health and Wellness program* – a 3-hour online or in-person training program designed by HHS's Office on Trafficking in Persons and Office on Women's Health for service providers to respond to human trafficking.[50] While not exclusively tailored to Native American human trafficking victims, HHS officials reported that training participants have served Native Americans in urban, rural, and reservation communities.

[46]For a list of grant programs and the allowable uses of the grant funds, see our companion report, GAO-17-325, app. II.

[47]Department of Justice, *15th National Indian Nations Conference Justice for Victims of Crime*, accessed June 1, 2017, http://www.ovcinc.org/home.

[48]Tribal Forensic Healthcare, *Online Courses*, accessed June 1, 2017, http://www.tribalforensichealthcare.org/page/OnlineCourses.

[49]IHS officials said that the webinar will be posted to http://www.tribalforensichealthcare.org/page/Webinars and will be archived for future viewing.

[50]Department of Health & Human Services, *SOAR to Health and Wellness Training*, accessed June 1, 2017, https://www.acf.hhs.gov/otip/training/soar-to-health-and-wellness-training.

In addition to these trainings, federal officials noted that grant funds can be used to support service providers in organizing training and technical assistance for other service providers to address human trafficking in Indian country or of Native Americans.

Agency Comments

We provided a draft of this report to DHS, DOI, DOJ and HHS for their review and comment. DOJ and HHS provided technical comments, which we incorporated as appropriate. DHS and DOI did not have additional comments.

If you or your staff have any questions about this report, please contact me at (202) 512-8777 or goodwing@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix I.

Gretta L. Goodwin
Director, Homeland Security and Justice

Appendix I: GAO Contact and Staff Acknowledgments

GAO Contact

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Staff Acknowledgments

In addition to the contact named above, Joy Booth, Assistant Director; Christoph Hoashi-Erhardt, Analyst-in-Charge; Kristy Love; Marie Suding; Steven Rocker; Paulissa Earl; Marycella Mierez; Maria Surilas; Camille Henley; Eric Hauswirth; Susan Hsu; Claire Peachey; Sasan J. “Jon” Najmi; Michele Fejfar; David Blanding; and Susan Baker made significant contributions to this report.

Related GAO Products

Human Trafficking: Action Needed to Identify the Number of Native American Victims Receiving Federally-funded Services. GAO-17-325. Washington, D.C.: March 30, 2017.

Human Trafficking: State Has Made Improvements in Its Annual Report but Does Not Explicitly Explain Certain Tier Rankings or Changes. GAO-17-56. Washington, D.C.: December 5, 2016.

Human Trafficking: Agencies Have Taken Steps to Assess Prevalence, Address Victim Issues, and Avoid Grant Duplication. GAO-16-555. Washington, D.C.: June 28, 2016.

Human Trafficking: Actions Taken to Implement Related Statutory Provisions. GAO-16-528R. Washington, D.C.: May 26, 2016.

Human Trafficking: Implementation of Related Statutory Provisions, Law Enforcement Efforts, and Grant Funding. GAO-16-748T. Washington, D.C.: June 28, 2016.

Human Trafficking: Oversight of Contractors' Use of Foreign Workers in High-Risk Environments Needs to Be Strengthened. GAO-15-102. Washington, D.C.: November 18, 2014.

Human Trafficking: A Strategic Framework Could Help Enhance the Interagency Collaboration Needed to Effectively Combat Trafficking Crimes. GAO-07-915. Washington, D.C.: July 26, 2007.

Human Trafficking: Monitoring and Evaluation of International Projects Are Limited, but Experts Suggest Improvements. GAO-07-1034. Washington, D.C.: July 26, 2007.

Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad. GAO-06-825. Washington, D.C.: July 18, 2006.

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HUMAN & SEX TRAFFICKING:

Trends and Responses across Indian Country

EXECUTIVE SUMMARY

Human and sex trafficking is a crime that affects nearly every community across our nation; it is an insidious threat that has proven difficult to track and quantify, and exceedingly hard to dismantle. While there is a perception that human trafficking involves international criminals targeting victims living in the developing world, it is commonplace here in the US and in Indian Country. We can not ignore the networks, pipelines, the victims, or the systems that enable human trafficking.

In this Tribal Insights Brief, the NCAI Policy Research Center paints a portrait of human trafficking in American Indian and Alaska Native communities—from its root causes and historical context to current trends—in order to emphasize the systemic policy and program levers that are essential in combating this crime. Our goal is to support tribal nations in promoting health and justice for their citizens by raising awareness of and engagement with this critical issue for our communities.

Information provided in this brief includes:

1. Definitions of human and sex trafficking
2. Historical context and root causes of trafficking (e.g., vulnerabilities and risk factors)
3. Data concerning the prevalence and impact of trafficking in Native communities
4. Suggestions for identifying and supporting victims of trafficking
5. Sovereign Prevention: Sample tribal codes addressing trafficking
6. Recommendations and resources

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What is human trafficking?

There are a range of definitions used in law and policy to identify trafficking. To foster collective awareness and foster community discussions about what trafficking may look like in local contexts, we highlight some of the most commonly cited legal definitions below:

International law

The recruitment , transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[1]

US law

The term "sex trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. "Severe forms of trafficking in persons" means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[2]

The term "labor trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for labor or service through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.[3]

These definitions highlight the role of coercion and deceit in trapping victims and isolating them from help, transporting them away from family and community networks, and exploiting them for economic or personal gain. This is a devastating crime against humanity and in the context of Native communities, it is squarely placed within the context of a much longer historical campaign of subjugation and assimilation.

In the sections that follow, we will review the impact of colonization and how it has produced risk factors and vulnerabilities to human trafficking in Native communities.

> **"*When a man*,** desperate for work, finds himself in a factory or on a fishing boat or in a field, working, toiling, for little or no pay, and beaten if he tries to escape— that is slavery.
>
> ***When a woman*** is locked in a sweatshop, or trapped in a home as a domestic servant, alone and abused and incapable of leaving— that's slavery.
>
> ***When a little boy*** is kidnapped, turned into a child soldier, forced to kill or be killed— that's slavery.
>
> ***When a little girl*** is sold by her impoverished family— girls my daughters' age— runs away from home, or is lured by the false promises of a better life, and then imprisoned in a brothel and tortured if she resists— that's slavery.
>
> ***It is barbaric, and it is evil, and it has no place in a civilized world."***
>
> President Barack Obama,
> White House End Human Trafficking Initiative

Historical Context

Leading sex trafficking researcher and Native scholar, Dr. Sandi Pierce notes that it is no secret that "the selling of North America's [I]ndigenous women and children for sexual purposes has been an ongoing practice since the colonial era. There is evidence that early British surveyors and settlers viewed Native women's sexual and reproductive freedom as proof of their 'innate' impurity, and that many assumed the right to kidnap, rape, and prostitute Native women and girls without consequence."[4, 5, 6]

Prior to colonial contact, American Indian/Alaska Native people (AI/AN) had strong kinship systems and self-governance. Historical documents and oral narratives passed down through families indicate that violence against Native women was very rare, and women were (and are) acknowledged to be sacred and revered members of communities.[7] The imposition of assimilation policies heavily impacted Native communities—fundamentally disrupting family, kinship, and community structures and governance. These policies are embodied in systemic discrimination, boarding schools, relocation, involuntary sterilization, the out-adoption of Indian children, and violence against Native women. These historical events have created cycles of trauma within Indian country.

Researchers have broadly defined historical trauma "as an event or set of events perpetrated on a group of people (including their environment) who share a specific group identity (e.g., nationality, tribal affiliation, religion) with genocidal or ethnocidal intent (i.e., annihilation or disruption to traditional lifeways, culture, and identity)".[8, 9, 10] The stress of these experiences

manifests today—across generations. This reality is critical to understanding the vulnerability of today's Native men, women, and children to sex and labor traffickers in the US and Canada.

Vulnerabilities and Risk Factors

According to research, traffickers seek out persons perceived to be vulnerable. Vulnerability comes in many forms, including age (minors), poverty, homelessness, chemical dependency, prior experiences of abuse, lack of resources and/or support systems, and so forth. Traffickers then use various tactics to control vulnerable persons, including: inflicting sexual, emotional, or mental abuse; luring those struggling with addictions by enabling these addiction(s); withholding money or identifications needed to travel or access help; being physically violent and/or threatening assault.[11]

Communities that experience the following characteristics should be on alert for the presence of human and sexual trafficking:

- Historical trauma and cultural loss
- Significant poverty and/or economic isolation/dependence
- High rates of Adverse Childhood Experiences in the population
- High numbers of homeless and runaway youth
- High rates of family surveillance and involvement with child welfare system
- High rates of exposure to violence (direct and/or indirect, through domestic, intimate partner violence)
- High rates of personal or family/caregiver addiction to substances
- Low levels of police or law enforcement presence
- Influx of a transient, cash-rich workforce

Data Trends

Human trafficking is a highly underreported crime for a variety reasons, including the fact that "many trafficking victims do not identify themselves as victims. Some suffer from fear, shame, and distrust of law enforcement. It is also not unusual for trafficking victims to develop traumatic bonds with their traffickers because of the manipulative nature of this crime."[12] Moreover, in the US as well as in Canada, "there is no data collection/tracking method that provides a complete picture of sexual exploitation or human trafficking."[13] Most victimization data come from surveys of individuals engaged in prostitution or commercial sexual exploitation.

Reliance on prostitution data is somewhat problematic in the context of trafficking. Trafficking occurs where there is *coercive control*, "but an adult woman is able to consent to engage in illicit activity (such as prostitution)."[14] Therefore, some researchers challenge the use of prostitution data

in identifying trafficking trends.[15] *However*, in a frequently cited study of commercial sexual exploitation among Native women in Minnesota, researchers found that **about half of the 105 women** interviewed "met a *conservative legal definition of sex trafficking*, which involves third-party control over the prostituting person by pimps or traffickers. And most interviewees (**86 percent**) felt that no [one] really know[s] what they're getting into when they begin prostituting, and that there is deception and trickery involved" (emphasis added).[16]

So, while there are ongoing legal debates about how to define trafficking, the presence of prostitution networks can indicate high levels of vulnerability, exploitation, and coercion that contributes to trafficking. Thus, we have included research here that surveys the experiences of commercial sex workers. In what follows, we summarize data that describe the prevalence of sex trafficking among Native communities.

Data on prevalence. Across four sites surveyed in the US and Canada as part of a 2015 report, an average of **40 percent** of the women involved in sex trafficking identified as AI/AN or First Nations.

> "In Hennepin County, Minnesota, roughly **25 percent** of the women arrested for prostitution identified as American Indian…In Anchorage, Alaska, **33 percent** of the women arrested for prostitution were Alaska Native…In Winnipeg, Manitoba, **50 percent** of adult sex workers were defined as Aboriginal… and **52 percent** of the women involved in the commercial sex trade in Vancouver, British Columbia were identified as First Nations."[17]

To clarify how disproportionate these rates are, it is important to note that in not one of these cities and counties do Native women represent more than 10 percent of the general population.

And while these data are only snapshots of sex trafficking in major cities, similar trends are emerging in more remote, reservation communities.

In the past year alone, the White Earth DOVE Program (Down On Violence Everyday), which serves the White Earth, Red Lake, and Leech Lake Reservations in northwestern Minnesota, has identified **17 adult victims** of sex trafficking.[18] And in northeastern Montana, the Montana Native Women's Coalition reported that they have observed a **12 to 15 percent increase** over the previous year's program base (between 2014-2015) regarding the number of Native women who have been trafficked.[19]

Health consequences of trafficking

In addition to understanding how prevalent trafficking is for Native people, it is important to consider the experiences and consequences for victims of trafficking—particularly in the realm of health, as researchers have collected data from survivors. Among 105 AI/AN women surveyed who were subjected to commercial sexual exploitation in the state of Minnesota[20]:

- **92 percent had been raped;**
- **84 percent had been physically assaulted in prostitution;**
- **79 percent of the women had been sexually abused as children by an average of four perpetrators;**
- **72 percent suffered traumatic brain injuries in prostitution;**
- **71 percent had symptoms of dissociation; and**
- **52 percent had Post Traumatic Stress Disorder (PTSD) at the time of the interview— a rate that is in the range of PTSD among combat veterans.**

In 2015, another study surveying 107 human trafficking survivors (AI/AN and non-Native alike) across 12 US cities was designed to identify the health consequences of sex trafficking and support the delivery of health care to victims. These were among its findings on physical and psychological health outcomes[21]:

Category of Physical Health	Percent of respondents reporting at least one symptom
Any physical health problem	99 percent (of 106 respondents)
Neurological	92 percent (of 106)
General health	86 percent (of 105)
Injuries	69 percent (of 102)
Cardiovascular/respiratory	67 percent (of 106)
Gastrointestinal	62 percent (of 106)
Dental	54 percent (of 105)

Psychological Health Issues	During Trafficking (n=106)	After Trafficking (n=83)
Reported at least one issue	98 percent	96 percent
Average number of issues	12 percent	11 percent
Depression	89 percent	81 percent
Flashbacks	68 percent	64 percent
Shame/guilt	82 percent	71 percent
PTSD	55 percent	62 percent
Attempted suicide	42 percent	21 percent

These findings show that **9 out of 10** trafficking victims suffer neurological symptoms and depression; that PTSD increases after escaping sex slavery and attempted suicides decrease by half.

Regarding reproductive health, **two-thirds** had contracted a sexually-transmitted disease or infection.

When the study asked about the violence experienced by the victims, ***more than two-thirds*** reported being punched, beaten, kicked, raped, and threatened with a weapon.[22]

"Human trafficking of Native women in the United States is not a new era of violence against Native women but rather the continuation of a lengthy historical one… Native women experience violent victimization at a higher rate than any other US population. Congressional findings are that more than 1 in 3 Native American and Alaska Native women will be raped in their lifetime… more than 6 in 10 will be physically assaulted. Native women are stalked more than twice the rate of other women. Native women are murdered at more than ten times the national average. Non-Indians commit 88% of violent crimes against Native women. Given the above statistical data and the historical roots of violence against Native women, the level of human trafficking given the sparse data collected can only equate to the current epidemic levels we face within our tribal communities and Nations."

Lisa Brunner, National Indigenous Women's Resource Center[23]

Identifying and Supporting Victims

The most important, and perhaps sensitive task in supporting victims is identifying them. Very often, victims will be arrested and brought into courts as criminal offenders. The challenge for judges and law enforcement officers, then, is to look beyond the crime to determine whether the individual is in need of help. The indicators and risk factors listed in this document may be of help in victim identification.

It is recommended that you not approach a suspected trafficker or victim—their safety as well your own may be at risk. Instead, we direct you to various resources here that have been compiled for your use. Encouraging tribal citizens—in urban and reservation communities—to employ these tools may save a life.

- ***Call 1-866-DHS-2-ICE*** (1-866-347-2423) to report suspicious criminal activity to the US Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) Tip Line. It is accessible outside the US at 802-872-6199.
- ***Submit a tip at www.ice.gov/tips.*** Highly trained specialists take reports from both the public and law enforcement agencies on more than 400 laws enforced by ICE HSI, including those related to human trafficking.
- To get help from the **National Human Trafficking Resource Center** (NHTRC), call **1-888-373-7888** or **text HELP or INFO to BeFree** (233733). The NHTRC can help connect victims with service providers in the area and provides training, technical assistance, and other resources. The NHTRC is a national, toll-free hotline available to answer calls from anywhere in the country, 24 hours a day, 7 days a week, every day of the year. The NHTRC is not a law enforcement or immigration authority and is operated by a nongovernmental organization funded by the Federal government.[24]

There are eighteen tribal coalition groups across the US who can help victims and families. Resources can be found on their website, **www.tribalcoalitions.org**.

Information on how to recognize the signs of trafficking is available at: ***traffickingresource-center.org/what-human-trafficking/recognizing-signs.*** Signs include:

- Is not free to leave or come and go as he/she wishes
- Is in the commercial sex industry and has a pimp / manager
- Was recruited through false promises concerning the nature and conditions of his/her work
- High security measures exist in the work and/or living locations (e.g. opaque windows, boarded up windows, bars on windows, barbed wire, security cameras, etc.)
- Shows signs of physical and/or sexual abuse, physical restraint, confinement, or torture
- Is not in control of his/her own money, no financial records, or bank account
- Is not in control of his/her own identification documents (ID or passport)
- Is not allowed or able to speak for themselves (a third party may insist on being present and/or translating)
- Lack of knowledge of whereabouts and/or of what city he/she is in
- Loss of sense of time

Services for Native victims

In a recent human rights report focused on the trafficking of Native peoples in the state of Oregon, a tribal service provider reports that as a system, "we pass out Band-Aids," not the comprehensive services victims so desperately need.[25] Providers simply do not have the resources to offer effective assistance. In terms of specific areas where resources are needed, interviewees working on reservations in multiple locations around the state identified the following:

- Services through IHS to help women with substance abuse problems stay clean;
- Sexual Assault Nurse Examiners (SANE) available at IHS locations;
- Counselors and victim advocates who are trained to help victims of domestic violence and sexual abuse;
- General funding to promote advocacy and community building efforts;
- Shelters for women, particularly those who have been exposed to prostitution or sex trafficking; and
- Tribal healing methods and services.

Confirming these resource shortfalls, a recent national survey found significant gaps in access to sexual assault examiner (SAE) and sexual assault response team (SART) programs for **more than two-thirds** of 650 Census-designated Native American lands reviewed, which included 381 lands that reported ***no service coverage*** within a 60-minute driving distance.[26]

To gauge what services *are* being accessed to some degree, the 105 AI/AN women who were subjected to commercial sexual exploitation in Minnesota shared[27]:

- 80 percent had used outpatient substance abuse services. Many felt that they would have been helped even more by inpatient treatment;
- 77 percent had used homeless shelters;
- 65 percent had used domestic violence services; and
- 33 percent had used sexual assault services.

Their most frequently stated needs were for individual counseling (75 percent), peer support (73 percent), housing, and vocational counseling (both 66 percent). Many of the women felt they ***owed their survival to Native cultural practices***—and most wished for Native healing approaches to be integrated with mainstream social services.[28] The Administration for Native Americans affirmed that cultural safety and the use of women's circles, sweat lodges, and other culturally appropriate practices are critical to healing in their 2015 Information Memorandum on "Recognizing and Responding to Human Trafficking among American Indian, Alaska Native and Pacific Islander Communities."[29] In the following section, we review several codes tribes have passed to combat human trafficking within their borders.

Sovereign Prevention: Sample Tribal Codes Addressing Trafficking

SNOQUALMIE TRIBAL CODE

TITLE 7, Chapter 1: Criminal Code [30]

7.21. Sex Trafficking

(A) A person is guilty of sex trafficking when they are knowingly involved in the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age.

(B) The buying or selling of children for any reason.

(C) Sex trafficking is a Class A offense. [Class A Offenses Maximum Penalty: One (1) year in jail and/or $5,000 fine and/or community service. Minimum Penalty: Six (6) months in jail and/or $2,500 fine and/or community service. SNOQ. TRIBAL CODE § 17.2 (Sentencing Guidelines)]

PASCUA YAQUI TRIBAL CODE

TITLE 4: Criminal Code [31]

Section 130 Commercial Sexual Exploitation of a Minor

(A) A person commits commercial sexual exploitation of a minor by knowingly: (1) Using, employing, persuading, enticing, inducing or coercing a minor to engage in or assist others to engage in sexual conduct for the purpose of producing any visual or print medium or live act depicting such conduct; (2) Using, employing, persuading, enticing, inducing or coercing a minor to expose the genitals or anus or the areola or nipple of the female breast for financial or commercial gain; (3) Permitting a minor under such person's custody or control to engage in or assist others to engage in sexual conduct for the purpose of producing any visual or print medium or live act depicting such conduct; (4)Transporting or financing the transportation of any minor through or across this Reservation with the intent that such minor engage in prostitution or sexual conduct for the purpose of producing a visual or print medium or live act depicting such conduct.

SWINOMISH TRIBAL CODE

TITLE 4, Chapter 3: Criminal Code [32]

4-03.070 Sexual Exploitation of Minors

(A) A person is guilty of sexual exploitation of minors if the person, for the purpose of producing any visual depiction of sexually explicit conduct or for the purpose of sexual gratification: employs, uses, persuades, induces, entices, or coerces any person under age eighteen (18) to engage in sexually explicit conduct; causes a person under eighteen (18) to assist any other person to engage in sexually explicit conduct; or in any way willfully aids a person under eighteen (18) to engage in sexually explicit conduct.

(B) Sexual exploitation of a minor is a Class A offense.

(C) Any person who willfully assists in the production or distribution of a visual depiction of sexually explicit conduct by a minor also commits the Class A offense of sexual exploitation of children.

TULALIP TRIBAL CODE

CHAPTER 3.25: Offenses Against the Family [33]

3.25.020 Aggravated promotion of prostitution

(1) A person commits the offense of aggravated promotion of prostitution if he or she purposely or knowingly commits any of the following acts:

(a) Compels another to engage in or promote prostitution;

(b) Promotes prostitution of a child under the age of 18 years, whether or not he or she is aware of the child's age;

(c) Promotes the prostitution of one's child, ward, or any person for whose care, protection, or support he or she is responsible.

(2) Aggravated promotion of prostitution is a Class E offense. [Ord. 49 § 6.7.2, 1-8-2010 (Res. 2010-10)

EASTERN BAND OF CHEROKEE INDIANS TRIBAL CODE

ARTICLE XIII: Offenses Against Public Morality and Decency [34]

Section 14-80.1 Prostitution

It shall be unlawful to:

(1) Be an inmate or resident of a house of prostitution or otherwise engage in sexual activity as a business or for hire;

(2) Loiter in or within view of a public place for the purpose of being hired to engage sexual activity;

(3) Engage in or offer or agree to engage in any sexual activity with another person for a fee;

(4) Pay or offer or agree to pay another person a fee for the purpose of engaging in an act of sexual activity;

(5) Enter or remain in a house of prostitution for the purpose of engaging in sexual activity;

(6) Own, control, manage, supervise, or otherwise keep, alone or in association with another, a house of prostitution or a prostitution business;

(7) Solicit a person to patronize a prostitute;

(8) Procure or attempt to procure a prostitute for another;

(9) Lease or otherwise permit a place controlled by the actor, alone or in association with others, to be used for prostitution or the promotion of prostitution;

(10) Procure an inmate for a house of prostitution;

(11) Encourage, induce, or otherwise purposely cause another to become or remain a prostitute.

(12) Transport a person with a purpose to promote that person's engaging in prostitution or procuring or paying for transportation with that purpose;

(13) Share in the proceeds of a prostitute pursuant to an understanding that one is to share therein, unless one is the child or legal dependent of a prostitute;

(14) Own, operate, manage, or control a house of prostitution; or

(15) Solicit, receive, or agree to receive any benefit for doing any of the acts prohibited by this section.

Recommendations

Trafficking in Native communities is a clear and present danger—even if it is difficult to identify and quantify. We provide some emerging recommendation for tribal nations in their efforts to protect their citizens and prevent trafficking in its many forms. Several of these recommendations were drawn from , "Mapping the Market for Sex with Trafficked Minor Girls in Minneapolis: Structures, Functions, and Patterns" (Martin & Pierce, 2014).

- **Host a community discussion to educate tribal citizens about recognizing the signs of trafficking and accessing available resources.** There is an ongoing need to provide information and education to community leaders and members everywhere about looking out for signs of trafficking and working together to prevent it. Community discussions can create essential awareness and deter predators.
- **Equip children and youth to seek help and prevent peer recruitment.** Traffickers often use peer groups to recruit youth. It is essential to embed prevention in existing programs and activities community youth already participate in.
- **Ensure adequate and safe housing options for homeless, runaway, couch-hopping, and pregnant/parenting youth.** Access to safe and adequate housing creates less vulnerability for displaced youth. Short– or long-term shelter options with support services, transitional housing, and permanent subsidized housing could all address needs.
- **Equip tribal police departments to investigate networks of sex buyers and gang-related operations.** Many tribes already include prostitution activity as part of their criminal codes. It is important to educate law enforcement and other community health workers to be aware of predatory networks that may be enable trafficking activity and to equip these workers to take action.
- **Foster community and school competency in addressing sexual exploitation and youth trauma.** In addition to identifying trafficking, it is important for tribal nations to work to address the impacts of exploitation and trauma in their citizens who have been impacted. A comprehensive, trauma-informed approach can benefit all and prevent trafficking from taking root.
- **Develop cross-community, regional, and/or state networks to share information and resources.** Traffickers rely on extensive networks to increase their reach. Communities that partner across known or vulnerable areas can prevent trafficking activity and protect citizens.

"While the U.S. Department of State's 2015 Trafficking in Persons (TIP) report recognizes that American Indians and Alaska Natives are among the most vulnerable populations to trafficking in the United States, trafficking of Native peoples– specifically labor trafficking– remains largely invisible in scholarship and media… And while almost all of the research focuses on sex trafficking of Native women and children, men are most likely not exempt and sex trafficking is most likely not the only type of trafficking occurring within Native communities… ***A Native-informed intervention model and lens will be crucial to the production of research and success of programs, policies and organizations***."

In the spirit of fostering a Native-informed intervention model, we will be sharing additional samples of tribal code from seven tribal nations we have identified once we secure their permission to do so, as well as others that are identified. NCAI looks forward to sharing information on efforts to prevent trafficking amongst tribal nations to put an end to these activities and taking care of one another. The safety of our communities is all of our responsibility.

Endnotes

[1] United Nations Convention Against Transnational Organized Crime. *Protocol to Prevent, Suppress and Punish Trafficking in Persons*. November 15, 2000 art. 3(a), GA 55/25. Retrieved from: https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12-a.en.pdf.
[2] Civic Impulse. (2016). H.R. 3244 — 106th Congress: Victims of Trafficking and Violence Protection Act of 2000. Retrieved from: https://www.govtrack.us/congress/bills/106/hr3244.
[3] See note 2.
[4] Pierce, A. and Koepplinger, S. (2011). New language, old problem: Sex trafficking of American Indian women and children. Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence. Retrieved from: http://www.vawnet.org.
[5] Deer, S. (2010). Relocation revisited: Sex trafficking of Native women in the United States. *William Mitchell Law Review 36*(2): 622-683. Retrieved from: http://www.wmitchell.edu/lawreview/documents/8.Deer.pdf%20.
[6] Smith, A. (2003) Not an Indian tradition: The sexual colonization of Native peoples. *Hypatia 18*(2): 70-85.
[7] Farley, M., Matthews, N., Deer, S., Lopez, G., Stark C., and Hudon, E. (2011). Garden of Truth: The Prostitution and Trafficking of Native Women in Minnesota. St. Paul, MN: William Mitchell College of Law. Retrieved from: http://www.prostitutionresearch.com/pdfs/Garden_of_Truth_Final_Project_WEB.pdf.
[8] Evans-Campbell, T. (2008). Historical Trauma in American Indian/Native Alaska Communities: A Multi-level Framework for Exploring Impacts on Individuals, Families, and Communities. *Journal of Interpersonal Violence 23* (3), 316-338. Retrieved from: https://ces300.files.wordpress.com/2011/01/j-interpers-violence-2008-evans-campbell-316-38.pdf.
[9] Walters, K., Mohammed, S.A., Evans-Campbell, T., Beltrán, R.E., Chae, D.H., & Duran, B. (2011). Bodies Don't Just Tell Stories, They Tell Histories. *Dubois Review: Social Science Research on Race 8* (1), 179-189.
[10] Ehlers, C.L., Gizer, I.R., Gilder, D.A., Ellingson, J.M., & Yehuda, R. (2013). Measuring historical trauma in an American Indian Community Sample: Contributions of substance dependence, affective disorder, conduct disorder and PTSD. *Drug and Alcohol Dependence 133* (1), 1-21. Retrieved from: http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3810370/pdf/nihms-497049.pdf.
[11] See note 5.
[12] Sweet, V. (2014). Rising Waters, Rising Threats: The Human Trafficking of Indigenous Women in the Circumpolar Region of the United States and Canada. Social Science Research Network. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399074.
[13] See note 12.
[14] Human Rights Caucus (1999). Recommendations and Commentary on the Draft Protocol to Combat International Trafficking in Women and Children Supplementary to the Draft Convention on Transnational Organized Crime. Retrieved from: http://www.walnet.org/csis/groups/nswp/untoc-comment.html.
[15] Gozdiak, E.M. and Collett, E.A. (2005). Research on human trafficking in North America: A review of literature. *International Migration 43,* pp. 99-128. Retrieved from: https://publications.iom.int/system/files/pdf/global_survey.pdf#page=100.
[16] See note 7.
[17] Sweet, V. (2015). Trafficking in Native Communities. Published on 5/24/2015 by *Indian Country Today Media Network.* Retrieved from: http://indiancountrytodaymedianetwork.com/2015/05/24/trafficking-native-communities-160475.
[18] Dalrymple, A. and Lymn, K. (2015). Native American populations 'hugely at risk' to sex trafficking. Published on 1/5/2015 by the *Bismarck Tribune.* Retrieved from: http://bismarcktribune.com/bakken/native-american-populations-hugely-at-risk-to-sex-trafficking/article_46511e48-92c5-11e4-b040-c7db843de94f.html.
[19] Armitage, L. (2015). 'Human Trafficking Will Become One of the Top Three Crimes Against Native Women.' Published on 7/15/2015 by *Indian Country Today Media Network.* Retrieved from: http://indiancountrytodaymedianetwork.com/2015/07/15/human-trafficking-will-become-one-top-three-crimes-against-native-women-161083.
[20] See note 7.
[21] Lederer, L.J. and Wetzel, C.A. (2014). The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities. *Annals of Health Law 23*, pp. 61-91. Retrieved from: http://

www.icmec.org/wp-content/uploads/2015/10/Health-Consequences-of-Sex-Trafficking-and-Implications-for-Identifying-Victims-Lederer.pdf.
[22] See note 21.
[23] Brunner, L. (2013). "The Devastating Impact of Human Trafficking of Native Women on Indian Reservations." Testimony of Lisa Brunner before the Committee on Homeland Security and Governmental Affairs; Hearing on "Combating Human Trafficking: Federal, State, and Local Perspectives." September 23, 2013.
[24] US Department of Homeland Security Blue Campaign (2016). "Identify A Victim." Retrieved from: https://www.dhs.gov/blue-campaign/identify-victim.
[25] Weedn, H, Scovel, J., and Juran, J. (2014). Human Trafficking & Native Peoples in Oregon: A Human Rights Report. Published and prepared by the International Human Rights Clinic at the Willamette University College of Law. Retrieved from: http://www.doj.state.or.us/victims/pdf/human_trafficking_and_native_peoples_in_oregon_a_human_rights_report.pdf.
[26] Juraska , A., Wood, L., Giroux, J., and Wood, E. (2014). Sexual assault services coverage on Native American land. *Journal of Forensic Nursing 10* (2), pp. 92-97. Retrieved from: http://journals.lww.com/forensicnursing/Fulltext/2014/04000/Sexual_Assault_Services_Coverage_on_Native.6.aspx.
[27] See note 7.
[28] See note 7.
[29] Administration for Native Americans (2015). "Information Memorandum on Recognizing and Responding to Human Trafficking among American Indian, Alaska Native and Pacific Islander Communities." Published by the US Department of Health and Human Services. Retrieved from: http://www.acf.hhs.gov/programs/ana/resource/information-memorandum-on-human-trafficking-among-american-indian-alaska-native-and-pacific-islander-communities.
[30] Snoqualmie Tribal Code. Title 7, Chapter 1: Criminal Code. Sex Trafficking. Retrieved from: http://www.snoqualmietribe.us/sites/default/files/criminal_code_7.1_compresses.pdf.
[31] Pascua Yaqui Tribal Code. Title 4: Criminal Code; Chapter 2: Sex Offenses and Chapter 3: Domestic Violence. Retrieved from: http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/toc/toc_title4.html.
[32] Swinomish Tribal Code. Title 4: Criminal Code; Chapter 3: Sexual Offenses. Retrieved from: http://www.swinomish.org/media/3700/0403sexoffenses.pdf.
[33] Tulalip Tribal Code. Chapter 3.25: Offenses Against the Family. Retrieved from: http://www.codepublishing.com/WA/Tulalip/html/Tulalip03/Tulalip0325.html.
[34] Eastern Band of Cherokee Indians Tribal Code. Article XIII: Offenses Against Public Morality and Decency. Retrieved from: https://law.resource.org/pub/us/code/city/nc/Cherokee%20Indians%20Eastern%20Band,%20NC%20Code%20thru%20supp%20%2316.pdf.

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This publication was produced by the NCAI Policy Research Center in carrying out our mission to provide tribal leaders with the best available knowledge to make strategically proactive policy decisions in a framework of Native wisdom that positively impact the future for Native peoples. Tribal Insights Briefs are specifically designed to highlight the exercise of tribal sovereignty around some of the most current and compelling issues of our time. Other publications in the Tribal Insights Brief series include:

- *Tribal Transportation Insights: Preventing Unintentional Injury and Death*
- *Higher Education & Workforce Development: Leveraging Tribal Investments to Advance Community Goals*

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Shattered Hearts

The Commercial Sexual Exploitation Of American Indian Women And Girls In Minnesota

Minnesota Indian Women's Resource Center

Prepared by Alexandra (Sandi) Pierce, Ph.D. for the Minnesota Indian Women's Resource Center, Minneapolis MN

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Dedication

This report is dedicated to Bill 'Big Wolf' Blake, who devoted his life to ensuring that Native children would have an environment where they could thrive in safety. Bill, a member of the Red Lake Nation and a Sergeant with the Minneapolis Police Department, was a passionate supporter of this project and an active participant in a meeting with American Indian elders, community leaders, and service providers to discuss this report and next steps just days before his unexpected death. Though we grieve his passing, we are immensely grateful for the time that we had with him, and for his tireless work to prevent violence against our children. Thank you, Bill, and we wish you a good journey.

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Last but certainly not least, we want to express our deep appreciation for the support and guidance of MIWRC's Board of Directors, and for their ongoing dedication to helping American Indian women and their families live safer and healthier lives.

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In 2007, a long time resident of the Supportive Housing Program at the Minnesota Indian Women's Resource Center (MIWRC) came into a staff member's office, saying she was looking for a job but no one would give her a break. The resident was having trouble completing her GED due to dyslexia, and had very little useful work experience. She told the staff member that the only way she knew how to make money was to prostitute herself, and she did not want to go back to that.

Her story, which she was disclosing for the first time, was alarming. She had been pimped out by her mother at the age of 12 to support the mother's crack habit. By the time she was 14 she had begun to pimp out other young girls to feed her own drug addiction. At the point in time when she walked into the staff member's office, she had done hard time in prison, given birth to six children, and lost custody of them all. The MIWRC staff member realized that under current Minnesota law, this resident was a victim of a federal crime, the prostitution of a juvenile under the Trafficking Victims Protection Act (TVPA).

Rather than being recognized or protected as a trafficking victim, she had been criminalized. Today, even though she has been repeatedly beaten and sexually assaulted by pimps and johns, she is ineligible for most federally-funded services and supports for victims of physical and sexual violence because of her prostitution arrests. And all she wants to know is, who will ever give her a chance?

Background

The topic of this report is the commercial sexual exploitation of American Indian women and girls in Minnesota, including but not limited to sex trafficking. In 2006, the Legislature passed Minnesota Statute section 299A.79 requiring the Commissioner of Public Safety to develop a plan to address current human trafficking and prevent future human trafficking in Minnesota. To develop a comprehensive plan for addressing the complicated issue of trafficking and the needs of trafficking victims, the commissioner created, per Minnesota Statute section 99A.7955, the statewide Minnesota Human Trafficking Task Force. The Task Force's charge is to advise the Commissioner on the statewide trafficking assessment and on the commissioner's plan to address human trafficking and prevent future trafficking in Minnesota, assisting in two statutory actions:

- Collect, share, and compile trafficking data among government agencies to assess the nature and extent of trafficking in Minnesota
- Analyze the collected data to develop a plan to address and prevent human trafficking[1]

Each year, the Minnesota Office of Justice Programs and the Minnesota Human Trafficking Task Force, with input from organizations providing services to trafficked individuals, produces an annual report to the Minnesota Legislature and provides training on identifying trafficking victims, methods for prosecuting traffickers, methods for protecting the rights of trafficking victims, and methods for promoting the safety of trafficking victims.[2]

As part of its activities to produce the 2007 Human Trafficking Report, the Office of Justice Programs

[1] Office of Justice Programs, (no date). *Human trafficking task force.* Minnesota Department of Public Safety. Retrieved May 1, 2009 from http://www.dps.state.mn.us/OJP/cj/httf/about.htm

[2] *Ibid*.

interviewed law enforcement personnel, nurses, and social service providers, asking questions about the characteristics and experiences of sex trafficking victims they had worked with. Based on their responses, the OJP estimated that at least 345 American Indian women and girls in Minnesota had been sexually trafficked in a three-year period.

After a client disclosed her own experience, MIWRC recognized that other Native women coming to the agency for housing, domestic violence, sexual assault, and other crisis-related services might have similar stories. Staff contacted other Native-specific housing and social service agencies in Minnesota to ask what their caseworkers were seeing in terms of commercial sexual exploitation of Native women and girls. Several reported an increasing number coming in for domestic violence and sexual assault services, later acknowledging that their assailant had trafficked them for prostitution. Tribal advocates in South Dakota and Minnesota had also began raising red flags, reporting that Native girls were being trafficked into prostitution, pornography, and strip shows over state lines and internationally to Mexico.

Reports began coming in from Duluth, of police rescuing Native girls who had been lured off reservations, taken onto ships in port, beaten, and gang-raped by the ships' crews. In Canada, where the history and current circumstances of Native (Aboriginal) people closely parallel those of American Indians in the U.S., research studies were consistently finding Aboriginal women and girls to be hugely over-represented in the sex trade. An international report on the commercial sexual exploitation of children described Canadian Aboriginal and American Indian youth as being at greater risk than any other youth in Canada and the U.S. for sexual exploitation and trafficking.[3]

By 2008, Minneapolis had been identified by the FBI as one of thirteen U.S. cities having a high concentration of criminal activity involving the commercial sexual exploitation of juveniles.[4] In September of that year, The Advocates for Human Rights released a sex trafficking needs assessment report, commissioned by the Office of Justice Programs and the Minnesota Human Trafficking Task Force pursuant to a mandate from the Commissioner of Public Safety. The needs assessment involved evaluation of government response to sex trafficking in Minnesota, identification of facilities and services currently available to sex trafficking victims, assessment of the effectiveness of those services, and recommendations for improvement.[5] In the report, The Advocates for Human Rights noted the significant lack of information about American Indian trafficking victims and the relative absence of services to not only help them find safety, but to also heal from the trauma of life in prostitution.

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[3] Beyond Borders , ECPAT-USA and Shared Hope International, (2008). *Report of the Canada-United States consultation in preparation for World Congress III against sexual exploitation of children and adolescents*. Beyond Borders , ECPAT-USA and Shared Hope International.

[4] Cited in The Advocates for Human Rights, (September 2008). *Sex trafficking needs assessment for the State of Minnesota.* Minneapolis: The Advocates for Human Rights.

[5] The Advocates for Human Rights, (September 2008). *Sex trafficking needs assessment for the State of Minnesota.* Minneapolis: The Advocates for Human Rights.

Despite Minnesota's significant efforts to identify sex trafficking victims and meet their needs, to our knowledge there had never been any sort of summary report produced in either Minnesota or the U.S. regarding the commercial sexual exploitation of this nation's indigenous girls and women. The abundance of anecdotal evidence suggested that a disproportionate number of Midwest Native women and girls were being targeted by sex traffickers, yet no reliable data existed to support or contradict this theory.

As a first step to addressing this gap, MIWRC approached the W.K. Kellogg Foundation to request support for developing a report that aggregated what is known to date about the commercial sexual exploitation of American Indian women and girls in Minnesota, and to develop a set of recommendations for addressing gaps in knowledge and addressing the needs of victims. The W.K. Kellogg Foundation agreed to support the project, which began in November 2008 and resulted in this report.

Organization of the report

This report is organized to tell a story. For any story, there is always a setting, a context within which the story unfolds. Therefore, Section I briefly describes the historical experiences of American Indian women in the U.S. that have made them uniquely vulnerable to commercial sexual exploitation, and unique in the ways that such exploitation impacts their well-being.

Section II describes the methods and sources used to produce this report, and our definitions for the terms we use to describe the experiences of commercially sexually exploited Native women and girls.

Section III provides information about the prevalence of Native women's and girls' involvement in the sex trade in Minnesota, across the U.S. and in Canada.

Section IV describes Native women's and girls' patterns of entry into commercial sexual exploitation.

Section V is a summary of the risk factors that have been found to facilitate Native women's and girls' entry into commercial sexual exploitation, and of current data describing the representation of Native women and girls in those facilitating factors in Minnesota.

Section VI provides information about barriers and challenges to helping Native women and girls to escape commercial sexual exploitation.

Section VII contains our conclusions, including a theoretical model for understanding and addressing the problem.

Section VIII describes our recommendations.

I. The context

An understanding of Native women's and girls' experiences in the history of this nation is critical for understanding their unique vulnerability to commercial sexual exploitation. Four fundamental beliefs have been found to be essential for a coherent and resilient sense of self, which protects a person against sexual exploitation and/or helps a victim of such exploitation to heal:

- The world is a good and rewarding place
- The world is predictable, meaningful, and fair
- I am a worthy person
- People are trustworthy.[6]

The traumatic experiences of American Indian people during the colonial era and their exposure to new losses and new trauma each consecutive generation have had a devastating effect on Native people, families, and communities, and on their ability to sustain those four beliefs.

American Indians have been stereotyped as a stoic and savage people, incapable of what society deems "normal" feelings,[7] but historic events contributed significantly to the development of this stereotype. U.S. government actions such as extermination policies, religious persecution, forced migration to Indian reservations, and systematic removal of Native children to boarding schools caused repeated exposure to trauma, which impeded a natural grieving process. Each time, past and current trauma were transferred to the next generation along with the unresolved grief in what has been termed generational trauma or historical trauma.[8] The long-term impacts have been well-documented: widespread poverty, low educational attainment, high rates of community and interpersonal violence, high rates of alcohol-related deaths and suicide, poor physical health, and corroded family and community relationships.

When a dominant society refuses to recognize a people's grief and losses as legitimate, the result is sadness, anger, and shame, feeling helpless and powerless, struggles with feelings of inferiority, and difficulty with self-identity. This negatively impacts interpersonal relationships and Native peoples' sense of themselves as sacred beings.[9] Disenfranchised grief is in itself a significant barrier to the healing of trauma, either generational or recent, and it, too, prevents development of the four beliefs needed to develop a strong and resilient sense of self.

In addition to these significant influences on American Indian women's well-being, ongoing experiences with racism lead to what has been termed "colonial trauma response," which results

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[6] Roth S and Newman E, (1995). The process of coping with sexual trauma, in Everly G and Lating J (Eds.), *Psychotraumatology: Key papers and core concepts in post-traumatic stress.* New York: Plenum Press, pp. 321-339.

[7] *Ibid*.

[8] Yellow Horse Brave Heart M and DeBruyn L, (1998). American Indian holocaust: Healing historical unresolved grief, *American Indian and Alaska Native Mental Health Research 8*(2): 60-82.

[9] Kaufman G, (1996). *The psychology of shame: Theory and treatment of shame-based syndromes*. New York: Springer.

when a Native woman experiences a current event that connects her to a collective, historical sense of injustice and trauma. Just as people with post-traumatic stress disorder are "triggered" to relive traumatic events they have experienced, American Indian women, who have endured massive trauma and injustice historically, are "triggered" to connect current experiences with racism, abuse, and/or injustice with those experienced by their female ancestors, in a very immediate and emotional way. A Native woman's response to the situation is not only based on her own experience, but on the experiences of generations of her female ancestors.[10]

For this reason, Native women experience sexual assault, prostitution, and sex trafficking as a continuation of the colonization process, in which Native women's sacred selves were routinely exploited for the gratification of a person who claimed the right to do so while ignoring or invalidating the impact on the woman herself. When the assailant, pimp, or john is a white male, the psychological impact on a Native woman is even greater.

While the historical experiences of all Native people have intensified Native women's vulnerability to sex trafficking and other forms of commercial sexual exploitation, generational trauma has also reduced Native communities' ability to respond positively to victims of sexual crimes. Native victims of sexual assault often do not report the assault because they do not believe that authorities will investigate or charge the crime, and they fear being blamed or criticized by people in their communities. Any admission of involvement in prostitution carries an even greater stigma, so Native women and girls trafficked into prostitution rarely seek help. If unable to escape prostitution prior to reaching the age of 18, Native child trafficking victims find themselves categorized as criminals rather than victims, which only adds to the trauma they have already experienced in prostitution. Most literally have nowhere to turn, as there are very few culturally-based services to help them heal from their experiences in safety. There are also very few culturally-based "upstream" interventions in place that explicitly focus on preventing the trafficking of American Indian girls into the sex trade.

Native women's experiences during colonization

From the times of earliest exploration and colonization, Native women have been viewed as legitimate and deserving targets for sexual violence and sexual exploitation. In the mid-1500s, the secretary of Spanish explorer Hernando de Soto wrote in his journal that De Soto and his men had captured Appalachee women in Florida "for their foul use and lewdness."[11] Historian Kirsten Fischer reported that during the earliest years of the Carolina Colony, indigenous cultures in the area all viewed women as sacred beings. Women held and managed the community's resources, including fields and the produce from them. They also had significant autonomy in their choices regarding sexual relationships, including short-term sexual alliances, marriage, divorce, and cohabitation. Native women often played an active and high-status role in

[10] Evans-Campbell T, (2008). Historical trauma in American Indian/Native Alaska communities: A multilevel framework for exploring impacts on individuals, families, and communities, *Journal of Interpersonal Violence 23*: 316-338.

[11] Gallay A, (2002). *The Indian slave trade: The rise of the English empire in the American South, 1670-1717*. New Haven: Yale University Press, pp. 34.

trade, sometimes using sexual liaisons to smooth trade relations while also acting as mediators providing outsiders with language skills and lessons in local customs.[12]

Fischer noted that Native cultures in what came to be the Carolina Colony did not have the concept of private property or inheritance of property, so European cultures' emphasis on women's virginity and chastity to ensure that property would be inherited father-to-son was not present in the Native worldview. Fischer quoted the writings of John Lawson, a surveyor for the Carolina Colony, who published his impressions of the Native people he had seen. Lawson's writings reflected British male colonists' interpretations of Native women's high status and freedom, viewed through their own patriarchal lens:

> *[They are] of that tender Composition, as if they were design'd rather for the Bed than Bondage[13]…[the] multiplicity of Gallants [was] never a Stain to a Female's Reputation…[the] more Whorish, the more Honorable.*[14]

Indian men did not escape being stereotyped in this process. King's Botanist John Bartram wrote that the Indian men of South Carolina, Georgia, and Florida:

> *…are courteous and polite to the women, gentle, tender, and fondling even to an appearance of effeminacy, tender and affectionate to their offspring.*[15]

Rather than understanding Native men's behaviors as respect, self-possession and restraint, colonial writers viewed them as undersexed and passive, and either unwilling or unable to control their women or to take proper advantage of the wilderness around them. The colonists were "amazed at what seemed an unnatural breach of patriarchal authority," marveling that Indian husbands submitted to a "petticoat government" and let themselves be "cuckolded by" promiscuous wives.[16] These attitudes permitted colonists to justify their use of Native women and Native lands however they pleased, without obligation or limits.

Male colonists also recognized Indian women's ability to control their own fertility, which allowed them to believe that their sexual encounters with Native women, forced or consensual, had no consequences. It was a short cognitive leap to view Native women as shamelessly promiscuous and depraved, which freed male colonists from their own social rules about extramarital sexual relations.

The fact that Native women's sexual relations with colonists were often connected to trade allowed colonists to view those relations as tainted and even mercenary.[17] As a result of these

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[12] Fischer K, (2002). *Suspect relations: Sex, race, and resistance in colonial North Carolina*. Ithaca: Cornell University Press.

[13] *Ibid.*, p. 62.

[14] *Ibid.*, p. 67.

[15] Waselkov, Gregory A. and Braund, Kathryn E. Holland (1995). *William Bartrand on the Southeastern Indians.* Lincoln: University of Nebraska Press, p. 114.

[16] Fischer K, (2002). *Suspect relations: Sex, race, and resistance in colonial North Carolina. Ithaca: Cornell University Press*, p. 37.

[17] *Ibid.*, p. 56.

beliefs, English surveying teams routinely harassed and raped Native women, considering sexual restraint in such circumstance to be foolish.[18]

The conceptual framework to justify the sexual exploitation of American Indian women was now in place, supported by two critical stereotypes that emerged from this period in history: the sexually loose, mercenary, and innately immoral American Indian woman and the ineffective, profoundly lazy American Indian man, both of which exhibited a savage disregard for the norms of decent society.

Native women's experiences during national expansion

In 1769, an officer at York Factory on Hudson Bay described the frequent trafficking of Native women in and around the fur trade posts in his journal:

> *…the worst Brothel House in London is not common a [stew] as the men's House in this Factory was before I put a stop to it.*[19]

Similar sexual exploitation of Native women occurred in Oregon Territory as the British sought to extend their fur trade south. At Fort Langley, a Hudson's Bay Company outpost on the Fraser River in Oregon, Fort Commander James Yale (1776-1871) married three Indian women within his first three years at the fort to smooth trade relations with local tribes.[20] Native women such as these were considered "secondary wives" with no legal rights, and as European women began to arrive, these wives and their children were frequently abandoned.[21]

As immigrants moved westward, anti-Indian attitudes and stereotypes born in the colonial era grew and expanded. Entire villages were decimated by smallpox and measles epidemics, some deliberately launched by military distribution of blankets carrying the infection. The U.S. Army not only killed American Indian men in battle, it also slaughtered entire encampments of women, elders, and children. Troops sent to protect settlers referred to American Indian women as "breeders," justifying their rape, murder, and sexual mutilation.

U.S. Army Lieutenant James Connor wrote the following account of the attack launched by U.S. Army Colonel Chivington against Black Kettle's band of Cheyenne in 1864, despite their flag of truce:

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[18] Fischer K, (2002). *Suspect relations: Sex, race, and resistance in colonial North Carolina. Ithaca: Cornell University Press*, p. 68.

[19] Bourgeault R, (1989). Race, class, and gender: Colonial domination of Indian women, in Forts J et al., (Eds.), *Race, class and gender: Bonds and barriers (2nd edition).* Toronto: Jargoned Press.

[20] Garneau D, (January 30, 2007). *Early years of the Canadian Northwest 1830-1849.* Retrieved February 2, 2009 from http://www.telusplanet.net/public/dgarneau/B.C.6.htm

[21] Lynn J, (August 17, 1998). *Colonialism and the sexual exploitation of Canada's Aboriginal women*, paper presented at the American Psychological Association 106th Annual Convention, San Francisco CA.

> *I heard one man say that he had cut out a woman's private parts and had them for exhibition on a stick…I also heard of numerous instances in which men had cut out the private parts of females and stretched them over the saddle-bows and wore them over their hats while riding in the ranks.*[22]

In 1871, an armed "citizens' group" from Tucson attacked a group of Apache camped at Camp Grant. In a sworn affidavit presented to the Bureau of Indian Affairs, U.S. Calvary Lieutenant Royal E. Whitman, commanding officer at the camp, reported on the aftermath:

> *The camp had been fired and the dead bodies of some twenty-two women and children were lying scattered over the ground; those who had been wounded in the first instance, had their brains beaten out with stones. Two of the best-looking of the squaws were lying in such a position, and from the appearance of the genital organs and of their wounds, there can be no doubt that they were first ravished and then shot dead. Nearly all the dead were mutilated.*[23]

The genocide of American Indian people during this period has been likened to the Jewish Holocaust, because it was fueled by the government's formal policies calling for extermination and religious persecution of Native people. Following the Wounded Knee massacre, similar to treatment of Jewish victims at Auschwitz, victims were stripped and thrown into a mass grave "like sardines in a pit."[24] Oral traditions for spiritual healing often died with the elders carrying that knowledge, further impacting Native peoples' ability to grieve losses together in healing ceremonies.

Native girls' boarding school experiences

Mission schools were established as early as the late 1700s for the "education of the Indian." In 1879, the Bureau of Indian Affairs opened Carlisle Industrial School in Pennsylvania, which became the model for government-funded, Christian-oriented Indian boarding schools. Approximately 12,000 American Indian children attended Carlisle in its 39 years of operation.[25] At times, there were as many as 100 government-operated Indian boarding schools nationwide.[26] The purpose of these schools was to destroy American Indian children's ties to their families, culture, religion, and language, and to replace those with the values and behaviors of the dominant Christian society.[27] This segment of a serialized story in Carlisle's weekly student newsletter written by a white school matron and titled "How an Indian girl might tell her own story if she had the chance" illustrates the school's goal for Native girls. In the story, an Indian

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[22] Brown D, (1970). *Bury my heart at Wounded Knee: An Indian history of the American West*. New York: Holt, p. 90.

[23] Board of Indian Commissioners, (1872). *Third annual report of the Board of Indian Commissioners to the President of the United States, 1871.* Washington DC: Government Printing Office. Retrieved March 2, 2009 from http://www.archive.org/stream/annualreportofbo03unitrich/annualreportofbo03unitrich_djvu.txt

[24] Mattes M, (1960). The enigma of Wounded Knee, *Plains Anthropologist* 5(9):1-11, p. 4.

[25] Anderson S, (2000). On sacred ground: commemorating survival and loss at the Carlisle Indian School, *Central Pennsylvania Magazine (May edition).*

[26] National Public Radio, (May 12, 2008). *American Indian boarding schools haunt many.* Retrieved December 22, 2008 from http://www.npr.org/templates/story/story.php?storyId=17645287

[27] Hoxie F, (1989). *A final promise: The campaign to assimilate the Indians, 1880-1920*. Cambridge: Cambridge University Press.

girl has graduated from Carlisle and returned home to her Native community. When a white storekeeper asks if she will return to wearing "Indian clothes," she responds:

> *No! Do you think I can not appreciate what the great and good Government of the United States has done for me? Do you think I would be so ungrateful after the Government has spent so much time and money to educate me as not to use the knowledge I have obtained? I see I cannot do much here, but I believe I can keep myself right if I try. I can keep from going back to Indian ways if I am determined. I don't believe the [tribal leader] could force me back into the Indian dress. If he tried to I should run away. I believe the white people would protect me if I should run to them.*[28]

Native researchers Maria Yellow Horse Brave Heart and Lemyra DeBruyn, who have written extensively on historical trauma among American Indians, summarized the impact of "Indian education" on American Indian communities:

> *The destructive and shaming messages inherent in the boarding school system…were that American Indian families are not capable of raising their own children, and that American Indians are culturally and racially inferior…abusive behaviors—physical, sexual, emotional—were experienced and learned by American Indian children raised in these settings. Spiritually and emotionally, the children were bereft of culturally integrated behaviors that led to positive self-esteem, a sense of belonging to family and community, and a solid American Indian identity.*[29]

In the Midwest, reservation day schools and boarding schools were funded by the U.S. government and most frequently operated by the Catholic Church. Tim Giago, a well-known Lakota author and boarding school survivor, described what he witnessed as a child in a Catholic mission school in South Dakota:

> *These children were being indoctrinated into the rituals and beliefs of the Catholic Church. It was not out of the question for the abusers to warn the children that if they spoke about what happened to them that they would be committing a mortal sin and they would burn in hell…the children were required to go to confession at least once per week. Can you imagine their fear when they looked through the confessional screen and saw the face of the priest that had been abusing them? What were they to think? Don't you know that they were already suffering from the guilt pushed upon them by their abusers? When they saw the priest behind the confessional screen they knew that they had no one and nowhere they could turn for help. They buried what happened to them deep inside.*[30]

The Canadian Prime Minister issued a public policy in 2008 for the harm done to Native children in Canadian residential schools, but it was not until October 2009 that the U.S. Senate approved a resolution apologizing to American Indians for years of "ill-conceived policies" and acts of

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[28] Burgess M, (October 18, 1889). Segment of a serialized story in *The Indian Helper* transcribed and posted online by Barbara Landis. In 1891, the story was published as a book by Embe titled *Stiya, a Carlisle Indian Girl at Home*. Transcribed serial segment retrieved June 2, 2009 from http://home.epix.net/~landis/stiya.html

[29] Yellow Horse Brave Heart M and DeBruyn L, (1998). The American Indian holocaust: Healing historical unresolved grief, *American Indian and Alaska Native Mental Health Research 8*(2):63.

[30] Giago T, (October 25, 2007). *Children left behind: The dark legacy of Indian mission boarding schools.* Santa Fe: Clear Light Publishing. Retrieved May 4, 2009 from http://www.huffingtonpost.com/tim-giago/the-catholic-indian-missi_b_69887.html

violence by U.S. citizens. The resolution, described by the Associated Press as "controversial," was not a stand-alone action by the Senate. Rather, it was tacked onto a defense spending bill.[31]

Impact of assimilation policies on Native women

In the 1850s, the U.S. began establishing and relocating American Indians to reservations. The ultimate goal was their eventual assimilation. Francis Walker, Commissioner of Indian Affairs in the 1870s, imposed a system in which Native people could not leave the reservation without permission, and were required to participate in industrial labor. Walker proposed that "a severe course of industrial instruction and exercise under restraint" would teach American Indians industriousness and frugality, and prepare them for civilized society. In a further effort to force assimilation, Congress passed the Dawes Allotment Act in 1887, which broke up reservations into 160-acre parcels allotted to individual heads of families. It also allowed the U.S. to sell any unallotted land, resulting in the sale of over 17 million acres of Indian land in 1891 alone.[32]

From the 1950s to the 1970s, the U.S. government launched a series of aggressive efforts to assimilate American Indians. Three intersecting initiatives from that era had a significant impact on American Indian women's traditional roles in their communities, their safety, and their perceptions of themselves as sacred beings: tribal termination and urban relocation efforts, involuntary sterilization of Native women, and large-scale efforts to adopt Native children into white families.

Termination and relocation

At the time of the post-World War II economic boom, the average American Indian on a reservation earned $950 a year, compared to the $4,000 earnings of the average white person. The federal government initiated the Urban Indian Relocation Program in 1952, which encouraged reservation Indians to relocate to major cities where jobs were supposedly plentiful. Relocation offices were initially set up in Chicago, Denver, Los Angeles, San Francisco, San Jose, St. Louis, Cincinnati, Cleveland and Dallas, later expanding to include 28 urban areas. Minneapolis was one. Bureau of Indian Affairs (BIA) employees were charged with orienting new arrivals and managing financial and job training programs for them.[33]

Native people were told they would receive temporary housing and assistance obtaining permanent housing, counseling and guidance in finding a job, and community and social services, including start-up money. A couple with four children was to receive $80 a month. About 30 percent of all American Indians were rapidly relocated to cities, where they just as

[31] Associated Press, (October 7, 2009). *Senate approves apology to American Indians.* Retrieved October 8, 2009 from http://www.usatoday.com/news/washington/2009-10-07-senate-apology-american-indians_N.htm

[32] Takaki R, (1993). *A different mirror: A history of multicultural America.* Boston: Back Bay Books. Pp. 233-236.

[33] Public Broadcasting Service, (September 2006). *Indian Country Diaries: The urban relocation program*. Retrieved February 2, 2009 from http://www.pbs.org/indiancountry/history/relocate.html#

quickly joined the urban poor when the promised assistance failed to materialize. By 1980, up to 750,000 had moved to the cities.[34] The National Council on Urban Indian Health reports:

> *The haunting memories of forced relocation and broken promises on the part of the federal government have affected the overall well being of the American Indian community. This has resulted in high rates of severe mental and physical health disparities. Contemporary health and social issues include poverty, alcoholism, heart disease, diabetes, and unemployment.*[35]

In 1953, Congress passed two measures: Public Law 280 (PL-280), which authorized some states to unilaterally assume jurisdiction over criminal and civil matters on reservations, and a resolution to end federal relations with tribes as quickly as possible. Nine of Minnesota's eleven tribes are currently subject to PL-280; only Bois Forte Band of Chippewa and the Red Lake Nation have retained federal jurisdiction for criminal matters. By the early 1960s, the U.S. had terminated 109 tribes across the nation, withdrawing from all relations with them, including trust and treaty obligations.[36] Increasingly isolated from the social supports and cultural strengths of their tribal communities, American Indian women relocated to urban areas experienced increased exposure to physical and sexual violence along with poverty and its added stressors.

Involuntary sterilization

During the 1960s and 1970s, the Indian Health Service (IHS), the primary source of medical care for most American Indians at the time, routinely performed tubal ligations on Native women and girls without their consent and sometimes during other surgeries without their knowledge. The U.S. government had targeted American Indians for family planning due to their high birth rate, and sterilization was considered an acceptable intervention. Between 1970 and 1976, the IHS sterilized between 25 and 50 percent of Native women in various areas of the U.S. One Choctaw-Cherokee physician examined IHS records and estimated that by 1975, 25,000 American Indian women had been sterilized by this unit of the federal government. In general, Native women agreed to tubal ligation after being threatened with losing their children and/or their welfare benefits. Most of them consented while still sedated during a Caesarean section or during labor to deliver a child, and most did not understand the 12th-grade reading level consent forms or the permanency of the procedure.[37]

Sterilization abuse destroyed these Native women's sacred roles as life-bringers. Mary Ann Bears Come Out, who conducted interviews with women who were sterilized during this era, described the impact:

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[34] Public Broadcasting Service, (September 2006). *Indian Country Diaries: The urban relocation program*. Retrieved February 2, 2009 from http://www.pbs.org/indiancountry/history/relocate.html#

[35] National Council on Urban Indian Health, (undated). *Relocation has been endemic to modern American Indian history.* http://www.ncuih.org/Relocation%20(2).pdf

[36] Josephy A Jr., (1988). Modern America and the Indian, in Hoxie E (Ed.), *Indians in American History*, pp.251-272. Arlington Heights IL: Harlan Davidson.

[37] Cited in Lawrence J, (Summer 2000). The sterilization of Native American women, *American Indian Quarterly 24*(3): 400-419.

> *The sterilization of Indian women affected their families and friends; many marriages ended in divorce, and numerous friendships became estranged or dissolved completely. The women had to deal with higher rates of marital problems, alcoholism, drug abuse, psychological difficulties, shame, and guilt. Sterilization abuse affected the entire Indian community in the United States.*[38]

The Indian Adoption Project

Before 1978, the wholesale removal of Native children from their families and tribes by state social services agencies and courts was commonplace. In Minnesota, one of every four Native children under the age of one was removed and adopted, usually by a non-Native family.[39] Most often, the justification for removal was "neglect," claiming the parent had "inappropriately" left the child with an extended family member for a prolonged period of time—ignoring the fact that in many Native cultures, extended family members play important parenting roles.[40]

Building on that practice, the Bureau of Indian Affairs and the U.S. Children's Bureau entered into a contracted collaboration with the Child Welfare League of America in 1958, to administer the Indian Adoption Project. The project was a response to the number of Native children in foster care or informal kinship care in poverty-stricken reservation settings, based on the idea that Native children would have better health and brighter futures if they escaped the conditions of reservation life. In 1962, the Director of the Indian Adoption Project described the benefits that white families could also realize by adopting an American Indian child:

> *As tribal members they have the right to share in all the assets of the tribe which are distributed on a per capita basis. The actual as well as anticipated benefits of an Indian child adopted through our Project are furnished by the Secretary of the Interior.*[41]

From 1958 to 1967, the Indian Adoption Project removed 395 Native children from 16 western states for adoption by white families in Illinois, Indiana, New York, Massachusetts, Missouri, and other states in the East and Midwest. The Adoption Resource Exchange of North America (ARENA), a national organization, took over the work of the Indian Adoption Project in 1966 and continued placing Native American children in white adoptive homes into the early 1970s.[42] A 1969 study by the Association on American Indian Affairs found that roughly 25-35 percent of Native children had been separated from their families, and the First Nations Orphan Association estimates that between 1941 and 1978, 68 percent of all Indian children were removed from their

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[38] Cited in Lawrence J, (Summer 2000). The sterilization of Native American women, *American Indian Quarterly 24*(3): 410.

[39] U.S. Congress, (1978). *The House Report, H.R. Rep. No. 1386, 95th Congress, 2nd Session*, reprinted in 1978 U.S. Code Congressional and Administrative News 7530.

[40] *Ibid*.

[41] Lyslo A, (December 1962). *Suggested criteria to evaluate families to adopt American Indian children through the Indian Adoption Project*, Child Welfare League of America Papers, Box 17, Folder 3, Social Welfare History Archives, University of Minnesota, pp. 3-5.

[42] Herman E, (July 11, 2007). *The Adoption History Project*. Department of History, University of Oregon. Retrieved May 2, 2009 from http://darkwing.uoregon.edu/~adoption/topics/IAP.html

homes and placed in orphanages or white foster homes, or adopted into white families.[43] This wholesale separation of Native children from their families and communities had devastating repercussions:

- It shamed Native mothers, reinforcing the stereotype fostered by the "Indian education" era that American Indian women are not competent to raise their own children.
- It left families and communities with disenfranchised grief that could not be resolved.
- It prevented the transmission of cultural values and practices through social learning and oral story-telling traditions.

Removing Native girls from their families and tribes and adopting them into white households severely curtailed these children's ability to foster any understanding of their roles in traditional Native community life, and their ability to build relationships with other Native people.[44] Their appearance marked them as American Indian, exposing them to racial targeting for sexual violence, but they had not been permitted to develop a culture-based identity as sacred givers of life.

These historic experiences over generations and the trauma induced by them have had a cumulative effect on today's American Indian girls and women. Coupled with regular exposure to racism and the poverty of most Native families and communities, they have significantly impacted Native girls' attainment of the four basic beliefs described at the beginning of this review, which are essential for a coherent and resilient sense of self:

- The world is a good and rewarding place
- The world is predictable, meaningful, and fair
- I am a worthy person
- People are trustworthy.[45]

The damage caused by life in prostitution

Later in this report, we describe the factors that make Native women and girls vulnerable to commercial sexual exploitation. Some may ask "Why does vulnerability matter?" It matters because women and girls in prostitution suffer extremely high rates of violence and trauma, and these experiences make it very difficult for them to ever return to a healthy lifestyle.

In over 20 years of research, the rates of rape and sexual assault of women in prostitution have consistently been found to range between 70 and 90 percent.[46,47] A U.S. study found that women

[43] Kreisher K, (March 2002). Coming home: The lingering effects of the Indian Adoption Project, *Children's Voices*. Child Welfare League of America. Retrieved May 2, 2009 from http://www.cwla.org/articles/cv0203indianadopt.htm

[44] Jones B, (1995). *The Indian Child Welfare Act handbook: A legal guide to the custody and adoption of Native American children*. Section of Family Law, American Bar Association.

[45] Roth S and Newman E, (1995). The process of coping with sexual trauma, in Everly G and Lating J (Eds.) *Psychotraumatology: Key papers and core concepts in post-traumatic stress.* New York: Plenum Press, pp. 321-339.

[46] Silbert M and Pines A, (1982). Victimization of street prostitutes, *Victimology 7*(1-4): 122-133.

in prostitution had been raped an average of twice weekly. At least 84 percent of the women interviewed were victims of aggravated assault, 49 percent had been kidnapped, and 53 percent were victims of sexual torture. Those that were tortured reported having been burned, gagged, hung, and bound, and having body parts mutilated by pinching, clamping, and stapling.[48]

Though no U.S. data are available on the experiences of American Indian women in prostitution, one study in Vancouver, a city with a large proportion of Native women and girls in the sex trade, found that 68 percent of prostituted women had been recently raped and 72 percent had been kidnapped.[49] A second Vancouver study found that 90 percent of women in prostitution (about half of whom were Aboriginal) had been physically assaulted in prostitution. Of this group, 82 percent named johns as their assailants. In addition to cuts, black eyes, and "fat lips," 75 percent had sustained severe physical injuries from pimps and johns that included stabbings, beatings, broken bones (jaws, ribs, collar bones, fingers), and spinal injuries. Half had suffered concussions and fractured skulls when pimps and/or johns assaulted them with baseball bats and crowbars, or slammed their heads against walls or car dashboards. Prostituted women have reported frequent experiences with extreme violence whenever they refuse to perform a specific sex act.[50]

A study with commercially sexually exploited youth and adults in British Columbia, an area in which many are Native, found that significant changes occur when sailors are in port in Victoria. Youth reported the need to protect their safety at these times by traveling in groups and not provoking sailors, and prostituting women viewed these times as a combination of increased business opportunities and greater risk of violence.[51]

In addition to violence perpetrated by johns, research in regions with large Aboriginal populations has found that the vast majority of prostituted women experience extreme physical and sexual violence at the hands of pimps, boyfriends, and husbands.[52,53]

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[47] Parriott R, (1994). Health experiences of Twin Cities women used in prostitution. Unpublished survey initiated by WHISPER, Minneapolis MN, cited in Farley et al., 2003, Prostitution and trafficking in nine countries: An update on violence and posttraumatic stress disorder, in *Prostitution, trafficking and traumatic stress*. Binghamton NY: Haworth Maltreatment & Treatment Press.

[48] Hunter S, (1994). Prostitution is cruelty and abuse to women and children, *Michigan Journal of Gender and Law 1*: 1-14.

[49] Cler-Cunningham and Christenson C, (2001). Studying violence to stop it: Canadian research on violence against women in Vancouver's street level sex trade, *Research for Sex Work 4,* June: 25-26.

[50] Farley M and Lynne J, (2005). Prostitution of indigenous women: Sex inequality and the colonization of Canada's Aboriginal women, *Fourth World Journal 6*(1): 21-29.

[51] Hunt S, (2006). *Violence in the lives of sexually exploited youth and adult sex workers in BC: Provincial research.* Justice Institute of British Columbia, Centre for Leadership and Community Learning. Retrieved April 20, 2009 from http://peers.bc.ca/images/orchidupdat0407.pdf

[52] Currie S, Laliberte N, Bird S, Rosa N, and Sprung S, (1995), *Assessing the Violence Against Street Involved Women in the Downtown Eastside/Strathcona Community*, Downtown Eastside Youth Activities Society and Watari Research Society, Ministry of Women's Equality, Vancouver BC.

[53] Lowman J and Fraser L, (1995). *Violence against persons who prostitute: The experience in British Columbia*. Unedited technical report. Department of Justice Canada. Cited in Federal/Provincial Territorial Working Group on Prostitution (1998) *Report and recommendations in respect of legislation, policy, and practices concerning prostitution-related activities.* Canadian Federal/Provincial Working Group on Prostitution.

Verbal abuse by johns adds another layer of trauma for women in prostitution. Canadian studies have found that 83 to 88 percent of prostituted women describe verbal assaults as an intrinsic part of prostitution.[54,55] Research participants have reported that johns called them names during sex intended to humiliate, eroticize, or justify the john's treatment of the woman, often racial slurs.[56] Other research has found that racially-motivated verbal and physical violence are particularly intense forms of racial discrimination that have a profound impact on mental health, even when it is not accompanied by violence or abuse.[57,58] Some prostituted women have described verbal abuse by johns as the aspect of life in the sex trade that is most damaging.[59] A Native woman in Vancouver described the effect of johns' verbal abuse on her self-esteem:

> *It is internally damaging. You become in your own mind what these people do and say to you. You wonder, how could you let yourself do this, and why do these people want to do this to you?*[60]

Involvement in prostitution is also often deadly. In 1985, the Special Committee on Pornography and Prostitution in Canada reported the death rate of prostituted women as 40 times that of women in the general population.[61] Since Aboriginal women's overall death rate for homicide is 40 times that of the general Canadian population, prostituted Native women are by far those at greatest risk of lethal violence.[62] One Vancouver study found a 36 percent incidence of attempted murder among prostituted women,[63] and in 2004 Amnesty International reported that at least 500 Aboriginal women and girls had gone missing over the previous 30 years.[64]

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[54] Cler-Cunningham and Christenson C, (2001). Studying violence to stop it: Canadian research on violence against women in Vancouver's street level sex trade, *Research for sex work 4,* June: 25-26.

[55] Farley M, Lynne J, and Cotton A, (2005). Prostitution in Vancouver: Violence and the colonization of Aboriginal women, *Transcultural Psychology 42*: 242-271

[56] Baldwin M, (1992). Split at the root: Prostitution and feminist discourses of law reform, *Yale Journal of Law and Feminism 5*: 47-120.

[57] Williams D, Lavizzo-Jourey R, and Warren R, (2002). The concept of race and health status in America, *Public Health Reports 109*(1): 26-41.

[58] Turner C and Kramer B, (1995). Connections between racism and mental health, in Willie C, Rieker B, Kramer B, and Brown B (Eds.), *Mental health, racism, and sexism.* Pittsburgh PA: University of Pittsburgh Press, pp. 3-25.

[59] Cited in Farley M, Lynne J, and Cotton A, (2005). Prostitution in Vancouver: Violence and the colonization of Aboriginal women, *Transcultural Psychology 42*: 242-271.

[60] *Ibid*.

[61] Special Committee on Pornography and Prostitution (The Fraser Committee), (1985). *Pornography and prostitution in Canada*, p. 350. Ottawa: Minister of Supply and Services Canada.

[62] Health Canada Medical Services Branch, (1996). Unpublished tables from 1995, cited in The Royal Commission on Aboriginal Peoples, 1996, *Report of the Royal Commission on Aboriginal Peoples,* p. 153. Ottawa ON: Minister of Supply and Services Canada.

[63] Cler-Cunningham and Christenson C, (2001). Studying violence to stop it: Canadian research on violence against women in Vancouver's street level sex trade, *Research for Sex Work 4,* June: 25-26.

[64] Amnesty International Canada, (2004). *Canada: Stolen sisters—a human rights response to discrimination and violence against indigenous women in Canada.* Ottawa: Amnesty International. Retrieved December 4, 2008 from http://www.amnesty.ca/campaigns/resources/amr2000304.pdf

II. Methods and definitions

The information summarized in this report came from four primary sources: two regional round table discussions with advocates, data from screening forms used by MIWRC staff during client intake over a 6-month period, published materials (statistics, reports, and scholarly articles), and data or data output provided to MIWRC by the entities that collected those data.

Regional round table discussions with advocates

Two round table discussions were held with a total of 30 advocates working with American Indian women and girls. The first round table, attended by 12 advocates, was held in Duluth on January 30, 2009. The second, attended by 18, was held in Minneapolis on March 27, 2009.

Each round table discussion was about five hours in length. Almost all of the participating advocates are themselves American Indian, and were working in a variety of programs that brought them into contact with Native women and girls in prostitution as well as those seeking to escape prostitution. Both discussions included advocates from housing programs, domestic violence and sexual assault programs, tribal women's programs, programs serving homeless women and youth, and collaborative programs involving social services and law enforcement. Lunch was provided, and the majority of the participants stayed for the entire discussion. At each round table, advocates responded to the same set of semi-structured questions on the following topics:

- How frequently their work involved Native women and/or girls engaged in survival sex, who had been prostituted or trafficked, or who had worked in strip clubs or pornography.
- The types of commercial sexual exploitation affecting Native women and girls.
- The prevalence of various types of commercial sexual exploitation among Native women and girls in their region of the state.
- How Native girls and women enter the sex trade, age of entry, and who recruits them
- The facilitating factors that make Native women and girls vulnerable to recruitment into the sex trade
- Native women's and girls' experiences in the sex trade and barriers to exiting
- Advocates' recommendations for prevention, policies, interventions, and services for Native girls and women wanting to escape commercial sexual exploitation

The round table discussions were digitally recorded and transcribed verbatim. Open coding was used to identify major and minor themes in the two round table conversations, and quotes were organized within those themes. A copy of the facilitator's guide for the round tables is included in the Appendix.

Screening at intake for social services

To establish a basic source of data to estimate how many of its clients have been involved in commercial sexual exploitation, the Minnesota Indian Women's Resource Center asked an additional set of questions at intake for three of the agency's programs over a six month period. To prevent client concern about having disclosures documented, MIWRC program counselors waited until after the intake interview to fill out the screening form. To ensure anonymity, no names were recorded on the forms. The data from the forms were entered and analyzed by the research consultant charged with producing this report, who had no contact with the clients whose information was recorded. As of June 15, 2009, MIWRC had screened 95 Native and women and girls. A copy of the screening form is included in the Appendix.

Published materials

We recognize that the two round tables and the intake data alone are not adequate for drawing generalizeable conclusions. To place our findings in a larger frame of reference, we triangulated our data with following types of published materials and data sources in preparing this report:

- Statistics reported by government entities, public institutions, researchers, nonprofit organizations, and foundations
- Published research reports and journal articles describing the prevalence and characteristics of commercial sexual exploitation, prostitution, and sex trafficking
- Published reports and journal articles focusing on public policy and law regarding sex trafficking and other forms of commercial sexual exploitation
- Published research and articles produced by American Indian and Aboriginal survivors of commercial sexual exploitation and/or organizations serving Native victims
- Reports and other publications regarding recommended programming and support services for victims of sex trafficking and other forms of commercial sexual exploitation

American Indian tribes in the upper Midwest and Canadian Aboriginal communities share a common history of colonization and government oppression. Many also share a common ancestry and language, with active relationships back and forth across the U.S./Canada border. Therefore, the statistics and publications cited in this report include those from both the United States and Canada.

When citing demographic statistics from other studies or reports that were based on the U.S. Census, the authors of those publications did not always clarify whether they were reporting percentages for people identifying as American Indian only, or if those percentages included people identifying as American Indian as well as those that identified as American Indian in combination with one or more other races. In those cases, we simply reported the percentages as they appeared in the publication.

Data and output provided to MIWRC

Additional sources included a subset of data provided to MIWRC by Wilder Research, which contained the responses of all non-reservation American Indian women and girls participating in Wilder's 2006 statewide study of homelessness in Minnesota. We analyzed those data by age group, and the results of our analyses are described in this report.

Though raw data from the 2007 Minnesota Student Survey could not be released to MIWRC because cell sizes were too small to ensure the confidentiality of research participants in specific counties, the Minnesota Department of Education and the Minnesota Department of Health generated data output tables for MIWRC for American Indian girls in the 9th and 12th grades statewide, and when cell sizes were large enough, for American Indian 9th and 12th grade girls in Beltrami, Hennepin, Ramsey, and St. Louis Counties. Because 12th-grade girls' data could not be released for one of the four counties due to small numbers, we elected to report only statewide comparisons, and to include data on 6th grade girls' responses already released to the public. The charts developed for this report show percentages of girls by grade in school, in three categories:

- Girls identifying solely as American Indian (American Indian only)
- Girls identifying as American Indian only combined with those of girls identifying as American Indian plus another race (American Indian + in combination)
- All girls in the general population (referred to as "all girls")

We feel that the distinction between girls identifying as "American Indian only" and those identifying as "American Indian + in combination" is an important one, especially in the urban area. Hennepin County has noted that of the American Indian people included in the county's population during the 2000 U.S. Census, 69 percent also identified as one or more other races, and 40 percent of the county's American Indian children are of mixed-race ancestry.[65]

Limitations of this report

The time frame for this project was quite short, which limited the information that could be identified and accessed. We did not apply a rigorous standard to evaluate the generalizeability of the information to be included. Because this is the first report of its kind, we gathered every bit of information we felt to be reasonably reliable in describing the issue. As noted earlier, our samples for the round table discussions and clients screened at intake were quite small, and limited both demographically and geographically. Therefore, what we report here should be considered an exploratory study, a first glance at a complex problem, and only the tip of a very large iceberg.

[65] Source: Census 2000, cited in American Indian Families Project (September 2003), *A look at American Indian families in Hennepin County*, pp 1-2. Minneapolis: Hennepin County Office of Planning and Development.

Definitions

We recognize that men and boys are also victims of sexual exploitation, commercial and otherwise. Our focus on women and girls is not intended to deny the experiences of male victims, but rather to examine the impacts that are specific to females. For this reason, our definitions all refer to women and girls.

American Indian, Aboriginal, Native

Other than references to Alaska Natives, the indigenous people of the United States are most frequently referred to as American Indian or Native American. In Canada, indigenous people are legally categorized as First Nations, Metís or Inuit, and collectively described as Aboriginal. For simplicity's sake when discussing the Canadian and U.S. research literature, we use the terms American Indian or Native when referring to indigenous people in the U.S., and Aboriginal or Native when referring to indigenous people in Canada.

Adolescents, girls, young adults, and youth

For the purposes of this report, the terms "girls" and "adolescents" are used to describe females ages 12 to 18. "Young adults" are ages of 18 to 24. The term "youth" encompasses young women and young men ages 12 to 24. Though over the age of 18 and legally considered adults in the United States, American Indian females ages 18 to 24 are still very vulnerable and many are in need of youth-oriented services.

Commercial sexual exploitation

In the U.S., the term "commercial sexual exploitation" is almost exclusively applied to children. The National Institute of Justice defines commercial sexual exploitation of a child (CSEC) as sexual abuse of a ***minor*** for ***monetary*** gain (emphasis ours), including any accompanying physical abuse, pornography, prostitution, and the smuggling of children for unlawful purposes.[66] There is no parallel federal definition for commercially sexually exploited adults, who are instead defined as "prostitutes" unless they can prove force, fraud, or coercion and thus be considered victims of sex trafficking.

In a study of 150 Aboriginal prostituted youth in 22 communities across Canada, research participants differentiated between commercial sexual exploitation and sexual abuse even though they often overlap, arguing that exploitation is taking advantage of someone else for personal profit, pleasure, and/or control. In response, the researchers proposed this definition:

[66] National Institute of Justice, (December 2007). *Commercial sexual exploitation of children: What do we know and what do we do about it? (NCJ 215733)*, p. 1. Washington DC: U.S. Department of Justice, Office of Justice Programs.

> *Commercial sexual exploitation is the exchange of sex for food, shelter, drugs/alcohol, money, and/or approval.* [67]

Adult women are also sexually exploited by others taking advantage of their vulnerabilities for profit, pleasure, and/or power. Therefore, the definition used in this report is:

> *The exploitation of a woman's or girl's sexuality for financial or other non-monetary gains, in manner that involves significant benefits to the exploiter and violates the exploited person's human right to dignity, equality, autonomy, and physical and mental well-being.* [68]

Prostitution

We define prostitution as the act of engaging in sexual intercourse or performing other sexual acts in exchange for money or other considerations, including food, shelter, transportation and other basic needs. We use the terms "in prostitution," "involved in prostitution," and "prostituted" rather than "prostitute" because we find it unreasonable to assign a label to an exploited person that implies that she is responsible for her own exploitation. We concur with Melissa Farley, who pointed out:

> *We do not refer to battered women as 'battering workers.' And just as we would not turn a woman into the harm done to her (we don't refer to a woman who has been battered as a 'batteree') we should not call a woman who has been prostituted a 'prostitute.'* [69]

Though the term "sex worker" is used by some as an alternative to the term "prostitute," we choose not to, because it frames prostitution as an acceptable form of work rather than a form of sexual violence.

Sex trade

We use the term "sex trade" to describe the "business" of commercial sexual exploitation, all transactions in which sexual activity is exchanged for food, shelter, drugs, transportation, approval, money, or safety. We do not suggest that women and girls who are sold, traded, or purchased for sexual purposes are trading fairly in a free market system. Similar to the slave trade, women and girls in the sex trade are being exploited in exchange for their survival and/or the benefit of a more powerful person. [70]

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[67] Kingsley C and Mark M, (2000). *Sacred lives: Canadian Aboriginal children and youth speak out about sexual exploitation*. Save the Children Canada, p. 41.

[68] Adapted from the definition used on page 11 of Walker N, (April 2002). *Prostituted teens: More than a runaway problem—Michigan Family Impact Seminars, Briefing Report No. 2002-2.* East Lansing MI: Institute for Children, Youth and Families, Michigan State University.

[69] Farley M, (2003). Prostitution and the invisibility of harm, *Women and Therapy 26*(3/4): 247-280. Retrieved February 6, 2009 from http://www.scribd.com/doc/6732117/Prostitution-the-Invisibility-of-Harm-HAWTH

[70] Based on the definition used in Kingsley C and Mark M, (2000). *Sacred lives: Canadian Aboriginal children and youth speak out about sexual exploitation*. Save the Children Canada.

The sex trade includes:

- Street prostitution
- Escort agencies
- Massage parlors
- Brothels, "trick pads" and "sex party houses"
- Bars and clubs that sell "lap dances" and "private dances"
- Businesses that organize and sell "private parties" with strippers and nude dancers
- Strip clubs
- Pornography and live "sex shows"
- Phone and Internet sex

Sex trafficking

International, federal, and Minnesota laws all reflect the idea that trafficking involves the recruiting, harboring, receipt or transportation of persons in order to exploit them. The Trafficking Victims Protection Act of 2000 (federal law) defines sex trafficking as:

> *The recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is under 18 years of age.*[71]

In Minnesota law, sex trafficking is defined as a type of promotion of prostitution:

> *…a person subjected to the practices in subdivision 7a [which are: receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual].*[72]

In their 2008 sex trafficking needs assessment report to the State of Minnesota, The Advocates for Human Rights described the difference in the sex trafficking definition used in Minnesota law, compared to that used in federal law:

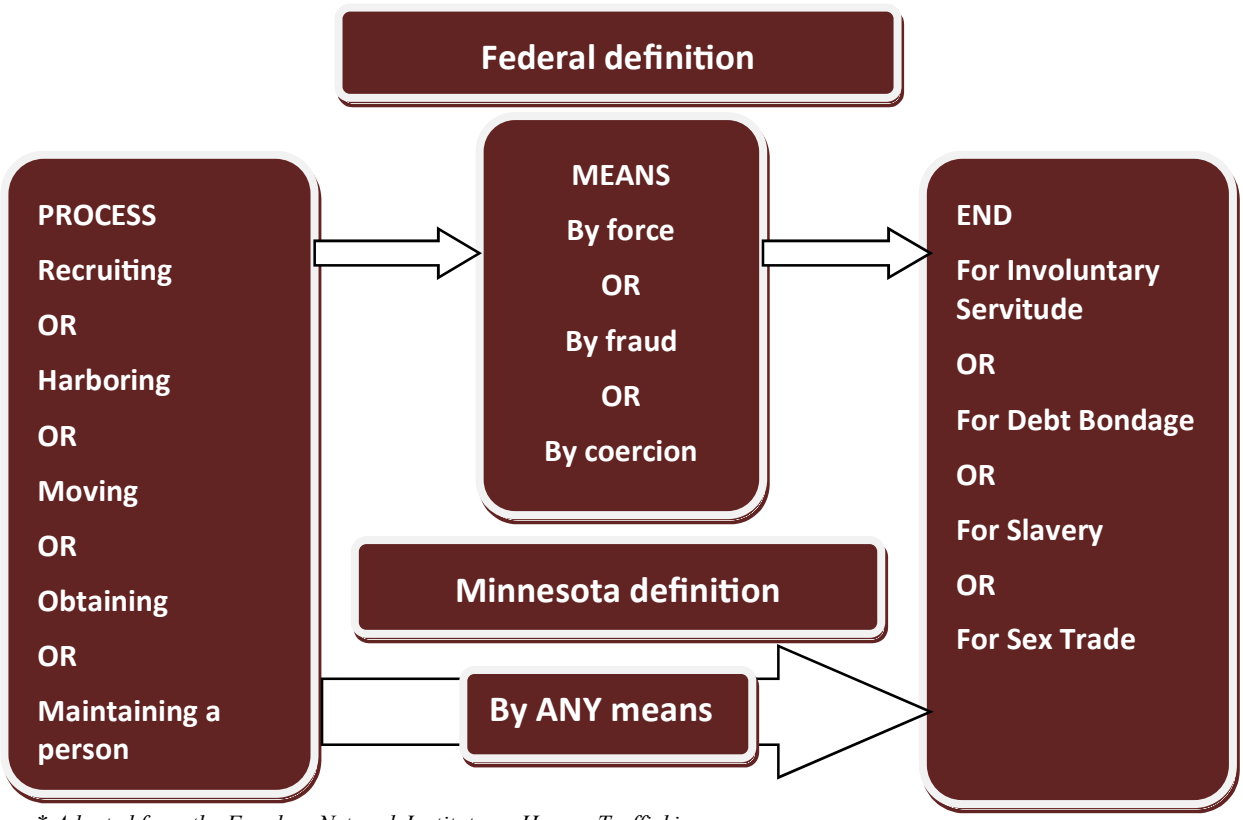
> *… federal law requires that traffickers use the means of 'force, fraud or coercion' to recruit or maintain an adult in sex trafficking while Minnesota does not. Minnesota law recognizes that a person can never consent to being sexually exploited and considers individuals who have been prostituted by others as trafficking victims. Federal law requires an assessment of the level of 'consent' of the prostituted person in determining whether the crime of trafficking has occurred.*[73]

[71] See 18 U.S.C. § 1591 (a).

[72] Minnesota Statute § 609.321, subd. 7a

[73] The Advocates for Human Rights, (September 2008). *Sex trafficking needs assessment for the State of Minnesota.* Minneapolis: The Advocates for Human Rights.

Basically, the federal trafficking law requires that three elements be present for a crime to be considered trafficking. In Minnesota law, the victim is not required to establish "means" to prove that she did not consent. Rather, courts determine responsibility based on the conduct of the trafficker.[74]



** Adapted from the Freedom Network Institute on Human Trafficking.*

On its website, the U.S. Department of State describes the signs that a person may be a trafficking victim, which include:

- Evidence of being controlled, evidence of inability to move or leave a job;
- Bruises or other signs of physical abuse;
- Fear or depression;
- Not speaking on own behalf

The same website recommends asking possible trafficking victims a set of questions, including:

- Can you come and go as you please?
- Have you or your family been threatened?
- What are your working and living conditions like?

[74] The Advocates for Human Rights, (September 2008). *Sex trafficking needs assessment for the State of Minnesota.* Minneapolis: The Advocates for Human Rights.

- Where do you sleep and eat?
- Do you have to ask permission to eat/sleep/go to the bathroom?
- Are there locks on your doors/windows so you cannot get out?

Many prostituted women under the control of a pimp in the U.S. would probably evidence the same signs and respond to the U.S. Department of State's proposed questions in exactly the same way as a woman meeting the federal definition of a victim of international sex trafficking. Donna Hughes, professor and Carlson Endowed Chair at the University of Rhode Island, has pointed out the overlap in definitions of sex trafficking and pimping, emphasizing that women's experiences in prostitution and sex trafficking are quite similar in regard to violence, control, exploitation, and level of victimization. Hughes notes that in multiple studies of women in prostitution, the average reported age of entry suggests that 70 percent were, by definition, victims of sex trafficking at the time they entered the sex trade. Hughes also reports that though the Trafficking Victims Protection Act provides for a grant program for local and state authorities to provide services to mostly U.S. citizen victims, those funds were never requested by the Department of Justice, and subsequently no programs were ever funded.[75]

The United Nations definition of trafficking echoes Hughes' point, including means beyond those described in U.S. federal law:

> *…deception, abuse of power of a position of vulnerability, or of the giving and receiving and benefits to achieve the consent of a person having control over other persons, for the purpose of exploitation.*[76]

In this report, we use the State of Minnesota's definition for sex trafficking, with the understanding that women and girls involved in "survival sex" experience deliberate exploitation of their vulnerability, with a clear sexual benefit to the exploiter:

> *…receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of an individual.*[77]

Victim

The definition of "victim" is perhaps the most contested and least resolved issue related to sex trafficking and other forms of commercial sexual exploitation. There is considerable controversy as to whether an adult involved in prostitution should ever be considered a trafficking victim. The controversy is directly tied to the argument over whether or not a woman or child can ever

[75] Hughes D, (November 2, 2006). *Prostitution and trafficking: Is there a difference?* Presentation at Breaking Free, Saint Paul MN. Retrieved May 19, 2009 from http://www.uri.edu/artsci/wms/hughes/prost_v_traff.ppt

[76] United Nations General Assembly, (January 2000). *Revised draft protocol to prevent, suppress and punish trafficking in persons, especially women and children*, supplementing the United Nations Convention against Transnational Organized Crime, A/AC.254/4/Add.3/Rev.5, Article 3a. Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Seventh session, Vienna, 17-28.

[77] Minnesota Statute § 609.321, subd. 2; Minnesota Statute § 609.321, subd. 7a. For a full description of Minnesota trafficking law, see The Advocates for Human Rights, (September 2008). *Sex trafficking needs assessment for the State of Minnesota.* Minneapolis: The Advocates for Human Rights.

give informed consent to be purchased and used for another person's benefit or gratification, without regard to her safety or well-being.

The assumption that a woman in prostitution is a consenting adult regardless of her circumstances is codified in law. Anupriya Sethi, who conducted interviews with program coordinators and others working with sexually trafficked Aboriginal women and girls in Canada, described the difficulty inherent in this assumption when defining a victim of sex trafficking:

> *It is often argued that a person who consents to engage in prostitution cannot be considered trafficked thereby suggesting that only coercion or force should form an integral part of the trafficking definition. However, it is essential to recognize that consent does not necessarily suggest an informed choice.*[78]

In a 2007 report, the National Institute of Justice emphasized the importance of minor status in recognizing sex trafficking victims:

> *...when a minor, with few visible choices, sells sex at the hands of an exploitative adult, it is generally a means of survival. The term 'teenage prostitute' also overlooks the legal status of minors who have greater legal protection regarding sexual conduct because of their emotional and physical immaturity and the need to protect them from exploitative adults. Therefore, it is important that victims of child sexual exploitation are not mistaken for offenders…Clearly, these youth are being harmed emotionally and are in considerable physical danger.*[79]

Another factor is that some states do not allow juveniles to be automatically considered victims of statutory sex crimes if they are older than 15.[80] In Minnesota, the age of consent is 16, but if a victim is younger, criminal charges still may not result in a conviction if the perpetrator is only a few years older. For instance, if the victim is 13, 14, or 15 and the perpetrator is less than 48 months older, coercion must be proved to convict him/her of first-degree criminal sexual conduct.[81] The Office of Juvenile Justice and Delinquency Prevention described the dilemma confronting police officers at the point of contact with juveniles involved in prostitution:

> *On the one hand, they are offenders involved in illegal and delinquent behavior. On the other, they are children who are being victimized by unscrupulous adults.*[82]

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[78] Sethi A, (2007). Domestic sex trafficking of Aboriginal girls in Canada: Issues and implications, *First Peoples Child and Family Review 3*: 57-71, p.59.

[79] Office of Juvenile Justice and Delinquency Prevention, (June 2004). Prostitution of juveniles: Patterns from NIBRS, *Juvenile Justice Bulletin.* Washington DC: Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice.

[80] Klain E, (1999). *Prostitution of children and child-sex tourism: An analysis of domestic and international responses.* National Center for Missing and Exploited Children. Retrieved December 16, 2008 from http://www.docstoc.com/docs/415161/Commercial-Sexual-Exploitation-of-Children-What-do-we-Know-and-What-do-we-do-about-it---December-2007

[81] Minnesota Statute 609.342. Retrieved June 24, 2008 from https://www.revisor.leg.state.mn.us/statutes/?year=2008andid=609.342

[82] Office of Juvenile Justice and Delinquency Prevention, (June 2004). Prostitution of juveniles: Patterns from NIBRS, *Juvenile Justice Bulletin.* Washington DC: Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice.

The definition of a sex trafficking victim used in the Minnesota Office of Justice Programs' *2007 Human Trafficking in Minnesota* report is consistent with the federal definition:

> *A trafficking victim can be anyone who is forced, defrauded, or coerced into commercial servitude regardless of movement.*[83]

In contrast, the United Nations Protocol considers any person prostituted by someone taking advantage of their vulnerability to be a victim, whether or not the prostituted person consented.[84]

As noted earlier, under Minnesota law the conduct of the trafficker is supposed to be the basis used by courts to determine whether any person has been trafficked for sexual purposes. To date no one has ever been prosecuted for sex trafficking under the Minnesota law, so there is no "test case" for establishing victimization. On May 21, 2009, the Minnesota Legislature unanimously passed and the governor signed a bill amending Minnesota's sex trafficking law, which will enable law enforcement and prosecutors to better hold perpetrators accountable. Specifically, the amendments:

- Provide law enforcement and prosecutors with the ability to arrest and charge sex traffickers with higher penalties where an offender repeatedly traffics individuals into prostitution, where bodily harm is inflicted, where an individual is held more than 180 days, or where more than one victim is involved;
- Increase the fines for those who sell human beings for sex;
- Criminalize the actions of those individuals who receive profit from sex trafficking;
- Categorize sex trafficking with other "crimes of violence" to ensure that those who sell others for sex are prohibited from possessing firearms; and
- Add sex trafficking victims to those victims of "violent crime" who are protected from employer retaliation if they participate in criminal proceedings against their traffickers.[85]

For the purposes of this report, any woman or girl who has been sexually exploited for the benefit of her exploiter is considered a victim of commercial sexual exploitation, whether the exploiter receives some financial benefit or gains other things of value, including goods, power, and status. If the victim is under 18 and/or if the trafficker is compensated in cash or other things of economic value, she is considered a sex trafficking victim.

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[83] Minnesota Statistical Analysis Center, (September 2007). *Human trafficking in Minnesota: A report to the Minnesota Legislature,* p. 4. St. Paul: Minnesota Office of Justice Programs, Minnesota Statistical Analysis Center.

[84] United Nations General Assembly, (January 2000). *Revised draft protocol to prevent, suppress and punish trafficking in persons, especially women and children*, supplementing the United Nations Convention against Transnational Organized Crime, A/AC.254/4/Add.3/Rev.5, Article 3a. Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Seventh session, Vienna, 17-28.

[85] The Advocates for Human Rights, (June 2009). *Update on sex trafficking legislation*. Retrieved June 24, 2009 from http://www.theadvocatesforhumanrights.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/Website_update_--_passage_of_bill.doc

Survival sex

We use the term "survival sex" to describe the exchange of sex for money and other considerations such as food, shelter, transportation, or safety by women and girls who do not think of themselves as involved in prostitution but rather, as doing "what they have to do" to survive.

Runaway and thrown-away

A runaway is defined as a girl who leaves home or a place of legal residence without the permission of parent(s) or legal guardian(s) for at least 24 hours. If a girl has been told to leave or was locked out of her home and told not to return, if she is a runaway who was not actively sought by her parent(s) after leaving, or if her parent(s) or guardian(s) failed to provide food or basic needs and she left home to meet those needs, she is defined as thrown-away.

Pimp/trafficker

We use the terms pimp and trafficker interchangeable, defined as a person who promotes and/or profits from the sale and/or abuse of another person's body or sexuality for sexual purposes, or from the production and/or sale of sexual images made of that person.

John

Because it is the most recognized term for a purchaser for sexual services, we use the term john to describe an adult male who provides some type of compensation to engage in a sexual encounter with a woman or girl. It is important to remember that if the girl is under the age of 18, this person is, in fact, a sex offender.

Honoring the efforts and resilience of Native people

The next two sections of this report present a large body of evidence that Native women face "a perfect storm" of victimization, oppression, and poverty that makes them tremendously vulnerable to commercial sexual exploitation. The information presented here calls attention to some problems that must be solved in the larger society. It also identifies some problems that must be solved within our own Native communities, where victimized Native women and girls cannot always find the level of safety and support that they need.

Even so, it is important to recognize that the continued existence of American Indian communities is a tribute to the resilience of Native people and their unending efforts to retain their language, social relationships, and culture. Many, many Native people are working to strengthen and heal their communities and to provide healthy options and positive futures for Native youth, and those efforts do make a difference.

Today, hundreds of Dakota and Ojibwe children and adults are learning and speaking their Native languages at weekly language tables in the Twin Cities and in language preservation programs on reservations. There is also an immense variety of programs, camps, and other events in urban areas and on reservations where Native youth can learn their history, culture, and values, connected to caring elders that help them learn in the traditional way.

A number of tribes have urban offices to meet the needs of members not living on reservations. One operates a pharmacy in Minneapolis that provides free prescription medication to all American Indians eligible for services through the Indian Health Service. Native-specific organizations in urban areas constantly collaborate to share information and resources to better serve American Indian people. During American Indian Month (May) in 2009, tribal offices and American Indian programs and agencies in the Twin Cities coordinated and hosted 48 events, including sunrise ceremonies, a sweat lodge, and storytelling; plays, concerts and art exhibits; open houses and feasts; educational events, Indian Youth Olympics and youth group presentations; health presentations and fund-raising walks.

Our goal in developing this report was to give our Native communities and their allies in the larger society information that could help pave the path to healing. Much good is already being done, and we look forward to what is to come.

III. Prevalence

Involvement in prostitution

Data collected by MIWRC

At the two round tables hosted by MIWRC, advocates working with Native women and girls in housing, domestic violence, sexual assault, and other social service programs focused on meeting crisis needs described the practice of trafficking Native girls and women into prostitution as a significant problem in both Duluth and Minneapolis.

The Duluth area advocates reported that street prostitution is highly visible, particularly when ships are in port and during times of the year when tourism is at its highest, such as hunting season and during the summer. Twin Cities advocates reported that in both Duluth and in the Twin Cities, much of the local prostitution activity occurs in bars, which makes it relatively invisible. These are some of the advocates' comments regarding the severity, visibility, and geographic locations of prostitution-related activity:

> *All you have to do is drive down First Street and ask somebody. It is so frickin' visible. I can't even believe it…Where we're located right on the corner of First Ave East and First Street down here. [Second speaker] In Duluth. [First speaker] It's prime area for street prostitution and there's [names of three strip bars] there. So now, right around the corner from North Shore is another strip place, and so there's a lot that happens right there. The liquor store is right there too. So, especially in the summer…it's not invisible by any means, way shape or form. If you even sit on a corner for a day you'll know who they are. Because people are coming, they're just getting into cars…I've overheard people negotiating prices, so it's really visible. [Duluth advocate]*
>
> *I work in the housing program portion of a women's shelter. I see the [Native] women and we accept the women escaping from prostitution. I did my data collection for a report and I couldn't believe how many people that we had…it was pretty close to 30 women, escaped from prostitution in a few short months. [Twin Cities advocate]*
>
> *The [Native] women are inside the bars and prostitution is happening in the bars, which makes it harder for the police to catch because it's not an outside thing. I see more of that coming down here…it's not just the pimps, it's the establishments that are making money off that girl being in the bar, bringing those patrons in because they know she's there on Wednesdays. And the young girls that want to drink, they get a fake ID. That's the prime way to get them in and recruit them, because they've got a bar setting versus a car or in a house. [Twin Cities advocate]*

At the Minneapolis round table, some of the advocates had been working with Native domestic violence and sexual victims for 25 to 30 years. Several of these long-time advocates reported that sex trafficking of American Indian women and girls is not a new development in either reservation or urban Indian communities. These are some of their comments:

> *This is an old story. This is not a new way of exploiting Native women, this has been happening since I was a child. I would hear those stories from women or people connected to my family network, about that happening to women. I'd hear my aunties or great aunties telling those stories, I'm talking about back to the 1940s. [Twin Cities advocate]*
>
> *As [another long-time advocate] was talking, it flashed into my mind, a very dear friend of mine would disappear out of my life, for probably six months to a year, and even longer. And she'd come back, just really all anxious, and so we'd work…She never talked about where she was at, and I always kind of suspected that something was going on. But, she was being trafficked between here and Mexico. This was 20-some years ago. Just recently, well, 10 years ago, she called me up from Utah and we talked for quite a while. She said that she was involved in prostitution. She had been prostituted by this group of people here in Minneapolis that she was involved with, and the man she was living with was a chiropractor, pretty well respected. And, he was the one who was sending her off. [Twin Cities advocate]*
>
> *This has been going on a hundred years on the ships. There's women my mom's age who talk about their grandmas working on the ships. [Duluth advocate]*

Two of the Duluth advocates that worked extensively with younger Native girls reported that even though Native women have been prostituting to the ships in port for many years, the conditions have changed dramatically. This is how they explained those changes:

> *Girls have conversations with their mothers about their time, when the mothers were working on the boats. Many of the girls were conceived out of working on the boats. But the mothers have a different way of talking about it. The opportunities of the people she met and that sort of thing. I'm not saying it's any less dangerous, but I think times have changed considerably. The mother relates it to being her choice when she worked on the boats, and she really cherishes those relationships she has with other women that are her friends now. But she really fears for her daughter, that times have changed and it's a whole different arena that you're dealing with now. [Duluth advocate]*
>
> *The violence has increased. I don't want say it but the nationality is a big thing for this family I am working with. The mother who worked on the boats, she is really intimidated by African American men in the community. A number of people that I'm working with, young women, have been recruited by African American men and immediately taken to Milwaukee, Chicago, or the Twin Cities. So, there's like this fear when the mom talks about it about, 'You really don't know what you're getting into. You don't know their family, you don't know their community, you don't know.' And what happens is, they take the girls from here further away. Away from their support system. [Duluth advocate]*

The data from 95 Native women and girls entering MIWRC programs also suggest that the trafficking of Native girls into prostitution is a significant, though rarely discussed, problem. Overall, 40 percent of incoming clients reported involvement in some type of commercial sexual exploitation and 27 percent reported activities defined as sex trafficking under Minnesota law (see Figures 1 and 2).

MIWRC's screening process confirmed other studies' findings that Native victims frequently do not identify as having been sexually trafficked, instead presenting with other issues such as

domestic violence and sexual assault.[86] Not one of the 25 MIWRC clients meeting the state's legal definition at intake had presented herself as a sex trafficking victim.

1. Percent of MIWRC clients reporting involvement in prostitution and pornography at intake (n=95)

	Number	Percent
Exchanged sex for shelter	24	25%
Exchanged sex for food	14	15%
Exchanged sex for money	32	34%
Exchanged sex for drugs or alcohol	30	32%
Exchanged sex for transportation	10	11%
Exchanged sex for some other type of assistance	5	5%
Asked to recruit or pimp other girls	21	22%
Pressured/forced to pose for nude photos or videos	11	12%

**Some reported multiple types of sexual exploitation, so percentages may total more than 100%.*

2. Percent of MIWRC clients trafficked into prostitution for the benefit of another person (n=95)

	Number	Percent
Trafficked for shelter	10	11%
Trafficked for food	7	7%
Trafficked for money	17	18%
Trafficked for drugs or alcohol	17	18%
Trafficked for transportation	4	4%
Trafficked for some other benefit	5	5%

**Some reported being trafficked for multiple benefits, so percentages may total more than 100%.*

Though prostitution arrests are often used to estimate the scope of prostitution in an area, the intake data collected by MIWRC confirm that these data are a poor indicator. None of the clients under age 18 that met the state definition for sex trafficking victims at intake had ever been arrested for prostitution, though 18 of the 25 trafficked adult women (72%) had one or more prostitution arrests (see Figure 3).

[86] Minnesota Department of Public Safety, Minnesota Office of Justice Programs, and Minnesota Statistical Analysis Center, (September 2007). *Human trafficking in Minnesota: A report to the Minnesota Legislature.* Saint Paul: Minnesota Statistical Analysis Center.

3. Arrests for prostitution (only those MIWRC clients reporting prostitution involvement, n=37)		
	Number	Percent
Arrested for any prostitution-related offense	18	46%
1-2 arrests	5	13%
3-5 arrests	3	8%
6 or more arrests	3	8%
Number of arrests not recorded	7	18%

Information from other sources

Very few reports and publications have addressed the number of Native women and girls involved in prostitution in Minnesota. The State of Minnesota Office of Justice Programs (OJP) reported that in 2006, there were a total of 3,989 trafficking and prostitution related arrests and 1,790 convictions, most of which were for prostitution. The number of American Indian women arrested for prostitution offenses is not available.

In 2007, the Minnesota Office of Justice Programs conducted an online human trafficking survey with service providers, nurses, and law enforcement statewide. Twelve respondents reported working with a total of 345 American Indian female victims of sex trafficking in the previous three years.[87] In response to OJP's 2008 human trafficking survey, twelve service providers reported working with a total of 79 American Indian sex trafficking victims in the three-year period prior to the interview.[88] In both years' surveys, respondents described movement of trafficked Native women and girls from reservations to the Twin City metro and other cities, from one city to another, and from Minnesota to another state. Responses to the two surveys were based on overlapping time frames, so the discrepancy in the 2007 and 2008 numbers suggests that one or more of the 2007 providers that reported high numbers of American Indian trafficking victims did not participate in the 2008 survey. The numbers reported by the service providers were also estimates, since most did not use a systematic method to track the number of Native victims.[89,90]

Data provided by Hennepin County Corrections show a total of 313 arrests for prostitution-related offenses in 2008, twelve (4%) of which were American Indian women arrested for

[87] Minnesota Department of Public Safety, Minnesota Office of Justice Programs, and Minnesota Statistical Analysis Center, (September 2007). *Human trafficking in Minnesota: A report to the Minnesota Legislature.* Saint Paul: Minnesota Statistical Analysis Center.

[88] Minnesota Department of Public Safety, Minnesota Office of Justice Programs, and Minnesota Statistical Analysis Center, (September 2008). *Human trafficking in Minnesota: A report to the Minnesota Legislature.* Saint Paul: Minnesota Statistical Analysis Center.

[89] *Ibid*.

[90] Minnesota Department of Public Safety, Minnesota Office of Justice Programs, and Minnesota Statistical Analysis Center, (September 2007). *Human trafficking in Minnesota: A report to the Minnesota Legislature.* Saint Paul: Minnesota Statistical Analysis Center.

prostitution or loitering with intent to commit prostitution. Though the number of Native women was small, their representation in prostitution arrests was almost double their representation in the county population. Hennepin County has recently switched to a new data system, so county trends in prostitution arrests of Native women cannot be determined.[91]

The Minneapolis Police Department was able to provide its number of arrests of American Indian women from 2004 to 2008 (see Figure 4). According to a Minneapolis police officer, the significant decline in arrests seen in these data does not reflect a decline in prostitution-related activities, but rather the low priority given to addressing prostitution when there has been no public outcry.[92]

4. Arrests for prostitution-related offenses in Minneapolis, American Indian females 2004 - 2008[93]

American Indian females	2004	2005	2006	2007	2008
Prostitution	83	57	70	53	9
Loitering with intent to commit prostitution	28	11	24	28	3
Promoting prostitution	1	3	2	3	-
Total, all prostitution-related offenses	112	71	96	84	12

A Minneapolis police officer and a Hennepin County Corrections staff member reported that by County policy, adolescents involved in prostitution-related crime are no longer arrested for prostitution, but may be arrested for a status offense such as truancy or runaway.[94,95] No data were available from Hennepin County or the Department of Justice on the number of American Indian juvenile females apprehended for each type of status offense.[96]

A recent study based on analysis of Hennepin County Corrections data found 70 women on probation for prostitution-related offenses in Hennepin County. Almost one-fourth (24%) were American Indian, while American Indian women represent only 2.2 percent of the county's population. Of the 17 Native women in the sample, 10 (59%) were arrested in the 3rd Precinct, which encompasses the Phillips neighborhood in which the Minnesota Indian Women's Resource is located. Five (29%) were arrested in the 5th Precinct, which is adjacent to the 3rd Precinct and borders the Phillips neighborhood. Over half of the Native women in the study lived in the same two precincts: seven lived in the 3rd Precinct and four lived in the 5th precinct.[97]

[91] Telephone conversation with Hennepin County Corrections data analyst, March 23, 2009.

[92] Meeting December 31, 2008.

[93] Data faxed to MIWRC by the Minneapolis Police Department on December 19, 2008.

[94] Meeting December 31, 2008.

[95] Telephone conversation, March 23, 2009.

[96] Meeting with Lauren Martin, co-author of a report based on Hennepin County Corrections data, April 10, 2009.

[97] Martin L and Rud J, (October 2007). *Prostitution research report: Data sharing to establish best practices for women in prostitution.* Minneapolis: Prostitution Project, Hennepin County Corrections and the Folwell Center.

Racial miscoding in police incident data is a problem that inhibits accurate counts of prostituted American Indian women. It occurs frequently because individual officers identify the race of offenders and victims in their reports, with the result that the same person may have different racial designations in various reports. It is also difficult in many instances to determine whether the subject of the report is a victim or an offender, and even more so when it is a juvenile involved in prostitution. In 1988, the U.S. Department of Justice began replacing its long-established Uniform Crime Reporting (UCR) system with a more comprehensive National Incident-Based Reporting System (NIBRS). Child sexual abuse experts David Finkelhor and Richard Ormrod have described the NIBRS as the only available source of geographically diverse and uniformly collected crime data that:

- Provides detailed descriptions of police-involved incidents of the commercial sexual exploitation of minors
- Includes a description of both the offender and the victim in sex-related crimes.

NIBRS data are collected, compiled, and entered by local law enforcement, but data coding continues to be problematic. Finkelhor and Ormond note that police are not provided coding guidelines for distinguishing between victims and offenders or for coding the race of a victim or an offender in the data they enter into the NIBRS. The researchers describe NIBRS data as even more limited for identifying the prevalence of minors used in pornography, because the number of jurisdictions participating in the NIBRS is still quite small.[98] In 2005, Minnesota received Bureau of Justice funding for Minneapolis and St. Paul Police Departments begin preparations for NIBRS participation, but that process does not appear to have moved beyond the planning phase at this point in time.[99]

In the absence of data-based estimates of the number of women and girls in prostitution, estimates by organizations working with prostituted women and youth are generally considered the most reliable. Based on client intake interviews at Breaking Free, a non-profit organization serving women and girls in prostitution, Executive Director Vednita Carter has estimated that between 8,000 to 12,000 Minnesota women and children of all races are involved in prostitution on any given night, statewide.[100,101] PRIDE (from Prostitution to Independence, Dignity and Equality), a program of the Family and Children Service of Minneapolis, estimates that there are at least 1,000 juveniles currently in prostitution in Minnesota. Neither of these organizations has published any estimate of the number of American Indian women and girls in prostitution.

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[98] Finkelhor D and Ormrod R, (December 2004). Child pornography: Patterns from NIBRS. *Juvenile Justice Bulletin*. Washington DC: Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice.

[99] Bureau of Justice Statistics, (undated). *Justice statistics improvement program: NIBRS implementation program—NIBRS grant activity*. Retrieved August 19, 2009 from http://www.ojp.usdoj.gov/bjs/nibrs2.htm

[100] Carter V, (2004). Providing services to African-American prostituted women, in Farley M (Ed.), *Prostitution, trafficking, and traumatic stress.* New York: Taylor and Francis, Inc.

[101] Carter V, (2000). Breaking free, in Hughes D (Ed.), *Making the harm visible: Global sexual exploitation of women and children.* The Coalition Against Trafficking in Women.

In contrast to the relative absence of prevalence data in the U.S., there have been a number of Canadian studies of Aboriginal women's and girls' involvement in prostitution and other forms of commercial sexual exploitation. In all that were identified for inclusion in this report, the Aboriginal proportion of prostituted women and youth was hugely disproportionate to their representation in the population (see Figure 5).

5. Aboriginal representation in Canadian studies with prostituted women

Year of study	Region	Native % of population	% found to be Aboriginal
2002	Vancouver BC [102]	1.7-7.0%	52%
2001	Victoria BC [103]	2.0%	15%
2001	Canada [104]	2 to 3%	14-60%
2001	Vancouver BC[105]	1.7-7.0%	63%

In Vancouver BC, the Women's Information Safe Haven (WISH) Drop-In Centre Society, which serves about 200 women engaged in prostitution and/or survival sex every night, reports that Native women make up half of all women that come through its doors. [106] In research with 22 communities across Canada, Aboriginal children were found to represent up to 90 percent of children in the sex trade in some communities. [107] The Manitoba Youth and Child Secretariat reported more than two thousand commercially sexually exploited youth, noting that a large number of this group are Aboriginal.[108] More recently, youth crime expert Michael Chettleburgh estimated that 90 percent of all urban Canadian teenagers in prostitution are Aboriginal.[109]

[102] Farley M and Lynne J, (2005). Prostitution of indigenous women: Sex inequality and the colonization of Canada's Aboriginal women, *Fourth World Journal 6*(1): 21-29.

[103] Benoit C and Millar A, (2001). *Dispelling myths and understanding realities: Working conditions, health status, and exiting experiences of sex workers*. Victoria: Prostitutes Empowerment, Education, and Resource Society.

[104] Assistant Deputy Minister's Committee on Prostitution and Sexual Exploitation of Youth, (2001). *Sexual exploitation of youth in British Columbia.* Victoria: Ministry of Attorney General, Ministry for Children and Families, and Ministry of Health.

[105] Farley M and Lynn J, (2000). *Pilot study of 40 prostituted women and girls in Vancouver, Canada*. Unpublished manuscript cited in Farley and Lynne, 2002, Prostitution of indigenous women: Sex inequality and the colonization of Canada's Aboriginal women.

[106] Shannon K, Bright V, Allinott S, Alexson S, Gibson K, Tyndall M, and the Maka Project Partnership, (2007). Community-based HIV prevention research among substance-abusing in survival sex work: The Maka Project Partnership, *Harm Reduction Journal (4)* 20. Published online December 8, 2007. Retrieved March 4, 2009 from http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=2248179

[107] Kingsley C and Mark M, (2000). *Sacred lives: Canadian Aboriginal children and youth speak out about sexual exploitation*. Save the Children Canada, p. 41.

[108] Manitoba Youth and Child Secretariat, (1996). *Report of the Working Group on Juvenile Prostitution.* Winnipeg: Manitoba Child and Youth Secretariat.

[109] Cited in Cherry T, (November 13, 2008). Flesh trade targets natives, *Toronto Sun*. Retrieved March 20, 2009 from http://www.torontosun/news/canada/2008/09/29/6916776-sun.html

The McCreary Centre Society, a non-profit community-based youth health research and youth engagement organization in Vancouver, conducted a series of five surveys with sexually exploited street youth in British Columbia over a 6-year period. In the communities participating in the 2000 and 2006 surveys, the proportion of female Aboriginal street youth increased from 38 percent at the time of the first survey to 56 percent at the time of the second. In all five surveys, 34 to 57 percent of the street youth reporting commercial sexual exploitation self-identified as Aboriginal, and of those that were Native females, 24 to 56 percent reported having been commercial sexually exploited.[110] The 2006 survey involved 762 street-involved youth in BC, over half of whom were Aboriginal.

Involvement in the Internet sex trade

Data collected by MIWRC

Several of the advocates at the regional round tables described younger girls' use of technology and experiences with internet-based commercial sexual exploitation:

> *A lot of the [youth] drop-in centers now have computers…In St. Paul, they actually cleaned out their computers not too long ago, and they found quite a few of their youth that were uploading pictures off their phones onto the computers to post them onto Craigslist. [Twin Cities advocate].*
>
> *My Space too. That's what I see with a lot of young girls, and starting to get victimized by men getting them to show their body or their body parts. [Second speaker] Sexting. [Girls are doing] that sex texting stuff too, sending nude photos to people through their phones. [Twin Cities advocates]*

Advocates also identified Craigslist as a site used by Native girls in the sex trade, and noted pimps' use of the internet to recruit Native girls in the Twin Cities for the stripping and prostitution circuit in the northern part of the state during hunting and tourist seasons.

Information from other sources

In 1999, the Hofstede Committee Report on juvenile prostitution in Minnesota called attention to the ease with which johns could use the Internet to download naked images of commercially sexually exploited women, converse with their pimps, make appointments, and still retain anonymity. The Committee noted that law enforcement was challenged in two ways: determining the girls' ages, and distinguishing between legal escorts and prostituting women.[111]

Similar to what was reported by the advocates at the round tables, a Twin Cities law enforcement officer recently described a case in which he arrested a 49-year pimp from Woodbury for prostituting a 23-year old woman and her 15-year-old sister via the Craigslist website's "erotic

[110] Saewyc E, MacKay L, Anderson J, and Drozda C, (2008). *It's not what you think: Sexually exploited youth in British Columbia.* Vancouver: University of British Columbia School of Nursing. Report based on data from surveys conducted by the McCreary Centre Society, Vancouver BC. Retrieved May 1, 2009 from http://www.nursing.ubc.ca/PDFs/ItsNotWhatYouThink.pdf

[111] Hofstede Committee, (November 1999). *The Hofstede Committee report: Juvenile prostitution in Minnesota.* Saint Paul: Minnesota Attorney General's Office.

services" section. The pimp took some of their money, drove them to the hotel, and waited for them in the car while the women met the officer.[112] Another Minneapolis police officer with extensive experience working with prostitution crime and gang activity confirmed that in the Twin Cities, Craigslist is the primary venue for commercial sexual exploitation of Native adults and juveniles.[113]

A recent study of prostituted women and girls in Chicago found that eight percent were in contact with johns through the Internet, specifically Craigslist. The research team reported that at the time, Craigslist received more than 9 billion page views every month, and Craigslist users published more than 30 million new classified ads each month. Men were able to access live, interactive strip shows via web-cam in addition to the sex trade "resources" described 10 years ago by the Hofstede Committee, for most intents and purposes beyond the reach of law enforcement.[114]

IV. Patterns in entering the sex trade

Age of entry

Data collected by MIWRC

At the round tables hosted by MIWRC in Duluth and Minneapolis, advocates reported that the Native women and girls they work with have entered prostitution and other types of commercial sexual exploitation at two different life stages, each connected to specific life circumstances:

> *Everybody I've come across has been young [at the time they entered prostitution]. Like, 12, 13, 14 sometimes 15. I met one woman who was maybe 19, she was really the exception. There's definitely that 12-15 range. They seem like babies! [Duluth advocate]*
>
> *Several of the women have talked about when they started, and the youngest so far was 12. [Twin Cities advocate]*
>
> *I think the other age group are those [ages] 20 to 30 with young kids and their 5-year MFIP has run out. [Duluth advocate]*

Among the women and girls that reported commercial sexual exploitation during intake at the Minnesota Indian Women's Resource Center, 90 percent of the younger clients had entered prostitution before the age of 18, compared to about half of the older clients. Almost half of the younger women (42%) were 15 or younger when they first entered the sex trade. Three clients had entered prostitution between age 10 and 11, and one 14-year-old had been trafficked into pornography at the age of 11, reporting that she had been photographed or filmed for

[112] Chanen D, (March 20, 2009). Craigslist used to sell sex with teens, *Minneapolis Star Tribune.* Retrieved March 30, 2009 from http://www.startribune.com/local/41610897.html

[113] Meeting in Minneapolis, May 13, 2009.

[114] Raphael J and Ashley J, (May 2008). *Domestic sex trafficking of Chicago women and girls.* Chicago: Schiller, DuCanto and Fleck Family Law Center, DePaul University of Law.

pornography 10 times in the previous six months. Almost one-fourth (24%) of the incoming clients reporting involvement in prostitution had entered at age 27 or older, which supports the advocates' emphasis on Native mothers' vulnerability when their public assistance eligibility has ended.

6. Age at which MIWRC clients entered prostitution or pornography (n=32)*

Age at entry	Number	Percent
8-12	7	21%
13-15	7	21%
16-17	7	21%
18-23	5	15%
27-38	6	18%
39-55	1	6%

**Age of entry not reported for 5 clients. Percentages are based on the number for which age of entry was recorded.*

Information from other sources

The 1999 Hofstede Report on juvenile sex trafficking in Minnesota reported that 14 was the average age of entry into prostitution at the time.[115] Other studies of youth and adults in prostitution in the U.S. have reported the average age of entry ranging from 13 to 17, most often about age 14.[116] Several studies conducted in Seattle, an area similar to Minneapolis in its population of low-income American Indians, found that almost all commercially sexually exploited girls enter the sex trade before the age of 16. One involving 60 women prostituted via escort services, street prostitution, strip clubs, phone sex, and massage parlors found that all had entered prostitution between the ages of 12 and 14.[117] A second, involving 200 adult women in prostitution, found that 78 percent began as juveniles and 68 percent entered prostitution when they were 15 or younger.[118] A third study found that 89 percent of the prostituted women that were interviewed had entered prostitution before the age of 16.[119] A fourth study published in June 2008 reported that girls were entering prostitution in Seattle around the age of 12 or 13.[120]

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[115] Hofstede Committee, (November 1999). *The Hofstede Committee report: Juvenile prostitution in Minnesota.* Saint Paul: Minnesota Attorney General's Office.

[116] National Center for Missing and Exploited Children, (November 2002). *Female juvenile prostitution: Problem and response.* Washington DC: Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice.

[117] Boyer D, Chapman L, and Marshall B, (1993). *Survival sex in King County: Helping women out.* Report to the King County Women's Advisory Board. Seattle: Northwest Resource Associates.

[118] Silbert M and Pines A, (1982). Entrance into prostitution, *Youth and Society 13*: 471-500.

[119] Nadon S, Koverola C, and Schludermann E, (1998). Antecedents to prostitution: Childhood victimization, *Journal of Interpersonal Violence 13*: 206-221.

[120] Lowman J and Fraser L, (1989). *Street prostitution: Assessing the impact of the law.* Vancouver BC: Department of Supply and Services Canada.

Most advocacy groups working with women in prostitution in the U.S. agree with what has been found in the research studies. Vednita Carter of Breaking Free in Saint Paul has reported that the average age of entry into prostitution has been 13, but recently announced that her organization is seeing a larger number of younger girls.[121] However, no U.S. studies have reported average age of entry for American Indian girls.

Though none reported separate averages by gender, several Canadian studies from the 1990s reported the average age of Aboriginal youth entering the sex trade as 14, but noted that some start as early as age 9.[122,123,124,125, 126] More recent Canadian research suggests that Aboriginal youth are becoming victims of commercial sexual exploitation at younger ages than before. In a series of surveys with street-involved youth in British Columbia, about one in three victims of commercial sexual exploitation reported their age of entry as 13 or younger.[127] Citizen groups involved in safety patrols in Winnipeg have reported children as young as eight years old being approached on the street or in back lanes by men in vehicles, presumably for the purpose of sexual exploitation.[128] A 2002 study by the Urban Native Youth Association in Vancouver found commercial sexual exploitation of children as young as 9, with age of first being trafficked into prostitution averaging 11 to 12 years of age.[129]

[121] Carter V, (March 13, 2008). *Press release: Local responses to prostitution*. Retrieved May 1, 2009 from http://www.health.state.mn.us/injury/new/svpnews.cfm?gcNews=109

[122] Bramly L, Tubman M and Rapporteurs S, (1998). *International summit of sexually exploited youth: Final report.* Out From the shadows: The sexually exploited youth project. Vancouver: Save the Children Canada.

[123] Calgary Police Commission, (1997). *Children involved in prostitution: Report by The Task Force on Children in Prostitution*. Calgary: Calgary Police Commission.

[124] Jesson J, (1993). Understanding adolescent female prostitution: A literature review. *British Journal of Social Work 23*: 517-530.

[125] Manitoba Youth and Child Secretariat, (1996). *Report of the Working Group on Juvenile Prostitution.* Winnipeg: Manitoba Child and Youth Secretariat.

[126] McIntyre S, (1994). *The youngest profession: The oldest oppression.* PhD Thesis, University of Sheffield: Department of Law.

[127] Saewyc E, MacKay L, Anderson J, and Drozda C, (2008). *It's not what you think: Sexually exploited youth in British Columbia.* Vancouver: University of British Columbia School of Nursing. Report based on data from surveys conducted by the McCreary Centre Society, Vancouver BC. Retrieved May 1, 2009 from http://www.nursing.ubc.ca/PDFs/ItsNotWhatYouThink.pdf

[128] Gorkoff K and Runner J (Eds.), (2003). *Being heard: The experiences of young women in prostitution*. Halifax: Fernwood.

[129] Urban Native Youth Association, (2002). *Full Circle.* Vancouver: Urban Native Youth Association.

Modes of entry

Stripping, exotic dancing, and escort services

Data collected by MIWRC

At the round tables hosted by MIWRC, advocates often described girls entering the sex trade by stripping or nude dancing and then progressing to other types of commercial sexual exploitation:

> *Sometimes [Native girls] are on their own. Some other girls say 'Hey, I'm making good money doing this stripping,' and off they go. But then they end up with the drug thing [being prostituted for drugs]. [Second speaker] And they're letting underage girls into stripping. They [pimps] helping them get their fake IDs and stuff. There are 16, 15-year-olds stripping in town here. [Duluth advocate]*
>
> *…high school to early 20s with the dancing, they go out on the dancing circuit. And just being trafficked, maybe before, to Chicago, places like that. And then as they get farther along in their 20s and their 30s, then it's the trading, the sex for the drugs or the housing, a place to stay. [Twin Cities advocate]*

The advocates reported that most of the younger Native women and girls they worked with did not consider stripping or nude dancing to be sexual exploitation, instead viewing it as a somewhat glamorous way to make good money quickly. These are some examples of advocates' comments:

> *[One of the girls in my family], she asked her father 'What do you think about stripping?' because her friends are doing it and it's just becoming more and more common. [Twin Cities advocate]*
>
> *Deer hunting season. Big stripping time. And they're set-up joints. Like every little small bar has strip nights then and that's part of that circuit. I worked with someone for a long time who considered herself to be an independent contractor [in prostitution]. During hunting time, it was her big season in terms of making money and she would just go from one little bar to another in South Dakota, that was the main place. [Duluth advocate]*

The advocates described bars and strip clubs as prime recruiting grounds for pimps, asserting that bar and club owners are often complicit. At both round tables, advocates mentioned a "circuit" traveling throughout the state and sometimes to other states, for which young Native women are recruited to dance. Once they begin, they are quickly taken over by a pimp who moves them from place to place, prostituting them out of the bars and clubs in the circuit. These comments were part of those discussions:

> *[Traffickers] can have their own bachelor party-type setting, where they have it all set up and have the girls just coming in. Some pimp, male or female, has put this all together and provided everything, and just told her 'All you have to do is dance.' When you talk about entering prostitution, dancing doesn't seem as harsh to the individual as actually street-walking. You don't look at it as if you're doing anything wrong, because you go to clubs and nowadays the dancers in clubs are more seductive than some of the stuff the girls do on the stage. [Twin Cities advocate]*

> *You can walk into any strip club and you know, the people who work there are recruiters, so it seems so much less dangerous. I don't think other people think of it as sexual exploitation…A lot of Native girls work at [a local strip club]. [Second speaker] Yeah, [that club] is what I'm hearing about, too. There's a couple of pimps up at [that club] right now who've got a couple of girls…I know a few people who started off cocktail waitressing at a strip club and then it becomes normalized and then they're stripping. I had a friend who was cocktail waitressing and then she got a $4,000 tip from a football player, and then after that she was stripping. [Twin Cities advocates]*
>
> *They make their money on the side by the sex that they have with the customers. They don't make that much dancing, it's mostly the side thing. And then, there's drug involvement with it, too. But I've heard about where they go from here and there's a regular circuit where they go, like over to Wisconsin…This circuit that they travel, it just keeps going and going…and often times they are connected with [someone who] might be a gang connection that gets him out working and sends him out there. [Duluth advocate]*
>
> *Where you have some person that's controlling it and the money's going to go to them, the girls are prostituting. They actually make the money, the people who own the bars, the people that bring them there. But the ones that are going on the stripping circuit on their own, they leave with the clothes on their backs, with 20 bucks maybe. [Duluth advocate]*

One of the Duluth advocates noted that Native women in prostitution often decide to go back to stripping as a less risky option:

> *There's girls out there that are turning tricks that are saying, 'I'm going to go legal, so I'm going to go dance.' [Duluth advocate]*

Several advocates at both round tables reported pimps moving Native girls to cities from reservations, and to and from cities throughout the Midwest for prostitution. These are some of their comments:

> *There's a new thing out of track houses where girls are being trafficked and they're brought from other states down to houses here because of the 'no turn off' heat rule that we have. Guys are coming and purchasing these houses that are in foreclosure, they are renting them for a few months, 6 months or whatever and they're bringing girls here and putting them in these houses and that's where they stay. They don't go anywhere, they stay in these houses and the girls are ranging from 12 to 21, but they're being transported here and they're being moved all through MN. Some are from Chicago…They're coming from Iowa, Detroit. New York. [Twin Cities advocate]*
>
> *I also know of girls from out towards Bemidji, Red Lake, that way, that come this way that are brought down there to be prostituted on the boats. I don't know specifics about that, but they talk about it. [Duluth advocate]*

Information from other sources

Each year, 40 new strip clubs open nationwide. Many are described as "gentlemen's clubs," catering to businessmen who may spend up to $2000 a night on drinks, food, and "private dances" where patrons have physical contact with the dancer. One study found a disproportionate number of strip clubs in rural areas of the Upper Midwest where poverty and isolation had created a pool of women vulnerable for recruitment into the sex trade. For example, in 2003, Aberdeen, South Dakota had five strip bars despite a small population (25,000) and a

location 100 miles from any town of comparable size. Dancers in these bars and clubs reported that they were not only expected to work as strippers, but they are also required to accept degrading treatment, provide the club manager with sex during the "job interview," and allow the manager to prostitute them to customers.[130] The study author quoted a survivor of prostitution and stripping, Heidi Somerset, who was giving a talk in Moorhead:

> *One woman had her pimp along…and she had to meet the quota. So she had to do whatever it takes to get that money. The men shoved bullets up her, beer bottles, shoved dollar bills up her, and this was the situation that I encountered.*[131]

Though none reported findings by race, several studies in the U.S. have found that women and girls in prostitution are frequently involved in different types of commercial sexual exploitation at different times, including pornography, stripping and exotic dancing, escort services, and erotic massage services. Research with prostituted girls in Chicago found that 28 percent had started as escorts when first recruited, and at the time of the interview, 41 percent were currently working for an escort service. Almost 93 percent of the girls that had entered the sex trade via an escort service had a pimp at recruitment, and in addition to working in escort businesses, 43 percent were also trading sex at private parties and 68 percent were also trading sex at a hotel.[132]

Canadian researchers have found a similar pattern to that described by the advocates at round table discussions. Aboriginal girls are recruited as dancers in their early teens and then moved across Canadian provinces for "dance shows," where they are quickly routed into prostitution. Eventually losing ties with their communities, they become even more vulnerable as they age, and often moved into the more dangerous areas of the sex trade.[133]

Research in Canada found that the sex trade has no distinct "career ladder." One study found Aboriginal and other women in prostitution involved in a variety of types of commercial sexual exploitation, including pornography, street prostitution, strip bars, and escort agencies. Among those in escort services, 15 percent were Aboriginal though they represented only two percent of the region's population. Frequently, participants reported involvement in two types of commercial sexual exploitation at the same time.[134] One Canadian study with a sample of Vancouver women actively engaged in prostitution or recently exited, over half of whom were Aboriginal, found that two-thirds had pornography made of them while also engaged in

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[130] Short S, (2004). Making hay while the sun shines: The dynamics of rural strip clubs in the American Upper Midwest, and the community response, in Stark C and Whisnant R, (Eds.), *Not for sale: Feminists resisting prostitution and pornography*.

[131] *Ibid*.

[132] Raphael J and Ashley J, (May 2008). *Domestic sex trafficking of Chicago women and girls.* Chicago: Schiller, DuCanto and Fleck Family Law Center, DePaul University of Law.

[133] Sethi A, (2007). Domestic sex trafficking of Aboriginal girls in Canada: Issues and implications, *First Peoples Child and Family Review 3*: 57-71.

[134] Benoit C and Millar A, (October 2001). *Dispelling myths and understanding realities: Working conditions, health status, and exiting experiences of sex workers (short report)*. Victoria BC: Prostitutes Empowerment, Education, and Resource Society (PEERS).

prostitution, while 64 percent reported being upset by a john's efforts to force them to perform an act that the john had seen in pornography.[135]

Recruited or trafficked by pimps, boyfriends, and gangs

Data collected by MIWRC

In the two round table discussions, advocates reported that many of the Native women and girls they worked with were recruited by pimps, and almost always referred to their pimps as their "boyfriends" or "girlfriends." The advocates discussed a number of strategies used by pimps to recruit and groom Native women and girls for prostitution:

> *They're just these really beautiful girls and those men will sit there and stroke that. Like, 'You're so beautiful,' and then just start to turn them into objects. Talking about their body like 'Oh, this is so nice about your body', or 'Your body is so much better,' and the pimp starts to separate them from the other girls. It is like, 'You're so special.' I think that's part of that breakdown, with starting to break down other people. It is so intentional. We have young men who go into this [pimping] knowing…how to like, break a girl down, because they know that they can make a lot of money off of that. [Duluth advocate]*
>
> *[The pimp tells her] 'I want to take care of you.' Boyfriend or girlfriend, 'I'll take care of you.' With runaways, it's a place to sleep. [Second speaker] Yeah, so they're already doing survival sex kind of stuff. But it's like, [the pimp says] 'Don't worry, you won't need to go out on the street anymore. You won't need to do this. You can just stay here.' And then pretty soon it's like, 'You know, you have to start contributing. I'm not going to financially cover you. So, here, I can get you set up doing this. You're so hot, you're so good looking, you should go strip.' [Duluth advocate]*
>
> *First of all, he offered to chauffeur her [an adolescent client] around. He doesn't come across as saying, you know, 'Let's do this, and you're gonna get paid for any kind of sex act.' It's like, 'I've got this big car and you can drive me from place to place and get paid that way.' And, it's just like all these things lead up to other things. [Twin Cities advocate]*

Advocates in the Twin Cities and in Duluth described pimps, especially those affiliated with gangs, recruiting Native girls at parties deliberately set up for recruitment purposes. Others described boyfriends targeting girls who have access to money and moving them into prostitution when the money is gone. These are some of their comments:

> *So they're fourteen and they want something better and they're running around searching and they don't know where to find it they don't know where it is. So they come to Duluth, they go to the party, or they meet the guy down at the Holiday center, and he says 'Hey, why don't you come hang out with us?' The girls are just looking for anything. So part of that is, pimps and some of the tricks too, is that 'Well, you came looking for me, I didn't come looking for you, you came looking for me, you wanted this. You came here.' But they're deliberately exploiting the girls. [Duluth advocate]*

[135] Farley M and Lynne J, (2005). Prostitution of indigenous women: Sex inequality and the colonization of Canada's Aboriginal women, *Fourth World Journal 6*(1): 21-29.

> *The older guys will look for the younger girls at parties and so that's where I've seen some of the women get recruited. And then what happens is they'll start like dating or seeing the pimp and then so they engage that way. And then they'll take 'em, like 'Let's go down to the cities for a trip.' And then they'll be brought down to the cities, and then it'll be 'Lets go down to Morton' and they'll get further and further away, until they end up in Illinois or Iowa, and then they're stuck. [Twin Cities advocate]*
>
> *One other thing too, some girls get targeted for when they're gonna turn 18 and they're gonna get their per capita payment, and guys will talk about 'That's the way to come up' because they'll take the girl's money. But that also starts that pattern of using them, and then using them and using them. [Duluth advocate]*

Some advocates described Native women with children whose landlords had forced them or their children into prostitution by threatening the family's ability to stay in safe housing. These are some of the advocates' stories:

> *This young lady was in this unit with her kids, and she was supposed to pay a certain amount of rent. And MFIP [welfare] wanted her to verify that through a shelter statement. The landlord refused to write the shelter statement, so then she got sanctioned. So then she didn't have enough money to pay her rent. Then she was offered to do some prostitution. [Twin Cities advocate]*
>
> *The landlord piece is not uncommon, not uncommon at all. Landlords put the woman in a situation where they actually end up owing rent or they know they're getting rates half off of rent, or some landlords even up the rent. It was in the woman's range at first and now she fell on hard times, she lost a job, she still owes rent and the landlord will go ahead and proposition them in that manner, swap or trade. And if not for the mother, then for the daughters. And the fact that the mom says, 'We need a place to live.' You know, 'You just gotta go in there, he's not going to do anything to you, just go, you don't wanna be out on the streets.' And the kid feels, you know, 'I owe this to our family', the loyalty piece, so you do it. And once it's done once, that's all it takes. [Twin Cities advocate]*

In both Duluth and Minneapolis, advocates described the pimps they knew to be recruiting Native girls as primarily African-American or Latino, and reported that the number of pimps in the area seemed to vary at different times. These are some of the advocates' descriptions:

> *Some of the girls I work with were approached right on the street, right in Phillips. They were talking about how they were approached on the street, they were offered money over there by 26th and Cedar. That's a hot spot and I don't know what's going on over there, but they're very young girls. They're usually walking around late at night so obviously they're not being supervised. These are girls that are vulnerable and out there. They're 12, 13, 14. It was Latino men that approached them. [Twin Cities advocate]*
>
> *Most of the pimps I've run into, they're not Native…And they were not from here, they came here and more of them were African-American. And there was this one period of time where there's like four of them in a row, and then I don't hear anything, don't see anything. It kinda goes in waves like that. [Duluth advocate]*

Several of the advocates described Native women and girls being sent out by pimps to recruit, especially in shelters and youth centers where vulnerable Native women and girls go to be safe. These are some of the ways that pimp-controlled Native women and girls convince others to join them in prostitution:

> *I see [young girls thinking the sex trade is glamorous] as a new trend for the ones that I am working with. [Second speaker] They're all into that glamorized type of talk amongst one another. [First speaker] And I see more of the stuff that comes through Duluth as being more glamorized. And the girls recruiting other girls because then they won't have to do so much work and that's what they're expected to do. Then, the girls fight amongst each other over this guy! [Duluth advocates]*
>
> *They [pimps] are working them right out of the shelter…there are women that will pose [as battered women] to get in the shelter and bring women out…And that homeless youth drop-in center, that is a target place and it has been a target place ever since it's been open, and it continues. And advocates are always trying to figure out, you know, you want kids coming in for services, how you keep them safe. [Duluth advocate]*

The Duluth advocates also described pimps and Native women and girls already in prostitution using violence to coerce younger women and girls into the sex trade. These are some of those stories:

> *I encountered this woman this summer. She was older, 18, 19…a couple of girls had talked her into it. Kind of bribed her. Not bribed, but the same thing, like the description of 'Look at this, look at what I have, you should come up here it could be yours too.' And then…when she got up here, she realized she didn't want to do this and she thought she could walk away, but she couldn't. Those girls actually beat the crap out of her, so she ended up in the hospital. Somebody, not her, called the cops, but she was a mess and they beat the hell out of her. And the guy [pimp] had never had anything to do with it. [Second speaker] He didn't have to…They're handling it. [Duluth advocates]*
>
> *I'm working with someone who's been trafficked out by her family for a very long time. She's probably 17 now or 18. Another girl we work with just reported a sexual assault against this girl, and our understanding of the intention was someone was trying to recruit her for prostitution, as a part of her ring. And then that person sexually assaulted the girl, pretty brutally. Skin chunks out of her and things like that. That was woman on woman. The unfortunate part of that was that when this girl tried to report, a lot of people told her female on female wasn't sexual assault, so it took her a long time to find any help. [Duluth advocate]*

Advocates reported significant involvement of Native gangs and Native branches of other street gangs in prostituting Native girls. Either the girl's boyfriend was a gang member, or female gang members used violence to coerce Native girls into prostitution. Two gangs were mentioned most frequently, Native Mob and Gangster Disciples, though some advocates also mentioned Mexican or Latino gangs without specifying the name of the gang. These are some of the advocates' stories about gang involvement in recruiting Native girls for prostitution:

> *There's times when it's more organized than at other times…what will happen is that the gangs come in and it gets real organized. And then, instead of seeing those women on the street, they're in a hotel room somewhere and people are coming to their hotel room, one right after another…after a period of time they make their money and they leave. [When asked what gang] Gangster Disciples, from Chicago. [Duluth advocate]*

> *This guy [from one of the wealthy tribes] is buying gifts, buying a car for her. For one thing, he couldn't get a car because he had no license and no credit or nothing. She could buy the car with his money and then he could take it back at any time, and then all the clothing because then she would look good and of course the love connection…then there's the domestic abuse, and the addiction part. And, so, in order to get the drugs and the money she has to be doing what he wants. Otherwise, she'll get beat up. And there's also a gang connection involved in this, Native Mob. That other gang members will beat her up. Or other women that are connected with the other gang members and doing the same kind of thing will beat her up. [Duluth advocate]*
>
> *We sometimes see younger girls, in the 12-13 age range, especially the girls that are involved with Mexican gangs that are being sexually exploited. I'm thinking of one in particular. She has not said that, but they [staff] see her continuously being dropped off by different older gang members to school every day. [Twin Cities advocate]*

When screening incoming clients for commercial sexual exploitation, MIWRC staff asked all that met the state definition of a trafficking victim about factors that might put them at risk of re-involvement in commercial sexual exploitation. Eighty percent of the younger women reported that they were at risk of further commercial sexual exploitation due to fear of violence against themselves or others; one of these had specifically said that she had been trafficked into prostitution by a gang.

Information from other sources

Similar to the grooming process that advocates described at the MIWRC round tables, a 2005 study of prostituted girls in Atlanta described pimps' grooming strategies as two-stage. Initially, the pimp makes the girl feel attractive and valued, developing a sexual relationship with her, spending money on her, introducing drugs, and providing focused attention and validation that she is "special." The second phase involves moving the girl around to eliminate her relationships with family and others, then breaking her will and self-esteem through physical and verbal abuse. The researchers found that this process results in the girl forming a deep attachment to her pimp and having no option to refuse when he demands that she begin prostituting.[136]

Also similar to what advocates described at the round tables, research with adolescent girls in corrections placement for prostitution found that girls had been approached by pimps and recruiters in many locations: while walking, hanging out with friends on the street or at malls and corner stores, at friends' homes, and even outside the juvenile justice center while waiting to meet with a probation officer. The study found that two major recruitment methods were used: "finesse pimping" and "guerilla pimping." "Finesse pimping" involved the same grooming process described by the advocates at round tables and found in the Atlanta study cited above: putting vulnerable girls in a position where they felt obligated to repay the trafficker by encouraging her to move in, taking care of her basic needs, purchasing small gifts, providing free drugs, and generally treating her with great kindness. The next step was to present her with "opportunities" for a lucrative "modeling" career working for an escort service, which she later

[136] Priebe A and Suhr C, (September 2005). *Hidden in plain view: the commercial sexual exploitation of girls in Atlanta*. Atlanta: Atlanta Women's Agenda.

found was prostitution and a source of income for the pimp. By then, her drug habit and her emotional dependency on the pimp made it very difficult to refuse. "Guerilla pimping," similar to advocates' descriptions of violent gang and prostitution ring tactics during round table discussions, was recruitment by force: using threat, physical violence, and intimidation against the girl or against someone she cared about to coerce her into prostitution. Reflecting the stories told by advocates at the MIWRC round tables, the Atlanta study found that women played multiple roles: pimps, recruiters, groomers, watchers who made sure girls got to and from their assigned locations, and wife-in-laws (other women trafficked by the same pimp) living together and supervised by the pimp or the woman closest to him.[137]

Studies of gang activity in the U.S. also support the advocates' stories of Native girls trafficked into prostitution by gangs. In 2001, research on the commercial sexual exploitation of children in the U.S., Canada, and Mexico found significant gang involvement. The authors reported that girls in Native gangs were expected to be emotionally supportive of male members, including providing sex on demand.[138] A second gang study found that American Indian and African-American gangs involve their girl members in prostitution more frequently than Latino and other gangs, framing it as the girls' fair contribution to the gang's economy.[139]

Other research in Minnesota and the U.S. has found that Native female gang members participate in the guerilla recruitment of younger Native girls for prostitution, similar to the advocates' reports at round tables. In one study from 1995 to 1998, 100 current and former gang members were interviewed. Fourteen interviews were with Native youth members of four different gangs: Latin Kings (a female from St. Paul, two males and one female from Mille Lacs reservation, and a male from Hayward, Wisconsin); Vice Lords (two females from Mille Lacs reservation, one male from Duluth, and one male from Minneapolis); Gangster Disciples (a female from Red Lake reservation, a female from Minneapolis, and a male from Morton); and Native Mob (two males, one from Mille Lacs reservation and one from Minneapolis). The Native girls all reported that most girls involved with the gangs provided male members with sex on demand and/or were trafficked for drugs and money. A female Gangster Disciple from Red Lake described women's roles and status in her gang:

[137] Williamson C and Prior M, (January 2009). Domestic minor sex trafficking: A network of underground players in the Midwest, *Journal of Child and Adolescent Trauma 2*(1): 46-61.

[138] Estes R and Weiner N, (2001). *The commercial sexual exploitation of children in the U.S., Canada, and Mexico: Full report of the U.S. national study.* Philadelphia: Center for the Study of Youth Policy, University of Pennsylvania School of Social Work.

[139] Harris M (1994). Cholas: Mexican-American girls and gangs, *Sex Roles: A Journal of Research 330*(3-4):289-301.

> *I got beat-in six times, stopped one minute each time, got beat-in again…I took six minutes, because…If I don't have respect they can treat me like shit…But, if I had respect I would be able to violate people if they were like throwing up signs that they weren't supposed to throw up or else wearing the wrong color. I'd feel more better and then I would have control over most a the people who did not have respect. And, that would just make it easier on me…Once in a while the girls just go chill by themselves…But, if [my homie's] boyfriend [wants to] come with her, he'll come. She has no say in it. See, her boyfriend is our superior and even though we're not supposed to be like dating other people in the gang, he can just pass her on, pass her on to another gang member. When they pass her on, she just goes lower and lower.*[140]

A Native male Latin King member described girls' initiation into his gang:

> *When you get a girlfriend, she gotta be gang raped. She's gotta go around and get boned by all of us guys. All of us Kings…We meet girls and stuff at pow-wows and they hang around with us and then they get the idea that we wanna go out with them, but we really don't. And then they just bring it up. 'Is it all right if we roll with you? Make us a Queen or something?' Then we're like, 'Yeah, we'll make you a Queen.' Then we'll take them back to our house…Everybody on the rez has got their cellular phones or their pagers. Then we'll each get a page and we'll go call somebody and say, 'Hey, there's gonna be an initiation'…You take them in your bedroom or on the couch. In the back or down in the basement. Wherever. Then whenever they're done, they'll come out. Then whoever is next, they'll take. She stays in the bedroom. She can't come out and then whoever got done with her will come back out and say 'Hey, whoever's next, go ahead."*[141]

A Minneapolis police officer with extensive knowledge of local gang activities confirmed that girls' status in Native gangs is very low, and regardless of the male member they "belong" to, none have a level of status that would protect them from being prostituted.

More recent U.S. studies suggest that gangs are playing an increasingly large role in the sex trafficking of American Indian girls and women. In 2006, *Minnesota Public Radio* described gangs as a big problem on Minnesota's American Indian reservations, reporting that authorities estimate hundreds of young Native men on White Earth, Red Lake, and Leech Lake reservations that consider themselves part of a gang.[142] Amnesty International reported that in interviews with sexual assault survivors on the Standing Rock Sioux Reservation, there were several reports of gang rapes. A June 2008 study of prostituted youth in Seattle noted a recent increase in gang activity in that area, also finding that 100 percent of the gang-affiliated youth in the study were being trafficked in street prostitution.[143,144]

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[140] Harrington J and Cavett K, (2000). *G is for Gangsta: Introductory assessment of gang activity and issues in Minnesota*. St. Paul: Hand in Hand.

[141] *Ibid*.

[142] Robertson T, (March 16, 2006). *The huge influence of gangs*. Minnesota Public Radio.

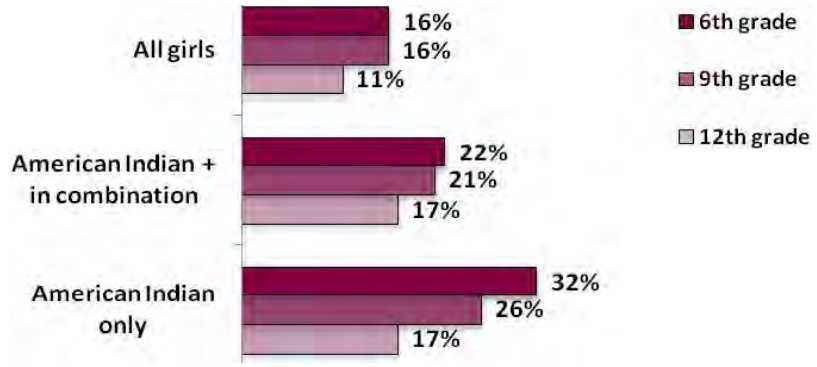
[143] Amnesty International, (2007). *Maze of injustice: The failure to protect indigenous women from sexual violence in the U.S.* London: Amnesty International.

[144] Boyer D, (June 2008). *Who pays the price? Assessment of youth involvement in prostitution in Seattle.* Seattle WA: City of Seattle Human Services Department, Domestic Violence and Sexual Assault Prevention Division.

In January 2009, the National Gang Intelligence Center reported that several American Indian gangs, particularly Native Mob, have expanded on and off reservations, beyond Indian Country. The report described Native Mob as one of the largest and most violent Native American gangs operating in the United States, currently most active in Minnesota, Michigan, Wisconsin, North Dakota, and South Dakota. The report noted that Native Mob and other urban and suburban gangs in Minnesota are expanding their drug distribution activities, sometimes working in conjunction with Mexican drug trafficking and criminal organizations.[145]

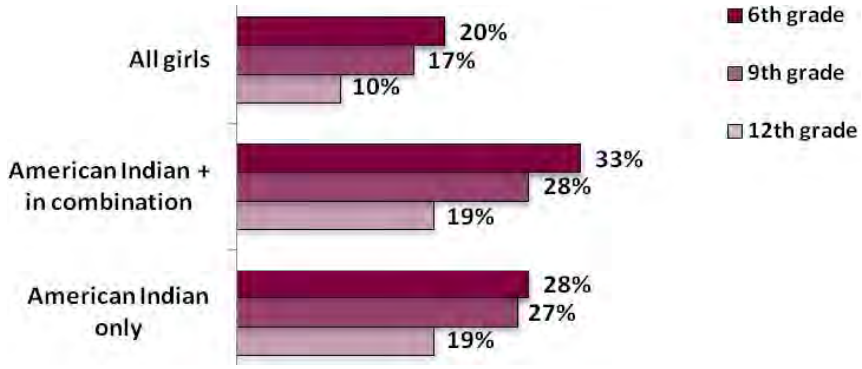
Findings from the 2007 Minnesota Student Survey strongly suggest that American Indian girls in Minnesota are more affected by gangs than girls in the general population (see Figure 7). A significantly larger percentage of Native girls also reported having been threatened at school than girls in the general population (see Figure 8). It cannot be determined whether some of these threats may be related to guerilla recruitment, but they clearly indicate a lack of safety at school.

7. Girls reporting "illegal gang activity is a problem at my school," statewide*



**2007 Minnesota Student Survey*

8. Girls reporting that they have been threatened at school during the past 12 months, statewide *



**2007 Minnesota Student Survey*

[145] National Gang Intelligence Center, (January 2009). *National gang threat assessment 2009.* Retrieved April 12, 2009 from http://www.usdoj.gov/ndic/pubs32/32146/index.htm

In Canada, there is significant evidence that pimps and their recruiters are targeting Native girls. In 2005, the principal of a Vancouver elementary school went before the City Council's Planning and Environment Committee to report that recruiters had repeatedly tried to come on school grounds to target Aboriginal girls ages 10 to 12, and to urge the Committee not to expand the park next to the school because the school would be unable to police it. While teachers had been able to deal with recruiters by issuing "no trespassing" orders when they entered school grounds, they would not have the same authority in a public park.[146] Similar school-based recruitment has been found in other Canadian cities with high concentrations of Aboriginal peoples, including Winnipeg.[147]

Similar to the advocates' stories, Canadian research has also found that it is common for prostituted Aboriginal girls to refer to their pimps as "boyfriends" and to refuse to consider themselves sexually exploited.[148] Canadian pimps also use force or manipulation to coerce Native girls into approaching friends and peers with tales of a better, more glamorous lifestyle, inviting Aboriginal girls to parties at "trick pads," providing them with drugs, and then trafficking them for prostitution.[149] Recently, drug dealers and gang members have largely taken over the role of the pimp, sometimes using the same grooming process that is seen in finesse pimping.[150]

The Native Women's Association of Canada (NWAC) recently identified four primary Native gangs in Canada: the Indian Posse, Redd Alerts, Warriors, and Native Syndicate. NWAC reported that Native girls were currently being "banged-in" by the four gangs, required to have sex with multiple members of the gang in order to become a member.[151] A 2001 study in Winnipeg, Manitoba found significant involvement of Native women and girls with gangs. Most "gang girls" were between the ages of 14 and 24, though the fastest-growing segment was under the age of 16. Key informants reported that 70 to 80 percent of the female street youth that they see are affiliated with a gang, and one reported that over 90 percent of male and female gang members are Aboriginal. The study found that female Native gang members frequently used guerilla pimping to recruit girls for prostitution to increase their own status in the gang.[152] This is

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[146] West J, (Summer 2005). Pimps and drug traffickers target First Nations school girls, *First Nations Drum.* Retrieved May 5, 2009 from http://www.firstnationsdrum.com/Sum2005/WomGirls.htm

[147] Sethi A, (2007). Domestic sex trafficking of Aboriginal girls in Canada: Issues and implications, *First Peoples Child and Family Review 3*: 57-71.

[148] Thrasher P, (2005). *Child sexual exploitation, Port Alberni, BC.* BC: Port Alberni's Women's Resources Society. Cited in Sethi A, (2007). Domestic sex trafficking of Aboriginal girls in Canada: Issues and implications, *First Peoples Child and Family Review 3*: 57-71.

[149] *Ibid*.

[150] Scheirich W, (April 2004). Manitoba's strategy: Responding to children and youth involved in sexual exploitation, *Envision: The Manitoba Journal of Child Welfare 3*(1). Retrieved March 19, 2009 from http://www.envisionjournal.com/application/Articles/59.pdf

[151] Native Women's Association of Canada (NWAC), (June 20-22, 2007). *Aboriginal women and gangs: An issue paper*, p. 2. Prepared for the National Aboriginal Women's Summit in Corner Brook, New London, Canada.

[152] Nimmo M, (2001). *The "invisible" gang members: A report on female gang association in Winnipeg*. Manitoba: Canadian Centre for Policy Alternatives.

how one key informant described guerilla recruitment of vulnerable Native girls by Aboriginal female gang members:

> *The latest one that I had contact with, she's twelve years old. She's a gang member now…She fought it, trying to stay away from [the gang]. She kept coming to me for about a month…Because of her friends, her family, the sort of lifestyle where she lived, it was all around her. And her friends kept saying, 'Oh, come on, come on. Join. You've got to be part of us'…And then she came one Sunday, and she pulled out her rag [gang bandana], and said, 'I'm a member. I was initiated over the weekend.' She was 'jumped in,' beat up, and she had to do something. I'm afraid she's going to have to do a lot more.*[153]

As this report was being completed, a flurry of news articles described rapid expansion of Native gangs in Canada. In late May 2009, the National Aboriginal Gang Commission held a conference, gathering testimonies to determine how to stem the tide of Native gangs in Canada. Some testimony described Native gangsters' growing involvement in drug trafficking and prostitution, branching out to other aspects of the sex trade by owning strip clubs and producing pornography. De Lano Gilkey, a gang expert from the U.S., warned that addressing younger Native youth's admiration of the gangster lifestyle is of critical importance, saying "These wanna-bes are the gonna-bes. They have something to prove."[154] NWAC and the Royal Commission on Aboriginal Peoples have both suggested that Aboriginal youth are attracted to gangs because they have suffered a loss of cultural ties and believe they will find an alternative "family" in a gang.[155,156]

Recruited or trafficked by family members and friends

Data collected by MIWRC

One advocate reported that of the three Native pimps she had encountered, two were Native mothers trafficking their children. The frequency of reports of Native adults prostituting their young female relatives and/or a mother's pimp recruiting her daughters was one of the most disturbing findings of the round table discussions. Advocates in both Minneapolis and Duluth described Native girls deciding to begin working for a pimp or on their own so they could have their own money after having been trafficked by a family member. For example:

> *There's a couple of families in town, I've heard about that, that they, grandma, moms, daughters—they're living through organizing [prostitution of Native girls to the ship crews] that way. [Duluth advocate]*

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[153] Nimmo M, (2001). *The "invisible" gang members: A report on female gang association in Winnipeg*. Manitoba: Canadian Centre for Policy Alternatives.

[154] Hanon A, (May 28, 2009). National Aboriginal Gang Commission is gathering testimonies to help stem the tide of Native gangs in Canada, *Edmonton Sun.* Retrieved May 28, 2009 from http://www.edmontonsun.com/news/columnists/andrew_hanon/2009/05/28/9595796-sun.html

[155] *Ibid*.

[156] Royal Commission on Aboriginal Peoples (RCAP), (1996). *Report of the Royal Commission on Aboriginal Peoples.* Ottawa: Minister of Supply and Services Canada.

> *Family traffics them first, and then if they run away, whoever they meet, that's their boyfriend, their pimp. [Duluth advocate]*
>
> *It was basically based on her mom trafficking her in the house room to room [at age 12], but her mom was doing it [prostituting] as well, so it was just family. They needed to pay rent and get what they need, food. [Twin Cities advocate]*

Advocates also reported that Native girls are being recruited for prostitution by their friends. For example:

> *We just talked to a young girl that walked into my office that was 14 years old, that was recruited when she was 12 by another 14 year old girl. Which is not as intimidating, when your girlfriend comes over and says, 'Hey, come see what I'm doing to make some money.' [Twin Cities advocate]*

The intake data collected by MIWRC over a 6-month period showed that, of the Native women and girls that reported having been trafficked into prostitution, most were recruited by one or more friends, followed by family members and boyfriends (see Figure 9).

9. MIWRC clients' recruitment into prostitution (those reporting prostitution that also named their recruiter), n=28)

Recruited by:	Number	Percent
Friend/friends	14	50%
Family member (mother, aunt, step-uncle, uncle)	5	18%
Boyfriend	5	18%
Pimp/gang/landlord	3	11%
Neighborhood/self	3	11%

** Some reported being recruited by two people acting together, so percentages add to more than 100%.*

Information from other sources

Though none have focused specifically on Native girls, some U.S. studies have reported family involvement in prostituting their children while others have not. In one large study of commercially sexually exploited youth in the U.S., Canada, and Mexico, molestation by family members was reported to be a common type of child sexual exploitation, but there was no mention of trafficking by family members.[157] In contrast, research with prostituted girls in Atlanta and Chicago found significant involvement of families in the sex trafficking of underage girls. The Atlanta study also found that while pimps' use of female recruiters was becoming increasingly common, these recruiters were frequently a girl's peers or family members, male and female. Sometimes they were siblings only slightly older than the girls being recruited.[158]

[157] Estes R, (2002). The silent emergency: The commercial sexual exploitation of children in the U.S., Canada and Mexico, in Michigan Family Impact Seminars, (2002), *Prostituted teens: More than a runaway problem.* Briefing Report No. 2002-2. East Lansing MI: Michigan State University and Wayne State University.

[158] Priebe A and Suhr C, (September 2005). *Hidden in plain view: the commercial sexual exploitation of girls in Atlanta*. Atlanta: Atlanta Women's Agenda.

The Chicago study found that ten percent of the prostituted women and girls in the sample had been recruited by a family member, most often a sister or a cousin.[159]

Only a few U.S. studies mention the role of friends in recruitment for prostitution. In the Chicago research described above, 19 percent of the prostituted girls that were interviewed reported having been recruited by a girlfriend.[160] A recent study in Ohio found that girls were usually recruited for prostitution by a friend or a friend of a friend who worked for a pimp, often someone they knew from their neighborhoods.[161] Other research has found that youth in conflict with their families often have friends and siblings already in prostitution. Wanting to demonstrate their autonomy, many become involved in prostitution as a form of sexual experimentation in which they can receive money for acts they find enjoyable.[162,163]

Similar to advocates' and MIWRC clients' reports, a Canadian study with 150 commercially sexually exploited Aboriginal youth found that they often had friends who had told them about the "easy money" and the potential to have some sense of control in their lives by entering the sex trade. This is how one Aboriginal girl described her own recruitment into prostitution by peers and a pimp "boyfriend":

> *My friends liked to take me along [when they were prostituting] and that's how it started for me. 'Look how easy it is, and you get this much money,' and then the boyfriend who says, 'Come on, I love you so much. Go out and make me some money…because if we don't have money, we can't spend time together.'*[164]

Research in Canada has also found family-based sex trafficking to be quite common in some Aboriginal communities.[165] In one study with 45 Native women in prostitution, ten (22%) were from families involved in prostitution: five had sisters in prostitution, four had mothers (one of whom also had a prostituted grandmother), two had pimp fathers, and one had a father who pimped out the research participant and her mother.[166]

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[159] Raphael J and Ashley J, (May 2008). *Domestic sex trafficking of Chicago women and girls.* Chicago: Schiller, DuCanto and Fleck Family Law Center, DePaul University of Law.

[160] *Ibid*.

[161] Williamson C and Prior M, (January 2009). Domestic minor sex trafficking: A network of underground players in the Midwest, *Journal of Child and Adolescent Trauma 2*(1): 46-61.

[162] Steinberg L, (2001). Adolescence, in Gale Group (Eds.), *Encyclopedia of childhood and adolescence.* Farmington Hills MI: The Gale Group.

[163] Peterson S, Nachtman C, and Roman J, (2002). What are the risk factors for becoming a prostituted teen?, in *Prostituted teens: More than a runaway problem. Briefing report No. 2002-2, Michigan Family Impact Seminars.* Michigan State University and Wayne State University.

[164] Kingsley C and Mark M, (2000). *Sacred lives: Canadian Aboriginal children and youth speak out about sexual exploitation*. Save the Children Canada

[165] Lynn J, (1998). *Colonialism and the sexual exploitation of Canada's Aboriginal women.* Paper presented at the American Psychological Association 106th Annual Convention, San Francisco, August 17, 1998.

[166] Tutty L and Nixon K, (2003). That was my prayer every night: Just to get home safe, in Gorkoff K and Runner J, (Eds.), *Being heard: The experience of young women in prostitution*, pp. 29-45. Halifax: Fernwood.

V. Factors that facilitate entry

Generational/historical trauma

Data collected by MIWRC

At both round tables, advocates kept returning to the impact of generational or historical trauma and the cultural loss resulting from it as they described the unique vulnerability of American Indian girls to commercial sexual exploitation and the absence of safety in these girls' lives:

> *A lot of the women who are being prostituted, it's just the bottom line that was there. The majority of the time it means that we need to recognize where this came from in our communities. I mean, American Indian people say over and over again 'This is not how we treat our children. This is not where we are as far as respecting youth.' And I think traditionally that was true, but something dramatic like genocide happened. It was like a nuclear bomb, so the war site is exactly the best example of what happened to our communities. [Twin Cities advocate]*
>
> *I think [cultural loss] is part of what leads to that whole addiction thing because they can't relate to where they're stuck in this life here and they can't figure out how that cultural strength is going to help them…And in the high school years they get into just starting with pot and those kinds of things…and then it's easier to exploit them. [Duluth advocate]*
>
> *We don't necessarily talk about relocation, which was a formal government policy, and that relocation in particular made our families vulnerable. It was both extreme poverty there [on the reservation] and extreme poverty here [in the city]. Our families lived on the banks of the Mississippi in Minneapolis when we first came here because we couldn't get houses, we couldn't get jobs, nothing. We couldn't live together either. [Twin Cities advocate]*

Information from other sources

Though a significant body of U.S. literature links generational/historical trauma to substance abuse, child abuse, and violence in American Indian communities, we were unable to identify any that described its role in the commercial sexual exploitation of American Indian women and girls. However, a number of studies with prostituted Aboriginal women and girls in Canada have found that generational/historical trauma plays a critical role in their exploitation. In an article describing her research with domestically trafficked Aboriginal girls in Canada, Anupriya Sethi described the legacy of colonization and residential schools as a root cause of their vulnerability to being trafficked for sexual purposes.[167]

A study involving 150 commercially sexually exploited Aboriginal youth across 22 Canadian communities reported findings that reflect the same trauma-related vulnerability described by advocates at the MIWRC round tables:

[167] Sethi A, (2007). Domestic sex trafficking of Aboriginal girls in Canada: Issues and implications, *First Peoples Child and Family Review 3*: 57-71

> *All of the Aboriginal youth who were consulted during the focus groups spoke of the physical, sexual, and/or emotional abuse they experienced in their home lives, as parents, relatives, care givers, and neighbors continued to suffer from the legacy of cultural fragmentation…their early years were filled with adults who were unable to break the cycle of pain and despair…their families and communities turned to alcohol, drugs, and violence to make their own sense of hopelessness…these youth lacked the skills and models necessary to create a healthy life for themselves.*[168]

From the perspectives of the advocates attending both MIWRC round tables, every one of the additional risk factors described below is directly linked to historical trauma and cultural loss. Within that context, these are the factors identified by the advocates that facilitate Native girls' and women's entry into the sex trade.

Runaway, thrown away, and/or homeless

Data collected by MIWRC

Advocates working with younger Native girls in prostitution reported that many had run away from home as a result of abuse or neglect. Some described girls from impoverished northern reservations who, seeing very few opportunities for a glamorous or affluent lifestyle at home, run away to Duluth or the Twin Cities in hope of attaining their dreams. These are some of the advocates' comments:

> *Kids running away. Running away from home. And that still happens on the remote reservations. I work with the girls on reservations, there is nothing going on, they don't know what to do, they got to get out of there…[They say] 'I'm outta here. I have family in Duluth, I have a sister in Duluth or someone in Duluth.' It seems like Duluth is the place to be with that stuff or something. Easier to get to, it's friendly…that's a lot of the wording: 'I gotta get out of here, there's absolutely nothing, I got nothing, I got to live wherever I can live.' [Duluth advocate]*
>
> *They'll do what they have to do to survive and stay on a couch or sleep on someone's couch overnight. Some of them, because of the duration, have gone into working in the dope house itself, and that comes with residency. They're taken advantage of in more ways than one inside those houses. [Twin Cities advocate]*
>
> *Most of the prostituted girls I've encountered, their parents would not ask or comment on whether they knew the person they were going to anyways. Especially for the younger kids that are trying to get drunk, they are trying to find drugs or whatever. And so they know somebody who knows somebody, there you go. [Duluth advocate]*

Some advocates talked about their own and other Native women's experiences in prostitution, in which they had come to view commercial sexual exploitation as a reasonable choice when they had no other way to support and sustain themselves. Others described women's need for shelter as the motivating force keeping them in prostitution:

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[168] Kingsley C and Mark M, (2000). *Sacred lives: Canadian Aboriginal children and youth speak out about sexual exploitation*. Save the Children Canada, p. 13.

> *There's the survival aspect. And that's what they're doing, the ones that I see out on the reservation. They would never identify themselves as prostituting or using sex to get what they want. But that's what they're doing. And, when I think about it now, now that we're identifying more of what goes into this trafficking, how broad the scope is, this trading sex for things like survival, there's a lot of that going on at the reservations. [Duluth advocate]*
>
> *Sexual exploitation for the young women and the girls we work with is such a secondary issue. It's like, 'Help me find shelter, help me find food, help me find clinics.' And then if you work with them long enough, it's 'Oh yeah, I was sexually exploited.' [Twin Cities advocate]*

Information from other sources

Though none described findings for American Indians specifically, studies with women and girls in prostitution in the U.S. have consistently found that 50 to 75 percent ran away from home as adolescents.[169,170] In recent research with women on probation for prostitution in Hennepin County, 61 percent of the participants reported that they had run away when they were minors. Most described their reason for running away as "family problems."[171]

Researchers have consistently found that when youth run away from home with no place to go, it is usually because of parental neglect, physical or sexual abuse, family substance abuse, and/or family violence.[172,173,174,175] In one study with runaways in medium-sized cities in the Midwest, 81 percent of the participating youth had been pushed or grabbed in anger by an adult in their home, 64 percent had been threatened with a gun or knife, 59 percent felt neglected, 28 percent were abandoned by their parents for at least 24 hours, and 21 percent had been forced by a caregiver to engage in a sexual activity.[176] In a second study with runaway adolescents, 43 percent said that they had left home because of physical abuse, and 24 percent had left because of sexual abuse.[177]

Children of the Night, a national organization that works to rescue children from prostitution, says that of the one and one-half million children that run away each year in the U.S., it is safe to

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[169] Raphael J and Shapiro D, (August 2002). *Sisters speak out: The lives and needs of prostituted women in Chicago—a research study*. Chicago: Center for Impact Research.

[170] Flowers B, (2001). *Runaway kids and teenage prostitution: America's lost, abandoned, and sexually exploited children*. Westport CT: Greenwood Press.

[171] Subset of data provided by Julie Rud, Minneapolis Police Department, from dataset used to produce Martin L and Rud J, (2007) *Prostitution research report: Data sharing to establish best practices for women in prostitution.* Minneapolis: Prostitution Project, Hennepin County Corrections and the Folwell Center.

[172] Smoller J, (September 2001). Homeless youth in the United States, *Prevention Researcher 8*(3): pp. 1, 3-5.

[173] Janus M, McCormack A, Burgess A, and Hartman C, (1987). *Adolescent runaways: Causes and consequences.* Lexington MA: Lexington Books.

[174] Whitbeck L, Hoyt D, and Ackley K, (1997). Abusive family backgrounds, and later victimization among runaway and homeless adolescents, *Journal of Research on Adolescence 7*: 375-392.

[175] Janus M, Archambault F, Brown S, and Welsh L, (1995). Physical abuse in Canadian runaway adolescents, *Child Abuse and Neglect 19*: 433-447.

[176] Whitbeck L and Hoyt D, (1999). *Nowhere to grow: Homeless and runaway adolescents and their families.* Hawthorne NY: Walter de Gruyer, Inc.

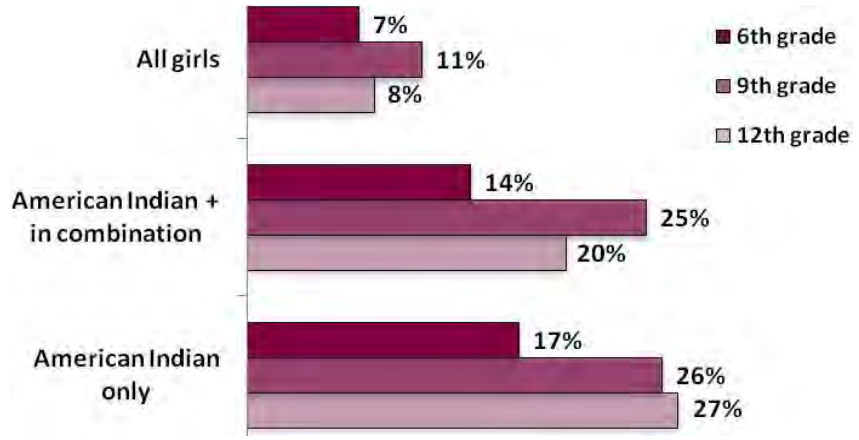
[177] Molnar B, Shade S, Kral A, Booth R, and Watters J, (1998). Suicidal behavior and sexual/physical abuse among street youth, *Child Abuse & Neglect 22*(3):213-222.

estimate that about one-third will have some type of involvement with prostitution and/or pornography.[178] A statewide study in Michigan reviewed youth arrests for running away and estimated that 2,000 youth arrested as runaways (a little over 57%) were likely to have become involved in prostitution.[179] The National Center for Missing and Exploited Children reported that up to 77 percent of prostituted teens have run away from home at least once before turning to prostitution as a way to support themselves.[180]

Runaway and thrown-away youth have very few legitimate ways to pay for their basic needs. Getting a job is very difficult without an address, phone number, high school diploma, work experience, or references, and even if they succeed, they usually do not have the identification needed to open a checking account or cash a check. Some fear being sent back home if they use their real name or home address.[181,182]

In the 2007 statewide Minnesota Student Survey, a much higher percentage of American Indian high school girls reported having run away at least once in the previous 12 months than girls in the general population (see Figure 10).

10. Girls that ran away in the past 12 months, statewide*



**2007 Minnesota Student Survey*

[178] Children of the Night, (2009). *Frequently asked questions.* Retrieved May 19, 2009 from http://www.childrenofthenight.org/faq.html

[179] Walker N, (2002). Prostituted teens: A problem for Michigan too, in *Prostituted teens: More than a runaway problem.* East Lansing: Michigan State University Institute for Children, Youth, and Families.

[180] Cited in Flowers B, (2001). *Runaway kids and teenage prostitution: America's lost, abandoned, and sexually exploited children*. Westport CT: Greenwood Press.

[181] Whitbeck L and Hoyt D, (1999). *Nowhere to grow: Homeless and runaway adolescents and their families.* Hawthorne NY: Walter de Gruyter, Inc.

[182] Robertson M and Toro P, (1998). *Homeless youth: Research, intervention, and policy.* Washington DC: The National Symposium on Homelessness Research. Retrieved May 29, 2009 from http://www.aspe.hhs.gov/progsys/homeless/symposium/3-youth.htm

Research with Aboriginal youth in Canada has also identified running away from home as a major risk factor for entering prostitution. A study that analyzed 400 youths' social services case files in two large Canadian cities found that among the Aboriginal youth that had run away at least once, 44 percent had become involved in prostitution, compared to 13 percent of Aboriginal youth that never ran away.[183] Targeted by pimps promising a glamorous life in the big city, Aboriginal girls quickly find themselves trapped. One researcher working with prostituted Aboriginal women and girls noted:

> *These are young, naïve and emotionally vulnerable Aboriginal women who are brought into cities like Toronto with the promise of shelter, a secure job, and a new start…what they get is sexual exploitation up to 10 to 15 times a day with no say in what percentage of their daily earnings they will get to keep for themselves. Once they realize what the reality is, it's too late to get out of the sleazy business, and those who do build up the courage to try and opt out are usually never seen again—they are killed.*[184]

Homelessness, the direct result of running away from home, has also been identified as a primary risk factor for the commercial sexual exploitation of youth.[185] One study found that being homeless for more than 30 days is the single most determining factor in young children and teens entering prostitution, and youth advocacy groups report that homeless youth can expect to be approached by a pimp, john, or drug dealer within 36 hours when they are first on the street.[186,187, 188]

A study of commercially sexually exploited youth in Winnipeg found that 86 percent had been homeless for 40 days or more.[189] In three surveys of street-involved youth in British Columbia in which 34 to 57 percent of participants were Aboriginal, researchers found that 34 to 44 percent of younger victims of commercial sexual exploitation were living or had recently lived in precarious housing situations, including living on the street, couch-surfing, and staying in shelters, transition houses, hotels, squats, abandoned buildings, tents, and cars. The proportion of

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[183] Schissel B and Fedec K, (1999). The selling of innocence: The gestalt of danger in the lives of youth prostitutes, *Canadian Journal of Criminology*. Pp. 35-56.

[184] Polera V, (October 22, 2008). Ignoring the plight of Aboriginal women: An interview with Anupriya Sethi, *Excalibur—York University and Community Newspaper (web edition).* Retrieved December 27, 2008 from http://excal.on.ca/cms2//index.php?option=com_content&task=view&id=6446&Itemid=2

[185] Williams L, Powell A, and Frederick M, (November 2008). *Pathways into and out of commercial sexual exploitation: Preliminary findings and implications for responding to sexually exploited teens*. Retrieved February 3, 2009 from http://thewomensfoundation.org/wp-content/uploads/2008/11/pathways_11-18-08.pdf

[186] Carter V, (Executive Director of Breaking Free), (March 13, 2008). *Press release: Local responses to prostitution*. Retrieved December 27, 2008 from the Minnesota Department of Health Injury Prevention News website, http://www.health.state.mn.us/injury/new/svpnews.cfm?gcNews=109

[187] Paul and Lisa Program Study, (1999). New York City. Cited in *The Hofstede Committee report: Juvenile prostitution in Minnesota* (1999), p.6.

[188] Nadon S, Koverola C and Schledermann E, (April 1998). Antecedents to prostitution: Childhood victimization, *Journal of Interpersonal Violence 13*: 206-207.

[189] Nadon S, (1991). *Childhood victimization: Antecedents to prostitution.* Unpublished Master's thesis, University of Manitoba, Winnipeg, Manitoba, Canada. Cited in Scheirich W, (April 2004). Manitoba's strategy: Responding to children and youth involved in sexual exploitation, *Envision: The Manitoba Journal of Child Welfare 3*(1). Retrieved March 19, 2009 from http://www.envisionjournal.com/application/Articles/59.pdf

older prostituted youth reporting similar housing instability was even higher: 50 percent had lived in precarious housing during the past year and 95 percent had done so at some point in time.[190] In five surveys of British Columbia's street-involved youth over a 6-year period, the McCreary Centre Society found that an average of 61 percent reported a great need for safe housing.[191]

Homelessness is also a factor that facilitates women's and girls' entry into prostitution. Studies with prostituted women have found that 84 to 90 percent are currently homeless or have been homeless in the past.[192,193] In the 2006 Wilder Research statewide study of homelessness, non-reservation American Indians represented 28 percent of the unaccompanied homeless youth ages 17 or younger in outstate Minnesota and 12 percent in the Twin Cities area, though they are only two percent of Minnesota's youth population.[194] On Indian reservations, Native youth more frequently doubled up in other people's homes for shorter stays, while single adults were more likely to describe long periods of living with family members and friends.[195] Over the years that Wilder's homelessness survey has been conducted (every three years since 1994), there has been a significant increase in the proportion of American Indians among unaccompanied homeless youth, from 10 percent in 1994 to 20 percent in 2006.[196] Sixty percent of non-reservation homeless Native girls 17 and younger reported having left home to be on their own by the age of 13.[197]

Pertinent to the advocates' stories of Native mothers with children being vulnerable to landlords threatening eviction to recruit the mother or her daughters into prostitution, many of the non-reservation Native women and girls interviewed in the 2006 Wilder Research study of homelessness had children. Two-thirds had children under the age of 17, including 20 percent of the girls ages 17 and younger.[198]

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[190] Saewyc E, MacKay L, Anderson J, and Drozda C, (2008). *It's not what you think: Sexually exploited youth in British Columbia.* Vancouver: University of British Columbia School of Nursing. Report based on data from surveys conducted by the McCreary Centre Society, Vancouver BC. Retrieved May 1, 2009 from http://www.nursing.ubc.ca/PDFs/ItsNotWhatYouThink.pdf

[191] Saewyc E, Bingham B, Bruananski D, Smith A, Hunt S, Northcott M, and the McCreary Centre Society, (2008). *Moving upstream: Aboriginal marginalized youth and street-involved youth in B.C.* Vancouver B.C.: McCreary Centre Society.

[192] Farley M and Barkan H, (1998). Prostitution, violence against women, and posttraumatic stress disorder, *Women and Health 27*(3): 37-49.

[193] Council for Prostitution Alternatives, (1991). Characteristics of 800 CPA participants, in Weitzer R (Ed.), *Sex for sale: Prostitution, pornography, and the sex industry,* pp. 139-155. New York: Routledge.

[194] Wilder Research, (June 2008). *Overview of youth and young adult homelessness in Minnesota.* St. Paul: Amherst H. Wilder Foundation.

[195] Wilder Research, (November 2007). *Homeless and near-homeless people on northern Minnesota Indian reservations*. Saint Paul: Wilder Research.

[196] Wilder Research, (June 2008). *Overview of youth and young adult homelessness in Minnesota.* St. Paul: Amherst H. Wilder Foundation.

[197] Based on analysis of the non-reservation American Indian female subset of the 2006 Homelessness in Minnesota data, provided by Wilder Research.

[198] *Ibid*.

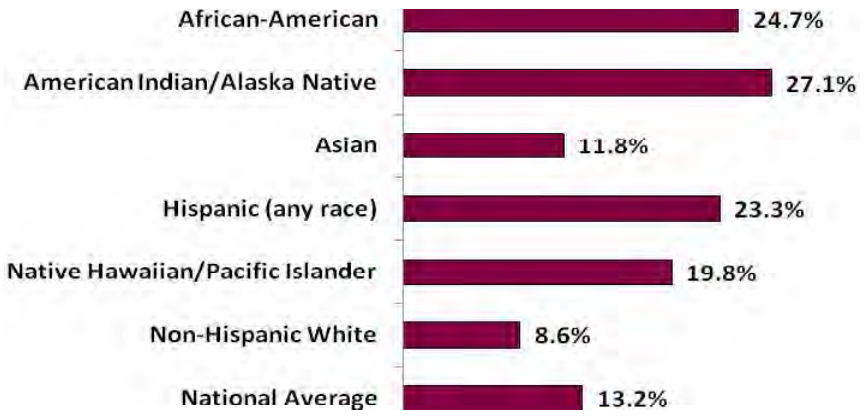
Poverty is a major contributor to homelessness. In the 2006 Wilder Research study of homelessness, about one-third of homeless non-reservation American Indian women and girls reported leaving their most recent regular or permanent housing for reasons related to poverty (see Figure 11).

11. Poverty-related reasons Native girls and women left stable housing (2006 Wilder Research study of homelessness in Minnesota)[199]

Partial or main cause of current homelessness	Age group 17 & under (n=20)	18-21 (n=31)	22+ (n=208)
Could not afford rent or house payments	29%	39%	42%
Eviction, foreclosure, or the lease not being renewed	29%	33%	39%
Family lost their housing (youth & young adults only)	33 %	27%	Not asked

National 2008 poverty rates released by the U.S. Census in September 2009 show that American Indians are more likely to live in poverty than any other group in the nation (see Figure 12).

12. Percent living in poverty by race and Hispanic ethnicity, nationwide 2008[200]



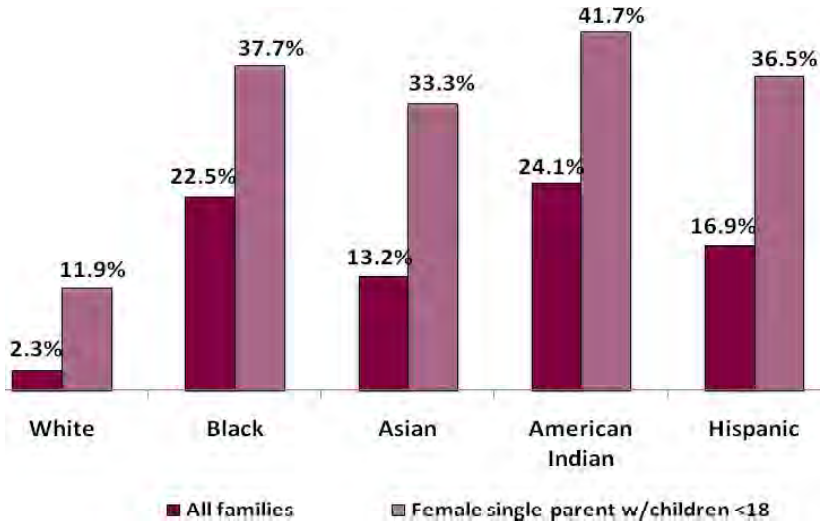
Poverty data for 2008 are not available at the state or county level, but in 2000, over 40 percent of Hennepin County's Native single mother-headed households (which represent 47% of Native households and one-third of Native children) were living in poverty[201] (see Figure 13).

[199] Based on analysis of the non-reservation American Indian female subset of the 2006 Homelessness in Minnesota data, provided by Wilder Research.

[200] Source: U.S. Census 2008 estimates, cited in Families USA, (September 2009). *Fact sheet: Health coverage in communities of color—Talking about the new Census numbers.* Retrieved September 18, 2009 from http://www.familiesusa.org/assets/pdfs/minority-health-census-sept-2009.pdf

[201] Children's Defense Fund Minnesota, (November 2007). *10 quick facts about child poverty in Minnesota.* St. Paul: Children's Defense Fund Minnesota. Retrieved March 12, 2009 from http://www.cdf-mn.org

13. Percent of Hennepin County families in poverty by race and Hispanic ethnicity[202]



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Similar to Native women in the U.S., poverty contributes to Aboriginal women's and girls' homelessness in Canada and to their involvement in the sex trade. In a survey of 183 prostituting women in Vancouver, almost one-third of whom were Aboriginal, 40 percent reported entering prostitution because they needed the money.[203] In another study of prostituting women in Vancouver, over half of whom were Aboriginal, 86 percent reported past or present homelessness and cited housing as current, urgent need.[204] In the British Columbia study of active and exited women in prostitution described earlier, nearly 25 percent were without stable housing at the time of the interview. The percentage without housing was even higher for women currently engaged in street prostitution.[205]

Repeated exposure to abuse, exploitation, and violence

Childhood abuse

Data collected by MIWRC

Advocates at both round tables reported that most if not all of the prostituted Native women and girls they had encountered had been sexually abused as children. Many of the advocates described childhood sexual abuse as the key experience setting the stage for Native girls' entry

[202] Source: Census 2000, cited in American Indian Families Project (September 2003). *A look at American Indian families in Hennepin County*, p. 6. Minneapolis: Hennepin County Office of Planning and Development.

[203] PACE Society, (2000). *Violence against women in Vancouver's street-level sex trade and the police response*. Vancouver BC.

[204] Farley M and Lynn J, (2004). Prostitution in Vancouver: Pimping women and the colonization of Aboriginal, in Stark C and Whisnant R (Eds.), *Not for sale: Feminists resisting prostitution and pornography.* North Melbourne, Victoria, Australia: Spinifex Press.

[205] Benoit C and Millar A, (2001). *Dispelling myths and understanding realities: Working conditions, health status, and exiting experiences of sex workers*. Victoria: Prostitutes Empowerment, Education, and Resource Society.

into the sex trade, as the primary reason that girls Native run away from home and then enter prostitution in order to survive. For example:

> *I know women I've worked with that have been sexually assaulted by family members and it was ongoing, and that's why they left. And then they found out they could get paid for it, so think 'What's the difference?' [Duluth advocate]*
>
> *I can't think of even one that doesn't have sexual assault in their history, that doesn't have domestic violence in their history, that didn't start…being expected to service Dad's friends. So, they weren't being paid for it, but what's really that different? [Twin Cities advocate]*

Some advocates also emphasized the impact of childhood sexual abuse on Native girls' ability to even recognize sexual exploitation, reporting that many view sexual abuse by a family member as relatively harmless compared to sexual exploitation by someone outside the family. This is one of the comments from that discussion:

> *I was talking to some of the young girls there about incest, and they really don't think that incest is as bad as a pedophile having sex with a two-year-old. So they thought, 'Well, it's a family member, it's at home and it's safe.' They really didn't correlate that it's the same thing. It is as bad, as damaging, and they don't get it. [Twin Cities advocate]*

Information from other sources

Supporting advocates' identification of sexual abuse as a primary facilitating factor at the round tables, studies in the U.S. have found that 60 to 73 percent of youth in prostitution and 55 to 90 percent of adult women in prostitution were sexually abused at home.[206,207,208,209,210] One study with 602 runaway adolescents in four Midwestern states found that the more abuse an adolescent had experienced at home, the more time they spent on their own and the more likely they were to have friends who sold sex.[211] Other research has confirmed that the amount of time that runaway youth have been on their own without a caring adult is strongly related to increased use of substances and to substance abuse, which are in turn related to increased risk of commercial sexual exploitation.[212,213]

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[206] Silbert M and Pines A, (1981). Sexual child abuse as an antecedent to prostitution, *Child Abuse and Neglect 5*:407-411.

[207] Silbert M and Pines A, (1982). Entrance into prostitution, *Youth and Society 13*(4): 471-500.

[208] Bagley C and Young L, (1987). Juvenile prostitution and child sexual abuse: A controlled study, *Canadian Journal of Community Mental Health 6*: 5-26.

[209] Simons R and Whitbeck L, (1991). Sexual abuse as a precursor to prostitution and victimization among adolescent and adult homeless women, *Journal of Family Issues 12*(3): 361-379.

[210] Belton R, (October 22, 1992). *Prostitution as traumatic re-enactment.* Paper presented at the 8th Annual Meeting of the International Society for Traumatic Stress Studies, Los Angeles CA.

[211] Tyler K, Whitbeck L, Hoyt D, and Yoder K, (2000). Predictors of self-reported sexually transmitted diseases among homeless and runaway adolescents, *Journal of Sex Research 37*(4): 269-377.

[212] Whitbeck L, Hoyt D, and Yoder K, (1999). A risk-amplification model of victimization and depressive symptoms among runaway and homeless adolescents, *American Journal of Community Psychology 27*: 273-296.

[213] Kipke M, Montgomery S, Simon T, and Iverson E, (1997). Substance abuse disorders among runaway and homeless youth, *Substance Use and Misuse 37*:969-986.

Physical abuse at home has also been identified as a major risk factor for youth entry into the sex trade.[214] The 2008 rate of American Indian child maltreatment reports in Minnesota was more than six times their proportion in the population, and American Indians also had the highest rates of recurring maltreatment at six- and twelve-month follow-up. The vast majority of American Indian maltreatment reports were for neglect, but Native rates for reported physical abuse and sexual abuse were also higher than those of any other group (see Figure 14). As of April 2009, the Minnesota Department of Human Services reported that American Indian children accounted for 10 percent of child maltreatment victims statewide, more than six times their representation in the child population.[215]

14. Child maltreatment by race, statewide 2008[216]

	American Indian	Black	Asian	White	2 or more races	Hispanic (any race)
Total maltreatment reports per 1,000 in the MN child population	78.5	51.0	8.5	11.9	42.0	29.7
Neglect (non-medical)	62.4	37.2	5.5	7.6	32.4	19.4
Physical abuse	17.4	13.9	2.8	3.7	10.5	7.6
Sexual abuse	6.7	3.9	0.7	1.3	3.5	2.5
Medical neglect	1.4	0.9	0.2	0.1	0.6	0.3
Percent recurring within 6 months	5.8%	8.1%	3.9%	3.7%	6.6%	3.6%
Percent recurring within 12 months	14.5%	13.1%	3.9%	5.8%	11.7%	5.7%

**Children in the Hispanic category can be any race(s).*

Though the number of Native children separated from their families is itself alarming, foster placement is also a risk factor for entering the sex trade. In their book *Being Heard: The Experiences of Young Women in Prostitution,* Gorkoff and Runner reported that 63 percent of prostituted girls and young women in their study had been involved with the child protection system as children. Over three-fourths had been in foster and group homes, often for many years.[217] The most recent available statewide data (2008) on out-of-home placement of Minnesota children indicate that almost nine percent (8.81%) of the children in foster care were American Indian.[218]

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[214] Estes R and Weiner N, (2001). *The commercial sexual exploitation of children in the U.S., Canada, and Mexico: Full report of the U.S. national study.* Philadelphia: Center for the Study of Youth Policy, University of Pennsylvania School of Social Work.

[215] Minnesota Department of Human Services, (April 2009). *Child abuse and neglect prevention: Strengthening families is fundamental.* Retrieved June 5, 2009 from http://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-4735-ENG

[216] Children and Family Services, Minnesota Department of Human Services, (July 2009). *Minnesota's Child Welfare report 2008: Report to the 2009 Legislature.* Retrieved August 18, 2009 from http://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5408A-ENG

[217] Gorkoff K and Runner J (Eds.), (2003). *Being heard: The experiences of young women in prostitution*. Halifax: Fernwood.

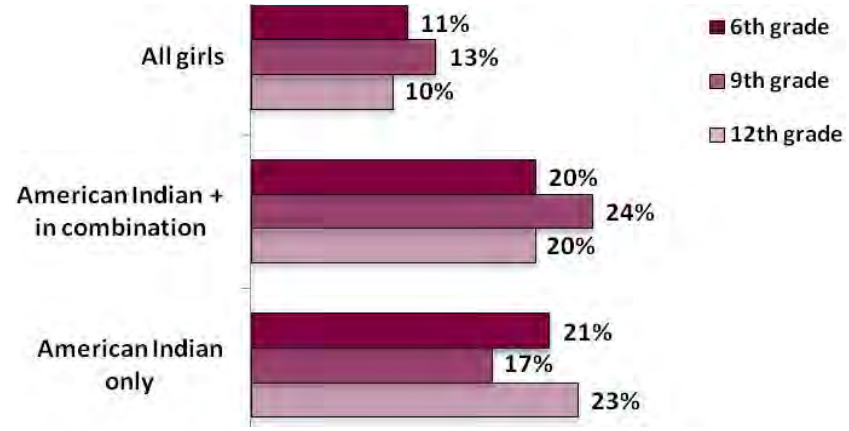
[218] Ombudsperson for Families, State of Minnesota, (January 2009). *2010-11 Biennial budget,* p.2. Retrieved September 6, 2009 from http://www.admin.state.mn.us/fmr/documents/BBS-1011%20Other%20Agncy,%20bds,%20councils,%20comm/Ombudsperson%20for%20Families.pdf

In Hennepin County, the most recent available data (2006) show eight percent of the confirmed child maltreatment cases to be American Indian, four times their representation in the county's child population.[219] Native children represented an even larger percentage of Hennepin County children in foster care (9%).[220]

Some Native researchers have suggested that the disproportionate number of American Indian child neglect reports may be related, at least in part, to standard definitions of neglect being based on a nuclear family model, while American Indian child rearing norms are based on the assistance of an extended family and community network.[221,222] However, in 2008 the National Indian Child Welfare Association described child neglect in American Indian communities as "serious, large scale, and persistent," pointing out Indian Health Service data show the leading cause of death for Native children under the age of 14 to be accidents, mostly alcohol-related.[223]

Supporting the advocates' reports at round tables that abuse at home is a common experience for Native girls, findings from the 2007 Minnesota Student Survey suggest that Native girls in Minnesota experience much higher rates of physical and sexual abuse at home than their peers in the general population (see Figures 15 and 16).

15. Girls' reports of physical abuse at home, statewide*



**2007 Minnesota Student Survey*

[219] Hennepin County Child Protection Task Force, (June 2007). *Hennepin County Child Protection Task Force final report.* Retrieved January 20, 2009 from http://hennepin.us/portal/site/HCInternet/menuitem.3f94db53874f9b6f68ce1e10b1466498/?vgnextoid=5895287c61a64110VgnVCM1000000f094689RCRD

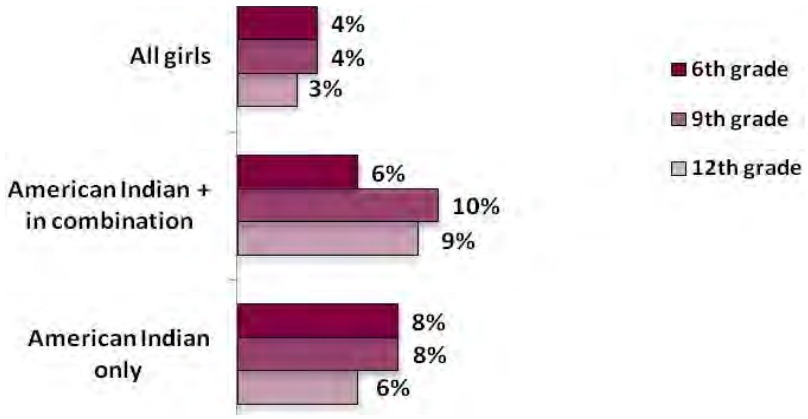
[220] *Ibid.*

[221] Cross T and Simmons D, (April 14, 2008). *Child abuse and neglect and American Indians.* Portland OR: National Indian Child Welfare Association.

[222] Horesji C, Heavy Runner-Craig B , and Pablo J, (1992). Reactions by Native American parents to Child Protection agencies: Cultural and community factors, *Child Welfare 71*(4): 329-342.

[223] Cross T and Simmons D, (April 14, 2008). *Child abuse and neglect and American Indians.* Portland OR: National Indian Child Welfare Association.

16. Girls' reports of sexual abuse at home, statewide*



**2007 Minnesota Student Survey*

Homeless American Indian women and girls are even more likely to report having experienced childhood abuse. In the 2006 Wilder Research study of homelessness in Minnesota, 40 to 50 percent of Native girls and women disclosed physical or sexual maltreatment or parental neglect as a child. Native girls and younger women frequently cited not feeling safe from violence in the home or abuse by someone in the household as the reason for their current homelessness (see Figure 17).

17. Homeless Native females' history of abuse or neglect (2006 Wilder Research study of homelessness in Minnesota)[224]

	Age group			
Percent of homeless Native females that reported…	11-17	18-20	21	22+
Physical mistreatment as a child or youth	45%	41%	40%	54%
Sexual mistreatment as a child or youth	30%	41%	20%	51%
Parental neglect (no food, shelter, or medical care; absence)	32%	33%	60%	41%
Homeless now due to feeling unsafe from violence in the house	28%	31%	Not asked	
Homeless now due to physical/sexual abuse in the home	17%	31%	Not asked	

In Canada, a national study involving interviews with 150 commercially sexually exploited Aboriginal youth found that 80 percent had been physically, sexually, emotionally, and verbally abused in their homes, which led to them running away. Many also reported significant trauma at the hands of family friends, neighbors, and/or peers. [225] In a smaller study, 48 percent of prostituted youth in Winnipeg, many of whom were Aboriginal, reported physical abuse or

[224] Based on analysis of the non-reservation American Indian female subset of the 2006 Homelessness in Minnesota data, provided by Wilder Research.

[225] Kingsley C and Mark M, (2000). *Sacred lives: Canadian Aboriginal children and youth speak out about sexual exploitation*. Save the Children Canada, p. 13.

neglect at home, and 68 percent reported sexual abuse.[226] Research with women in street prostitution in Vancouver also found histories of abuse among almost all of the women interviewed, 52 percent of whom were Aboriginal women. Close to three-fourths of the participants reported physical abuse in childhood, and 82 percent reported childhood sexual abuse.[227]

In a review of over 400 youth probation files compiled by the Department of Social Services in two large Canadian cities, researchers found that 41 percent of Aboriginal youth in the sex trade had experienced neglect, compared to five percent of non-Aboriginal youth.[228] Clinical and anecdotal evidence from Canada suggests that in some communities, the incidence of childhood sexual abuse among Aboriginal people is 80 percent or higher.[229,230]

Physical and sexual victimization as older teens and adults

Though no U.S. studies were identified that described rates of physical and sexual victimization of prostituted American Indian women or girls, a significant body of research has found high rates of physical and sexual victimization among American Indian adult women and older teen girls in general (see Figure 18). National data show Native women to be over 2.5 times more likely to be raped or sexually assaulted than women in the general population.[231]

Analysis of the National Crime Victim Survey data showed that half of the Native women who reported having been raped also reported suffering physical injuries in addition to the rape, compared to 30 percent of U.S. women in the general population.[232] Based on a national survey, researchers have estimated that over one-third of Native women will be raped during their lifetimes, compared to less than one in five women in the general population.[233]

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[226] Nadon S, (1991). *Childhood victimization: Antecedents to prostitution.* Unpublished Master's thesis, University of Manitoba, Winnipeg, Manitoba, Canada. Cited in Scheirich W, (April 2004). Manitoba's strategy: Responding to children and youth involved in sexual exploitation, *Envision: The Manitoba Journal of Child Welfare 3*(1). Retrieved March 19, 2009 from http://www.envisionjournal.com/application/Articles/59.pdf

[227] Farley M, Lynne J and Cotton A, (2005). Prostitution in Vancouver: Violence and the colonization of Aboriginal women, *Transcultural Psychiatry 42*: 242-271.

[228] Schissel B and Fedec K, (1999). The selling of innocence: The gestalt of danger in the lives of youth prostitutes, Canadian Journal of Criminology. Pp. 35-56.

[229] McEvoy M and Daniluk J, (1994). Wounds to the soul: The experiences of Aboriginal women survivors of sexual abuse, *Canadian Psychology 36*(3): 221-235.

[230] Farley M and Lynne J, (2005). Prostitution of indigenous women: Sex inequality and the colonization of Canada's Aboriginal women, *Fourth World Journal 6*(1):1-29.

[231] Perry S, (December 2004). *American Indians and crime—A BJS statistical profile 1992-2002.* Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs.

[232] Bachman R, (September 29, 2003). *The epidemiology of rape and sexual assaults against American Indian women: An analysis of NCVS data*, presented to a federal and tribal working group on sexual assault against Native women. Cited in Sarah Deer, 2005, Sovereignty of the soul: Exploring the intersection of rape law reform and Federal Indian law, *Suffolk University Law Review 38*: 455.

[233] Tjaden P and Thoennes N, (2000). Full report of the prevalence, incidence, and consequences of violence against women. Washington DC: U.S. Department of Justice.

18. Lifetime rates of women's physical and sexual victimization, by race

Year	Authors	n	Sample	Type of vctimization	AI/AN	White	Black	Hisp
1999	Walters & Simoni[234]	68	New York City	Nonpartner sexual violence	27%			
1999	Walters & Simoni[235]	68	New York City	Interpersonal violence	25%			
2000	Tjaden & Thoennes[236]	88	National	Intimate partner rape	16%	8%	7%	8%
1998	Tjaden & Thoennes[237]	88	National	Rape	34%	18%	19%	15%
2004	Malcoe, Duran & Montgomery[238]	312	Oklahoma	Severe physical IPV	39%			
2004	Malcoe & Duran[239]	422	Oklahoma	Sexual IPV	49%			
2003	Bohn, 2003[240]	30	Minnesota	Physical or sexual IPV	87%			

Note: IPV=intimate partner violence. Comparisons with other racial/ethnic groups are given when included in the study. Otherwise, the entire sample was American Indian.

Low-income Native women have been found to be extremely vulnerable to partner violence. In a study of 312 low-income pregnant and childbearing Native women recruited from a tribal WIC clinic in southwestern Oklahoma, researchers found that more than half reported lifetime physical and/or sexual intimate partner violence and 40 percent reported injuries from partner-perpetrated violence.[241]

In the 2006 Wilder Research study of homelessness, almost half of the homeless non-reservation Native women ages 18 to 21 reported having been in an abusive relationship, and the same proportion reported staying in one because they had no other housing options (see Figure 19).

[234] Walters K and Simoni J, (1999). Trauma, substance use, and HIV risk among urban American Indian women. *Cultural Diversity and Ethnic Minority Psychology* 5(3): 236-248.

[235] *Ibid*.

[236] Tjaden P and Thoennes N, (2000). *Extent, nature, and consequences of intimate partner violence: Findings from the National Violence Against Women Survey*. Washington, DC: National Institutes of Justice.

[237] Tjaden P and Thoennes N, (November 1998). *Prevalence, Incidence and Consequences of Violence Against Women:Findings From the National Violence Against Women Survey.* Washington, DC: National Institute of Justice, U.S. Department of Justice.

[238] Malcoe L, Duran B and Montgomery J, (2004). Socioeconomic disparities in intimate partner violence against Native American women: A cross-sectional study, *BMC Medicine.* Retrieved May 16, 2009 from http://www.biomedcentral.com/1741-7015/2/20

[239] Malcoe L and Duran B, (in press). Intimate partner violence and injury in the lives of low income Native American women, in B. Fisher (Ed.), *Violence Against Women and Family Violence: Developments in Research, Practice, and Policy Conference Proceedings.* Washington, DC: National Institute of Justice, U.S. Department of Justice. Retrieved April 7, 2009 from http://www.ncjrs.gov/pdffiles1/nij/199701.pdf

[240] Bohn D, (2003). Lifetime physical and sexual abuse, substance abuse, depression, and suicide attempts among Native American women, *Issues in Mental Health Nursing* 24(3): 333-352.

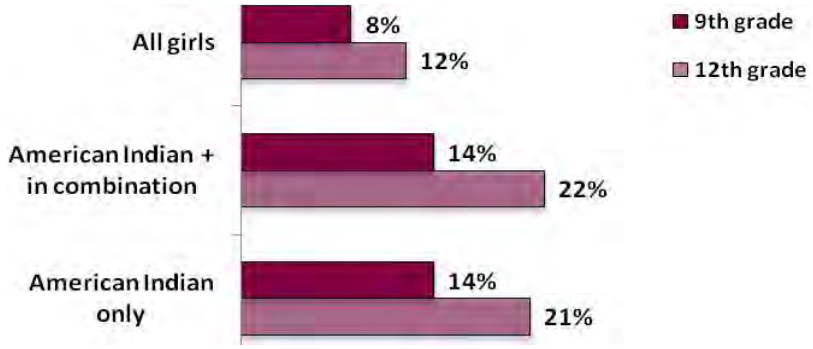
[241] Malcoe L, Duran B and Montgomery J, (2004). Socioeconomic disparities in intimate partner violence against Native American women: A cross-sectional study, *BMC Medicine.* Retrieved May 16, 2009 from http://www.biomedcentral.com/1741-7015/2/20

19. Experiences with violent victimization (2006 Wilder Research study of homelessness in Minnesota, n=44) [242]

Percent of homeless Native girls and women that reported…	Age group 11-17	18-21	22+
Being in physically abusive relationship during past 12 months	20%	48%	25%
Staying in an abusive situation because she did not have other housing options	5%	48%	50%
Physically or sexually attacked or beaten while without a regular place to stay	10%	16%	31%

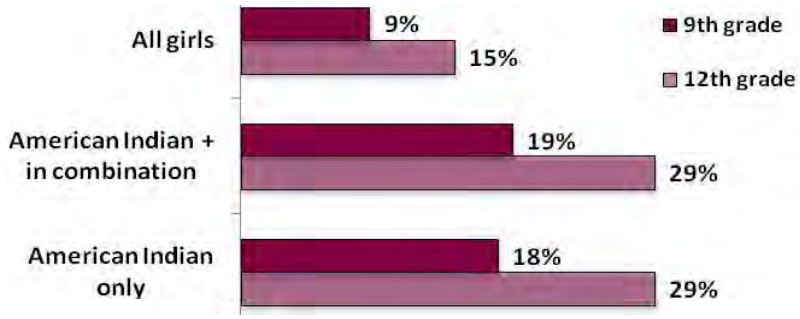
Violent victimization by a partner appears to begin early for many American Indian girls in Minnesota. In the 2007 Minnesota Student Survey, both 9th and 12th grade Native girls reported physical and sexual violence by dates much more frequently than girls in the general population (see Figures 20 and 21).

20. Girls reporting sexual assault by a date, statewide*



2007 Minnesota Student Survey. Sixth grade girls were not asked this question.

21. Girls reporting physical assault by a date, statewide*



2007 Minnesota Student Survey. Sixth grade girls were not asked this question.

[242] Based on analysis of the non-reservation American Indian female subset of the 2006 Homelessness in Minnesota data, provided by Wilder Research.

Normalization of sexual exploitation and violence

Data collected by MIWRC

Advocates at the round tables reported that Native girls' frequent exposure to violence, abuse, and commercial sexual exploitation in their homes, their peer groups, and communities tends to normalize these behaviors. Several advocates working with adolescent Native girls described the ways that girls' social environments often lead them to view threats to their safety and sexual exploitation as "no big deal." For example, this is one advocate's description of a Native girl's response after being trafficked to Mexico:

> *We had a young lady who was being held in Mexico for three years, and she didn't think that she was traumatized. [Twin Cities advocate]*

Some advocates described the way that childhood exposure to prostitution can make it seem normal. These are some comments from those discussions:

> *If the mom is being trafficked, then she puts the child, the daughter at high risk. They may not intentionally want them involved in that, but then they'll be around that and they're vulnerable, and then they get pulled into it. [Duluth advocate]*
>
> *I grew up with a bunch of women who did trade sex for money, clothing, food, shelter, housing, sold underwear, did whatever they had to do to keep me in a private education and a good home. [I] want to be able to move on from that so we're not raising more kids who normalize that activity as part of everyday life. [Twin Cities advocate]*

Other advocates described some prostituted Native women and girls that viewed free-lancing, prostitution without a pimp, as a way to empower themselves. These girls and women viewed prostituting themselves and/or working with other women in a collective group as a way to have some control over their lives. These are some of the advocates' comments:

> *A majority of them have been exposed to sexual abuse. And so, it's kind of like, they're making the decision now, they're in control of their bodies and they're going to do what they need to do to get what it is that they want. [Duluth advocate]*
>
> *The other aspect that we're seeing too is the idea of liberation, 'My body, my choice, I can do it myself.' All woman-run. You're seeing more women that know how to do these things and are very skilled at how to prevent more harm from coming to themselves. And so they're banding together creating all female call services. [Twin Cities advocate]*
>
> *They're choosing to take this road because it is what they've always done. Or how they can survive right now. Because it's normal. [Duluth advocate]*

During the six months that MIWRC collected data from women and girls entering MIWRC programs, counselors asked incoming clients if they knew anyone who sells or trades sex, and if they knew anyone who makes others sell or trade sex. Clients' responses suggest that Native girls are exposed to prostitution as a "career option" at very young ages. Almost half (46%) of the 95 women screened for commercial sexual exploitation reported a personal friend in prostitution, and over one-fourth (26%) reported a prostituting family member (see Figure 22). Over one-fourth (28%) of the incoming MIWRC clients said they knew someone who makes others sell or trade sex, most frequently their boyfriend (see Figure 23).

22. MIWRC clients that knew someone in prostitution (n=95)

Clients reporting that they…	Number	Percent
Know at least one person in prostitution	45	47%
Personal friend	44	46%
Family members (all categories)	25	26%
Cousin(s)	10	11%
Aunt	8	8%
Sister	4	4%
Mother	2	2%
Two or more family members	7	7 %
Mother's friend	1	1%

23. MIWRC clients that knew someone who traffics others (n=95)

Clients reporting that they…	Number	Percent
Know at least one trafficker	27	28%
Boyfriend/husband/partner	13	14%
Landlord	4	4%
Friend(s)	3	3%
Drug dealer(s)	3	3%
Unspecified family member	2	2%
Pimp(s)	2	2%
Uncle and brother	1	1%
Friend of mother/aunt	1	1%
Friend of boyfriend/husband	1	1%
Unspecified person/people	9	10%

Information from other sources

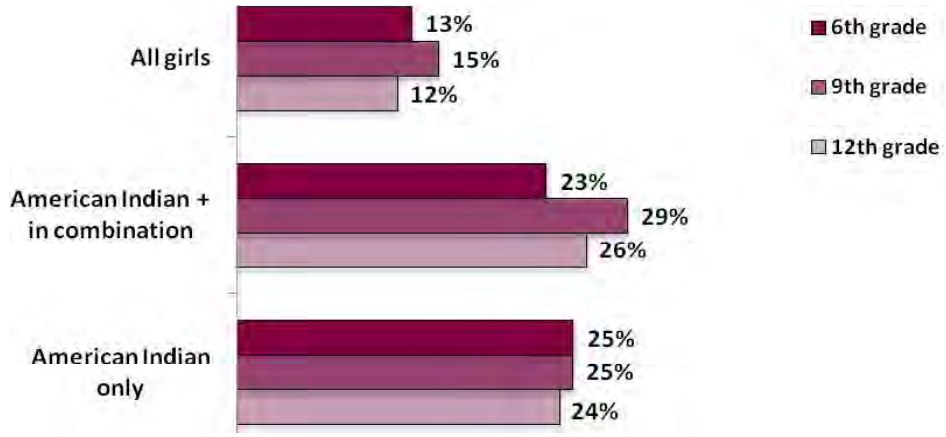
The advocates' reports of Native girls viewing violence and sexual exploitation as "no big deal" as a result of their social environments are echoed by National Indian Child Welfare Association:

> *Unrecognized and untreated child victims are at a high risk of growing up to become dysfunctional adults, and the repeated risk of sexual abuse greatly increases, generation after generation, within the community. The victims themselves become used to being victimized and see victimization as a fact of life.*[243]

[243] Cross T and Simmons D, (April 14, 2008). *Child abuse and neglect and American Indians.* Portland OR: National Indian Child Welfare Association.

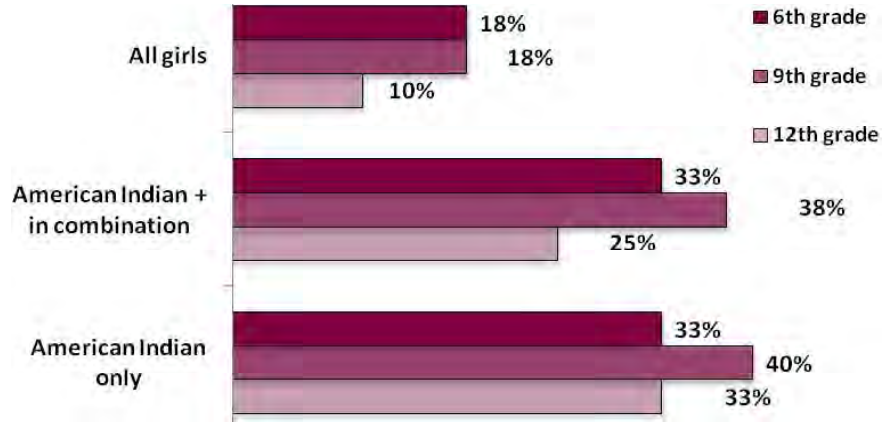
Native girls' responses to the 2007 Minnesota Student Survey indicate that they are not only frequent victims of family-perpetrated physical and sexual abuse, but they are also often witnesses to violence against others in the home. Native girls were much more likely than girls in the general population to report that a family member had physically assaulted another family member at home (see Figure 24). Given the amount of violence that Native girls encounter at home, at school, and in relationships, it is disturbing but not surprising that Native girls also reported being in physical fights much more frequently than girls in the general population (see Figure 25).

24. Girls reporting that a family member physically assaulted another family member*



**2007 Minnesota Student Survey.*

25. Girls reporting that they hit or beat up another person in the past 12 months*



**2007 Minnesota Student Survey.*

In Canada, studies with Aboriginal youth living on the street have found that these youth often report violence to be part of their daily life. A national study of 640 runaway and thrown-away

youth in shelters and 600 living on the street found high levels of violence among vulnerable and prostituted Aboriginal youth. About one-half of youth living in shelters and two-thirds of the street youth reported carrying a weapon; one-fourth of street youth said they had committed a violent act using a weapon.[244] In research conducted in five areas of British Columbia, prostituted Aboriginal youth noted that a cycle of violence had been normalized in their communities, which they felt made it impossible for many caught in that cycle to break the pattern.[245]

Other studies have found that children's exposure to prostitution contributes to their entry into the sex trade. An international study of commercial sexual exploitation of children in the U.S., Canada, and Mexico found that exposure to a pre-existing adult prostitution zone and social groups that condone or tolerate child-adult sexual relationships is a key contributing factor in youth entering prostitution.[246] A study with prostituted Canadian women has found that over 20 percent grew up in environments where prostitution was common. Research participants described their own involvement in commercial sexual exploitation as a result of learned behavior and day-to-day survival within their families for generations.[247] One Canadian researcher whose participants included a large number of Aboriginal youth noted that, to youth living in impoverished neighborhoods where street prostitution is concentrated and they have no other access to money, an offer to watch an indecent act by a man cruising by in his car can easily seem reasonable and worthwhile.[248]

Similar to the advocates' comments about Native women and girls involved in "free-lancing," studies with Aboriginal youth that had been sexually exploited by family members at a young age found that many viewed the sex trade as a way to have some control over their lives. These youth saw no harm in being paid for sex since it was taken for free when they were still at home.[249] One study with commercially exploited youth and 22 Aboriginal communities across Canada reported that for many Aboriginal youth in the sex trade, prostitution presented them with an illusion of escape and independence.[250]

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[244] Administration for Children and Families, (October 1995). *Youth with runaway, throw-away, and homeless experiences: Prevalence, drug use, and other at-risk behaviors—A FYSB research summary*. Silver Spring MD: Family and Youth Services Bureau, National Clearinghouse on Families and Youth.

[245] Hunt S, (2006). *Final Report—Violence in the lives of sexually exploited youth and adult sex workers in BC: Provincial research.* Justice Institute of British Columbia, Centre for Leadership and Community Learning. Retrieved April 20, 2009 from http://peers.bc.ca/images/orchidupdat0407.pdf

[246] Estes R and Weiner N, (2001). *The commercial sexual exploitation of children in the U.S., Canada, and Mexico: Full report of the U.S. national study.* Philadelphia: Center for the Study of Youth Policy, University of Pennsylvania School of Social Work.

[247] Tutty L and Nixon K, (2003). Selling sex? It's really like selling your soul, in Gorkoff K and Runner J (Eds.), *Being heard: The experience of young women in prostitution*, pp. 29-45. Halifax: Fernwood.

[248] Scheirich W, (April 2004). Manitoba's strategy: Responding to children and youth involved in sexual exploitation, *Envision: The Manitoba Journal of Child Welfare 3*(1). Retrieved March 19, 2009 from http://www.envisionjournal.com/application/Articles/59.pdf

[249] Urban Native Youth Association, (2002). *Full circle.* Vancouver BC: Urban Native Youth Association. Retrieved February 29, 2009 from http://www.unya.bc.ca/resources

[250] Kingsley C and Mark M, (2000). *Sacred lives: Canadian Aboriginal children and youth speak out about sexual exploitation*. Save the Children Canada.

Addiction

Parents' addiction as a risk factor

Data collected by MIWRC

Advocates at both round tables described a parent's substance abuse, particularly drug abuse, as playing a role in some Native girls' entry into prostitution. This is an example of those stories:

> *Two years ago I was working with three sisters who had been prostituted by their mother since they were two, and the girls were about 15, 16, 17. They were just shifting and turning on their mother and taking their profits…it was kind of a struggle, mom still wanted money for her drug addiction, and they were starting to want to take their [own] money. [Twin Cities advocate]*

Information from other sources

Research has found that family substance abuse is strongly related to youth running away, which puts them at greater risk of sexual exploitation. In a national U.S. study, researchers found that 31 percent of 640 runaway and thrown-away youth in shelters and 45 percent of 600 runaway and thrown-away youth living on the street reported problematic substance use by a family member (most frequently a step-parent) during the 30 days before the youth left home. These youth told interviewers that when family members used substances, they were more likely to get into arguments with the youth, to neglect or ignore them, or to hit them.[251] The Michigan Network of Runaway, Homeless, and Youth Services reported that 41 percent of the youth they had served in 1995 reported leaving because of adult substance abuse in the home.[252]

In the statewide study of homelessness conducted by Wilder Research, over half (56%) of the Native girls age 21 and younger described their parents' drug and alcohol use as the partial or main reason they were currently homeless.[253] Findings from the 2007 Minnesota Student Survey also suggest that family alcohol and drug abuse are significant problems for many Native high school girls. Statewide, American Indian girls reported problematic alcohol use by a family member at more than double the rate of girls in the general population (see Figure 26). The same pattern is seen in Native girls' Minnesota Student Survey reports of a family member's drug use causing problems. The percentage of American Indian girls reporting problematic family drug use was also high, two to three times that of girls in the general population for the three grade levels (see Figure 27).

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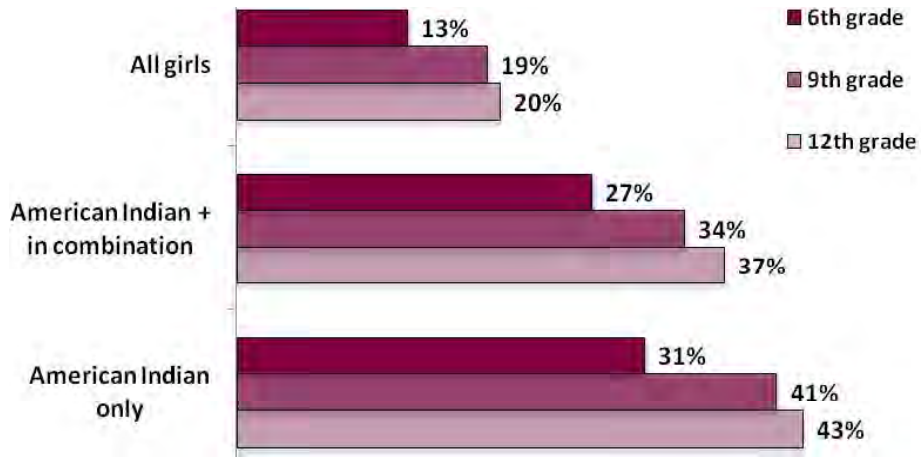
[251] Administration for Children and Families, (October 1995). *Youth with runaway, thrown-away, and homeless experiences: Prevalence, drug use, and other at-risk behaviors—A FYSB research summary*. Silver Spring MD: Family and Youth Services Bureau, National Clearinghouse on Families and Youth.

[252] Cited in Walker N, (2002). Prostituted teens: A problem for Michigan too, in *Prostituted teens: More than a runaway problem.* East Lansing: Michigan State University Institute for Children, Youth, and Families.

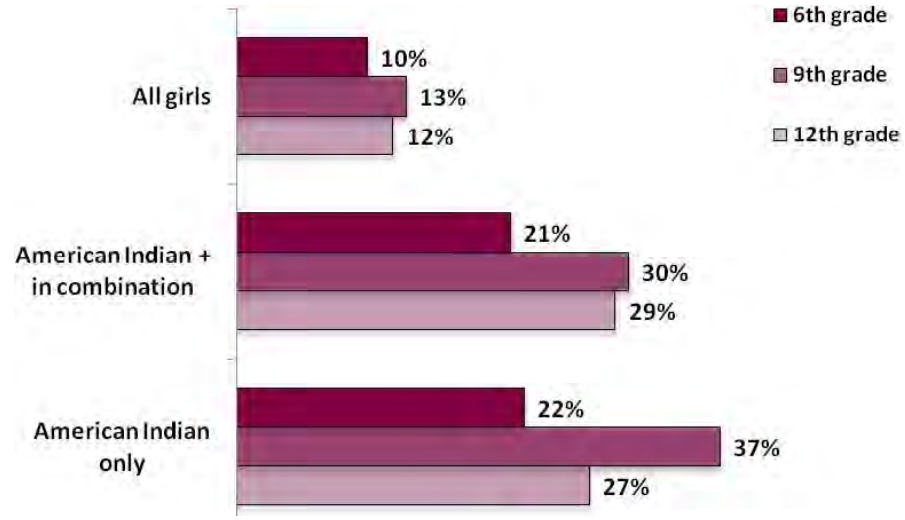
[253] Based on analysis of the non-reservation American Indian female subset of the 2006 Homelessness in Minnesota data, provided by Wilder Research.

26. Girls reporting that a family member's alcohol use repeatedly caused family, health, job, or legal problems, statewide*



2007 Minnesota Student Survey.

27. Girls reporting that a family member's drug use repeatedly caused family, health, job, legal problems, statewide*



2007 Minnesota Student Survey.

As noted earlier, Canadian studies with prostituted youth have also identified parental substance abuse as a primary factor in the physical and sexual abuse of Native youth, Native youth's decision to run away from home, and their resulting recruitment for prostitution.[254]

[254] Kingsley C and Mark M, (2000). *Sacred lives: Canadian Aboriginal children and youth speak out about sexual exploitation*. Save the Children Canada.

Personal addiction as a risk factor

Data collected by MIWRC

Advocates at both round tables described Native women's and girls' own addiction as a major facilitating factor in their entry into prostitution, and one that keeps them in the sex trade even when they want to leave. The Duluth advocates emphasized pimps' practice of providing girls with free drugs to get them addicted and then prostituting them. These are some of their comments:

> *There are a lot of women who enter after the age of 20. Who don't have parents in prostitution. A lot of those women are at that point where they have addictions. [Twin Cities advocate]*
>
> *I think they come into prostitution with addictions. I think they start, you know, they're experimenting around with drugs and then they find a ready source, because pimps latch onto that as a method to get them into it. [Duluth advocate]*
>
> *I also know a girl here, she got turned out with drugs, and she had to feed her addiction. So, she was really young and they gave her whatever, and then she had to keep that up. And it doesn't matter what your family status is, period. Because this girl I knew, her family status is pretty good. [Duluth advocate]*

Information from other sources

The Administration for Children and Families reported that family substance abuse is strongly related to runaway and thrown-away youths' own use of substances, which other research has shown to be a risk factor for entering the sex trade.[255] A number of studies have identified prostituted women's and girls' substance abuse as a precursor to their involvement in prostitution.[256,257, 258,259] In research based on a national sample of 200 prostituted juveniles and adults, 55 percent reported being addicted to drugs prior to entering the sex trade, 30 percent had become addicted following entry, and 15 percent said they became addicted at the same time they entered.[260]

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[255] Administration for Children and Families, (October 1995). *Youth with runaway, thrown-away, and homeless experiences: Prevalence, drug use, and other at-risk behaviors—A FYSB research summary*. Silver Spring MD: Family and Youth Services Bureau, National Clearinghouse on Families and Youth.

[256] Clatts M, Rees-Davis W, Sotheran J, and Atillasoy A, (1998). Correlates and distribution of HIV risk behaviors among homeless youths in New York City: Implications for prevention and policy, *Child Welfare 2*: 195-207.

[257] Pfeifer R and Oliver J, (1997). A study of HIV seroprevalence in a group of homeless youth in Hollywood, California, *Journal of Adolescent Health 20*: 339-342.

[258] Whitbeck L, Hoyt D, and Yoder K, (1999). A risk-amplification model of victimization and depressive symptoms among runaway and homeless adolescents, *American Journal of Community Psychology 27*: 273-296.

[259] Kipke M, Montgomery S, Simon T, and Iverson E, (1997). Substance abuse disorders among runaway and homeless youth, *Substance Use and Misuse 37*:969-986.

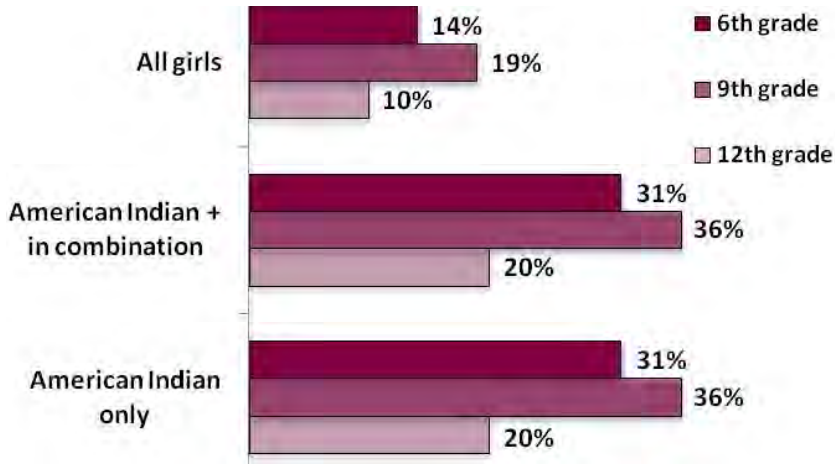
[260] Sweeney P, Lindegren M, Buehler J, Onorato I, and Janssen R, (1995). Teenagers at risk of human immunodeficiency virus Type I infection: Results from seroprevalence surveys in the United States, *Archives of Pedriatric and Adolescent Medicine 149*: 521-528.

In the Hennepin County study of women on probation for prostitution described earlier, 64 percent of the American Indian women for whom data were available reported drug use at the time of their arrest. One in five used both drugs and alcohol at the time of arrest, and half had received prior treatment for chemical dependency.[261]

American Indian women are more likely than women in other racial groups to become alcohol dependent as a response to childhood abuse. A study involving interviews with 979 American Indian women in seven tribal communities found that parental alcoholism, sexual abuse, combined physical and sexual abuse, emotional abuse, and emotional neglect as a child each doubled the risk of alcohol dependence. Those who had experienced four or more categories of these adverse experiences in childhood had seven times the risk of alcohol dependence.[262]

Early use of alcohol is a significant problem in American Indian communities. American Indian high school girls responding to the 2007 Minnesota Student Survey also reported early use of alcohol at much higher rates than girls in the general population (see Figure 28). In the Wilder Research study of homeless in Minnesota, one-third of homeless American Indian girls ages 11-17 and 42 percent of those ages 18-21 reported that their own use of drugs or alcohol was partial or main cause of their current homelessness.[263]

28. Girls reporting first use of alcohol at age 12 or younger, statewide*



**2007 Minnesota Student Survey.*

In the 2007 Minnesota Student Survey, 9th grade Native girls reported problematic drug and alcohol use at a rate close to double that of girls in the general population (see Figure 29).

[261] Subset of data provided by Julie Rud, Minneapolis Police Department, from dataset used to produce Martin L and Rud J, (2007) *Prostitution research report: Data sharing to establish best practices for women in prostitution.* Minneapolis: Prostitution Project, Hennepin County Corrections and the Folwell Center.

[262] Koss M, Yuan N, Dightman D, Prince R, Polacca M, Sanderson B, and Goldman D, (2003). Adverse childhood exposures and alcohol dependence among seven Native American tribes, *American Journal of Preventive Medicine 25* (3): 238-244.

[263] Based on analysis of the non-reservation American Indian female subset of the 2006 Homelessness in Minnesota data, provided by Wilder Research.

Among 12th grade Native girls, 20 to 35 percent reported at least one indicator of a substance abuse problem, over double the proportion of girls in the general population (see Figure 30).

29. 9th grade girls reporting problematic substance abuse, statewide (2007 Minnesota Student Survey)

Percent of girls reporting they…	Indian only	Indian + in combination	All girls
Could not remember what said or did after using alcohol/drugs 2 or more times	16%	15%	8%
Used more alcohol/drugs than intended 2 or more times	16%	14%	8%
Continued to use alcohol even though it was hurting relationships with friends or family	20%	16%	8%
Have needed to use more alcohol/drugs to get the same effect in the past 12 months	18%	16%	8%
Had 5 or more drinks in a row at least once in the past 2 weeks	29%	23%	13%

30. 12th grade girls reporting problematic substance abuse, statewide (2007 Minnesota Student Survey)

Percent of girls reporting that they…	Indian only	Indian + in combination	All girls
Could not remember what said or did after using alcohol/drugs 2 or more times	22%	21%	15%
Used more alcohol/drugs than intended 2 or more times	21%	21%	16%
Continued to use alcohol even though it was hurting relationships with friends or family	20%	15%	9%
Have needed to use more alcohol/drugs to get the same effect in the past 12 months	21%	17%	12%
Past 2 weeks, had 5 or more drinks in a row at least once	35%	32%	25%

Similar to research in the U.S., Canadian research has found substance abuse to be both a predictor for and a consequence of involvement in prostitution, particularly among Aboriginal women. A Montreal study involving interviews with 165 female street youth initially not involved in prostitution found at follow-up that substance abuse was a significant predictor for entering the sex trade.[264] A second Canadian study with young prostituted women, many of whom were Aboriginal, found that while drug use had facilitated their entry into prostitution, participants' use had also escalated as a result of being in prostitution. [265] Similar to the

[264] Weber A, Roy E, Blais L, Haley N, and Boivin J-F, (2001). Predictors of initiation into prostitution among female street youth. Included as part of Weber A, (2001). *HIV risk behavior and predictors of initiation into prostitution among female street youth in Montreal, Canada.* Master's thesis. Montreal, Canada: Department of Epidemiology and Biostatics, McGill University.

[265] Tutty L and Nixon K, (2003). Selling sex? It's really like selling your soul, in Gorkoff K and Runner J (Eds.), *Being heard: The experience of young women in prostitution*, pp. 29-45. Halifax: Fernwood.

advocates' remarks at the round table discussions, 60 percent of 183 prostituting women in Vancouver, about half of whom were Aboriginal, told researchers that they remained in the sex trade to maintain a drug habit.[266]

Risk due to fetal alcohol spectrum disorders

The Centers for Disease Control (CDC) currently use the term Fetal Alcohol Spectrum Disorders to describe three alcohol-related disorders: fetal alcohol syndrome (FAS), fetal alcohol effects (FAE), and alcohol-related neurodevelopmental disorder (ARND). The CDC describes how these three disorders differ:

> *The term FAE has been used to describe behavioral and cognitive problems in children who were prenatally exposed to alcohol, but who do not have all of the typical diagnostic features of FAS. In 1996, the Institute of Medicine (IOM) replaced FAE with the terms ARND and ARBD. Children with ARND might have functional or mental problems linked to prenatal alcohol exposure. These include behavioral or cognitive abnormalities or a combination of both.*[267]

Data collected by MIWRC

Advocates at both MIWRC round tables reported working with Native girls and women in prostitution who were affected by fetal alcohol spectrum disorders. The advocates described FASD as a critical risk factor, since it results in impaired judgment and impulsiveness, putting younger girls at very high risk of commercial sexual exploitation. Advocates also described FASD as a factor in Native parents prostituting their children, and the prevalence of FASD in Native youth in foster care. These are some of their comments:

> *One of the clients I work with, she comes and goes, she knows she's been diagnosed with FAE and her children have been diagnosed as well. So her mother drank and she drank while she was pregnant with her kids. So, she's working to keep herself in a home and she's exchanging sex for her home and so she has no problem with her kids doing the same thing, her daughters. [Second speaker] I think the other thing with FASD what we know about that brain damage, is you have a 15 year old girl's body but you have an 8 year old girl's mental capacity, because your brain is not formed correctly because you're brain damaged. [Twin Cities advocates]*
>
> *This is something that I always see, and I don't know that we know so much about, is how many people are affected by fetal alcohol. Some individuals are really aware of it, they have been tested, and usually those are the kids that are coming out of foster care, like they might have had that testing so they're aware of it. But when those two things get coupled, FAS and also foster care, that's its own dynamic. But also, there are the kids that might have FAS but don't know it and other people don't know it either, which makes them really vulnerable. [Duluth advocate]*

[266] PACE Society, (2000). *Violence against women in Vancouver's street-level sex trade and the police response*. Vancouver BC.

[267] Centers for Disease Control, (May 2, 2006). *Information, Fetal Alcohol Syndrome.* Retrieved April 18, 2009 from http://www.cdc.gov/ncbddd/fas/fasask.htm

Information from other sources

In research by the Centers for Disease Control, the fetal alcohol syndrome rate among American Indians has been found to be 30 times the rate among whites.[268] Other research in the U.S. has found that adolescents affected by FASD are at high risk of sexual exploitation. The authors of one study reported:

> *Teenagers and adults with FAS or FAE seem to 'plateau' academically and in daily functioning but their problems grow more serious as attention deficits, poor judgment, and impulsivity create obstacles to employment and stable living. Adolescents and adults with FAS/FAE have been described as 'innocent,' 'immature,' and easily victimized.*[269]

Findings from a study involving structured clinical interviews with 25 FASD-affected adults suggest that this group often suffers from substantial mental illness as well, including major depression, psychotic disorders, and anxiety disorders.[270] Ann Streissguth, a national expert on FASD, reported these findings from her own and others' research with this vulnerable population:[271]

- 62% have had a disrupted school experience between the ages of 12 and 20.
- 90% have had mental health problems diagnosed.
- 40% of youth ages 6-11, 48% of people ages 12-20, and 52% of those over age 21 have exhibited inappropriate sexual behavior and have been sexually victimized.
- 79% of girls ages 12 and up have exhibited sexually inappropriate behavior.

FASD also disproportionately impacts Native communities in Canada.[272,273] Canadian research with prostituted youth has found that those affected by FASD are particularly vulnerable to sexual exploitation by pimps using violent "guerrilla recruitment" methods, sometimes first offering them free drugs at house parties. Once addicted, FASD-affected youth are threatened and told they must work off their debt through prostitution. [274]

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[268] Cited in Kaisernetwork.org, (October 24, 2007). *Kaiser health disparities report: A weekly look at race, ethnicity, and health.* Retrieved March 27, 2009 from http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=48423

[269] Olson H, Burgess D and Streissguth, A, (1992). Fetal alcohol syndrome (FAS) and fetal alcohol effects (FAE): A lifespan view, with implications for early intervention, *Zero to Three: National Center for Clinical Infant Programs, 13*(1), 24-29.

[270] Famy C, Streissguth A and Unis A, (April 1998). Mental illness in adults with fetal alcohol syndrome or fetal alcohol effects, *American Journal of Psychiatry 155*: 552-554.

[271] Streissguth A, (May 4, 2005). *FASD: Juvenile Justice and the community*. Keynote lecture at the kick-off for the Hennepin County Juvenile Justice Project. Minneapolis MN.

[272] Boland F and Durwyn M, (1999). *Fetal alcohol syndrome: Understanding its impact*. Correctional Service of Canada. Cited in Kingsley C and Mark M, (2000), *Sacred lives: Canadian Aboriginal children and youth speak out about sexual exploitation*. Save the Children Canada.

[273] Vancouver/Richmond Health Board, (1999). *Healing ways: Aboriginal health and service review.* Retrieved May 6, 2009 from http://www.vch.ca/community/Docs/healing_ways.pdf

[274] Hunt S, (2006). *Final Report—Violence in the lives of sexually exploited youth and adult sex workers in BC: Provincial research.* Justice Institute of British Columbia, Centre for Leadership and Community Learning. Retrieved April 20, 2009 from http://peers.bc.ca/images/orchidupdat0407.pdf

In a study in British Columbia that involved interviews with FASD-affected adults, one research participant described the ways that FASD puts her at risk:

> *I have trouble making decisions, if they're bad or they're right, and that's what has been hardest throughout my life. I realize that it's right or wrong after I've done it, and then that's what makes it really bad…because you can get in a lot of trouble and I've gotten into lots of trouble…it's hard to say no to things…I used to do anything and everything, just, you know, for the hell of it, or just to have fun…but there'd be so much trouble…you think of having fun, you think you're going to have fun, and what's wrong with that and then you realize fun turns into trouble and trouble turns into danger.*[275]

Involvement with child protection systems

Data collected by MIWRC

A number of the advocates working with runaway and street youth described a history of removal from the home and placement in a foster care as an important risk factor for Native girls' entry into prostitution. One advocate described working with a Native girl in prostitution whose mother ran away from foster care:

> *Mom aged out of foster care and came to this community on her own from a rural area and just kinda connected really young. She came here probably, I wouldn't say she aged out of foster care, she ran when she was about 16 years old. Came to this area and nobody looked for her, more or less. She ended up connecting with people who were willing to take care of her, females. Who also had experiences of running back to this area because this is where her family is, or was. And she went from there, just started working on the boats. [Duluth advocate]*

Other advocates described working with prostituted Native girls who had been in foster care, and the role of Native parents' own foster placement in trafficking their children. These are some of those comments:

> *[One girl] had just aged out of foster care and she ended up here. [Second speaker] I think removal from the homes, girls in foster care. We've got a lot of kids running from foster homes, you know. [Duluth advocate]*
>
> *Every person I've known in my personal life that has ever been in foster care and that's Native has always been sexually abused. [Second speaker] I think that is a really big issue…What happened to the mom that she [trafficked] her child? [Twin Cities advocate]*

Information from other sources

Research has found that many commercially sexually exploited youth have been involved in the child welfare system. In their book *Being Heard: The Experiences of Young Women in Prostitution,* Gorkoff and Runner reported that 63 percent of prostituted girls and young women in their Canadian study had been involved with the child welfare system as children. Over three-

[275] Straarup D, (1997). Master's thesis: *Maneuvering the maze: Exploring the experiences of fetal alcohol effected adults*, pp. 71 and 72. School of Social Work, University of British Columbia. Retrieved May 16, 2009 from https://circle.ubc.ca/bitstream/2429/6445/1/ubc_1997-0483.pdf

fourths had been in foster and group homes, often for many years.[276] A national study of homeless, runaway and thrown-away youth in the U.S. found that 58 percent of 640 youth staying in shelters and 71 percent of 600 street youth had been placed or spent time in an institutional setting such as a foster home, group home, psychiatric or mental hospital, juvenile detention, or jail.[277]

American Indian youth have the highest rates of out-of-home placement in the state, representing 12 percent of children in foster care but only one percent of the state's child population. Reflecting the data on recurrence in Native child maltreatment cases at six-month and twelve-month follow-up, almost 20 percent of American Indian children that entered foster care in 2007 (19.8%) had re-entered within twelve months of a prior episode.[278] In 2009, nine percent of the children in Hennepin County foster care were American Indian, more than four times their representation in the county's child population.[279]

Foster placement was also a common background experience among non-reservation Native women and girls participating in the 2006 Wilder Research study of homelessness. Over one-fourth of the non-reservation Native girls ages 17 and under (28%) and 24 percent of those ages 18 to 20 reported having left foster care or a group home without a permanent place to go. Overall, almost 30 percent had lived in a group home at some point in time.[280]

Failure to finish high school

Research has found that a minor who has been expelled from school, or who is no longer interested in finishing school, is at a high risk of becoming involved in prostitution.[281] In the Hennepin County study of 70 women on probation for prostitution described earlier, only one of the 17 American Indian women had completed high school.[282]

Statewide, about 41 percent of American Indian students graduated on time in the 2006-2007 school year. Except for Hispanic students, many of whom are English Language Learners, American Indians had the highest dropout rate (34.5%) of any group statewide (see Figure 31).

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[276] Gorkoff K and Runner J (Eds.), (2003). *Being heard: The experiences of young women in prostitution*. Halifax: Fernwood.

[277] Administration for Children and Families, (October 1995). *Youth with runaway, thrown-away, and homeless experiences: Prevalence, drug use, and other at-risk behaviors—A FYSB research summary*. Silver Spring MD: Family and Youth Services Bureau, National Clearinghouse on Families and Youth.

[278] National Indian Child Welfare Association (NICWA), (November 2007). *Time for reform: A matter of justice for American Indian and Alaskan Native children.* Portland OR: National Indian Child Welfare Association.

[279] Minnesota Department of Human Services Social Services Information System, (May 2, 2007). Cited in Hennepin County Child Protection Task Force: Final report. Minneapolis.

[280] Based on analysis of the non-reservation American Indian female subset of the 2006 Homelessness in Minnesota data, provided by Wilder Research.

[281] Cited in Walker N, (2002). Prostituted teens: A problem for Michigan too, in *Prostituted teens: More than a runaway problem.* East Lansing: Michigan State University Institute for Children, Youth, and Families.

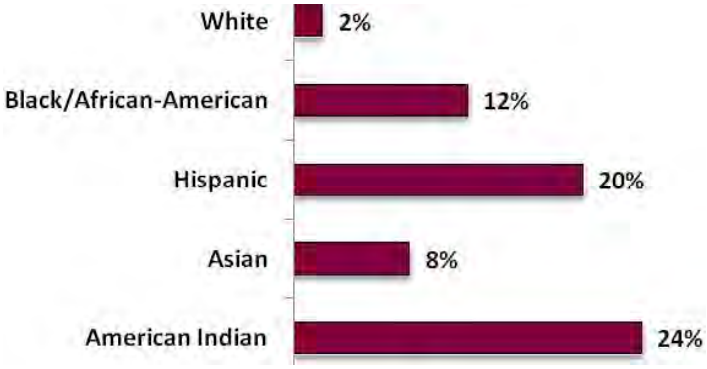
[282] Subset of data provided by Julie Rud, Minneapolis Police Department, used to produce Martin L and Rud J, (2007) *Prostitution research report: Data sharing to establish best practices for women in prostitution.* Minneapolis: Prostitution Project, Hennepin County Corrections and the Folwell Center.

In Hennepin County, the graduation rate for American Indians was even lower. Unlike other racial groups in the county, American Indian graduation rates did not improve since the previous year, but actually declined from 32.2 percent graduating on time in 2005 to only 30.2 percent graduating on time in 2006. Almost one-fourth (24%) dropped out of school that year (see Figure 32).

31. High school graduation rates, Minnesota public schools 2006-2007 (National Governor's Association rates)[283]

	Graduated on time	Dropped out	Were continuing
All students statewide	73.1%	6.3%	14.3%
American Indian students	41.4%	18. 6%	27.3%
Asian/Pacific Islander students	65.7%	6.0%	19.2%
Black students	41.3%	13.3%	32.6%
White students	80.4%	4.2%	10.7%
Hispanic students (any race)	41.3%	19.5%	23.6%

32. Percent of Hennepin County high school students that dropped out of school in 2006, by race[284]



In their responses to the 2007 Minnesota Student Survey, American Indian girls showed the least attachment to school when compared to girls in other racial groups. Statewide, Native girls were

[283] According to the Minnesota Department of Education, the NGA rate is a four-year, on-time graduation rate agreed to by all 50 states. In addition to grads and drops, it considers continuing and unknown students: these two additional groups add approximately 16,000 students statewide into the measure. For the Class of 2007, the cohort of students was determined by counting first time ninth graders in 2004 plus transfers into the group minus transfers out over the next four years. The NGA rate only considers students who graduate in four years. Data retrieved April 2, 2009 from http://education.state.mn.us/mde/Data/Data_Downloads/Student/Graduation_Rates/index.html

[284] Minnesota Department of Education. Data retrieved April 2, 2009 from http://education.state.mn.us/mde/Data/Data_Downloads/Student/Graduation_Rates/index.html

least likely to report that they like school (74.9%) and most likely to report truancy in the past 30 days (44.5%).[285]

Canadian research has found similarly high drop-out rates among Aboriginal youth. In Canada's 2001 Census, 62 percent of Aboriginal people living on reserves and 48 percent of those living off-reserve had less than a high school education.[286] In Canadian studies of gang-affiliated youth, most Native girls were typically two to three years behind their age cohort if they were still in school, and few finished even a 10th grade education.[287] Two surveys of street-involved Canadian youth over a six-year period found that youth involved in commercial sexual exploitation were much less likely to be in school than those that were not, and the difference in exploited and non-exploited youth's participation in school increased between 2000 and 2006. Though in general, street-involved girls tended to be in school more often than street-involved boys, those that were not engaged in prostitution were much more likely to be attending school than those that were (see Figure 33).

33. Percent of Native street-involved youth in Manitoba studies currently attending school[288]

Percent currently attending school	Prostituted youth	Unprostituted youth
2000 Street-Involved Youth Survey (boys and girls)	58%	63%
2006 Street-Involved Youth Survey (boys and girls)	57%	66%
2006 Street-Involved Youth Survey (girls only)	60%	76%

Mental and emotional vulnerability

Data collected by MIWRC

Advocates at both MIWRC round tables described issues related to mental health as a significant factor in Native girls' vulnerability to recruitment into the sex trade. Several advocates emphasized the effect of generational trauma on Native families, and by extension, the effect on Native girls' emotional vulnerability. These are some of their comments:

[285] Cited in Women's Foundation of Minnesota, (April 2008). *Status of girls in Minnesota.* Retrieved April 3, 2009 from http://www.wfmn.org/PDFs/StatusOfGirlsInMN_FullReportFINAL.pdf

[286] Dyck L, (November 2006). *Reaching Aboriginal youth: Issues and challenges in education*. Presentation at the STAN conference.

[287] Nimmo M, (2001). *The "invisible" gang members: A report on female gang association in Winnipeg*. Manitoba: Canadian Centre for Policy Alternatives.

[288] Saewyc E, MacKay L, Anderson J, and Drozda C, (2008). *It's not what you think: Sexually exploited youth in British Columbia.* Vancouver: University of British Columbia School of Nursing. Report based on data from surveys conducted by the McCreary Centre Society, Vancouver BC. Retrieved May 1, 2009 from http://www.nursing.ubc.ca/PDFs/ItsNotWhatYouThink.pdf

And then another situation is young women who are vulnerable to mental health issues. This is something that I always see. [Second speaker] Their home life is not as functional, there's a lot of chaos. So, there's all this chaos going on, so the other supports that other kids might have, like at school or those things, they're just not in place. [Duluth advocates]

We're talking mental health, we're talking about borderline personality disorders, post-traumatic stress, anxiety. Bipolar. And I think in the beginning, it's dissociation. [Second speaker] Right, because that's the only way to deal with it, is you dissociate, it's like an out of body experience. They go somewhere else or they become someone else to be able to detach what they just had to go through, so they turn into nicknames and secondhand names. I was Diamond on the street, even though I'm _____ in real life, and Diamond is a whole another personality. [Twin Cities advocate]

That void. Culture and identity, all those things that lead to that searching and that hopeless feeling of 'There's no place for me,' all that conflict between two worlds and just being vulnerable to being taken somewhere down a path. [Duluth advocate]

Information from other sources

American Indian women's high rates of violent physical and sexual victimization have mental health consequences. Depression in Native women is frequently linked to a history of child abuse, adult revictimization, and lifetime abuse.[289] The American Psychological Association (APA) describes anxiety, depression, insomnia, irritability, flashbacks, emotional numbing, avoidance of situations or activities and/or hypervigilance as manifestations of post-traumatic stress disorder (PTSD), which can result when a person has "experienced, witnessed, or been confronted with an event or events that involve actual or threatened death or serious injury, or a threat to the physical integrity of oneself or others," and when "the person's response involved intense fear, helplessness, or horror."[290]

Researchers have found high rates of PTSD among American Indian women.[291] One study found that depression, PTSD, and suicide are strongly related to Native women's experiences with forced sex by a partner.[292] Exposure to racial discrimination has also been found to play a role Native girls' mental health, often resulting in withdrawn behavior, anxiety, depression, and physical complaints related to stress.[293] In a study of American Indian teen mothers, 61 percent reported interpersonal violence. There was a significant relationship between the teens' violent

[289] Bohn D, (2003). Lifetime physical and sexual abuse, substance abuse, depression, and suicide attempts among Native American women, *Issues in Mental Health Nursing 24*(3): 333-352.

[290] American Psychiatric Association, (2000). *Diagnostic and statistical manual of mental disorders DSM-IV-TR (Fourth ed.)*. Washington D.C.: American Psychiatric Association.

[291] Robin R, Chester B, and Goldman D, (1996). Cumulative trauma and PTSD in American Indian communities, in Marsella A, Friedman J, Gerrity E, and Scurfield R (Eds.), (1996). *Ethnocultural aspects of posttraumatic stress disorder: Issues, research, and clinical applications*, pp. 239-254. Washington DC: American Psychological Association.

[292] Hamby S and Skupien M, (1998). Domestic violence on the San Carlos Apache Indian Reservation: Rates, associated psychological symptoms, and current beliefs, *The Indian Health Service Primary Care Provider* 23: 103-106.

[293] Whitbeck L, Hoyt D, Simons R, Conger R, Elder G, Lorenzo L, and Huck S, (1992). Intergenerational continuity of parental rejection and depressed affect, *Journal of Personality and Social Psychology 63*:1036-1045.

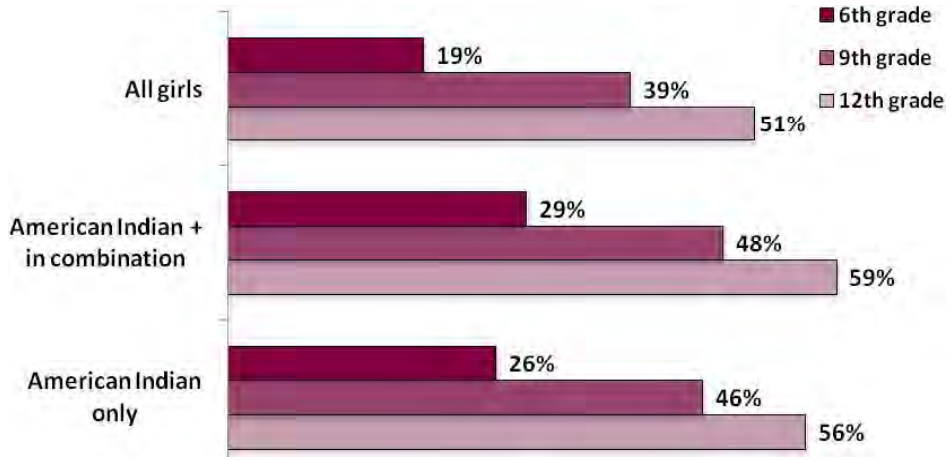
victimization and their likelihood of substance abuse and PTSD symptoms such as dissociation, defensive avoidance, intrusive experiences, and anxious arousal.[294]

In a recent study with prostituting women in Vancouver, over half were Aboriginal. Researchers found that 89 percent had at least one post-traumatic stress disorder (PTSD) symptom: 81 percent reported at least three numbing and avoidance PTSD symptoms, and 85 percent reported at least two physiological hyper-arousal symptoms.[295] These included:

- Having a difficult time falling or staying asleep
- Feeling more irritable or having outbursts of anger
- Having difficulty concentrating
- Feeling constantly "on guard" or like danger is lurking around every corner
- Being "jumpy" or easily startled

Native girls responses to the 2007 Minnesota Student Survey indicate that many are experiencing some level of emotional stress. At all three grade levels, a larger proportion of Native girls reported feeling high levels of emotional stress when compared to girls in the general population (see Figure 34).

34. Girls that felt under stress/pressure "quite a bit" or "almost more than I could take," statewide*



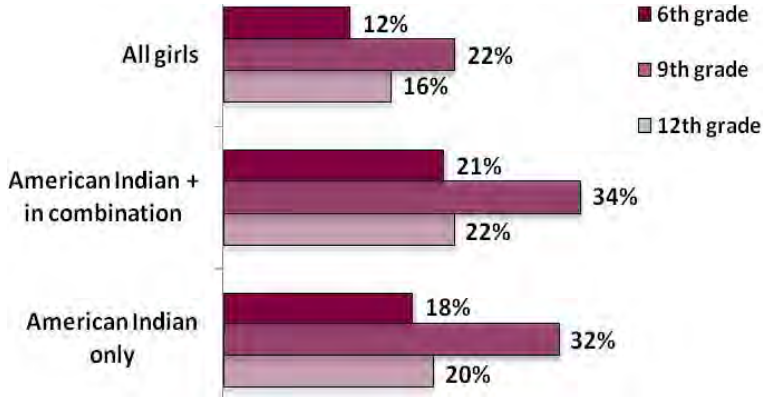
**2007 Minnesota Student Survey*

Native girls responding to the 2007 Minnesota Student Survey also more frequently reported that they had thought about suicide and that they had attempted suicide in the past 12 months than girls in the general population (see Figures 35 and 36).

[294] Mylant M and Mann C, (July 31, 2008). Current sexual trauma among high-risk teen mothers, *Journal of Child and Adolescent Psychiatric Nursing.* Retrieved June 1, 2009 from http://www.blnz.com/news/2008/09/02/Current_Sexual_Trauma_Among_High-Risk_9060.html

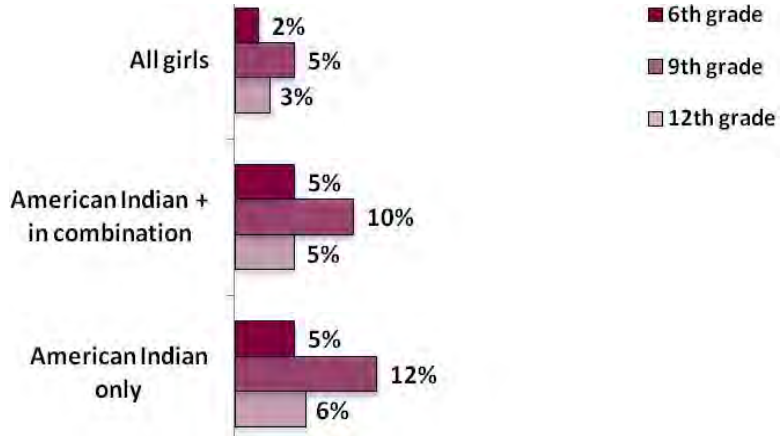
[295] Farley M, Lynne J, and Cotton A, (2005). Prostitution in Vancouver: Violence and the colonization of Aboriginal women, *Transcultural Psychology 42*: 242-271.

35. Girls that thought about killing themselves during the past year, statewide*



**2007 Minnesota Student Survey*

36. Girls that tried to kill themselves during past year, statewide*



**2007 Minnesota Student Survey*

A recent study found that 29 percent of American Indian teens believed they had only a 50-50 chance of living to age 35, compared to 10 percent of white teens. Teens that predicted a high likelihood of early death were much more likely to engage in subsequent risky behavior.[296] SAVE (Suicide Awareness Voices of Education) reports that the suicide rate for American Indian youth ages 10 to 15 in Minnesota is two to three times the rate of other groups in the state.[297] In Canada, the 2003 completed suicide rate for Aboriginal female youth ages 15 to 24 was almost 9 times that of female youth in the general population.[298] Many Native youth also do

[296] Borowsky I, Ireland M and Resnick M, (2009). Health status and behavioral outcomes for youth who anticipate a high likelihood of early death, *Pediatrics 124*(1): 81-88.

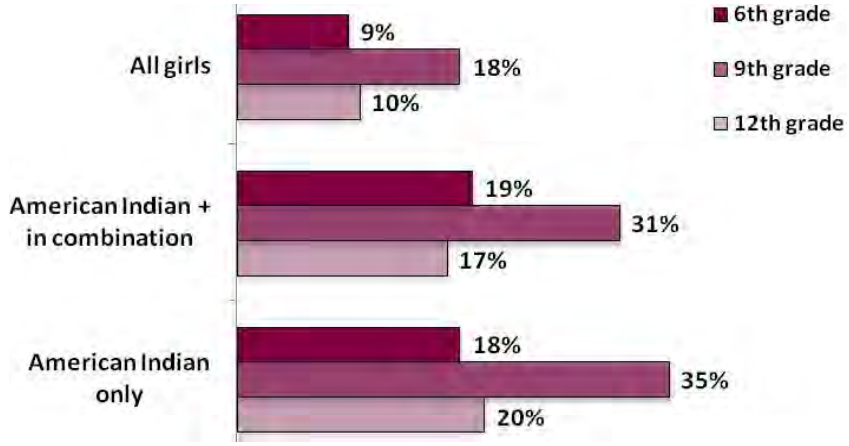
[297] Suicide Awareness Voices of Education (SAVE), (no date). Minnesota youth suicide statistics. Retrieved June 29, 2009 from http://www.save.org/index.cfm?fuseaction=home.viewPage&page_id=E9794786-DA70-AAB0-BABB61E8CC2F8EE0

[298] Health Canada, (2003). *A statistical profile on the health of First Nations in Canada.* Ottawa: Health Canada, First Nations and Inuit Health Branch.

not seek help when they feel distressed. A study with 101 American Indian youth who had attempted suicide found that 74 percent had not sought any help. Their most common reasons were embarrassment, not recognizing the problem, a belief that nobody could help, and feeling a need to rely on themselves.[299]

Self-injury (self-cutting/slashing or burning) is often used as a proxy measure for emotional well-being. Self-injury appears to be common among American Indian girls in Minnesota. Sixth and 9th grade Native girls responding to the 2007 Minnesota Student Survey reported having deliberately hurt themselves during the past year much more frequently than other girls (see Figure 37). The reduced percent of Native 12th grade girls reporting self-harm and their lower rates of reporting problematic alcohol use may be related to the extremely high American Indian drop-out rate. It is possible that Native girls that continue in school to this grade level are those with the strongest coping strategies, support systems, and/or life skills.

37. Girls that hurt themselves on purpose during the past year, statewide*



**2007 Minnesota Student Survey*

Research with homeless youth in the U.S. has resulted in similar findings. In a study of 428 street youth in Washington State, 14 percent were American Indian. Self-injurious acts were found to be extremely common; 69 percent of the youth reported that they had engaged in self-injury. A history of sexual abuse, physical abuse and neglect, and what the authors described as "deviant survival strategies" were found to be related to self-injury.[300]

Canadian research with prostituted Aboriginal adolescents on probation found that almost one-third had engaged in self-harm (self-cutting or slashing),[301] a rate very similar to that of 9th grade

[299] Freedenthal S and Stiffman A, (2007). "They might think I was crazy": Young American Indians' reasons for not seeking help when suicidal, *Journal of Adolescent Research, 22*: 58-77.

[300] Tyler K, Whitbeck L, Hoyt D, and Johnson K, (2003). Self-mutilation and homeless youth: The role of family abuse, street experiences, and mental disorders, *Journal of Research on Adolescence 13*(4): 457-474.

[301] Schissel B and Fedec K, (January 2009). The selling of innocence: The gestalt of danger in the lives of youth prostitutes, *Canadian Journal of Criminology*. Pp. 35-56.

Native girls responding to the Minnesota Student Survey. A Canadian study of incarcerated Canadian women who reported engaging in self-harm found that 64 percent were Aboriginal. These are some of the reasons participants gave when asked what motivated them to cut or slash themselves:

- A cry for attention or nurturing
- Self-punishment or self-blame
- Coping with isolation or loneliness
- Distracting themselves from or cleansing themselves of emotional pain
- A way to feel again, or to re-connect with reality
- Expression of painful life experiences
- Feeling in control, having power over self[302]

VI. Barriers to exiting the sex trade

The vast majority of prostituted women and girls want to leave prostitution.[303, 304] Despite that desire, most remain in the sex trade, for a variety of reasons. The following are the major barriers described by advocates attending the MIWRC round tables and in the literature produced by researchers and programs working with prostituted Native women and girls.

Inadequate support to ensure safety

Limited access to emergency or supportive housing

Studies of women and girls in prostitution cite a lack of safe shelter as the primary barrier to assisting those who want to leave the sex trade.[305,306] The advocates attending the MIWRC round table discussions also identified the absence of safe housing options as the major barrier for women and girls seeking to escape prostitution. These are some of their comments:

[302] Wichmann C, Serin R and Abracen J. (2002). *Women Offenders Who Engage in Self-harm: A Comparative Investigation*. Ottawa: Correctional Service Canada.

[303] Farley M and Lynne J, (2005). Prostitution of indigenous women: Sex inequality and the colonization of Canada's Aboriginal women, *Fourth World Journal 6*(1): 21-29.

[304] Elizabeth Fry Society of Toronto, (1987). *Streetwork outreach with adult female prostitutes: Final report.* Cited in Farley M, Lynne J, and Cotton A, (2005). Prostitution in Vancouver: Violence and the colonization of Aboriginal women, *Transcultural Psychology 42*: 242-271.

[305] Priebe A and Suhr C, (September 2005). *Hidden in plain view: the commercial sexual exploitation of girls in Atlanta*. Atlanta: Atlanta Women's Agenda.

[306] Kingsley C and Mark M, (2000). *Sacred lives: Canadian Aboriginal children and youth speak out about sexual exploitation.* Save the Children Canada.

> *It's like, 'Why would I waste my time talking with you about the situation, because there is nothing as a housing resource or as an advocate that you are going to be able to do. I think they're very aware that they're alone in that. [Duluth advocate]*
>
> *It's really frustrating when you have someone come in who says, 'I'm in this situation where I'm getting brought down to the Cities and I need to come back home.' Okay, we get a ticket so that person can come back home, and then it starts happening again by another family member, and then they're homeless and we can't move. We need a network of resources that are aware of the issue, and that can talk openly with about what we can do, and bring those resources together. We just don't have that right now. [Duluth advocate]*

Several advocates described federal regulations for public housing programs as a significant barrier for many prostituted Native women and girls with a felony conviction, which makes them automatically ineligible. Some advocates reported that most transitional housing programs and domestic violence shelters will refuse women and girls entry if they disclose that they have been prostituted. Minnesota state law also allows landlords and managers of subsidized housing to refuse to rent to a person with a history of prostitution.[307]

Some advocates described additional rules at battered women's shelters that effectively lock out Native women and girls in prostitution, simultaneously sabotaging advocates' efforts to help them exit the sex trade. These are examples of the stories they told:

> *I worked with someone for three years who was stripping. She was sexually abused as a child, got married at eighteen to someone who was abusive to her and when they got divorced she did all the things she was supposed to. Got her child got out, that's it. There's a strip club down the road that she made a little money at and she was good looking and was able to do that, and pretty soon now that's the only work experience she has, that's her whole entire life. She managed to get her son through high school and now he's out. She's traveling the circuit, she can't make any money, she's getting stuck places, sleeping in her car, staying at guys' houses who are holding guns to her head. She doesn't use, completely sober. And I spent three years with appointments over the phone, she'd call me from all over and talk. What kind of brought her to leaving is that she just could never be safe. There was no place to go. She couldn't get a job, she couldn't get into a [women's] shelter where she lived, and so I said if she could get up here we would get her into a shelter up here. And they kicked her out almost immediately and told her to go to the homeless shelter. She was used to being up all night, and that was an issue at the shelter. That was her job hours. I mean she was up until six in the morning and then slept all day, and that was what she got in trouble for and got kicked out for. [Duluth advocate]*
>
> *All of the places we outreach workers have to refer these young women and girls to, there's rules, there's curfews, you can't be chemically dependent or anything…they'll be at the point where they want help. They'll try it out and realize 'No, this isn't working for me. I'm not getting my needs met' and they go back into the same situation and they burn a lot of bridges. They have shelters saying 'No, you've been here once before. You can't come back.' Then they have nowhere to go. [Duluth advocate]*

[307] Carter V, (1999). Breaking Free, in Hughes D (Ed.), *Making the harm visible: Global sexual exploitation of women and children.* Kingston RI: The Coalition Against Trafficking in Women.

Absence of other options for self-sufficiency

As noted earlier in this report, most American Indian women and girls in the sex trade have not completed high school, so they rarely have marketable job skills or a formal employment history. Though 90 to 95 percent want to get out of the sex trade, most do not feel they have any other realistic options for earning enough money to survive.[308,309]

Distrust of law enforcement

Advocates at both round tables described Native women's and girls' distrust of police, fear that they would be arrested if they asked police for help, and fear that their trafficker would suffer no real consequences even if they did file a complaint and agree to testify. Some Minneapolis advocates reported interactions with city police in which they or their clients felt they were not treated well, and advocates working with prostituted Native girls in Duluth expressed frustration that the FBI chose not to prosecute a recent case involving four trafficked girls even though the girls were willing to testify and Duluth police had gathered extensive evidence. Echoing the Duluth advocates' stories, Kathy Black Bear at Rosebud Tribal Services in South Dakota reported that last year, an underage Rosebud girl living in Sioux Falls was trafficked to Mexico and kept there from January to March 2008. Ms. Black Bear reported that the FBI declined to investigate the case, so the tribe hired a private investigator to travel to Mexico, who successfully found the girl and brought her home. No charges were ever brought against the trafficker.[310]

Conversations with police officers suggest that limited staff time and budget constraints are often the reason that more pimps are not investigated. A Minneapolis police office explained that this is difficult when only two officers are assigned to prostitution-related crime citywide, and their other responsibilities allow them to spend an average of one week per month on prostitution-related investigations.[311] A second Minneapolis police officer reported that his unit would like to do more to apprehend pimps, but to do so requires significant planning, the cooperation of the person being prostituted, and a task force of five or six officers. He said that these costs tend to limit law enforcement efforts to the investigation of large prostitution rings that traffic minors, preferably those that also traffic drugs.[312] The same officer acknowledged that arresting the prostituted woman is generally considered the most expedient way to ensure her cooperation in securing adequate evidence to successfully prosecute her pimp.[313]

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[308] Farley M, Lynne J, and Cotton A, (2005). Prostitution in Vancouver: Violence and the colonization of Aboriginal women, *Transcultural Psychology 42*: 242-271.

[309] Elizabeth Fry Society of Toronto, (1987). *Streetwork outreach with adult female prostitutes: Final report.* Cited in Farley M, Lynne J, and Cotton A, (2005). Prostitution in Vancouver: Violence and the colonization of Aboriginal women, *Transcultural Psychology 42*: 242-271.

[310] Telephone interview with Kathy Black Bear, Rosebud Sioux Tribal Services, on April 6, 2009. Cited with permission.

[311] Interview with Minneapolis police officer, December 31, 2008.

[312] Meeting in Minneapolis, May 13, 2009.

[313] *Ibid*.

A study of prostituted women in Hennepin County using SIP (Subject in Process) numbers from the Hennepin County Court system confirmed that each woman convicted of prostitution had an average of eight prostitution-related arrests.[314] Minneapolis Police Department 3rd Precinct Inspector Lucy Gerold reported that the department does conduct "john stings" to arrest purchasers of sexual services, but noted that most have been allowed to plea bargain their sentences down to restorative justice.[315] In September 2008, Susan Segal, the Minneapolis City Attorney, reported that her office was currently reviewing its plea bargain standards in "john cases," and that prevention and treatment for prostituted girls is the focus of the department's work and the direction taken in the prostitution review calendar with the court.[316]

In a series titled "Lawless Lands," the *Denver Post* reported that from 1997 to 2006, federal prosecutors rejected almost two-thirds of reservation cases brought to them by FBI and Bureau of Indian Affairs investigators. The newspaper described some of the reasons that this occurred:

> *Investigative resources are spread so thin that federal agents are forced to focus only on the highest-priority felonies while letting the investigation of some serious crime languish for years. Long delays in investigations without arrest leave child sexual assault victims vulnerable or suspects free to commit other crimes, including, in two cases the Post found, homicide. With overwhelmed federal agents unable to complete thousands of investigations or supplement those done by poorly trained tribal police, many low-priority felonies never make it to federal prosecutors in the first place… Federal investigators usually take the lead when the victim is 9 or younger, authorities say; tribal investigators take the lead with older victims. But federal prosecutors often decline those cases precisely because the victim has been interviewed too many times or by investigators who aren't specially trained to handle child sexual assault.*[317]

It was outside the scope of this report to get extensive input from law enforcement personnel on this barrier, but a larger discussion of their perspectives should be included in future reports on this topic.

Child protection policies

Some advocates working with adolescent girls reported encountering challenges when child protection policies and priorities prevented opening a case for an adolescent girl who was being prostituted or was at extremely high risk of being prostituted. These are two of their stories:

[314] Hope L and Martin L, (2006). *Prostitution Project.* Cited in Martin and Rud (2007). *Prostitution research report: Data sharing to establish best practices for women in prostitution.* Minneapolis: Prostitution Project, Hennepin County Corrections and the Folwell Center.

[315] E-mail correspondence from Inspector Gerold to Suzanne Koepplinger, Executive Director of the Minnesota Indian Women's Resource Center, September 2, 2008.

[316] E-mail correspondence from City Attorney Segal to Suzanne Koepplinger, Executive Director of the Minnesota Indian Women's Resource Center, September 12, 2008.

[317] Riley M, (November 11, 2007). Lawless lands: Promises, justice broken. *Denver Post*. Retrieved February 2, 2009 from http://www.denverpost.com/ci_7429560

> *We dealt with a case where the girl was screaming for help and even did a self-report and they wouldn't open the case until the mother abandoned the kids. One of the things is, it's very dependent upon the youth's age. If they are 16, 17, they all just become disposable, forgotten. And if you don't get all of the information from the youth, if you don't have enough substantiated evidence about who, what, when, where, why, they can't open cases, they have nothing to work with. And the girls are not gonna talk. [Second speaker] Exactly. Even though we're mandated reporters and we're supposed to tell those things, if we don't have enough information, they can't open the case. You have to have enough information to warrant the opening of the case, or to even get them to investigate. [Twin Cities advocates]*
>
> *Number one, there's instances where child protection should be called, but we're finding gaps on why they can't be called. Two, there's this concern among mothers about child protection, that it's bad. In some of these cases I think that it would be helpful…These are younger girls, and they are being prostituted or are at very high risk of being prostituted. In the one case I couldn't prove nothing but the mother wouldn't let her get medical treatment, and I called around and they wouldn't let me take her as an advocate without Mom's signature. And so, I couldn't even get her the medical treatment without mom and the county didn't think that it would be a child protection case. But then I called it in three times just to see if I could get help. I just said 'I don't even want it to be a child protection case. I just want you to find me a loophole.' They did find me a loophole. [Twin Cities advocate]*

The scope and time frame for this report also limited our ability to access the perspectives of county child protection workers, which should be included in further discussions of this issue.

Limited resources for support and healing

Lack of services designed for Native women and girls in prostitution

Advocates repeatedly emphasized the fact that very few of the programs and services available to prostituted Native women and girls are designed to meet their needs, especially when they have not yet reached the point where they have made a firm commitment to leaving prostitution. These are some of their comments:

> *When she has to stay places where people hold guns to her head, when she has to sleep in her car, when she's taking off all of her clothes off for a dollar, and she doesn't have anything, she's never ever once applied for a job, has no job history, nothing. She's going into her fifties. She's also aging out of the business. So what ended up happening [when we couldn't get her into a shelter] was we found a place for her where she could go for a period of time in a whole different city and we got four tires donated for her car and filled it full of gas and off she went. And that was the best we could do. And she was here and she knew us, we could provide counseling and we could provide stuff. It was just so, I don't know, a very sad situation. [Duluth advocate]*
>
> *We ask our women, 'What do you need?' but our services aren't set up to help them, and I feel like it's an injustice to them, to pry into their life and say 'What the hell is going on, and how can I help you?' We don't even know, and our services aren't set up for that, so what can we do as organizations to make sure that we're all on the same page, that we treat the survivor the same no matter way? [Twin Cities advocate]*

Advocates also described the absence of programming that holistically addresses Native girls' and women's mental health, substance abuse, and safety issues. This is one of their comments:

> *What are you going to do to get her out? Because recognizing them, identifying them, that's great—but once she's ready to get out, are you going to have a place for her? This is not an overnight fix. This is not just 'Get her housing and her whole life is going to be better.' We're talking about incest, mental health issues, trauma that is life-long. [Duluth advocate]*

Advocates at both round tables described the ways that funders' requirements can impede prostituted Native women's and girls' access to the support they need. These are some examples of their comments:

> *[The programs I work with] are battered women's programming, and the attitude is 'It doesn't happen here' because there's no money for it [working with trafficked women], for them to have that kind of programming. When I used to run the shelter here, we never touched on that, that wasn't something we ever, ever talked about…But, like in Red Lake…the [reservation's] shelter there doesn't have programming for helping women in prostitution either. [Duluth advocate]*
>
> *The other piece is that in housing funding streams, the programming has become more and more [difficult]. The reporting and the documentation and the things that they're supposed to track, that advocates can't keep up with just 'Let's get you into housing.' Housing is really complicated, it takes a lot of time and energy to get all that stuff in place.' [Duluth advocate]*

Advocates and others have commented that there is also a significant lack of federal funding or state funding for assisting domestically trafficked and prostituted adult women. Though the Trafficking Victims Protection Act provides for a grant program that local and state authorities can use to provide services to mostly U.S. citizen victims, those funds were never requested by the Department of Justice, and subsequently no programs were ever funded.[318] Violence Against Women Act (VAWA) monies can be used for services to women in prostitution, but cannot be used for services to domestic victims of sex trafficking.[319,320] Victims of domestic violence and physical or sexual assault are eligible for reparations through Victims of Crime Act (VOCA) funding, but not if they were "committing a crime or any misconduct that is connected with the incident"—which automatically excludes prostituted women who have been beaten or sexually assaulted by a pimp or a john."[321]

Inadequate support from the mental health system

Earlier in this report, we described the overall emotional and mental vulnerability of Native girls and women, particularly the prevalence of post-traumatic stress disorder (PTSD). Life in

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[318] Hughes D, (July 30, 2007). Enslaved in the U.S.A.: American victims need our help, *National Review Online.* Retrieved June 14, 2009 from http://article.nationalreview.com/?q=ZDU0OGNlMDcwM2JmYjk0N2M0OTU4NGVlMTBlMmEyMjI

[319] *Ibid.*

[320] Minnesota Office of Justice Programs, (2007). *Violence Against Women Act FFY 2007-2009: Minnesota Office of Justice Programs State implementation plan,* p.6. Retrieved July 24, 2009 from http://www.ojp.state.mn.us/publications/VAWA_FFY07-09_Implementation_Plan.pdf

[321] Minnesota Senate, (April 22, 2009). *Public Safety Budget Division update*. Retrieved May 30, 2009 from http://www.senate.leg.state.mn.us/committees/2009-2010/finance_public_safety/update.htm

prostitution adds another layer of significant mental health consequences to pre-existing emotional problems. The advocates described many prostituted Native women and girls as living in a constant state of fear that is based on past experiences and current threat.

Research has found that prostituted women and girls often dissociate to survive psychologically, allowing their minds to distance themselves from experiences that are too much for them to process at the time.[322,323] Some survivors of abuse describe this as "leaving your body."[324] Frequent dissociation leads to a lack of connection in a person's thoughts, memory and sense of identity.[325] This significantly hampers a prostituted woman's or girl's ability to take steps to remove herself from a painful or dangerous situation.

In order to reach a level of stability that is needed to successfully exit the sex trade, many need mental health services while they are still in prostitution. As the advocates noted, most mental health professionals have no experience providing services to women living in the equivalent of a war zone, where rape and injury are routine occurrences and there is no protection against either. Though recognizing a need for psychiatric and psychological services for severely traumatized and mentally ill prostituted women, many of the advocates at the Minneapolis round table reported significant discomfort with having to secure a mental health diagnosis as a condition for rapid access to emergency or supportive housing. Some were also concerned about the mental health field potentially becoming the favored approach for addressing prostitution. These are some of the comments from that discussion:

> *Right now mental health is what is being funded the most, so a lot of times our women cannot receive resources until we get her the diagnosis. People are handing out the diagnosis, and that can be because they know housing comes first, and the most open model to people in prostitution is 'We'll take you where you're at and we'll move you forward rather than making you do those steps.' You can't even get them into a lot of housing programs that focus on where you are now, until you get a diagnosis. We have one woman we're working with, she got a diagnosis from, like, five doctors. [Twin Cities advocate]*
>
> *Plenty of women that I have worked with have been diagnosed as bipolar then get the medication that goes along with it. So it concerns me, that once women have that diagnosis, then the medication is it, that's the treatment. None of the other issues are addressed. [Twin Cities advocate]*

In addition to these concerns, advocates also described misdiagnosis and over-diagnosis as significant problems in assisting Native women and girls in prostitution as well as those trying to exit. Some questioned whether the criteria for certain mental health disorders were even appropriate for prostituted American Indian women and girls. These comments are part of those discussions:

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[322] McLeod E, (1982). *Women working: Prostitution now*. London: Croom Helm.

[323] Hoigard C and Finstad L, (1992). *Backstreets: Prostitution, money, and love.* Cambridge: Polity.

[324] Cori J and Scaer R, (2008). *Healing from trauma: A survivor's guide to understanding your symptoms and reclaiming your life*. Cambridge MA: Da Capo Press.

[325] National Mental Health Association, (2009). *Fact sheet: Dissociation and dissociative disorders.* Retrieved June 29, 2009 from http://www.nmha.org/go/information/get-info/dissociation-and-dissociative-disorders

That diagnosis of bipolar, I think it's archaic. We're talking about trauma, multiple generations of trauma. There's papers out about the trauma of racism which Native women experience. It's like not only the racism, the sexism, a lack of acknowledgement of the history of Native people and what this particularly means for women who have been exploited. That diagnosis doesn't accurately describe our experiences. And so the mental health field is kind of off the hook in addressing the social problems that go with that. And it's like, 'Here, we've done our share, this is what she has, give her the pills and refer her onto someone else.' [Twin Cities advocate]

There's one other side to dissociation, there's a positive side to that, and where that takes you is just spirituality. When you go out of body it's like you go into the spirit world. What does that mean? What is that about? Healing. Instead of all this 99.99% of negative stuff about what happening to you. And so, I've found women responsive to that and questioning what that meant for them. And that leads us right down the road of healing and spirituality. 'What does dissociation mean for you, and how do you find safety in that?' [Twin Cities advocate]

A counselor or a therapist can recognize some of the symptoms of PTSD as bipolar, or as schizophrenic. And unless you are well versed, or, I don't want to discredit any therapist, but I think doing more research and more involvement of what happens with mental health is needed, and I don't think a lot of therapists do that. Then you're stuck into a category. Because research is showing that PTSD has a lot of symptoms and if you're saying 'Oh, well she has disassociated, therefore she's schizophrenic...' [Twin Cities advocate]

Dependency, denial, and distrust of advocates

Advocates at both round tables described the tendency of prostituted Native women and girls to insist that they are in prostitution by choice, and to minimize or deny any harm they have experienced. These are some examples of those comments:

Finally, it got to the point where she wanted to leave, but this was absolutely not abuse to her. She was in control of her body, and those guys were idiots that wanted to give her any money for it. And, the fact of the matter was that she was never safe. [Duluth advocate]

Their mentality is 'This guy is taking care of me. He has provided for me. My family has let me down and this man cares about me. So, no matter what you guys are trying to tell me, I'm not trying to hear that because when you're gone at 5 o'clock he's still gonna be here. So everything you're telling me is a lie because he takes me home, he takes care of me, and me turning tricks is okay because I need to help out somehow. I can't work, I don't have a job and I can't find a job, so I'm doing what I can to help out.' [Twin Cities advocate]

One of the girls' mom used to work out on the boats and she came in and wanted to get an order against the guy who she thought but couldn't prove was pimping out her girl. That girl to this day still says 'He loves me and blah blah blah.' Puke everywhere, because he doesn't love you. He's shamelessly exploiting you and using you. [Duluth advocate]

Joe Parker, co-founder of a foundation that provides services to prostituted women and men, argues that this type of loyalty must be viewed as a manifestation of Stockholm Syndrome, a psychological condition common to hostage situations in which the hostage becomes emotionally bonded to her captor.[326,327] In a book chapter, Parker wrote:

[326] Parker J, (2004). How prostitution works, in Stark C and Whisnant R (Eds.), *Not for sale: Feminists resisting prostitution and pornography*, pp. 3-14. North Melbourne: Spinifex Press.

> *When the victim cannot fight or flee, she may try to form a protective relationship with her captor. She hopes that if she can prove her love and loyalty to the pimp, she can 'love' him into being good. This can become such a desperate attachment that she actually believes she loves him, and passes up chances to escape. Stockholm Syndrome is often the real reason for what others see as the 'choice' to stay in the sex industry.*[328]

At the round tables, advocates emphasized the extensive period of time it takes to build enough trust that prostituted Native women and girls are even open to considering that they are being exploited, and the longer period of time it takes until they become willing to leave the sex trade. Several advocates described their methods for giving younger girls time and space to tell what happened to them, to begin building that trust. This is one of their comments:

> *You've got to have that relationship, it isn't even a matter of asking the right question…I mean, once I know I've got that confidence with them and they're talking about problems and living in the cities, whatever, how horrible it was down there. So I ask questions about that. Maybe we're just starting to ask. But there still needs to be that relationship there. We're not doing the intake form with them. You know, when I get women where they start talking for some reason it's in the car. Even if we're sitting in the office it's 'Let's get some Dairy Queen,' just so I can get them in the car. [Duluth advocate]*

Some advocates cautioned that prostituted Native girls and women need to be offered options, saying that any programming that requires them to adopt a belief system, even one based on Native spirituality and healing, could potentially have a negative impact. This is one of their comments:

> *With some people who have been through so much trauma, are they even gonna be able to have faith right away in anything? So if you put them in [an immersion program based on Native spirituality] right away, is it gonna maybe push them away from that? What about people who go do that and then say 'That's just one more person playing on my vulnerability,' even if it was well intended? I wouldn't get my [Indian] name at that point, I would not…I look back and I think 'That's asking a lot. You know, it's one thing to sort of have my body but you will never have my mind,' right? When you're coming from that very protective space, you just get irritated and hate everybody. [Duluth advocate]*

Fear, shame, and the "don't talk" rule

During the round table discussions, several advocates commented that Native communities are often aware that certain families in the community are sexually exploiting and trafficking their girls into prostitution, but ignore the signs that this is occurring because they are reluctant to "interfere." Long-time advocates described this as the "don't talk" rule, and reflected that at one time, this same silence existed around domestic violence in Native communities. They felt that until communities start talking openly about sexual abuse, sexual assault, and commercial sexual exploitation, these problems will not cease. These are some comments from those discussions:

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[327] Carver J, (undated). Love and Stockholm Syndrome: The mystery of loving an abuser (Part 1), *Counseling Resource.* Retrieved June 29, 2009 from http://counsellingresource.com/quizzes/stockholm/

[328] Parker J, (2004). How prostitution works, in Stark C and Whisnant R (Eds.), *Not for sale: Feminists resisting prostitution and pornography*, pp. 3-14. North Melbourne: Spinifex Press.

> *We've got families that have been in prostitution for generations and you get one that starts talking, she's out of the family. You know, even sisters who were sexually abused by their father also, they're mad at her, you know, 'You better not move back to our rez.' [Second speaker] And then that causes a lot of drinking and drugs because they're ousted. [Duluth advocates]*
>
> *You do not call the police. I don't care what is going on, you call the police and your house will get stoned. Even neighbors who were not involved in what was happening. You just do not do it. That is a big piece that these women and girls are getting, when they're little. [Duluth advocate]*
>
> *One of the things we need to work on is that denial. We first have to recognize that this is happening…In our community, what is slowly killing us is that denial, that there is sexual abuse, there is incest happening, and as a result we're setting our future off to be utilized by someone else sexually. [Twin Cities advocate]*

When some of the advocates were discussing the need to get the community talking about commercial sexual exploitation, especially families prostituting their children, others responded that when they had opened discussions about incest and sexual assault in their own communities, many elders disapproved. This is an example comment from that discussion:

> *Um, some of the elders don't appreciate that. [Second speaker] Oh, I know, I know. I was 'that nasty girl who talks nasty.' [Duluth advocates]*

Research with Native child victims of physical and sexual abuse, physical and sexual assault, and commercial exploitation supports the advocates' reports. In one study with American Indian survivors of childhood sexual abuse, participants told researchers that when Native women or girls are sexually assaulted by a family member, they often fear being ostracized by their extended family if they report the assault. Reporting a family member, or even a member of another Native family in the same community, could result in significant social repercussions, so most victims do not report the assault.[329] In recent interviews with sexual violence survivors, activists, and support workers in three regions of Indian Country (Standing Rock Sioux Reservation in North and South Dakota, the State of Oklahoma, and the State of Alaska), Amnesty International also found that violence against Native women often goes unreported. In fact, a number of the women that were interviewed agreed to speak only if their anonymity was guaranteed. The researchers described barriers to reporting that included fear of breaches in confidentiality, fear of retaliation, and a lack of confidence that reports will be taken seriously or result in perpetrators being brought to justice.[330]

In the Canadian study with 150 commercially sexually exploited Aboriginal youth in 22 communities described earlier, prostituted youth that had run away from home told interviewers that in their home communities, there is no one they could talk to about the physical and sexual violence they had experienced at the hands of family members and other adults in the

[329] Gonzales J, (1999). Native American survivors, in California Coalition Against Sexual Assault, *Support for survivors manual,* pp. 257-259.

[330] Amnesty International, (2007). *Maze of injustice: The failure to protect indigenous women from sexual violence in the U.S.* London: Amnesty International.

community. The youth reported that people are often reluctant to "interfere," which leaves victims with no source of help or support. The youth felt that either they would not be believed, and/or that telling someone would simply trigger new violence.[331]

Absence of a common, evidence-based approach

At the round tables, advocates described two additional barriers they have encountered in trying to determine what services and approaches would result in the best outcomes.

The first is the absence of appropriate training for anyone working with prostituted Native women and girls, provided by people with cultural knowledge and extensive experience working with this population. The advocates reported that because addressing this issue is relatively new to Native communities, no common language or body of knowledge has been established. They felt that participating in the round tables and sharing information and perspectives had significantly increased their own knowledge and awareness, but felt that training is extremely important for advocates that have never been exposed to hearing stories of trauma this severe. The advocates with long-term experience working with prostituted Native women and girls emphasized the importance of training advocates on self-care, which they felt to be critical for working with such a traumatized population while staying balanced and avoiding burn-out.

The second barrier the advocates requested assistance in surmounting is the lack of a systematic approach to collecting reliable data about the number of Native women and girls involved in the various forms of commercial sexual exploitation, the number that meet the state's legal definition for trafficking, their current paths of entry, the prevalence of violence they are experiencing, and their needs while in prostitution and when trying to exit. Many of the advocates at both round tables voiced a high level of interest in participating in a collaborative data collection effort if MIWRC or a collaborative group would provide a questionnaire and technical assistance and enter and analyze those data. There was strong agreement at both round tables that these data are essential for effective planning and services.

[331] Kingsley C and Mark M, (2000). *Sacred lives: Canadian Aboriginal children and youth speak out about sexual exploitation*. Save the Children Canada.

VII. Conclusions

On July 22, 2009, MIWRC held a listening session with 33 Native community leaders and elders to discuss the draft of this report and to gather input on recommended action steps. Their comments are included in the following discussion.

The social ecology of vulnerability

Overall, the information we gathered for this report demonstrates that the sex trafficking of Native women and girls is neither a new problem nor a rare occurrence. It is, however, a very complex problem in its origins, activities, and solutions.

In reviewing our findings, we recognized that a social ecology framework is a useful lens for summarizing the influences that contribute to Native girls' and women's involvement in the sex trade. Social ecology is the study of people in their environment and the influence of that environment on human development and behavior.[332] This theoretical model allows for examination of layered social and economic influences on Native children's ability to develop the four beliefs described at the beginning of this report as essential for a coherent and resilient sense of self:

- The world is a good and rewarding place
- The world is predictable, meaningful, and fair
- I am a worthy person
- People are trustworthy.[333]

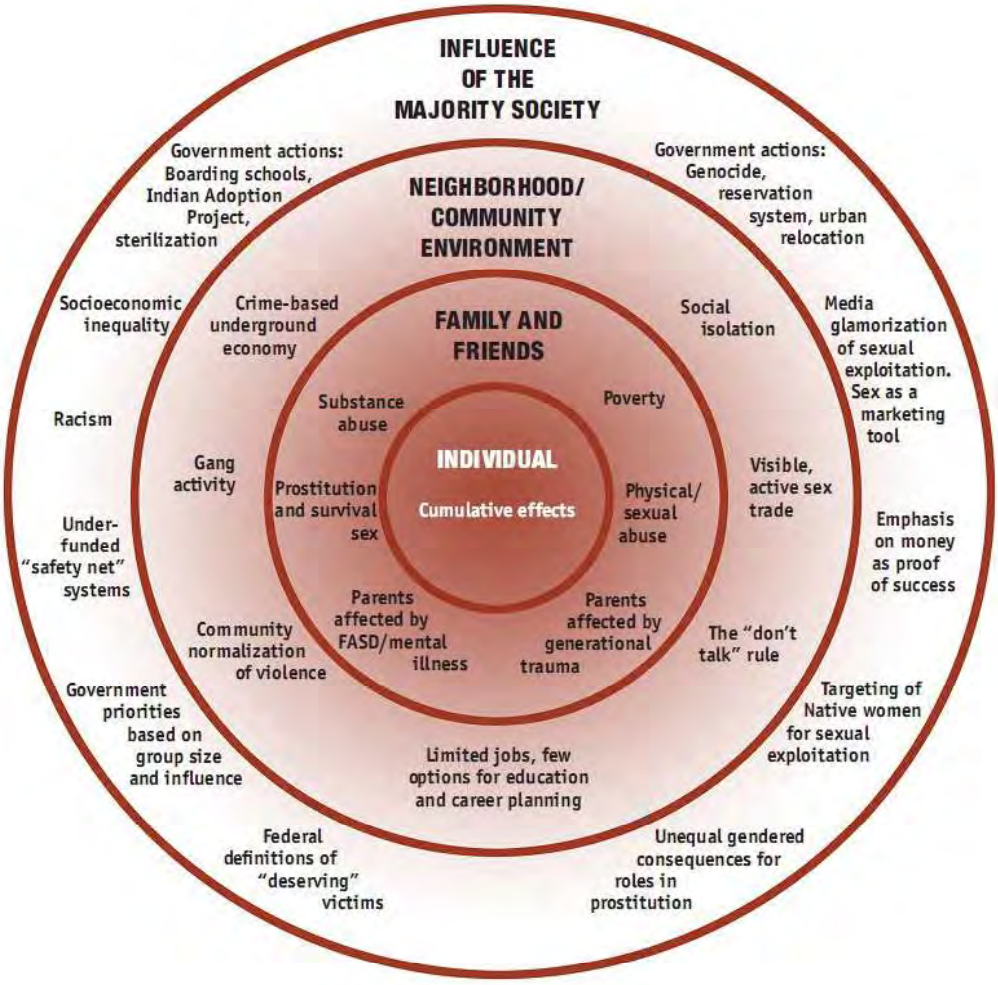
Using a social ecology lens to view the information presented in this report, we identified four major layers of influences that in combination make American Indian women and girls extremely vulnerable to sex trafficking:

- The impact of the majority society
- Neighborhood and community environments
- The influence of family and friends
- The cumulative impact on the individual

[332] Hawley AH, (1950). *Human ecology: A theory of community structure*. New York: Ronald Press.

[333] Roth S and Newman E, (1995). The process of coping with sexual trauma, in Everly G and Lating J (Eds.), *Psychotraumatology: Key papers and core concepts in post-traumatic stress.* New York: Plenum Press, pp. 321-339.

The social ecology of Native girls' vulnerability



Influence of the majority society

Government actions

The first and most pervasive layer of influence is that of the majority society. The historical review provided as context for this report describes a series of U.S. government actions that contributed to the poverty and social problems that plague American Indian communities today.[334] These include:

[334] See pp. 4-13.

- The removal of Native people from their traditional land base to remote rural reservations, which forced them to become dependent on the U.S. government for food and other survival needs

- The large-scale removal of Native children from their families and communities to boarding schools and adoptive homes, which prevented intergenerational transmission of language and cultural norms for community and family roles and individual responsibilities to family and community

- The widespread physical and sexual abuse of Native children in boarding schools, which significantly impacted their ability to parent their own children in healthy ways

- Prohibitions against practicing traditional spirituality and participating in ceremonies, which impeded grieving of losses and healing from trauma

- Urban relocation initiatives that failed to provide the promised resources, leaving Native families in dire poverty and isolated from the community support that had been present on the reservation

- Government-sponsored assaults on Native women's rights to their bodies, including rape in military action and involuntary sterilization by Indian Health Service physicians

Racism and the targeting of Native women for sexual violence

In the historical review, advocates' round table discussions, Canadian studies of prostituted Native women and youth, and the listening session with community leaders and elders, racism was consistently identified as a key factor in sexual violence against Native women and girls and in extreme physical and sexual violence against prostituted Native women and youth.[335] Research cited in this report also shows that Native women and girls are more frequently victims of sexual violence than any other group of women in the country, and that they more frequently sustain injuries in those assaults.[336]

In the listening session, one of the community leaders commented on the majority society's casual acceptance of the sexual exploitation of Native women:

> *I remember going to some kind of historical presentation where they were talking about the Voyageurs, and how they would keep an Indian woman in a trundle bed under their bed for 'their purposes.' And I was so appalled that anybody in the Historical Society would still be dramatizing that, like this was some great and wonderful historical event. And I was really hurt because I'm an Indian woman, and I went there with a group of school kids…if I'm appalled and offended, think of what it's doing to these poor little minds. They're being taught that, 'Oh, Indian women. All they're good for is sex.' [Native community leader at the listening session]*

[335] See pp. 6-8, 11-13,16-17.

[336] See pp. 65-66.

Media glamorization of sexual exploitation and sex as a marketing tool

Advocates participating in the two round tables made frequent reference to Native girls' perception of the sex trade, particularly dancing in strip clubs, as a glamorous career option in which they could make a lot of money very quickly.[337] A number of community leaders and elders at the listening session described the influence of the media (especially the sexualized nature of music videos) and the aggressive use of sex in marketing as significant majority-society influences that encourage Native girls and boys to view sexual exploitation as glamorous. These are a few of their comments:

> *I'm currently the chief baby-sitter for my granddaughters, who are both 13, the critical age, and one of them is wearing the Britney Spears look. And, I'm like, 'Don't you want to put something over that?' And, you know, monitoring their Internet activity…it's the clothing and the cosmetics and the ads that all say women are less valued than men…it is a sort of hammering, constant message. [Native community elder and leader at the listening session]*
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> *I have a 10-year-old now, and…when we set up camp [at a pow-wow] he wants to be gone and run around, and all the boys are running around…and then when they go to the vendor booths, the first place they always go is the one where they have all the hats and the pimp gear and all the bling and all that. He always wants to buy that stuff. He always wants that hat with the bunny sign on it. [Native community leader at the listening session]*

Socioeconomic inequality and the emphasis on money as proof of success

The advocates' stories, the Canadian literature on the relationship between poverty, homelessness, and Aboriginal women and youth entering the sex trade, and the over-representation of Native women and girls in the Wilder Research study of homelessness in Minnesota all show socioeconomic inequality to be a major factor facilitating Native women's and girls' entry into the sex trade. As we reported earlier, American Indian poverty is the highest in the nation, increasing over the past three years while Black, Hispanic, and White poverty rates declined.[338]

Poverty is clearly a major factor in facilitating Native women's and girls' entry into the sex trade. The advocates' stories, the Canadian literature on the relationship between poverty, homelessness, and Aboriginal women and girls entering the sex trade, and the over-representation of Native women and girls in the Wilder Research study of homelessness in Minnesota all illustrate the continuing influence of economic inequality on the choices available to Native women and girls.[339]

The advocates' discussions at the two round tables and the Canadian literature on studies of prostituted Aboriginal youth both described young Native girls' belief that the money they could earn in the sex trade would empower them, allowing them the freedom to run their own lives and

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[337] See pp. 39-40, 42-44, 52, 57, 68, 71.

[338] U.S. Census Bureau, (August 29, 2006). Income climbs, poverty stabilizes, uninsurance rate increases, *U.S. Census Bureau News.* Retrieved February 19, 2009 from http://www.census.gov/Press-Release/www/releases/archives/income_wealth/007419.html

[339] See pp. 39-41, 54-55, 57-60.

make their own choices. Advocates repeatedly described pimps' emphasis on money as a way to solve problems and realize dreams as a major incentive for Native girls to begin dancing in strip clubs and then move into prostitution.[340] One of the community leaders at the listening session described a recent experience that illustrates the way that poverty affects Native girls' attitudes toward sexual exploitation:

> *It wasn't too long ago, I was at a venue of Native people and I was within ear's length of a group of young girls. One of the young girls said that her baby needed diapers and so she did a booty call so she could get money to get diapers for her kid…so that was prostitution in the definition of the word. But she didn't see that. That was the normalcy of it, you know, 'I need this for my child and I'm going to use what I have.' If you have money, you can go to the store…If you don't have money, you have to use what you have at your disposal…And that was shared with a bunch of young girls, and none of them were appalled by it. There was more of a 'Yeah, I understand that,' than 'Oh, my god, how could you do something like that?' [Native community leader at the listening session]*

Government priorities based on group size and influence

American Indians are a small demographic group in Minnesota, representing only 1.6 percent of the state's population.[341] Research has shown that whenever decisions must be made about the allocation of government resources, small, low-income groups have limited influence over those decisions in comparison to larger, more affluent, or higher-status groups.[342]

Underfunded "safety net" systems

Our discussions with local police and advocates' stories about trying to find help from law enforcement and child protection units of local government highlighted limited funding as a significant barrier to identifying and protecting Native girls who had been trafficked into prostitution, and to active pursuit of pimps that traffic adult Native women.[343]

The prevalence of homelessness among Native women and girls described in the research literature, the high rates of running away among Native girls participating in the Minnesota Student Survey, and advocates' descriptions of the severe shortage of housing options for Native women and girls trying to escape the sex trade reflect an inadequate system for meeting the emergency shelter needs of low-income, sexually exploited Native girls and women.[344] Not only does the absence of an effective safety net make Native girls more vulnerable to sexual exploitation, it also makes it extremely difficult for trafficked girls to successfully exit the sex trade.

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[340] See pp. 39, 42, 44-46, 49, 51-52.

[341] 2000 U.S. Census, (2006). *Profile of populations on American Indian reservations.* St. Paul: State Demographic Center, Minnesota Department of Administration. Retrieved June 3, 2009 from http://www.demography.state.mn.us/Cen2000profiles/Cen00Reservations.html

[342] Gilens, Martin. 2005. Inequality and Democratic Responsiveness, *Public Opinion Quarterly 69*: 778-796.

[343] See pp. 89-91.

[344] See pp. 54-60, 91-92.

Unequal gendered consequences for roles in prostitution

The attribution of responsibility for women's involvement in the sex trade is deeply rooted in the notion that prostitution is a business transaction between equals and prostituted women have chosen the sex trade as a form of employment. Popular use of the term "the oldest profession" perpetuates this idea, despite a body of research indicating that most women and girls in prostitution want out of the sex trade, but have no other way to support themselves.[345]

There is significant bias in social and legal sanctions for women and girls in prostitution compared to those experienced by men that purchase sex. Catharine McKinnon has described a gap between the promise of civil rights and the real lives of prostituted women. McKinnon notes the ways that the law fails to protect the civil rights of women involved in prostitution while favoring the civil rights of pimps and johns, citing court decisions to make these points:

- The law does not protect prostituted women's freedom from arbitrary arrest, because it makes women into criminals for being victimized as women, and enforcement of prostitution law has traditionally involved police officers impersonating johns in order to arrest prostituting women.
- The law does not protect a prostituted woman's rights to property, since she cannot declare any parts of herself off-limits, while pimps and johns retain the right to use her body as they choose.
- The law does not protect prostituted women's right to liberty, since liberty is the ability to set limits on one's condition or to leave it.[346]

Our conversations with law enforcement personnel and advocates' stories at the round tables show that purchasers of sexual services typically receive light sentences and are frequently permitted to do community service or restorative justice rather than jail time.[347] This unequal treatment disproportionately excuses men's purchase of sexual services while it criminalizes and stigmatizes women engaged in the same transaction.

One of the Minneapolis police officers we talked with acknowledged that arresting the prostituted woman is considered the most expedient way to ensure her cooperation in securing adequate evidence for prosecuting her pimp.[348] A study of prostituted women in Hennepin County using SIP (Subject in Process) numbers from the Hennepin County Court system confirmed that each woman convicted of prostitution had an average of eight arrests for prostitution.[349]

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[345] See pp. 56, 80-82, 89.

[346] MacKinnon C, (2007). Prostitution and civil rights, in *Women's Lives, Men's Laws.* Cambridge MA: Harvard University Press, p. 152.

[347] See pp. 89-90.

[348] Meeting in Minneapolis, May 13, 2009.

[349] Hope L and Martin L, (2006). *Prostitution Project.* Cited in Martin and Rud (2007). *Prostitution research report: Data sharing to establish best practices for women in prostitution.* Minneapolis: Prostitution Project, Hennepin County Corrections and the Folwell Center.

Federal definitions of "deserving" victims

The advocates' stories of Native adult women who had been trafficked into prostitution as children described the impact of federal guidelines for "deserving" victims. As adults trying to exit prostitution, many had been refused access to emergency shelters, victim services, and federally-funded housing due to prior prostitution convictions.[350] As noted earlier, under the Trafficking Victims Protection Act of 2000, to qualify as a victim of sex trafficking entitled to protection and federally-funded services, a sexually exploited woman must provide evidence of force, fraud, or coercion.[351] Though the Trafficking Victims Protection Act provides for a grant program for local and state authorities to provide services to mostly U.S. citizen victims, those funds were never requested by the Department of Justice, and subsequently no programs were ever funded.[352]

Even though most were victims of child sex trafficking under the federal law at the time they entered prostitution, eligibility requirements for federally-funded victim services make it difficult for prostituted American Indian women to receive assistance. Victims of domestic violence and physical or sexual assault are eligible for reparations through Victims of Crime Act (VOCA) funding, but not if they were "committing a crime or any misconduct that is connected with the incident—which automatically excludes prostituted women beaten or sexually assaulted by a pimp or a john."[353] Violence Against Women Act (VAWA) monies can be used for services to women in prostitution, but cannot be used for services to victims of sex trafficking, which includes domestically-trafficked victims—and organizations wishing to provide such services must compete for funding in the "general" category.[354,355] Some advocates have suggested that a pool of VAWA funds should be earmarked for services to prostituted women, similar to earlier earmarks for women with disabilities, women on campuses, rural women, and tribal programs.[356,357] Child victims of sex trafficking do not cease to be victims simply because they turned 18. Their victimization in childhood continues to impact their lives as adults, skewing their view of what is possible and attainable.

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[350] See pp. 54-55, 87-88.

[351] See 18 U.S.C. § 1591 (a).

[352] Hughes D, (July 30, 2007). Enslaved in the U.S.A.: American victims need our help, *National Review Online.* Retrieved June 14, 2009 from http://article.nationalreview.com/?q=ZDU0OGNlMDcwM2JmYjk0N2M0OTU4NGVlMTBlMmEyMjI

[353] Minnesota Senate, (April 22, 2009). *Public Safety Budget Division update*. Retrieved May 30, 2009 from http://www.senate.leg.state.mn.us/committees/2009-2010/finance_public_safety/update.htm

[354] Hughes D, (July 30, 2007). Enslaved in the U.S.A.: American victims need our help, *National Review Online.* Retrieved June 14, 2009 from http://article.nationalreview.com/?q=ZDU0OGNlMDcwM2JmYjk0N2M0OTU4NGVlMTBlMmEyMjI

[355] Minnesota Office of Justice Programs, (2007). *Violence Against Women Act FFY 2007-2009: Minnesota Office of Justice Programs State implementation plan,* p.6. Retrieved July 24, 2009 from http://www.ojp.state.mn.us/publications/VAWA_FFY07-09_Implementation_Plan.pdf

[356] Williamson C, (2005). Violence against women in street level prostitution: Women centered community responses, *Advancing Women in Leadership Online Journal 18.* Retrieved August 22, 2009 from http://www.advancingwomen.com/awl/social_justice1/williamson.html

[357] See pp. 24-26, 92.

Influence of neighborhood and community environments

Gang activity and community normalization of violence

The discussions of advocates at the two round tables and the research literature from Canada and the U.S. described the considerable influence of gangs in Native communities, gangs' use of violence to coerce Native girls into prostitution, and Native girls' efforts to be as safe as they can in an unsafe environment through sexual relationships with gang members. Native girls' responses to the 2007 Minnesota Student Survey also indicated significant levels of gang presence at Native girls' schools. [358]

Native girls' responses to the 2007 Minnesota Student Survey and the responses of Aboriginal community members and prostituted youth in Canadian research described in this report also show violence to be a common feature of urban Indian neighborhoods and reservation life, and girls' own participation in that violence to be a form of self-defense.[359]

A visible and active sex trade

Advocates also repeatedly described young Native girls being approached on the street and offered money for sex, and in Canadian studies, Aboriginal youth reported the same experience. In the data collected by MIWRC, a significant number of Native women and girls reported knowing someone in prostitution, and many reported knowing a trafficker. The discussions at the advocates' round tables and the Canadian literature on Aboriginal youth involvement in prostitution both described Native youth exposure to a visible and active neighborhood sex trade as a key influence in normalizing involvement in prostitution. [360]

Social isolation and the "don't talk" rule

Research in poor neighborhoods has found that high levels of neighborhood violence and crime contribute to social isolation, where safety concerns limit the degree to which people become involved with or interact with their neighbors. The long-term success of children in these neighborhoods has been found to be strongly related to community members' willingness to support parents' efforts to keep their children safe.[361]

Minneapolis and Duluth both have large urban concentrations of American Indians in low-income, high-crime neighborhoods where short-term residence in rental housing is the norm. The advocates' stories at the round tables and the responses of Aboriginal community members in studies of prostituted youth in Canada described a similar reluctance among Native community members to get involved when a woman or child reports sexual assault, sometimes to the extent

[358] See pp. 44-50.

[359] See pp. 66-67, 70-71.

[360] See pp. 39-40, 68-69, 71.

[361] Furstenberg F, Jr., (1993). How families manage risk and opportunity in dangerous neighborhoods, in Wilson WJ (Ed.), *Sociology and the public agenda*, pp. 231-258. Newbury Park: Sage.

of blaming the victim. Both advocates and prostituted Native youth in Canada also emphasized the potentially dangerous consequences of calling the police.[362]

The advocates' accounts and the literature on the impact of abuse at boarding schools show community members' reluctance to get involved and the "don't talk" rule to be rooted in the experiences of Native children at boarding schools. Teachers and administrators perpetrating sexual and physical abuse forced Native children to accept responsibility for their own abuse, telling the children that they had caused or invited it. Native children learned to be ashamed of their own sexuality, and that telling anyone about the abuse only led to increased violence and more shame.[363] Passed down to consecutive generations, the end result of these efforts to avoid harm to self or others is a lack of safety for sexually exploited children and an absence of accountability for perpetrators in Native communities. One of the community leaders and elders at the listening session commented:

> *Some of us in this room have addressed this on several occasions, but it was always hard to get the community to jump on board. I mean, it was -- you know, you always had the choir; you always had the people that worked in the field that were interested in helping the victims that were in front of them at their desk, but there was not any cry from the community to deal with it on a community basis, at a community level, and so there are those pockets of safety for people that are committing these heinous crimes on a regular basis. [Native community elder and leader at the listening session]*

A crime-based underground economy

Though community participation in an underground economy was not included in our description of factors contributing to Native girls' and women's vulnerability to entering the sex trade, some of the community leaders and elders attending the listening session pointed out that Native girls' and women's involvement with "boosters" selling stolen clothing, shoes, and accessories normalizes illegal activity. This is one of their comments:

> *We need to also remember that this sub rosa economy is working all the time. The sale of illegal goods, all of that happens in our community, and the inability of young women to understand what they're doing in exchanging a sexual favor for money to buy diapers is part of that. [Native community elder and leader at the listening session]*

In addition to the advocates' lengthy discussion of Native women's and girls' trading of sex for shelter and other basic needs at both round tables,[364] this is how one of them described Native women's and girls' frequent use of boosters to get the things they want:

[362] See pp. 96-97.

[363] See pp. 9, 95-96.

[364] See pp. 43, 54-56, 71.

> *There are some really good boosters out there. [Second speaker] The guy where you get stuff hot? [First speaker] What I'm saying is it is so commonplace, because boosters are so prevalent. I mean, in other advocacy and other outreach, I was in people's homes and we were talking about healthy housing and education and their booster shows up and is trying to sell me clothes that they just got from the plus size clothing store, and he had an entire trunk of all this beautiful stuff. [Twin Cities advocate]*

Limited jobs, few options for education and career planning

In the neighborhoods where American Indians are concentrated in Minneapolis and Duluth, unemployment rates are high and opportunities for legal, living-wage employment are extremely limited, as are options for a quality education. The America's Promise Alliance recently reported that only about half (53%) of youth in the nation's largest cities graduate on time, with an 18 percent gap in graduation rates between youth attending city schools and youth attending suburban schools.[365] Inner-city schools consistently receive lower ratings for quality of education and student achievement than suburban schools, reflecting the broader patterns of inequality elsewhere in American society.[366] Students in these schools have been described as a "captured market," because their socioeconomic status makes them completely dependent upon the public school system.[367] In 2000, less than 75 percent of American Indian adults in Minnesota had completed at least a high school degree.[368] The high dropout rates of American Indian youth cited in this report suggest that unrewarding school experiences contribute to a belief that educational attainment and career planning are neither useful nor realistic life goals.[369]

Influence of families and friends

Poverty

The advocates' discussions at the round tables, the research literature from Canadian studies of prostituted Aboriginal women and youth, and the comments from community leaders and elders all emphasized the importance of family poverty in Native women's and girls' vulnerability to homelessness and to sexual exploitation of Native women and their children by landlords threatening eviction. The Hennepin County data showed over 40 percent of American Indian woman-headed households living in poverty, which suggests a high level of vulnerability to sexual exploitation for these families.[370]

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[365] America's Promise Alliance, (2009). *Cities in crisis 2009.* Retrieved May 8, 2009 from http://www.americaspromise.org

[366] Noguera, P and Akom A, (2000). Disparities Demystified: Causes of the racial achievement gap all derive from unequal treatment, *The Nation* 5(2): 29-35.

[367] Noguera P, (2002). Racial isolation, poverty and the limits of local control as a means for holding public schools accountable, *UCLA's Institute for Democracy, Education, and Access.* Los Angeles: University of California. Retrieved May 4, 2009 from http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1016&context=idea

[368] Minnesota State Demographic Center, (March 2003). *Educational attainment in Minnesota.* Retrieved May 4, 2009 from http://www.demography.state.mn.us/PopNotes/EducationalAttainment.pdf

[369] See pp. 39, 80-82, 101-102.

[370] See pp. 54-55, 57-60.

Physical and sexual abuse

The prevalence of physical and sexual abuse in the histories of prostituted Aboriginal women and youth in Canadian research and in prostituted Aboriginal youth's reasons for running away from home show that child abuse in the home is a major factor in vulnerability to commercial sexual exploitation. Native girls' reports in the 2007 Minnesota Student Survey of physical and sexual abuse at home and of having run away from home, combined with state and local data on American Indian child maltreatment rates, suggest that many of Minnesota's Native girls are at very high risk of being trafficked into the sex trade due to abuse.[371]

Native girls' responses to the 2007 Minnesota Student Survey also showed high rates of physical and sexual assault by boyfriends. The Wilder Research study of homelessness also found that Native women and girls frequently reported physical or sexual violence at home as the reason for their current homelessness. Other studies' findings of high rates of partner violence among low-income Native women suggest that many Native women and girls are forced to leave home to avoid violence, resulting in homeless that further increases their vulnerability to sex trafficking.[372]

Prostitution and survival sex

The involvement of female relatives and friends in survival sex and/or prostitution is clearly a factor that facilitates Native girls' own involvement. At both round tables, advocates described Native families involved in prostitution and bringing young daughters into the sex trade over several generations. The Canadian studies of Aboriginal youth involvement in prostitution reported similar findings. The advocates' stories at round tables and the Canadian research literature on Aboriginal youth in prostitution also identified friends (and pimps' recruiters posing as friends) as significant influences on young Native girls' recruitment into stripping and prostitution. The data collected from clients entering MIWRC programs confirmed that many have friends in prostitution, and also showed that clients reporting involvement in prostitution were most often recruited by a friend.[373]

The community leaders and elders attending the listening session to discuss the findings of this report also commented on Native families' involvement in prostituting their women and girls. This is one of those comments:

> *We all knew which houses were doing what in our community. And historically, because of who they were or who they were related to, or they're on the board, they were able to get away with it. Right? Everybody looked the other way on it. [Native community leader at the listening session]*

[371] See pp. 60-65.

[372] See pp. 65-67.

[373] See pp. 50-52, 68-69.

Substance abuse

Several of the advocates at the two round tables described Native mothers trafficking their daughters into prostitution to feed an addiction. Studies of prostituted youth in the U.S. and Canada also identified parental substance abuse as a facilitating factor for Native youth running away from home and entering the sex trade. In the 2007 Minnesota Student Survey, American Indian girls' rates of reporting drug and alcohol use by a family member were much higher than those of girls in the general population, and the responses of homeless American Indian women and girls in the 2006 Wilder Research study of homelessness indicate that family substance abuse is also a factor in forcing Native women and girls to leave home without any other place to stay.[374] The advocates, research in Canada and studies in the U.S. also noted the indirect affect of parental substance abuse on girls' vulnerability to sexual exploitation, being impacted by FASD.[375]

Parents affected by generational trauma, FASD, and/or mental illness

At the advocates' round tables and in findings from Canadian studies with prostituted Native women and youth, unresolved generational trauma was identified as a root cause of community violence, domestic violence, child abuse, and substance abuse that pervades Native communities in the U.S. and -Canada.[376] The research literature shows high rates of depression and PTSD among sexually assaulted Native women, which impact their ability to parent their children effectively. Advocates also described FASD-affected mothers trafficking their children, and research described in this report reflects the prevalence of FASD in Native communities. The research that we cited regarding adults with FASD and PTSD highlights the ways that a mentally ill or cognitively-impaired parent can increase Native children's vulnerability to sexual exploitation.[377]

The cumulative effect on Native girls

Lack of preparation for the legal workforce, viewing the sex trade as a glamorous option

Native girls' responses to the 2007 Minnesota Student Survey show high levels of disengagement from school and truancy, and data on American Indian school dropout shows that many leave school without the education level necessary to succeed at most living-wage jobs. The absence of employment opportunities in their neighborhoods and the lack of social networks for securing jobs leave them with no employment history or job skills. Without those resources, many Native girls have no hope of self-sufficiency through the legal job market. The glamorization of sexual exploitation in the popular media, a highly visible sex trade, and girls'

[374] See pp. 55, 72-73.

[375] See pp. 77-78.

[376] See pp. 53-54.

[377] See pp. 78, 83-84.

awareness that sex can be a resource for meeting basic needs combine to normalize the sex trade, encouraging Native girls to view it as a reasonable way to make money.[378]

Absence of safety and emotional vulnerability

The frequency of Native girls' 2007 Minnesota Student Survey reports of physical and sexual abuse at home, gang presence and threat of violence in their schools, and physical and sexual violence by dates shows an alarming lack of safety in their lives. Advocates' stories at the round tables and Canadian research with runaway and prostituted Native youth described the tremendous emotional vulnerability of Native girls in these situations, especially to pimps and recruiters that promise to take care of and protect them.[379] The reluctance of community members to intervene and community antagonism to anyone who calls the police makes Native girls even more vulnerable to sexual exploitation by pimps and gang members that use violence to force young girls into prostitution. The very limited options for emergency shelter and crisis services leave Native girls few alternatives.[380]

Native girls' trauma responses

Native girls' responses to the 2007 Minnesota Student Survey show that many use alcohol before the age of 12, show signs of alcohol dependency, and participate in violence against others. Research showing the prevalence of sexual assault and the link between sexual assault trauma and substance abuse by American Indian women suggests that a significant number are at extremely high risk of commercial sexual exploitation. Advocates' reports of prostituted Native women's reluctance to trust police or advocates and their dependency on pimps are reflections of the lack of safety in their lives. All of these trauma responses expose Native girls and women to new violence and make them even more vulnerable to sexual exploitation.[381]

Last words

In the listening session with Native community leaders and elders held on July 22, 2009, all of the participants confirmed the seriousness of the problem and inspired us with their commitment to working together on a community response to end the commercial sexual exploitation of Native women and children. These are just a few of their comments:

> *I'm really happy that this report came out. I'm really happy that finally we can sit in a group like this and talk about it, because we can't hide it any more. We can't tell our girls it's okay, because it's not okay…I really want to continue to be a part of this dialogue because I think it's long overdue.*

[378] See pp. 42-46, 54-58, 60-65, 82-86.

[379] See pp. 42-43, 54-58, 60-65, 82-86.

[380] See pp. 87-88, 95-97.

[381] See pp. 74-76, 89, 94-95.

> *The report shines a light on this—it's a stake in the ground. It says 'Look at this.' This is something that needs attention, and we're not going to solve this now or in the next little while, but if we don't start, we'll never solve it.*
>
> *One of our spiritual leaders said to us some years ago, those of us who are older, who have been victimized by racism in this country and also those of us who are women who have victimized in whatever ways simply because we are women—what he said to us was, 'That pain is yours. That is your pain, and you need to deal with it, but don't pass it on to your children. They will experience their own difficulties and they will have to deal with that, but do not talk to them about what you have dealt with.' I think [that] until we do deal with our own pain, it's impossible not to pass it on.*

Based on the information presented in this report, we conclude that commercial sexual exploitation is neither harmless nor victimless. The widespread notion that prostitution is a voluntary career choice made by a fully informed adult has no basis in reality for the vast majority of prostituted Native women and girls. We find it unreasonable and cruel to assume that any Native person in prostitution has made an informed choice to endure extreme violence and subjugation at the hands of pimps and purchasers of sexual services, or to accept this maltreatment as a normal occupational hazard.

While stripping and pornography are often framed as relatively harmless, we have identified these as gateways to prostitution for Native women and girls. The information that we presented here shows that some Native women and girls may enter the sex trade to pursue the illusion of a glamorous and lucrative career, but continued involvement in prostitution is almost always due to an absence of other options. Most are trafficked into the sex trade as children and never identified or protected as trafficking victims. Unable to find the support to needed to leave prostitution at the point they reach the age of 18, they are immediately considered criminals and are often refused access to shelters and other services for trafficking, sexual assault, domestic violence, and stalking victims.

Because our focus for this report was the commercial sexual exploitation of Native women and girls, we did not address the prostitution of Native boys or Two-Spirit (gay, lesbian, and bisexual) youth. However, a number of Canadian studies reported that though girls made up 75-80 percent of Aboriginal youth in the sex trade, the remaining 20-25 percent were boys, Two-Spirit, and transsexual individuals.[382,383,384,385] In a 2008 Canadian study of street youth, 23 percent of Aboriginal boys and 54 percent of Aboriginal girls described themselves as not entirely heterosexual, bisexual, or gay/lesbian. These youth were much more likely than

[382] Calgary Police Commission, (1997). *Children involved in prostitution: Report by The Task Force on Children in Prostitution*. Calgary: Calgary Police Commission.

[383] City of Burnaby, (1998). *Report of the City of Burnaby Task Force on the Sexual Exploitation and Prostitution of Children and Youth*. Burnaby: City of Burnaby.

[384] Jiwani Y and Brown S, (1999). *Trafficking and sexual exploitation of girls and young women: A review of select literature and initiatives*. Vancouver: FREDA.

[385] Manitoba Youth and Child Secretariat, (1996). *Report of the Working Group on Juvenile Prostitution.* Winnipeg: Manitoba Child and Youth Secretariat.

heterosexual-identifying youth to report having been kicked out of their homes or having run away, which makes them even more vulnerable to commercial sexual exploitation.[386]

Community priorities for moving forward

The community leaders and elders that attended the listening session agreed on three main points regarding next steps toward addressing the commercial sexual exploitation of Native people:

- Any approach to addressing the problem must prioritize the healing and empowerment of Native communities, and ensure that they are not re-victimized as a result of the information brought forth in this report.
- To ensure community engagement and an emphasis on healing and empowerment, the next stage of strategic planning must be led by a committed and knowledgeable group of Native people.
- This is not solely a women's issue—it is a community issue that also harms Native boys and Two-Spirit youth and adults.

[386] Saewyc E, Bingham B, Bruananski D, Smith A, Hunt S, Northcott M, and the McCreary Centre Society, (2008). *Moving upstream: Aboriginal marginalized youth and street-involved youth in B.C.* Vancouver B.C.: McCreary Centre Society.

VIII. Recommendations for action

The recommendations we provide here are an aggregate of those we gathered from:

- Advocates attending the two regional round tables
- American Indian community leaders and elders that attended the listening session
- Prostituted Aboriginal women and youth and Aboriginal community members participating in Canadian studies of commercial sexual exploitation
- Patterns of risk identified in data and literature gathered for this report.

Increase awareness of the problem

Provide education to a cross section of leadership on:

- The relationship between disproportionate poverty and other risk factors, and Native youth's disproportionate involvement in the sex trade.
- The extreme violence and trauma experienced by Native women and youth in prostitution.
- Traffickers' recruitment strategies and the significance of strip clubs, pornography, online and phone sex, and escort services as gateways to prostitution for Native youth.

Reframe the conversation and change the language

- Increase awareness that prostitution is not a life style choice, is not a victimless crime, and that the vast majority of prostituted people were trafficked into the sex trade as children. Clearly identify prostitution as a form of sexual violence.
- Highlight the proven relationships between men's belief that sex is a commodity that they have the right to purchase and the likelihood that they will commit violence against women.
- Eliminate terms that place the onus of responsibility on the exploited person; rather than "prostitute", promote "person in prostitution" or "prostituted person."

Hold sexual exploiters accountable

- Prosecute all cases of juvenile sex trafficking to the fullest extent of the law.
- Reduce demand by increasing penalties for the purchase of sexual services (particularly sex with minors), and prohibit plea bargain agreements that allow purchasers to reduce their penalties through community service and/or restorative justice.
- Support efforts by American Indian communities to hold families involved in multi-generational trafficking of their children accountable.
- Identify, arrest, and prosecute anyone attempting to recruit vulnerable Native adults and youth for prostitution at drop-in programs, homeless shelters, battered women's shelters, and other places providing emergency services.
- Address gangs' use of violence to force Native youth into prostitution.

Begin outreach

- Recruit Native survivors of prostitution for employment as outreach workers and community educators.
- Use harm reduction strategies, including providing condoms/promoting consistent condom use and partnering street nurses with outreach workers to provide Hepatitis B vaccinations.
- Distribute information about domestic sex trafficking, sexual assault programs, and other programs/services through community agencies, hospital emergency rooms, health clinics, and food shelves so that sexually exploited Native women and youth are more aware of places they can find help.
- Establish protocols to identify and interrupt recruitment at crisis support, outreach and drop-in programs, and ensure that programs are safe.

Improve access to emergency shelter and transitional housing

All of the information we gathered on what types of housing prostituted Native women and girls need to successfully exit the sex trade emphasized three key points that should inform any plan to improve emergency shelter and housing options.

- The sex trade reinforces dependency on a pimp, so victims of commercial sexual exploitation often take a very long time to make the final decision to complete separate themselves.
- These victims have known nothing but exploitation most of their lives, so are very reluctant to trust any program or organization that applies limits or makes demands.
- The most useful and effective services have the fewest requirements, and focus on "meeting victims where they are."

For these reasons, the following are the characteristic of emergency shelter and transitional housing needed to provide effective support to prostituted Native women and youth to avoid or leave the sex trade:

- 24-hour, 7 days a week "safe houses" statewide, where sexually exploited Native women and youth can access emergency shelter, showers, clothing, food, referrals for health care, and other basic needs.
- Transitional and supportive housing facilities statewide, specifically designed for prostituted women and youth who are moved from place to place. Staff should be culturally competent.
- Shelters, transitional housing and outreach services that link prostituted and at-risk Native women and youth to an array of holistic services to meet basic needs, receive health care, and access permanent safe housing.
- Funding for transitional housing that is long-term and covers operating expenses. Permitted length of stay must be adequate to ensure that prostituted Native girls and women have enough time to build the skills and stability they need to secure gainful employment.

To ensure access, existing emergency and transitional housing facilities should:

- To the extent possible, revise public housing policies blocking access to anyone with a felony conviction, to allow access for victims of sex trafficking whose convictions were due to having been trafficked.
- Work with child protection systems in the best interest of the families.
- Give prostituted people attempting to exit the sex trade the same priority as people with a mental health diagnosis, rather than requiring them to get a mental health diagnosis for priority access.

Increase options for self-sufficiency to reduce vulnerability

Poverty is one of the major factors in vulnerability to commercial sexual exploitation. The following are recommendations for services and programs that can help Native women and youth stay in school and/or gain the skills and resources they need to become self-sufficient.

- Provide opportunities to finish high school that include mentoring, flexible hours, and access to high quality childcare so that those with children can participate.
- Tailor employment services, academic, and career counseling to match prostituted Native women's and youth skills and interests, and accommodate learning styles.
- Build relationships with employers willing to provide internship and apprenticeship programs where prostituted Native women and youth can develop skills and build confidence in their abilities.

Promote healing

- Hold community forums and workshops in American Indian communities to raise awareness of sex trafficking, the vulnerability of Native women, youth, and Two-Spirit people, and available resources for victims and families.
- Build community support for believing Native people who report sexual abuse and sexual exploitation, valuing and protecting them rather than stereotyping and isolating them.
- Engage Native communities in recognizing and addressing the role of silence and denial in generational abuse and sexual exploitation, and in working as a community to hold all traffickers of Native children and youth accountable.
- Engage Native communities in holding producers and sellers of media and products that sexualize Native women and children accountable.
- Encourage culturally based agencies to incorporate programming to meet the unique needs of sexually exploited women and youth, and provide opportunities for collaboration and networking to streamline services.
- Create healing centers where victims and families can re-engage in traditional healing and build strong cultural identities to holistically address chemical dependency, mental illness, and sexual trauma.

Improve systems and increase collaboration between systems

Engage child protection, law enforcement, schools, and Native community-based housing and social service agencies in collaborative efforts to:

- Standardize intake procedures that can accurately identify victims of sex trafficking and provide them with immediate access to appropriate resources.
- Develop training protocols in partnership with other stakeholders to raise awareness and install effective response mechanisms.
- Support coordinated efforts by local law enforcement, Tribal law enforcement, the FBI, and the Coast Guard and other agencies to identify, investigate, and prosecute sex traffickers.
- Investigate possible sex trafficking when youth report sexual abuse in the home, and ensure that a trained child protection worker works closely with police and Native programs to meet the unique needs of prostituted Native children.
- Target gangs in schools, housing complexes, and neighborhoods by developing zero tolerance strategies to prevent and interrupt criminal activities with youth.
- Develop coordinated responses to truant and runaway Native youth that divert them from the juvenile justice system to Native programs that serve sexually exploited Native youth.

When the court case has begun against a Native sex trafficking victim's trafficker:

- Provide victims with a specific advocate who has the skills and knowledge to deal with her/him respectfully and for the length of time necessary.
- Provide Pro Bono legal services to the victim and a safe space where she/he and the attorney can meet.
- Do not require victims to be in the same room as the accused trafficker.
- Develop alternatives to corrections placement in foster care and group homes for prostituted Native youth so they are not isolated from their culture and community.
- Improve protections for victims who have outstanding warrants for their arrest, if those arrests are related to being trafficked, and consider that probation violations may be related to being trafficked.

Provide extensive training to all professionals that come into contact with prostituted Native women and youth

In addition to basic training on the dynamics and impacts of the sex trade, various professionals should receive more in-depth training. These are some of the main topics we suggest:

For police officers, prosecutors, courts, and guardians *ad litem*:

- The importance of screening runaway and truant Native youth for involvement in the sex trade, and making social services arrangements on site rather than releasing them back to the community.
- Establishing guidelines for recognizing when a prostituted Native person may be affected by FASD and or PTSD.

- Networking with referral agencies for culturally-appropriate intervention and support services.

For medical and emergency room personnel:

- The importance of treating prostituted victims of sexual or physical assault as assault victims, even when their injuries were perpetrated by a purchaser of sexual services.
- Information about trafficking laws, how to contact law enforcement, and how to keep a trafficking victim safe until the police arrive.

For teachers and school administrators, 5th through 12th grade:

- Sex trade culture and terminology, common recruitment strategies, trafficker profiles, and indicators that a student is being trafficked.
- Information about trafficking laws, how to contact law enforcement, and how to keep a trafficking victim safe until the police arrive.
- Referral agencies for culturally-appropriate intervention and support services.

For workers in child protection, child welfare, and family social services:

- Sex trade culture and terminology, and the importance of early intervention.
- Culturally-specific screening tools for sex trafficking and other forms of commercial sexual exploitation.
- Follow-up strategies for protecting and monitoring sexually exploited Native adolescents and teens to provide a safety net for those that continue living with their families, including information on suitable referral services.

For mental health professionals:

- The guilt and shame experienced by prostituted and trafficked Native adults and youth, and the need to respond immediately and skillfully.
- The importance of a nonjudgmental approach that does not include a timeline for progress.
- A careful diagnosis that takes potential FASD and PTSD into account as possible aggravating factors.
- Prostituted Native women's/youth's experiences with unnecessary or inappropriate medications.

Future research

Methodologically, our decision to convene round table discussions with advocates working with American Indian women and girls in crisis situations and use the information gathered there as a framework turned out to be a very useful approach. Our assumption that these advocates were likely to come into contact with trafficked and prostituted Native women and girls was correct. In the absence of any prior source of systematically collected data on Native women and girls in prostitution or other areas of the sex trade in either Minnesota or the U.S., triangulating advocates' experiences and observations with findings from published research, local data, and

MIWRC client screening data allowed us to develop a basic understanding of a little-understood and complex problem within relatively short period of time.

The data collected by MIWRC via client screening and the two advocates' round table discussions represented a very small number of participants in very limited geographic areas. Though these findings were helpful in creating a general picture of the problem, there is an urgent need for a regional study involving a systematic and coordinated data collection process, to develop findings that can be generalized to the larger population. MIWRC is currently revising and expanding its screening tool and process to improve our ability to identify trafficking victims and provide them with appropriate services and supports. We expect to implement the new tool and process in October 2009.

However, we cannot prioritize research over the needs of Native women and children still in the sex trade. At both round tables and at the listening session with Native community leaders and elders in Minneapolis, Native participants emphasized the great need for more in-depth information to build upon what was found in producing this report, but they also voiced a significant concern that research could not take priority over adequate funding for direct services to prostituted Native people. With that qualifier in place, regarding future research, we recommend:

- Funding for coordinated and appropriate support services to victims of commercial sexual exploitation is the community's highest priority—additional research will require a separate funding pool.
- Any future research should involve identification, experiences, and needs of all American Indian victims, regardless of gender.
- Data collection should involve multiple agencies and programs providing culturally-specific crisis services to Native people for emergency shelter and housing, domestic violence, sexual assault, substance abuse, crisis intervention, and the needs of at-risk youth
- Because this exploratory study found indications of trafficking between cities in Minnesota, Wisconsin, North Dakota, and South Dakota, we recommend a regional study that includes two large urban Indian communities in each of those four states: Minneapolis, Duluth, Grand Forks, Fargo, Sioux Falls, Rapid City, Milwaukee, and Green Bay.

Appendix

Round table facilitator's guide

Introduction: Introduce self and co-facilitator, introduce main concepts:

- Definitions of trafficking
- Reasons for emphasizing "commercial sexual exploitation" over "trafficking" and "prostitution"
- Goals for the round table: discuss who, what, why, how, where, and when
- Before lunch plan: Get through who, why, how, when and where
- After lunch plan: Talk about what keeps Indian women who are being sexually exploited from getting out of the sex trade, and what services are really needed for the victims and for the advocates who help them

BEFORE LUNCH:

Who and why?

1. Who is being exploited, and why are they vulnerable?
    a. Age
    b. Financial circumstances
        1. Ability to find legal employment
        2. Supporting children/ MFIP 5-year limit
        3. Housing stability
        4. Addiction—need to support the habit
    c. Mental health, FAS/FAE
    d. History of abuse/physical and sexual violence
    e. Other reasons
2. What kinds of commercial sexual exploitation are the Indian women and girls that you see involved in?
    a. Prostitution
    b. Pornography
    c. Stripping/nude dancing
    d. Survival sex? Trading sex for housing, rides, etc.?
    e. Other?

How?

3. How are they being recruited or forced into the different types of commercial sexual exploitation?
    a. Who is pimping them?
        1. Friends/family, boyfriends/pimps?
        2. Gangs? Landlords?
    b. How are they approached? What do the recruiters say to them?
    c. How are they "groomed" for prostitution and other kinds of commercial sexual exploitation?
        1. "Helping out" temporarily
        2. Gifts, being told they are "special"
        3. Giving and taking away affection, gifts, special treatment
        4. Violence, shaming
        5. Getting them addicted—what drugs?
    d. Do they start out being involved in one kind of sexual exploitation and progress to others?

When and where?

4. Where is the recruitment of Indian women into commercial sexual exploitation happening?
    a. Urban, reservation, suburbs?
    b. Pow-wows, 49s?
    c. Certain neighborhoods or housing types, certain parts of the state?
    d. Are they moved around to prevent them from getting help to leave?
        1. Where to where?
        2. Who moves them , and how?
5. Where have they been exchanging sexual activity for money or other resources at the time they start talking to you about it?
    a. Private homes
    b. Motel rooms
    c. Hotels/conference centers/casinos?
6. Are there specific "seasons" or times that you see more Indian women and girls involved in prostitution, nude dancing, or other types of commercial sexual exploitation?
    a. Are there specific seasons or times of the year that you see more Indian girls or women trying to get out of prostitution?

AFTER LUNCH:

Barriers to addressing the problem?

7. What prevents Indian girls and women from escaping a lifestyle where they exchange sexual behavior for money or resources?
    a. Do they view exchanging sexual activity for money or other resources as a "choice"?
    b. What brings them to you?
        1. What needs do they "present" with?
        2. How long does it take before you know that they are being prostituted or trying to escape sex work?
        3. As an advocate, what sends up the "red flag" for you? What tells you that an Indian woman's or girl's "friend," "boyfriend," or "protector" is a pimp, or that she is trying to leave prostitution?
8. What kinds of assistance do these women and girls need the most?
    a. Types of services, length of time needed
    b. What are some of the challenges to getting them those services?
        1. Funders' requirements
            a. For defining "victims" (arrest for prostitution makes them a criminal, not a victim)
            b. Length of time services are allowed/pressure to show results
        2. Lack of legal protection
            a. Police disinterest/lack of cooperation between different law enforcement agencies
                1. Who and why?
                2. No prosecution of pimps—reasons?
                3. Lack of cooperation between different law enforcement agencies
                4. Ways/reasons that American Indian women suffer greater impact, compared to other prostituted women
9. What about your needs, as advocates?
    a. What kinds of training and support would help you do this very difficult work?

Minnesota Indian Women's Resource Center

Client Screening & Tracking Form

Client ID:_____ Screening date:_____

Pre-screening: Prostitution and trafficking

1. Have you ever exchanged sexual activity for: Yes, for: (check all that apply) a. ❑[1] Shelter (living space, rent or reduced rent) b. ❑[1] Food c. ❑[1] Money d. ❑[1] Drugs or alcohol e. ❑[1] A ride or use of a car f. ❑[1] Any other kind of assistance (describe):_ _____ g. ❑[1] No, never have	2. Has anyone every pressured you, forced you, or paid you to pose for nude photos or videos? ❑[0] No ❑[1] Yes 2a. IF YES: How many times has this happened in the past 6 months? _____# of times
3. Has anyone ever asked you to recruit other women or girls to sell sex, or to manage a group of women or girls who sell sex? ❑[0] No ❑[1] Yes 3a. IF YES: How many times has this happened in the past 6 months? _____# of times	4. Has anyone ever threatened, tricked, or talked you into providing sexual activities to another person so the person pressuring you would get some benefit? Yes, so they could get: a. ❑[1] Shelter (living space, rent, or reduced rent) b. ❑[1] Food c. ❑[1] Money d. ❑[1] Drugs or alcohol e. ❑[1] A ride or use of a car f. ❑[1] Any other kind of assistance or benefit (describe):_____ g. ❑[1] No, never have

Do you know anyone else who has been involved in prostitution and/or sexual exploitation? (check all that apply)

5. As someone who sold or traded sex	6. As someone who made others sell or trade sex
a. ❑[1] Family (relationship):_____ b. ❑[1] Friend c. ❑[1] Other:_____ d. ❑[0] No, don't know anyone	a. ❑[1] Family (relationship):_____ b. ❑[1] Boyfriend/husband/partner c. ❑[1] Other:_____ d. ❑[0] No, don't know anyone

Pre-screening: Mental health and brain injury

7. Have you ever been assaulted in a way that caused a head injury—either by being hit, or caused to hit your head? ❑[0] No ❑[1] Yes 7a. IF YES: How many times? _____# of times	8. Have you ever fallen due to intoxication or drug use and hit your head? ❑[0] No ❑[1] Yes 8a. IF YES: How many times? _____# of times

9. Have you ever received a mental health diagnosis by a doctor or mental health professional?

❑[0] No

❑[1] Yes IF YES: What diagnosis/diagnoses, where received:_____

Screening questions for identified victims of trafficking

1. Age at which you entered prostitution:_____ 2. Current age: _____
3. Do you have children under the age of 18?
   - ❑[0] No, no children under age 18
   - ❑[1] Yes, at least one child living with you
   - ❑[2] Yes, but none live with you
4. How were you recruited into prostitution?
   a. People/relationships involved:_____
   b. Area of the state where this occurred:_____
   c. Situation/coercion/pressure that made you do it:_____
   _____
5. After recruitment, where were you trafficked?
   a. ❑[1] Domestically : What locations? _____
      a1. Across state lines? ❑[1] Yes ❑[0] No
   b. ❑[1] Internationally: From where, to where?_____
      b1. How were you transported? _____
6. Have you ever been arrested for prostitution or prostitution-related charges?
   - ❑[0] No
   - ❑[1] Yes IF YES: How many times?_____
7. Are you currently at risk of sexual exploitation?
   - ❑[0] No
   - ❑[1] Yes, due to (check all that apply):
     a. ❑[1] Emotional dependency on trafficker
     b. ❑[1] Homelessness
     c. ❑[1] Addiction
     d. ❑[1] Fear of violence against self or others
     e. ❑[1] Inability to financially provide for your child(ren)
     f. ❑[1] Other reasons:_____
8. Have you sought assistance at other sexual assault or victim of trafficking programs? We are only asking because we're working with these other organizations to estimate how many Indian women are in this situation (check all that apply)
   a. ❑[1] Phoenix/DIW
   b. ❑[1] MIWSAC
   c. ❑[1] Women of Nations
   d. ❑[1] Breaking Free
   e. ❑[1] Indigenous Women's LifeNet (MAIC)
   f. ❑[1] Ain Dah Yung
   g. ❑[1] Sexual Offense Services (SOS in St. Paul)
   h. ❑[1] Other program(s) in the metro area:_____
   i. ❑[1] Other program(s) outside the metro area:_____

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Human Trafficking Among Native Americans: How Jurisdictional and Statutory Complexities Present Barriers to Combating Modern-Day Slavery

Maggie Logan

HUMAN TRAFFICKING AMONG NATIVE AMERICANS: HOW JURISDICTIONAL AND STATUTORY COMPLEXITIES PRESENT BARRIERS TO COMBATING MODERN-DAY SLAVERY

Maggie Logan[*]

Introduction & Abstract

It is undeniable that human trafficking is a global enterprise that transcends all racial and geographic boundaries. "[H]uman trafficking is the second largest criminal industry in the world and [it] is easily the fastest-growing."[1] While much of the focus on human trafficking centers on its global effect, little attention is given to the rampant issues women on our own soil face. The breadth and regularity of human trafficking in the United States cannot be overstated, and most people fail to recognize its presence and complexity. Indeed, human trafficking is a troubling national issue, but its impact on Native Americans is even more startling and almost entirely overlooked. This article addresses human trafficking issues in the United States with particular emphasis on human trafficking among Native Americans in Oklahoma.

Although each state defines human trafficking differently, most definitions mimic federal law. Federal law defines human trafficking as "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act."[2] Oklahoma passed its first statute addressing human trafficking in 2008.[3] Since then, there have been no published court opinions interpreting the statute. A search of the Oklahoma docket system, however, reveals that Oklahoma courts utilize the trafficking statute with some regularity.[4] Oklahoma defines "human trafficking" as "modern-day slavery that includes, but is not limited to, extreme exploitation and the denial of

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1. Benjamin Thomas Greer, *Hiding Behind Tribal Sovereignty: Rooting Out Human Trafficking in Indian Country*, 16 J. GENDER RACE & JUST. 453, 460 (2013) (citation omitted).

2. 22 U.S.C. § 7102(10) (2012).

3. 21 OKLA. STAT. § 748 (Supp. 2014).

4. BLOOMBERG LAW, https://www.bloomberglaw.com/dockets/search/results/5105517730c9472709d253382d75ba55 (last visited Jan. 8, 2016) (access via subscription).

freedom or liberty of an individual for purposes of deriving benefit from that individual's commercial sex act or labor."[5]

This article analyzes Oklahoma's human trafficking statute and focuses on potential obstacles for individuals who file claims. Part I provides a national overview of human trafficking, as well as a history of trafficking among Native American women. Part II critically analyzes the federal human trafficking statute and compares it to Oklahoma's human trafficking statute. Part III discusses jurisdictional complexities in Oklahoma, other factors that prevent the arrest of sexually violent individuals, and the Violence Against Women Act. Finally, Part IV identifies ways to combat human trafficking of Native Americans through education and legislative change.

I. Background

Native American women are two and one-half times more likely to experience sexual violence than are other American women.[6] Furthermore, Native American women are trafficked far more frequently than any other racial group in the United States.[7] What is worse, is that staggering levels of sexual violence go unreported.[8] Due to the historic relationship between Native Americans and the federal government, Native Americans generally

5. 21 OKLA. STAT. § 748(A)(4).

6. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 2 (2007) (citing STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME – A BJS STATISTICAL PROFILE 1992-2002 (Dec. 2004); *see also* Alexandra (Sandi) Pierce & Suzanne Koepplinger, *New Language, Old Problem: Sex Trafficking of American Indian Women and Children*, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN 1 (Oct. 2011), http://www.niwrc.org/sites/default/files/documents/Resources/VAWnet.org-NativeSexTrafficking.pdf ("In comparison to other racial and ethnic groups, Native women remain the most frequent victims of physical and sexual violence in the U.S. and in Canada."); Andrea L. Johnson, Note, *A Perfect Storm: The U.S. Anti-trafficking Regime's Failure to Stop the Sex Trafficking of American Indian Women and Girls*, 43 COLUM. HUM. RTS. L. REV. 617, 619 (2012) ("American Indian women have suffered sexual violence and exploitation at the highest rate of any ethnic group.").

7. Kathryn Ford, *Tribal Justice and Sex Trafficking*, *in* A GUIDE TO HUMAN TRAFFICKING FOR STATE COURTS 135, 138 (2014) (citation omitted), http://www.htcourts.org/wp-content/uploads/Ch-8_140425_NACM_Guide_OnlineV_v04.pdf ("Evidence is emerging that Native people are severely overrepresented among victims of sexual exploitation.").

8. AMNESTY INT'L, *supra* note 6, at 4.

distrust federal and state justice systems.[9] For this reason, many trafficking victims choose not to identify themselves as victims out of fear.[10]

Jurisdictional issues play a significant role in the relationship between states and tribes. Many variables determine which court has jurisdiction over crimes that occur on tribal land.[11] These variables create difficulties and confusion for everyone involved. Most importantly, suspects of violent crimes often remain free.[12]

A. Sexual Violence Against Native Women

Sexual violence statistics reveal a troubling pattern of victimization against Native American women. According to the U.S. Department of Justice, "more than one in three" Native American women will be raped during her lifetime.[13] Further, Native American women are victims of sexual violence perpetrated by all races.[14] Studies reveal that Native American women are susceptible to a "substantially higher rate of interracial violence than experienced by white or black victims."[15] In fact, "in more than ninety percent of these cases, the offender is a non-Indian."[16]

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9. Ford, *supra* note 7, at 136.

10. Victoria Sweet, *Trafficking in Native Communities*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 24, 2015), http://indiancountrytodaymedianetwork.com/2015/05/24/trafficking-native-communities-160475; *see also* 22 U.S.C. § 7101(b)(7) (2012) ("Traffickers often make representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape.").

11. Ford, *supra* note 7, at 137.

12. AMNESTY INT'L, *supra* note 6, at 2 (citing PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000); Louise Erdrich, *Rape on the Reservation*, N.Y. TIMES, Feb. 26, 2013, http://www.nytimes.com/2013/02/27/opinion/native-americans-and-the-violence-against-women-act.html?_r=0; *see also* Futures Without Violence, *The Facts on Violence Against American Indian/Alaskan Native Women*, https://www.futureswithoutviolence.org/userfiles/file/Violence%20Against%20AI%20AN%20Women%20Fact%20Sheet.pdf (last visited Sept. 20, 2015) (stating that 96% of Native American women surveyed who had been raped also suffered other physical abuse as well).

13. AMNESTY INT'L, *supra* note 6, at 2; *see also* Futures Without Violence, *supra* note 12 (stating that 96% of Native American women surveyed who had been raped also suffered other physical abuse as well).

14. Futures Without Violence, *supra* note 12 (citing a statistic from the Bureau of Justice, recognizing that at least 70% of the violence experienced by Native American women is committed by people of another race).

15. *Id.* (citation omitted).

16. Gavin Clarkson & David DeKorte, *Unguarded Indians: The Complete Failure of the Post-*Oliphant *Guardian and the Dual-Edged Nature of* Parens Patriae, 2010 U. ILL. L. REV. 1119.

While these statistics are incomparable themselves, most scholars believe these statistics overwhelmingly underestimate the extent of sexual violence actually perpetrated against Native American women.[17]

Additionally, Native American women are susceptible to domestic violence and assault at much higher rates than any other ethnicity.[18] The statistics on the level of domestic violence that Native American women endure remain consistent from decade to decade.[19] The U.S. Department of Justice estimates the rate of domestic violence and physical assault against Native American's "to be as much as [fifty percent] higher than the next most victimized demographic."[20] These statistics indicate that human trafficking is a tremendous problem facing Native Americans.

Human trafficking is largely a problem of underreporting.[21] "Barriers to reporting include fear of breaches of confidentiality, fear of retaliation and a lack of confidence that reports will be taken seriously and result in perpetrators being brought to justice."[22] These factors all relate to the general distrust between tribes and the federal government. Because of the underreporting that occurs on tribal land, recognizing common signs of human trafficking is imperative. If law enforcement and concerned citizens recognized the signs of human trafficking, the underreporting problem could be alleviated.

The U.S. Department of State describes "key red flags" that individuals should look for to discover a human trafficking situation. Some key red flags include "poor living conditions," "inability to speak to individual[s] alone," "answers appear to be scripted and rehearsed," "signs of physical abuse," and "under [eighteen] and in prostitution"[23] to name a few.

B. Human Trafficking in the United States: How It All Began

The sex industry is rapidly growing in the United States.[24] The sex industry "involves sexual exploitation of persons, predominantly women

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17. AMNESTY INT'L, *supra* note 6, at 2.

18. Futures Without Violence, *supra* note 12 (citation omitted) (recognizing that 39% of Native American women surveyed identified as victims of intimate partner violence, a higher rate than any other race or ethnicity surveyed in this particular study).

19. *Id.* (citation omitted).

20. Futures Without Violence, *supra* note 12; *see also* PERRY, *supra* note 6.

21. *See* AMNESTY INT'L, *supra* note 6, at 4.

22. *Id.*

23. *Identify and Assist a Trafficking Victim*, U.S. DEP'T OF STATE, http://www.state.gov/j/tip/id/ (last visited Jan. 7, 2016).

24. Hanh Diep, *We Pay – The Economic Manipulation of International and Domestic Laws to Sustain Sex Trafficking*, 2 LOY. U. CHI. INT'L L. REV. 309, 311 (2005) (stating the

and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services."[25] In response to the increase in the sex industry, all fifty states have enacted human trafficking statutes.[26] As recently as 2004, "only four states had human trafficking laws."[27] But, between 2011 and 2012, many states recognized the need for such laws, and twenty-eight states passed human trafficking laws during this time frame.[28] This legislative response was in part due to the national recognition of human trafficking as an important emerging issue in the United States.

While "human trafficking" is a prominent global issue,[29] human trafficking within the United States has a lengthy and unsettling history that dates back to the colonial period.[30] "Human trafficking" is often defined and described as a modern-day form of slavery.[31]

The actual prevalence of human trafficking within the United States, however, is largely unknown.[32] Comprehensive studies are difficult for a variety of reasons. For example, "[t]rafficking victims are guarded closely by their captors . . . trafficked domestic servants remain invisible in private homes, and private businesses often act as a front for a back-end trafficking operation."[33] Furthermore, victims of human trafficking may display

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illegal sex industry is the "third fastest growing economic enterprise in the world") (citation omitted).

25. 22 U.S.C. § 7101(b)(2) (2012).

26. Heather C. Gregorio, Note, *More Than "Johns," Less Than Traffickers: In Search of Just and Proportional Sanctions for Buyers of Sex with Trafficking Victims*, 90 N.Y.U. L. REV. 626, 633 (2015).

27. Ashley Feasley, *Improving State Trafficking Laws*, HUMAN TRAFFICKING SEARCH: THE GLOBAL RESOURCE & DATABASE (Aug. 24, 2015), http://www.humantrafficking search.net/wp1/improving-state-trafficking-laws.

28. *Id.*

29. *See* Johnson, *supra* note 6, at 654 (finding that current laws on trafficking are not accomplishing much for Native Americans because of their focus on foreign anti-trafficking efforts).

30. Lisa Christiansen, *Human Trafficking of Native American Women in 2015*, LINKEDIN (Feb. 4, 2015), https://www.linkedin.com/pulse/human-trafficking-native-ameri can-women-2015-dr-lisa-christiansen.

31. 22 U.S.C. § 7101(a) (2012) (defining "human trafficking" as "a contemporary manifestation of slavery").

32. Heather J. Clawson, Nicole Dutch, Amy Solomon & Lisa Goldblatt Grace, *Human Trafficking into and Within the United States: A Review of the Literature*, ASPE, U.S. DEP'T HEALTH & HUM. SERVS. (Aug. 30, 2009), https://aspe.hhs.gov/basic-report/human-trafficking-and-within-united-states-review-literature.

33. *Id.*

symptoms of "Stockholm syndrome."[34] An individual with Stockholm syndrome (1) identifies with the captor, "express[ing] extreme gratitude over the smallest acts of kindness or mercy," (2) denies all acts of violence and injury, and (3) believes that anyone trying to penalize her pimp is an enemy.[35] Influenced by this syndrome, victims sometimes become intensely distrusting of anyone who offers assistance or an escape from this life.[36]

Although certain variables make recognizing all human trafficking cases difficult, law enforcement may rely on several risk factors to identify victims. Female victims of the human trafficking business generally share similar risk factors.[37] These factors include "poverty, poor education, and inequality."[38] State and federal governments recognize that these risk factors are tied to human trafficking.[39]

Congress recently reauthorized the federal Trafficking Victims Protection Act (TVPA) to account for the fact that certain women in these "categories" are easily targeted.[40] Because certain risk factors are now known and recognized, law enforcement is better able to locate and assist victims of human trafficking.

Human trafficking has only recently become a crime. In 2000, the United States became the first country to criminalize human trafficking under the TVPA.[41] The TVPA defines "sex trafficking" as the "recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act."[42] Congress passed the TVPA to restructure the identification and prosecution of human sex

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34. *Id*.; *see also* Kathryn Westcott, *What Is Stockholm Syndrome?*, BBC NEWS (Aug. 22, 2013) http://www.bbc.com/news/magazine-22447726 (describing the history and development of "Stockholm Syndrome").

35. Clawson et al., *supra* note 32.

36. *Id.*

37. Michelle Sauve, *Human Trafficking and Indigenous Populations*, ADMIN. FOR CHILDREN & FAMILIES (Aug. 8, 2014), http://www.acf.hhs.gov/blog/2014/08/human-trafficking-and-indigenous-populations.

38. *Id.*; *see also* 22 U.S.C. § 7101(b)(4) (2012) (describing other risk factors contributing to human trafficking).

39. *See* 22 U.S.C. § 7101(b)(4) (2012).

40. Johnson, *supra* note 6, at 648 (citing *Model Provisions of Comprehensive State Legislation to Combat Human Trafficking*, POLARIS PROJECT, 6 (2010), http://polaris2014.nonprofitsoapbox.com/storage/documents/Final_Comprehensive_ModelLaw__8_2010.pdf) (individuals with poor educational, social, cultural, or economic characteristics are purposefully targeted).

41. Pierce & Koepplinger, *supra* note 6, at 1.

42. 22 U.S.C. § 7102(10).

trafficking laws.[43] The TVPA "codified a 'victim-centered' approach to combating trafficking by expanding criminal statutes to reach more instances of trafficking, increasing criminal penalties for offenders, and creating numerous victim assistance programs."[44] Since the passage of the TVPA, sex trafficking has been federally prosecuted under 18 U.S.C. § 1591.[45]

Being trafficked is a traumatic emotional experience that poses serious health risks to the women involved. Sexually transmitted diseases and physical brutality are commonplace in the lives of trafficked victims.[46] These signs and symptoms are also prevalent among women involved in prostitution. Many domestically trafficked women find their way into the sex trade through prostitution. Though not always the case, prostitution is widely accepted as a consensual activity; trafficking, in contrast, involves an element of "deception, force, fraud, threat, or coercion."[47]

C. The Link Between Prostitution and Human Trafficking

Prostitution is often seen as a "baseline" for human trafficking. In fact, the U.S. Department of State considers sex trafficking as an aggregated form of prostitution. Specifically, "[w]hen an adult is coerced, forced, or deceived into prostitution—or maintained in prostitution through coercion—that person is a victim of trafficking."[48] Because women can voluntarily enter the prostitution industry, there is a large amount of controversy surrounding whether prostitutes may later become "trafficking victims."[49] Prostitution advocates believe the choice to sell and buy sex should be legal.[50] Contrary to this view, some believe that "prostitution is inherently demeaning and dangerous to those working in the commercial sex industry."[51] Conflicting views, like the ones above, create difficulties in the fight against human trafficking. Punishment assessment is a primary area of contention.

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43. Johnson, *supra* note 6, at 645-46.

44. *Id.* at 645.

45. 18 U.S.C. § 1591(a) (2012); *see also* Gregorio, *supra* note 26, at 633.

46. 22 U.S.C. § 7101(b)(10)-(11).

47. 21 OKLA. STAT. § 748(6)(a) (Supp. 2014).

48. *What Is Modern Slavery*, U.S. DEP'T OF STATE, http://www.state.gov/j/tip/what/index.htm (last visited Oct. 4, 2015).

49. Alexandra Pierce, *Shattered Hearts: The Commercial Sexual Exploitation of American Indian Women and Girls in Minnesota*, MINN. INDIAN WOMEN'S RESOURCE CTR. 21 (2009), http://www.miwrc.org/wp-content/uploads/2013/12/Shattered-Hearts-Full.pdf.

50. Gregorio, *supra* note 26, at 635.

51. *Id.*

Many states face one major difficulty: how should individuals, who knowingly, or even unknowingly, purchase sex from a woman who has been trafficked, be punished? "The [United States] criminal justice system currently lacks a proportional, clear, and effective law targeted at individuals who purchase sex with trafficking victims."[52] Because purchasers of sex from trafficked victims, whether knowing or unknowing, are a vital component in the rapidly growing trafficking industry,[53] criminal punishment of the purchaser of sex with a trafficked victim is a good start to combat human trafficking. Criminal punishment may deter sex purchasers from purchasing sex from women in general. As a result, the amount of women brought into the trafficking enterprise may decrease due to lower demand.

D. Four Approaches to Prosecution of Human Trafficking

There are four recognized approaches used to punish those who purchase sex from trafficked victims.[54] The first approach sanctions all purchasers of prostitution services systematically, regardless of whether the individual providing the services has been trafficked.[55] The principle behind this approach is that sanctioning all sex purchasers, regardless of whether the woman has been trafficked, will cut down on the demand for prostitution, and, in turn, sex trafficking will decrease.[56] Opponents of this approach argue that the minor sanctions imposed on purchasers of sex are not proportionate to the harm inflicted by those purchasing sex from trafficked victims.[57]

The second approach treats those who purchase sex from trafficked women as traffickers themselves.[58] State statutes that list verbs, such as "solicits", "purchases", or "maintain", specifically target sex purchasers of trafficked victims.[59] These verbs show the purchasers' intent. Oklahoma's anti-human trafficking statute follows this approach.[60]

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52. *Id.* at 626.
53. *Id.* at 632.
54. *Id.*
55. *Id.* at 641 (citation omitted).
56. *Id.*
57. *Id.* at 643.
58. *Id.* at 645.
59. *Id.*
60. 21 OKLA. STAT. § 748(A)(5), (6) (Supp. 2014) ("Human trafficking for commercial sex means: recruiting, enticing, harboring, maintaining, transporting, providing, or obtaining, by any means, another person through deception, force, fraud, threat or coercion for purposes of engaging the person in a commercial sex act.").

The third approach treats purchasers of sex from trafficked victims as noncommercial sex offenders.[61] The sex purchasers are charged with other crimes, such as statutory rape or sexual assault, to deter purchases.[62] But many associated charges only protect minors and, as a result, they are under-inclusive. Statutory rape laws punish individuals who have sex with a minor. In instances where the victim is an adult, rape charges are commonly brought against the sex purchaser.[63] This approach is great for children who are statutorily protected by law. Adults, on the other hand, must go through a lengthy court process and meet specified burdens of proof to ensure that justice is served.

The last approach urges prosecution of sex purchasers with knowledge of the victim's status as a trafficked victim.[64] Specifically, some states laws require that the sex purchaser possess actual knowledge of the victim's status as a trafficked individual.[65] Such laws, however, often minimize the effectiveness of anti-human trafficking statutes because actual knowledge of the woman's status as a trafficked victim is a high burden that is difficult to prove. Nevertheless, anti-human trafficking laws that require intent as a requisite mental state of the sex purchaser are often less ambiguous.[66] Statutes that require actual knowledge of the victim's status as a trafficked victim apply stricter punishment to individuals who purchase sex from a trafficked victim, as opposed to a non-trafficked victim.[67]

E. Trafficking Among Native American Women

Given both the elevated levels of domestic violence and the risk factors described above, Native American women are often targets for human trafficking. From our country's beginning, Native American women have been victims of human trafficking.[68] Some historians believe Christopher Columbus engaged in a form of human trafficking because he exploited Native American women to his crew.[69] Historically, the U.S. government

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61. Gregorio, *supra* note 26, at 654.

62. *Id.* (citation omitted).

63. *Id.* at 658 (noting that the requirements of rape legislation are "exceedingly difficult to satisfy" in these cases).

64. *Id.* at 662.

65. *Id.* at 661, 659 (stating that Delaware, Indiana, Iowa, Mississippi, Vermont, Wyoming, and New Jersey prohibit the "soliciting or patronizing" of a victim of human trafficking).

66. *Id.*

67. *Id.*

68. Sweet, *supra* note 10.

69. *Id.*

"sanctioned practices that included sexual abuse and prostitution."[70] During colonization, government officials "denigrated Native American women and girls by exposing them to and normalizing sexual abuse and subjecting those who resisted colonization to 'rape, physical abuse, and racist verbal abuse."[71] These views and actions of the federal government provided the basis for the objectification of Native American women that continues to present day.[72]

1. Generational Trauma

The term "generational trauma" describes the objectification and humiliation that Native American women have suffered since the beginning of colonization.[73] Generational trauma arises from the historical experiences suffered by Native American women, passed down from one generation to the next,[74] making future generations susceptible to the same types of issues. Generational trauma among Native American women still exists today, and there are no indications that it will stop.

Recent studies indicate that "prostitution of Native American girls is increasing at 'alarming rates.'"[75] Native American children are exceptionally vulnerable and "have been historically targeted and seasoned for prostitution and sex trafficking in the United States."[76] Specifically, many Native American children were exposed and normalized to sexual abuse during assimilation periods.[77] The process of assimilation dragged many Native American minors into prostitution, and this trend continues today through generational trauma.[78]

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70. Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1479 (2015) (discussing the process of removing Native American children from their communities and placing them in "boarding schools," where the children were commonly victims of sexual abuse).

71. *Id.*

72. Christine Stark, *Native Women Easy Prey for Traffickers*, STARTRIBUNE (Aug. 3, 2013, 7:29 AM), http://www.startribune.com/native-women-easy-prey-for-traffickers/218171361/.

73. Pierce & Koepplinger, *supra* note 6, at 2-3.

74. *Id.*

75. Butler, *supra* note 70, at 1483.

76. *Id.* at 1479.

77. *Id.* (stating that government-sanctioned boarding schools were used to assimilate Native Americans into American society, and many Native American children experienced rape, physical abuse, and racist verbal abuse while attending these schools).

78. *Id.*

Generational trauma exacerbates Native American women's vulnerability to traffickers because "traffickers . . . portray the sex trade as a quick path to empowerment and financial independence."[79] Generational trauma may also account for the fact that many Native Americans traffic their own friends and family.[80] Family members lead younger generations to sex work as a means of survival—"a way to get basic needs such as food, clothing, or lodging when no other economic opportunities are available."[81] Although younger generations sell themselves for sex, it's arguable that they are not actually being "trafficked" because the younger women make the choice to enter the sex enterprise.

In addition to generational trauma, living conditions and remote locations of many Native American tribes create optimal conditions for sex trafficking. Sex trafficking "hubs" include cities located near Native American reservations and Alaskan Native communities.[82] Strip clubs are often found in close proximity to tribal reservations, creating a class of vulnerable women, targeted for sex trafficking.[83] Although vulnerabilities have surrounded tribal women for centuries, no tribal government criminalized sex trafficking until 2012.[84]

2. Native American Human Trafficking - Gaining Serious Political Attention

While human trafficking among Native Americans has long been ignored, it is now at the forefront of political discussion.[85] Tribes around the world identified "preserving and protecting the human rights of our Indigenous people from such violations as involuntary servitude, human trafficking, or any other forms of oppression" as a fundamental objective.[86] Even the Obama administration "acknowledged a link between sex trafficking and rac[ial] and ethnic discrimination."[87] Specifically, the Obama administration "acknowledged that indigenous people are more

79. Pierce & Koepplinger, *supra* note 6, at 3 (citation omitted).

80. Johnson, *supra* note 6, at 641-42.

81. *Id.* at 642 (citing ALEXANDRA PIERCE, MINN. INDIAN WOMEN'S RES. CTR., SHATTERED HEARTS (2009)); *see also* Butler, *supra* note 70, at 1483 ("In a groundbreaking study on Native women in prostitution, 75 percent of the women interviewed had sold sex in exchange for shelter, food, or drugs.")(citation omitted).

82. Pierce & Koepplinger, *supra* note 6, at 1.

83. Johnson, *supra* note 6, at 638.

84. *Id*. at 653.

85. *See* Greer, *supra* note 1, at 461.

86. *See id.*

87. Butler, *supra* note 70, at 1468.

vulnerable to human trafficking."[88] Despite this political recognition, statutory interpretation and jurisdictional complexities severely hamper the fight against Native American human trafficking.

II. Human Trafficking Statutes

Criminal charges for human trafficking depend largely upon statutory interpretation. Because human trafficking statutes vary by jurisdiction, government prosecutors face many difficulties in systematically prosecuting traffickers. Under federal law, sexually trafficked minors are automatically deemed victims.[89] Conversely, sexually trafficked adults must prove the trafficker used force, fraud, or coercion to receive victim treatment, a task which is quite difficult.[90]

Although minors involved in the sex trade are protected under federal law, some states criminalize minors who prostitute themselves, contrary to what the TVPA provides. Oklahoma avoided this conflict and provided prostituted minors with relief, consistent with federal laws, instead of a criminal penalty, as discussed below.[91]

A. Trafficking Victims Protection Act of 2000 – The Federal Statute

There are many misconceptions when it comes to "trafficking." Many people think human trafficking requires the transportation of individuals from one place to another for sex. While almost all human trafficking statutes include some provision for the transportation of individuals against their will, human trafficking is defined much more broadly than this. The Trafficking Victims Protection Act ("TVPA") defines sex trafficking as "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act."[92] Though some states adopted verbose definitions of "commercial sex act," the TVPA has a shorter, highly-encompassing definition: "The term 'commercial sex act' means any sex act on account of which anything of value is given to or received by any person."[93]

88. *Id.* at 1507 (citing U.S. DEP'T OF STATE, 2014 TRAFFICKING IN PERSONS REPORT 19 (2014)).

89. Pierce & Koepplinger, *supra* note 6, at 5.

90. *Id.*

91. 21 OKLA. STAT. § 748.2(E) (Supp. 2014).

92. 22 U.S.C.A. § 7102(10) (West 2015).

93. *Id.* § 7102(4).

The TVPA called for clarity among trafficking statutes, after lawmakers encountered voluminous challenges with interpreting prior trafficking statutes. The TVPA serves to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."[94] While the primary focus of the TVPA seems to be on the sex trade, the TVPA is not limited to the sex industry; it also addresses forced labor and "violations of labor, public health, and human rights standards worldwide."[95]

Under the original 2000 version of the TVPA, multiple problems arose. The original 2000 version of the TVPA evaluated trafficking under a "reasonable person" standard.[96] When Congress reauthorized the TVPA in 2008, it acknowledged the practical difficulties of applying its original "sex trafficking" definition, together with proof of "force, fraud, or coercion," under the reasonable person standard.[97] Congress reworded the TVPA to include a more relaxed standard, defined as a "reasonable person of the same background or circumstances."[98] This new standard helped to ease the strict application of "force, fraud, or coercion."

"Force, fraud, or coercion" are terms that require a third party to "determine the level of consent" of the victim to evaluate whether trafficking occurred.[99] Whether the victim consented to the sexual act at the time the act occurred is a question of fact for the trier of fact. Women charged with prostitution may successfully establish that they were "trafficked," through the use of "force, fraud, or coercion"[100] by pleading certain requisite factors. In instances of successful pleading, the complaint contained one of the following allegations: (1) pimp enticed victim with financial gain, (2) pimp compelled women to enter the business by using threats of harm to family members, or (3) pimps used psychological manipulation.[101]

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94. 22 U.S.C. § 7101(a) (2012).

95. *Id.* § 7101(b)(3).

96. Johnson, *supra* note 6, at 648.

97. *Id.*

98. *Id.* (citing 18 U.S.C. § 1591(e)(4)) (explaining this change was made in recognition of the fact that traffickers seek out "victims who are easier to control because of their educational, social, cultural, or economic characteristics").

99. Pierce, *supra* note 49, at 21.

100. Johnson, *supra* note 6, at 648-49.

101. *Id.*

B. Oklahoma Human Trafficking – Statistics and the Statute

Oklahoma contains one of the "largest concentrations of trafficked victims."[102] Oklahoma's location makes the state optimal for human trafficking. Oklahoma is located in the center of the United States, where the intersections of major highways, such as I-40, I-44, and I-35, create a choice route for traffickers.[103] Because traffickers typically prey on women who have lower education and fewer resources, Oklahoma became a prime target for seeking out women for commercial sex purposes. "Oklahoma ranks first in the nation in female incarceration and child abuse deaths, third in divorce,[104] and fifth in teen" pregnancy.[105] These statistics portray many Oklahoma women as vulnerable and susceptible to the business of commercial sex, given that these statistics correlate with the "risk factors" previously identified.[106]

1. Oklahoma's Human Trafficking Statute

Oklahoma defines human trafficking as "modern-day slavery that includes, but is not limited to, extreme exploitation and the denial of freedom or liberty of an individual for purposes of deriving benefit from that individual's commercial sex act or labor."[107] While the TVPA primarily focuses on the sex trade, Oklahoma's statute emphasizes trafficking both in the "labor" context, and the "commercial sex act" context.[108] Under Oklahoma's statute, "human trafficking for labor" means:

> a. recruiting, enticing, harboring, maintaining transporting, providing or obtaining, by any means, another person through deception, force, fraud, threat or coercion or for purposes of engaging the person in labor, or

102. Greer, *supra* note 1, at 460; *see also* U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS FROM ATTORNEY GENERAL JOHN ASHCROFT ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2004, at 9 (2004).

103. Lori Fullbright, *Why Oklahoma Is a Prime Trade Route for Child Traffickers*, NEWS ON 6, Nov. 18, 2010, http://www.newson6.com/Global/story.asp?S=13533950.

104. Sarah Kujawa, Note, *Modern-Day Slavery: Human Trafficking in Oklahoma*, 38 OKLA. CITY U. L. REV. 105, 112 (2013).

105. *Id.*

106. Sauve, *supra* note 37.

107. 21 OKLA. STAT. § 748(A)(4) (Supp. 2014).

108. *Id.* § 748(A)(5-6).

b. benefiting, financially or by receiving anything of value, from participation in a venture that has engaged in an act of trafficking for labor[.][109]

The next section of the statute, "[h]uman trafficking for commercial sex purposes," is very similar in format and content to the "trafficking for labor" section. "Human trafficking for commercial sex" encompasses:

a. recruiting, enticing, harboring, maintaining, transporting, providing or obtaining by any means, another person through deception, force, fraud, threat or coercion for purposes of engaging the person in a commercial sex act,

b. recruiting, enticing, harboring, maintaining, transporting, providing, purchasing or obtaining, by any means, a minor for purposes of engaging the minor in a commercial sex act, or

c. benefiting, financially or by receiving anything of value, from participating in a venture that has engaged in an act of trafficking for commercial sex[.][110]

Although modeled similarly to the federal statute, it is evident that Oklahoma's statute is far more encompassing, and better able to combat trafficking, than the current federal statute.

For victims in Oklahoma, the state statute seems promising in providing adequate protection and relief. Unlike the federal statute, Oklahoma law provides more ways for victims to plead their status as trafficked individuals. Victims are not required to prove that the trafficker used "force, fraud, or coercion;" but Oklahoma victims may also allege that they were trafficked through the use of "deception" or "threat."[111]

The Oklahoma trafficking statute recognizes the tie between prostitution and trafficking. Specifically, Oklahoma legislators included the word "purchasing," and part "D" of the statute, which reads: "[i]t is an affirmative defense to prosecution for a criminal offense that, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking."[112] Under this provision, adults may seek relief from prostitution charges arising out of trafficking activities as an affirmative defense.

109. *Id.* § 748(A)(5).
110. *Id.* § 748(A)(6).
111. *Id.* § 748(A)(5-6).
112. *Id.* § 748(D).

Additionally, section 748.2 provides protection for victimized minors.[113] This section provides:

> If criminal charges were filed against the minor and the investigation shows, at the show-cause hearing, that it is more likely than not that the minor is a victim of human trafficking or sexual abuse, then the criminal charges against the minor shall be dismissed and the Department of Human Services case and services shall proceed.[114]

Once this burden has been met, criminal charges, such as prostitution charges, shall be dismissed.[115]

While excellent for minors, the statutory protections are not similar for adult victims.[116] Upon a showing of good cause, criminal charges are automatically dropped for minors; adults, in contrast, may only use section D of the statute as an affirmative defense. Thus, adult victims are still required to defend against criminal charges.[117]

2. Oklahoma Programs Designed to Combat Human Trafficking

Oklahoma codified guidelines to assist victims of human trafficking.[118] These guidelines include providing shelter that is not "inappropriate to their status as crime victims," neither penalizing nor criminalizing the victims for having been trafficked, providing prompt physical and emotional health care, and providing legal assistance.[119] In addition to the guidelines for victim assistance, Oklahoma law mandates task forces designed to combat human trafficking.[120]

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113. *Id.* § 748(A)(8) (defining "minor" as "an individual under eighteen (18) years of age").

114. *Id.* § 748.2(E).

115. *Id.*

116. *See id.* § 748(A)(9) (defining "victim" as "a person against whom a violation of any provision of this section has been committed").

117. This discrepancy could be due to the debate over whether or not adult women engaged in prostitution can be considered "victims," because of the common assumption they must have consented to prostitution.

118. *Id.* § 748.2(A).

119. *Id.* § 748.2(A)(1-5).

120. *Id.*

Local news recently discussed one such task force, the "OBN Human Trafficking Unit," calling it the "new weapon" created by the Oklahoma Bureau of Narcotics ("OBN").[121] OBN found a significant connection between the war on drugs and human trafficking.[122] OBN director Darrell Weaver commented that "the same type of vice crimes that happen with drug enforcement also happen with some of the human trafficking components."[123] Weaver stated that OBN uses similar tactics to combat both drug trafficking and human trafficking, including the use of undercover agents, surveillance techniques, and the use of informants to be able to "infiltrate" trafficking groups.[124]

Oklahoma reached out to other states, including Nevada, Texas, Florida, and Illinois, to learn the best techniques available to fight human trafficking.[125] OBN Human Trafficking Unit's tactics are comprehensive, with a focus on cyber investigations, labor trafficking, and sex slavery.[126] An undercover officer on the task force described sex trafficking as "occurring in broad daylight . . . right under our noses, and anytime there is money involved in it, there's a demand, and there is going to be somebody willing to step up for the supply."[127]

C. Jurisdictional Complexities and an Effort to Solve Them

Who has the power to initiate criminal proceedings? This is almost always the first question in a Native American human trafficking case. Three questions must be answered to determine the appropriate jurisdictional authority: "whether the victim is a member of a federally recognized Indian tribe or not; whether the accused is a member of a federally recognized Indian tribe or not; and whether the alleged offence took place on tribal land or not."[128] While these questions are often not easy to answer, they are pivotal steps in determining investigative and prosecutorial authority.[129]

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121. Videovigilanteokc, *2014 Overview of Human Trafficking in Oklahoma*, YOUTUBE (Feb. 22, 2014), https://www.youtube.com/watch?v=Y3U5zChkmyw (compiling several different news stories from different local news channels).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 27.

129. *Id.*

The Supreme Court of the United States established the threshold jurisdictional factors listed above in *Oliphant v. Suquamish Indian Tribe*.[130] In *Oliphant*, the Supreme Court held that the exercise of criminal jurisdiction over non-Indians, in the absence of an authorizing statute of Congress, was inconsistent with the domestic dependent status of the tribes. Thus, *Oliphant* largely stripped Indian tribes of the ability to protect their people and to prosecute violent crimes committed against Indians on Indian land.

Congress recently partially rectified the result of *Oliphant* in the Violence Against Women Reauthorization Act of 2013, which authorizes tribes to exercise criminal jurisdiction over certain non-Indians for domestic or dating violence against Indians,[131] but the factors established in *Oliphant* are still widely used today.[132]

Because the jurisdictional inquiries are complex, there is often an overlap in jurisdiction; the line, however, where tribal authority ends and federal or state authority begins is blurred.[133] While the United States adopted a "policy of tribal self-determination," federal limitations impede its applicability.[134] Due to the challenges surrounding criminal jurisdiction, there is a historical lack in prosecution of crimes committed against Native American women on tribal lands.[135]

In an attempt to clear up some of the jurisdictional challenges, Congress enacted The Major Crimes Act in 1885 (MCA).[136] MCA granted the federal government jurisdiction over serious crimes committed on tribal land.[137] The Act includes several amendments and revisions, but today it includes "murder, manslaughter, kidnapping, maiming . . . incest . . . felony child abuse or neglect, arson, burglary, [and] robbery," among other serious felonies.[138] While the federal government maintains criminal jurisdiction over all "serious crimes" that occur on tribal land, tribal authorities

130. 435 U.S. 191 (1978).

131. 25 U.S.C.A. § 1304(b) (West 2015).

132. 25 U.S.C. § 1302(b) (2012) (limiting tribes' criminal sentencing power to a maximum of three years).

133. AMNESTY INT'L, *supra* note 6, at 27.

134. *Id.* at 28.

135. Jessica Greer Griffith, Comment, *Too Many Gaps, Too Many Fallen Victims: Protecting American Indian Women from Violence on Tribal Lands*, 36 U. PA. J. INT'L L. 785, 800-01 (2015).

136. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2012).

137. *Id.*; *see also* AMNESTY INT'L, *supra* note 6, at 29.

138. 18 U.S.C § 1153.

maintain concurrent criminal jurisdiction to prosecute Native American perpetrators for the same major crimes.[139] Tribal governments remain unable to prosecute non-Indian perpetrators.[140]

D. Jurisdictional Issues in Oklahoma

Roughly 395,000 Native Americans live in Oklahoma, which is the second highest total of any state in the United States.[141] Like the national statistics, sexual violence among Native American women in Oklahoma is prevalent.[142] The relocation of Native American tribes to Oklahoma, together with the allotment of tribal lands, created a web of jurisdictional issues.

There are thirty-nine tribal governments in Oklahoma that maintain exclusive or concurrent jurisdiction with either the state or federal government, or both.[143] Out of the seventy-seven counties in Oklahoma, more than sixty include tribal lands.[144] Because tribal land overlaps with non-tribal land throughout the state, the jurisdictional issues discussed above are further complicated in Oklahoma.[145]

When prosecuting crimes that occur on Indian lands, jurisdictional complexities result in harmful, additional delay. Native American women face significant challenges in bringing their perpetrator to justice. Oklahoma authorities attempted to combat the harmful effects of its jurisdictional maze through "cross-deputization."[146]

Cross-deputization requires the cooperation of both tribal and state law enforcement officials to aid in responding to calls of violence.[147] These agreements allow law enforcement agencies to respond to crimes that

139. AMNESTY INT'L, *supra* note 6, at 29 (discussing the common misconception that under the Major Crimes Act only federal authorities are able to prosecute major crimes).

140. Griffith, *supra* note 135, at 788-89.

141. AMNESTY INT'L, *supra* note 6, at 33.

142. *Id.* (indicating that the rate of reported sexual violence among Native American women in Oklahoma is probably not representative of the "true scale of the problem," as many of the Native American women surveyed in Oklahoma reported not sharing their accounts of sexual violence with law enforcement).

143. *Id.* at 33-34.

144. *Id.* at 34.

145. *Id.* (For example, "[f]f it's a parcel of property in a rural area, it may take weeks or months to determine if it's Indian land or not; investigators usually cannot determine this, they need attorneys to do it by going through court and title records to make a determination.").

146. *Id.* at 38 ("Officers indicated that cross-deputization diminished jurisdictional challenges, increasing their ability to help all victims.").

147. *See id.*

would otherwise fall outside of their jurisdiction.[148] Cross-deputization agreements are heavily relied on by the tribes who choose to enter into such agreements.[149] These agreements empower tribal officers to "arrest and detain individuals for crimes committed on state land and enable state police officers to arrest individuals for crimes committed by Native Americans on tribal lands,[150] allowing for a faster emergency response. Nevertheless, because they are difficult to enter into, not every tribe has a "cross-deputization" agreement with the State of Oklahoma.[151]

E. Other Factors That Prevent the Arrest and Prosecution of Sexually Violent Perpetrators

Jurisdictional hurdles are not the only obstacles to the arrest and prosecution of sexually violent perpetrators. Other factors include insufficient resources for tribal police and a lack of training among tribal, state, and federal officials.[152]

According to Amnesty International, federal and state governments provide far fewer resources for tribal law enforcement.[153] Monetary limits on resources restrict the number of police officers that tribes employ.[154] Depending on the amount of funding, a tribe may employ around fifteen officers, while other tribes, who severely lack funding, employ three officers at most.[155] Tribal officers must patrol large tracts of land, and they must prioritize emergency response.[156] Native American women who report sexual violence must often wait hours for law enforcement to arrive, and they wait much longer on Indian land with fewer officers and resources.[157]

A lack of resources is also detrimental to law enforcement. Amnesty International believes that inadequate training on sexual violence and a lack of understanding of tribal cultural norms affect tribal and state law

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 38-39 (stating that the Oklahoma Association of Chiefs of Police and tribal law enforcement agencies have entered an agreement in hopes of making it easier for tribes and the state to enter into cross-deputization relationships).
152. *Id.* at 41.
153. *Id.* at 42.
154. *Id.*
155. *Id.* at 43.
156. *Id.* (finding that "officers do not prioritize responding to crimes of sexual violence").
157. *Id.* at 43.

enforcement officers alike.[158] The lack of funding provided to law enforcement, improper training, and misunderstanding of cultural differences render "[t]he detection and prosecution of trafficking in Indian country . . . generally ineffective."[159] This situation, coupled with jurisdictional complexities, "has created a de facto haven for traffickers, allowing the traffickers to operate with little concern of detection or prosecution."[160]

F. The Violence Against Women Act As It Relates to Trafficking

Congressed enacted the Violence Against Women Act ("VAWA") in 1994.[161] Congress designed VAWA to provide a "collection of funding program[s] initiatives and actions designed to improve criminal justice and community-based responses to violence against women, including sexual violence, in the [United States]."[162] When Congress reauthorized VAWA in 2013, it expanded tribal criminal jurisdiction over non-Indians who commit violent crimes in Indian country.[163]

Congress expanded the criminal jurisdiction of tribal courts in a specific tribal title, Title IX.[164] Congress designed Title IX to improve the justice system for Native American women.[165] Specifically, Title IX regulates the distribution of tribal funds, grants tribal law enforcement access to criminal databases, creates a national tribal sex offender registry, and creates a registry for all protection orders issued by tribes.[166]

In 2013, Congress reauthorized VAWA with heavy support from the Obama administration. The Obama administration "created new opportunities to reconsider the role of race and racism in perpetuating sex trafficking."[167] More importantly, the reauthorization of VAWA represents a significant improvement in the battle against sexual violence among Native Americans. The 2013 Reauthorization provided tribal authorities "the power to investigate, prosecute, convict, and sentence Indians, and non-Indians with ties to tribal lands, accused of committing certain

158. *Id.* at 51
159. Greer, *supra* note 1, at 454.
160. *Id.*
161. 42 U.S.C. § 13981 (2012); *see also* Ford, *supra* note 7, at 137.
162. AMNESTY INT'L, *supra* note 6, at 82.
163. *See id.*
164. AMNESTY INT'L, *supra* note 6, at 82 (stating that the VAWA reauthorization of 2005 provided for this expansion).
165. *Id.*
166. *Id.*
167. Butler, *supra* note 70, at 1468.

domestic abuse crimes against American Indian women in Indian Country."[168]

Although the 2013 Reauthorization broadened the scope of tribal authority, significant limitations remain. For example, many crimes are still not covered.[169] Second, VAWA authorizes tribal jurisdiction over non-Indian perpetrators only if the perpetrator "resides in the Indian country of the participating tribe; is employed in the Indian country of the participating tribe; or is a spouse, intimate partner, or dating partner of a member of the participating tribe or an Indian who resides in the Indian country of the participating tribe."[170]

Indeed, VAWA's language is quite encompassing, but tribes still generally lack the power to prosecute non-Indians who visit tribal land for only a brief period of time.[171] In the context of human trafficking, VAWA will likely fail because it does not account for individuals who pass through Indian Country for "work" or brief periods of time.

An essential part of VAWA is the national enforcement of protection orders.[172] VAWA provides that "all US jurisdictions must give 'full faith and credit' to protection orders issued by other US jurisdictions."[173] In other words, state courts must enforce all tribal protection orders,[174] but the efficacy of this provision is currently unknown.[175] Moreover, until tribal law enforcement agencies receive or otherwise regenerate adequate resources, state courts and Native American women alike are left with limited recourse and enforcement options against perpetrators who violate their protective order.

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168. Griffith, *supra* note 135, at 807.

169. *VAWA 2013 and Tribal Jurisdiction over Non-Indian Perpetrators of Domestic Violence*, JUSTICE.GOV, https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf (last visited Sept. 20, 2015).

170. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904(b)(4)(B), 127 Stat. 54, 122.

171. Griffith, *supra* note 135, at 810.

172. AMNESTY INT'L, *supra* note 6, at 48-49.

173. *Id.*

174. *Id.*

175. *Id.*

III. Suggested Approaches

A. Afford Prostituted Women the Same Relief as Prostituted Children

Recent human trafficking legislation shifted towards identifying and treating prostituted children as victims of human trafficking.[176] This approach, however, is limited to children.[177] The Oklahoma "[g]uidelines for treatment of human trafficking victims" are in its human trafficking statute, and provide, in pertinent part, the following: "If criminal charges were filed against the minor and the investigation shows . . . that it is more likely than not that the minor is a victim of human trafficking or sexual abuse, then the criminal charges against the minor shall be dismissed . . . ."[178]

Although this is a great achievement against modern child sex slavery, adult women continue to face the presumption that they consented to prostitution, and therefore, they are excluded from the definition of trafficking victims. This presumption impedes both protection and prosecution.

Fortunately, Oklahoma trafficking laws provide what could potentially be a shield for prostituted women who were coerced into the sex trade.[179] Oklahoma's human trafficking statute states, "[i]t is an affirmative defense to prosecution for a criminal offense that, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking."[180] This statute implies that all victims, regardless of age, who can prove that they were trafficked during the time of their criminal prostitution charges, may seek some relief from their prostitution charges.

Although Oklahoma law attempts to address the link between prostitution and trafficking, there are two problems with the statute as it stands. First, adults are clearly not provided the same protections as children. While some may argue that children deserve a higher level of protection, this statute places a heavy burden on individuals who are *forced* into prostitution. Second, it is a daunting task to prove one's status as a trafficking victim, especially for an individual who has been manipulated into thinking that she is not a victim.

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176. *See* Butler, *supra* note 70, at 1495.
177. 21 OKLA. STAT. § 748.2(E) (Supp. 2014).
178. *Id.*
179. *Id.* § 748(D).
180. *Id.*

Oklahoma's legislature attempts to provide relief for adult trafficking victims against pending criminal charges, but in reality, this relief is not easily within reach. To make relief from criminal charges more obtainable, individuals of any age should be provided the automatic release from criminal liability that children are essentially provided, upon a showing of "good cause" that they were a trafficked victim. If Oklahoma and other states adopt this type of relief, more women may feel empowered to seek help. As the law currently stands, individuals who come forward may be criminally prosecuted for prostitution if they cannot meet the heavy burden of proving that they are a victim of human trafficking.

The presumption of prostitution by choice is even more prevalent for Native American women. "[R]acism increases the likelihood that state and local law enforcement officials will categorize these prostituted people of color as criminals as opposed to crime victims."[181] Racism, coupled with the burden of proving trafficked status, could mean Native American women face an even harder challenge battling criminal prostitution charges and getting the real help they need.

B. Why the Major Crimes Act and the Violence Against Women Act Are Simply Not Enough

The Major Crimes Act of 1885 (MCA) gave the federal government jurisdiction over Indian offenders who committed certain, enumerated major crimes.[182] With a few small changes, the MCA could become a sword and not a shield to human trafficking.[183] Specifically, Congress should amend the MCA to include "human trafficking" as a "major crime;" this would allow the federal government and tribal courts to prosecute any individual who committed a trafficking offense, regardless of the typical jurisdictional limits involved on tribal lands.

Due to the heinous facts associated with human trafficking, it seems inexplicable to not consider human trafficking as a serious crime that should fall under the MCA. If Congress made this change, it would cure some of the jurisdictional ambiguities. For example, federal law enforcement and prosecutors would have no doubts about whether they

181. Butler, *supra* note 70, at 1501.

182. *Oliphant*, 435 U.S. 191, 203 (1978); *see id.* at 203 n.14 ("The Major Crimes Act provides that Indians committing any of the enumerated offenses 'shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.").

183. Much could be done to improve the functionality of this act, but for the purposes of this comment, critiques and comments will be limited to human trafficking.

possess the authority to assert jurisdiction over a Native American responsible for human trafficking.

While this change could substantially reduce some jurisdictional complexities, it is recognized that many traffickers of Native American women are not Native American; they simply target Native Americans. The proposed amendment to the MCA would not solve all of the issues associated with Native American trafficking, but it would be a tremendous and symbolic step. For example, in light of generational trauma, this addition to the list of serious crimes could help cut back on the trafficking occurring among Native American families. Additionally, outsourcing some of the prosecution of human trafficking of Native Americans could prompt more Native American victims to seek help and safety, knowing that the prosecution will be beyond hands of tribal leaders, who may have ties to the offender.

The Violence Against Women Act (VAWA) could also be substantially improved. While VAWA was a significant stride for Native American women, VAWA lacks the requisite power needed to combat all human trafficking concerns. VAWA facially grants tribes the power to assert jurisdiction over non-Indians who commit crimes of domestic violence on tribal lands.[184] While this seems expansive, "non-Indian domestic violence perpetrator" is limited to individuals residing in Indian country, employed in said Indian country, or those in an intimate relationship with a Native American residing in Indian country.[185] Tribal courts are not authorized to prosecute non-Indians who temporarily visit tribal land, even if the non-Indian is violent towards the tribe's women.

Furthermore, "spouse, intimate partner, or dating partner"[186] may not encompass certain relationships in need of protection. For example, many young individuals consider themselves to be in a relationship far before they are technically "dating" or "intimate" with one another.[187] Thus, considering that Native American women are victimized primarily by non-Indians,[188] the benefits of expanding the scope of VAWA cannot be overstated.

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184. See AMNESTY INT'L, *supra* note 6, at 48-49.

185. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904(b)(4)(B), 127 Stat. 54, 122.

186. *Id.*

187. 18 U.S.C. § 2266 (7) (2012) (definition of "intimate" contains no reference to a sexual relationship).

188. Clarkson & DeKorte, *supra* note 16.

Expanding the coverage of VAWA to include jurisdiction over *any* non-Indian who commits *any* form of violence against a Native American would be a tremendous stride in the fight against human trafficking. The surest way to enable Native Americans to protect their people is to give them the power to do so.

C. Provide Civil Law Enforcement Officers with the Proper Training to Recognize and Assist Native American Human Trafficking Victims

"Perhaps the greatest chance of identifying victims lies with law enforcement."[189] Law enforcement officers need proper training to accurately and sensitively assist Native American victims of human trafficking. To effectively assist human trafficking victims, law enforcement must thoroughly understand the TVPA and they must treat victims as "victims," and not as criminals. To shift focus from "criminal" to "victim," "adequate and ongoing education, training, and commitment" at every level of law enforcement must occur.[190] Although this shift is required in many contexts, law enforcement should be weary of those who consensually enter the prostitution industry and then attempt to plead victim status under the human trafficking statute.

In areas where the jurisdictional lines are blurred, Congress should enact legislation that allows either tribal officers or state officers to respond to the needs of Native American victims. Allowing these women to remain in limbo, with no assistance or safety, further enables sex traffickers to prey on Native American women. Immediate assistance must be provided by the first available law enforcement agency. If Native American women know that help will come if they seek it, perhaps this will enable more victimized women to seek out assistance. Jurisdictional questions may be solved later, after the victim has been properly assisted.

Additionally, state and city law enforcement within close proximity to tribal lands should receive adequate training on the social and religious cultures of every tribe that they may encounter. Just as cultural issues arise with international trafficking victims,[191] cultural issues are present for Native American victims. Familiarity with a tribe's culture will allow law enforcement to recognize particular risk factors and susceptibilities. Workshops on cultural sensitivity as well as efforts to foster communications with victims have been successful for internationally

189. Clawson et al., *supra* note 32.

190. *Id.*

191. *Id.* (describing dietary needs, religious practices, and behavior as some of the cultural issues commonly encountered amongst international trafficking victims).

trafficked victims.[192] Similar workshops would likely be successful in the sphere of Native American trafficking as well.

"Because trafficking victims' needs are complex and extensive, it is impossible for a single agency to respond effectively to this population."[193] Moreover, to effectively combat the horrendous issue of human trafficking, state and tribal agencies must learn to work with one another. Both state and tribal law enforcement officials must be aware of the cultural differences between one another and work to develop an understanding of the other's culture.

D. Establish Specific Penalties for Those Who Purchase Trafficked Women

The main problem with state statutes that address the punishment of sex purchasers from trafficked women is that the statutes often do not account for adult victims.[194] Most state statutes are primarily minor-focused.[195] Additionally, the "knowledge" requirement of many human trafficking statutes, including Oklahoma's, is difficult to prove.[196] Lack of knowledge, however, should not eradicate the need to punish purchasers strictly to help eliminate the demand for trafficked women.

"The US criminal justice system currently lacks a proportional, clear, and effective law targeted at individuals who purchase sex with trafficking victims."[197] Because there are several variables that play into each situation, Oklahoma should adopt a straight-forward approach that punishes anyone who purchases sex from a trafficked woman, with or without knowledge of her trafficked status and regardless of the victim's age. While this approach imposes a strict penalty on the "unknowing" purchaser, "per se" criminal liability is most in line with the goals of eradicating human trafficking. Additionally, punishing all individuals who purchase sex from a trafficked victim in a systematic manner will make punishment and sentencing guidelines easier for the courts to apply.

192. *Id.*

193. *Id.*

194. Gregorio, *supra* note 26, at 663 (concluding that the main problem with the Mann Act and state statutes is that they are underinclusive).

195. *Id.*

196. *Id.*

197. *Id.* at 626.

E. Use Trafficking Survivors to Develop Services and a Better Understanding of Human Trafficking

Survivors are the strongest weapon that we have to combat human trafficking among Native Americans. Some victim assistance programs currently incorporate "a peer-to-peer counseling model and often hire survivors to provide either some or all of the services to clients."[198] Victims seek "non-judgmental support" from those who have been in their situation before.[199]

Due to the high level of distrust that Native American's have with law enforcement[200], a program with a peer-to-peer design could be extremely beneficial. A program with peer-to-peer counseling will provide victims the help they need and it will gather information on other possible victims. "Peer-led services reduce or remove the cultural and language barriers that most sex trade workers experience when trying to communicate with those whose education about the trade has been academic or professional."[201]

F. A Better Understanding of Oklahoma's Statute

Although Oklahoma's human trafficking statute seems all encompassing, issues still exist in its application. In *Shattered Hearts*,[202] Alexandra Pierce analyzes the federal trafficking statute and compares it to Minnesota's human trafficking statute.[203] Pierce identifies three "elements" that make it easier to compare the federal statute to other state statutes.

Pierce describes the first element as "process," which includes recruiting, harboring, moving, obtaining, or maintaining a person.[204] The second element is "means" and its definition includes by force, fraud, or coercion.[205] The third element is "end" and it encompasses all of the possible goals a trafficker may have, such as involuntary servitude, debt bondage, slavery, or sex trade.[206] In sum, to be "trafficked" under the federal human trafficking statute, the victim must satisfy one element from each of the three categories.

198. Clawson et al., *supra* note 32.
199. *Id.*
200. Ford, *supra* note 7, at 136.
201. *Id.*
202. Pierce, *supra* note 49.
203. *Id.* at 22.
204. *Id.*
205. *Id.*
206. *Id.*

Alternatively, Minnesota's human trafficking statute eliminates the "means," providing that a claim for human trafficking arises when a person is "subjected to the practices" of "receiving, recruiting, enticing, harboring, providing, or obtaining *by any means* an individual to aid in the prostitution of the individual."[207] This approach essentially removes the requirement of force, fraud, or coercion.

Oklahoma's human trafficking statute begins with "processes," which is similar to the federal definition of "recruiting, enticing, harboring, maintaining, transporting, providing, or obtaining."[208] Oklahoma's "means" include "through deception, force, fraud, threat or coercion."[209] Oklahoma's human trafficking "ends" are a commercial sex act or forced labor.[210]

There are currently no published opinions on Oklahoma's human trafficking statute. But, a search of the Oklahoma docket system reveals that the State charges individuals under section 748.[211] A review of court documents reveals that most, if not all, of the charges pertaining to human trafficking are dismissed for one reason or another. The high level of dismissal for this type of case could be due to a lack of understanding of the statute and its terms.

To better understand how the statute applies and who should face human trafficking charges, attorneys and judges should become more familiar with the Oklahoma Jury Instructions for the human trafficking statute. The jury instructions clearly lay out the statute in a logical manner that can be understood far more readily than the statutory text.

The Oklahoma Jury Instructions put "Human Trafficking for Commercial Sex" into an elemental format, and state that "[n]o person may be convicted of human trafficking for commercial sex unless the State has proved beyond a reasonable doubt each *element* of the crime."[212] The first element requires the trafficker to have "knowingly" engaged in the next three elements.[213] The second element requires the trafficker to have recruited, enticed, harbored, maintained, transported, provided or obtained

207. *Id.* at 21-22 (emphasis added).
208. 21 OKLA. STAT. § 748(A)(5-6) (Supp. 2014).
209. *Id.*
210. *Id.*
211. BLOOMBERG LAW, *supra* note 4.
212. Oklahoma Uniform Jury Instructions – Criminal, Chapter 4, Section D (OUJI-CR-4-113B), OCCA ONLINE, http://www.okcca.net/online/oujis/oujisrvr.jsp?oc=OUJI-CR%204-113B (emphasis added) (last visited Jan. 8, 2016).
213. *Id.*

another person(s).[214] The third element provides that the trafficker must have satisfied element two through means of deception, force, fraud, threat, or coercion.[215] Finally, the fourth element requires the trafficker to have knowingly engaged in elements two and three for the purpose of engaging that person in an act of commercial sex.[216] These instructions also provide that one can be guilty of human trafficking if they knowingly benefited from an act of commercial sex.[217]

Oklahoma has parallel statutes for "human trafficking for labor" and "human trafficking for commercial sex." The Oklahoma Jury Instructions on "human trafficking for labor" are quite similar to those on "trafficking for commercial sex." Not only do these jury instructions make the statute easier to understand and apply, but they also make the distinction between prostitution and human trafficking quite clear.

Because human trafficking requires an element of deception, force, fraud, threat, or coercion, women who consensually enter the prostitution industry in Oklahoma will be barred from asserting human trafficking as a defense when one of these elements is not present.

Lawmakers and those who interpret and apply the law should turn to these jury instructions to determine whether someone qualifies as a trafficking victim or is guilty of human trafficking.

IV. Conclusion

To appropriately allocate resources and develop programs to combat human trafficking, Oklahoma must focus on obtaining more reliable statistical data of human trafficking.[218] Because of Oklahoma's jurisdictional composure, understanding the state's human trafficking statute and how it applies to Native Americans is a vital component to effectively eradicate human trafficking. Human trafficking is a complicated problem with many intricate parts, and the best solution to this problem is to develop a clear understanding of Oklahoma's state statute, apply it vigorously, and punish all purchasers of trafficked victims equally, regardless of the purchaser's "knowledge" and the victim's age.

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214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. Clawson et al., *supra* note 32 ("Obtaining more stable and reliable estimates of human tra fficking is key to helping Federal, State, and local governments appropriately allocate resources and develop programs and strategies to prevent human trafficking, prostitute traffickers, and protect and serve victims of this crime.").

Human trafficking advocates should use jury instructions to better understand and apply Oklahoma's Human Trafficking statute. Furthermore, law enforcement must focus on the special jurisdictional features of Oklahoma. Once Oklahoma's law enforcement agencies understand the barriers that Native Americans face and gain a solid grasp on the application of the human trafficking statute, the human trafficking statistics in Oklahoma will more accurately reflect the terrible epidemic of "human trafficking."

The State of

Human Trafficking in California

2012

Kamala D. Harris, Attorney General
California Department of Justice

Message from the Attorney General

Five years ago, leaders from our state's law enforcement and victim advocacy communities convened as the California Alliance to Combat Trafficking and Slavery Task Force. Their purpose was to evaluate the nature and extent of human trafficking in California and discuss how government and non-governmental organizations could collaborate to develop an effective response. The Task Force published its first report, *Human Trafficking in California*, in October 2007. I was proud to participate in the Task Force as San Francisco's District Attorney and to represent the California District Attorneys Association.

But much has changed since 2007. The crime of human trafficking has evolved profoundly over the last five years. Transnational and domestic gangs have expanded from trafficking guns and drugs to trafficking human beings. The perpetrators of human trafficking have become more sophisticated and organized, requiring an equally sophisticated response from law enforcement and its partners to disrupt and dismantle their networks. Another emerging trend is the adoption by traffickers of new technologies like social media to recruit victims, facilitate their crimes, and evade law enforcement. We also have the benefit of new legal tools, including California's groundbreaking anti-trafficking law, AB 22, which went into effect in 2006.

In light of these changed circumstances, as Attorney General of California, this year I convened a new anti-trafficking work group to reassess human trafficking in our state. I am pleased to present the results of their evaluation in the enclosed report, *The State of Human Trafficking in California*, 2012. The report reflects the work of representatives from law enforcement, victim service providers, non-governmental organizations, technology companies, and academic institutions. This diverse team brought their expertise and perspectives to discuss the current landscape of human trafficking in California and to evaluate and propose innovative strategies to investigate and prosecute traffickers and assist victims. I am proud to have convened this group, whose collective expertise and experience serves as the foundation for this report.

I hope the report will generate further discussion and, most importantly, effective action to fight human trafficking in California. I hope you will read it, find value in it, and share it widely.

Sincerely,

Attorney General Kamala D. Harris

Human Trafficking 2012 Work Group

The Attorney General's Human Trafficking Work Group is comprised of representatives of educational institutions, private entities, and a broad spectrum of law enforcement agencies, governmental agencies, victim service providers, and technology companies. We want to acknowledge and thank the representatives of the following agencies and organizations for their insight, discussion, and contributions to this project:

- Alameda County District Attorney's Office
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- Bilateral Safety Corridor Coalition
- California Coalition Against Sexual Assault
- California Department of Social Services, Refugee Programs Bureau
- California District Attorneys Association
- California Emergency Management Agency
- California Highway Patrol
- California Partnership to End Domestic Violence
- Central California Intelligence Center, Sacramento Regional Threat Assessment Center
- Central Valley Against Human Trafficking
- Coalition to Abolish Slavery & Trafficking (CAST)
- Community Service Programs
- Community Solutions, Inc.
- Congressman Dan Lungren's Office
- Courage to Be You, Inc./Courage House
- Department of Industrial Relations, Division of Labor Standards Enforcement
- The DNA (Demi & Ashton) Foundation
- East Bay Human Trafficking Task Force
- End Violence Against Women International
- Facebook
- Federal Bureau of Investigation Victim Assistance Program, Los Angeles Field Office
- Fresno Coalition Against Human Trafficking
- Fresno Economic Opportunities Commission, Sanctuary Youth Services
- Fresno Police Department
- Futures Without Violence
- Global Freedom Center
- Hayward Police Department
- Humanity United
- Inter-Tribal Council of California
- Joint Regional Intelligence Center, Los Angeles
- Los Angeles Metro Area Task Force on Human Trafficking
- Los Angeles Police Department
- McGeorge School of Law
- Microsoft Corporation
- Narika
- North Bay Human Trafficking Task Force
- North and Central California Anti-Trafficking Team

- Northern California Regional Intelligence Center
- Oakland Mayor's Office
- Oakland Police Department
- Operation SafeHouse
- Orange County Human Trafficking Task Force
- Partners Ending Domestic Abuse
- Riverside County Anti-Human Trafficking Task Force
- Riverside County District Attorney's Office
- Riverside County Sheriff's Department
- Regional Threat Assessment Center, Orange County
- Regional Threat Assessment Center, San Diego
- Sacramento County Public Defender's Office
- Sacramento Innocence Lost Task Force
- Sacramento Rescue and Restore Program, Sacramento Employment & Training Agency
- Sacramento Sheriff's Department
- Safe Border Community Project/ACTION Network
- San Diego County District Attorney's Office
- San Diego County Human Trafficking Advisory Council
- San Diego North County Human Trafficking Task Force
- San Diego Sheriff's Department
- San Francisco Asian Women's Center
- San Francisco Child Abuse Prevention Center
- San Francisco County Superior Court
- San Francisco District Attorney's Office
- San Francisco Police Department
- San Joaquin College of Law
- San Jose/South Bay Human Trafficking Task Force
- San Jose Police Department
- San Mateo County Sheriff's Department
- San Mateo Police Department
- Standing Against Global Exploitation Project (SAGE)
- State Threat Assessment Center
- Strong Hearted Native Women's Coalition
- University of Southern California Annenberg Center on Communication Leadership & Policy
- U.S. Attorney's Office, Eastern District of California
- U.S. Attorney's Office, Northern District of California
- U.S. Attorney's Office, Southern District of California
- U.S. Equal Employment Opportunities Commission, Los Angeles District Office
- Westminster Police Department
- Yolo County District Attorney's Office

For a list of the individuals on the Work Group, see Appendix A.

California Attorney General's Human Trafficking *Special Project Team*

Kamala D. Harris
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The recommendations expressed in this report are based on research and input from the California Attorney General's Human Trafficking Work Group and the Attorney General's staff. These recommendations should not be considered as representing the views of any agency or organization that participated in the Work Group.

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Photo Credits

The California Attorney General's Human Trafficking Special Project Team is grateful for the use of the following photographs: page 17, courtesy of the Office of the Attorney General, State of Chiapas, Mexico; page 20, courtesy of the U.S. Immigration and Customs Enforcement.

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Human Trafficking in California

Executive Summary

Executive Summary

"It ought to concern every person, because it's a debasement of our common humanity. It ought to concern every community, because it tears at the social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name – modern slavery."

President Barack Obama, September 25, 2012

The State of Human Trafficking in California 2012

On September 22, 2012, our nation celebrated the 150th anniversary of the Emancipation Proclamation. While slavery has been outlawed in this country since 1865, the promise of freedom still eludes thousands of men, women, and children who are forced into labor and prostitution in the United States today. Forced labor and sex trafficking are not just brutal relics of history or crimes that take place in faraway places. They comprise the world's fastest growing criminal enterprise, and they are flourishing right here in California.[1]

Human trafficking is an estimated $32 billion-a-year global industry.[2] After drug trafficking, human trafficking is the world's second most profitable criminal enterprise, a status it shares with illegal arms trafficking.[3] Like drug and arms trafficking, the United States is one of the top destination countries for trafficking in persons. California – a populous border state with a significant immigrant population and the world's ninth largest economy – is one of the nation's top four destination states for trafficking human beings.[4]

As part of the state's first anti-trafficking law (AB 22, Lieber), the California Alliance to Combat Trafficking and Slavery Task Force reviewed California's response to human trafficking and offered findings and recommendations in a 2007 report to the Governor, Attorney General, and Legislature. California has made tremendous progress in combating human trafficking since the Task Force released the *Human Trafficking in California* report, but significant new challenges in combating this crime have emerged in the last five years. First, criminal organizations and street gangs have

increasingly turned to trafficking in persons. The prevailing wisdom among these criminals is that human trafficking is more profitable and has a lower risk of being detected than drug trafficking. Second, new innovations in technology make it possible for traffickers to recruit victims and perpetrate their crimes online. It is critical that law enforcement have the tools and training to police online trafficking. Third, the Internet, social media, and mobile devices provide new avenues for outreach to victims and raising public awareness about this atrocious crime.

In January 2012, Attorney General Kamala D. Harris created a Human Trafficking Work Group to examine the nature and scope of human trafficking in California in 2012; to evaluate California's progress since 2007 in combating human trafficking; and to identify challenges and opportunities in protecting and assisting victims and bringing traffickers to justice. The Work Group included more than 100 representatives of state, local and federal law enforcement, state government agencies, victim service providers, nonprofit groups, technology companies, and educational institutions. This report reflects the Work Group discussions held during three day-long meetings in Sacramento, San Francisco, and Los Angeles, as well as supplemental research and investigation by the California Department of Justice.

Highlights of the 2012 Report

- **From mid-2010 to mid-2012, California's nine regional human trafficking task forces identified 1,277 victims, initiated 2,552 investigations, and arrested 1,798 individuals.**

- **In the same two-year period, California's task forces provided training to 25,591 law enforcement personnel, prosecutors, victim service providers, and other first responders.** Several non-governmental organizations have also trained judicial officers, airport personnel, social service providers, pro bono attorneys, and retail businesses, among others. The variety of individuals who have been trained underscores the pervasiveness of human trafficking and the important role that governmental and non-governmental actors play in detecting trafficking and assisting victims.

- **72% of human trafficking victims whose country of origin was identified by California's task forces are American.** The public perception is that human trafficking victims are from other countries, but data from California's task forces indicate that the vast majority are Americans.

- **Labor trafficking is under-reported and under-investigated as compared to sex trafficking.** 56% of victims who received services through California's task forces were sex trafficking victims. Yet, data from other sources indicate that labor trafficking is 3.5 times as prevalent as sex trafficking worldwide.

- **Local and transnational gangs are increasingly trafficking in human beings because it is a low-risk and high, renewable profit crime.** It is critical for federal, state, and local law enforcement and labor regulators to collaborate across jurisdictions to disrupt and dismantle these increasingly sophisticated, organized criminal networks.

- **A vertical prosecution model run outside routine vice operations can help law enforcement better protect victims and improve prosecutions.** Fostering expertise about human trafficking within a law enforcement agency and handling these cases outside routine vice operations can prevent erroneously viewing trafficking victims as perpetrators.

- **Early and frequent collaboration between law enforcement and victim service providers helps victims and prosecutors.** Victims who receive immediate and comprehensive assistance are more likely to help bring their traffickers to justice.

- **Traffickers are reaching more victims and customers by recruiting and advertising online.** Traffickers use online advertising and Internet-enabled cell phones to access a larger client base and create a greater sense of anonymity. Law enforcement needs the training and tools to investigate trafficking online.

- **Technology is available to better identify, reach, and serve victims.** Tools like search-term-triggered messages, website widgets, and text short codes enable groups to find victims online, connect them with services, and encourage the general public to report human trafficking.

- **Alert consumers need more tools to leverage their purchasing power to reduce the demand for trafficking.** Public and private organizations are just beginning to create web-based and mobile tools to increase public awareness and educate consumers about how to help combat human trafficking.

Chapter-by-Chapter Summary and Recommendations

Chapter 1 – The Crime of Human Trafficking

Under current law, human trafficking involves controlling a person through force, fraud, or coercion for labor or services. It is a crime perpetrated against men, women, and children of every nationality and socioeconomic status. Human trafficking is a low-risk, high-profit business – an estimated $32 billion-a-year global industry that has recently attracted the participation of increasingly sophisticated, organized criminal gangs. Domestic street gangs set aside traditional rivalries to set up commercial sex rings and maximize profits from the sale of young women. Transnational gangs use cross-border tunnels to move not only guns and drugs, but also human beings, from Mexico into California. The Internet and new technologies have also transformed the landscape of human trafficking. Traffickers use social media and other online tools to recruit victims and, in the case of sex trafficking, find and communicate with customers.

Chapter 2 – California's Response to Human Trafficking

The framework used by the United States and the world to combat human trafficking is a "3P" paradigm – prevention, protection, and prosecution. A "fourth P" – partnership – was introduced in 2009. California's anti-human trafficking efforts have addressed each piece of

this 4P paradigm through the establishment of the state's nine regional task forces and training offered statewide for victim service providers, medical professionals, law enforcement, airport personnel, and others. A number of cross-border partnerships with Mexican authorities are also underway to combat human trafficking, as well as critical interstate and federal efforts. Federal and state laws support these efforts by penalizing traffickers and providing victims with resources and support.

Chapter 3 – Identifying the Scope of Human Trafficking in California

It remains a key challenge to identify the scope of human trafficking in California, as statistical data on victims, arrests, and convictions are unreliable. As described in the 2007 report, the crime itself is hidden and under-reported. Common categories and shared definitions do not exist – nor is there any single agency responsible for statewide data collection. As a further complicating factor, potential cases of human trafficking are often investigated and prosecuted under related offenses such as pimping, pandering, and prostitution rather than the Penal Code 236.1, which criminalizes human trafficking.

The 2007 report included limited data from five of the six regional task forces that existed at the time, as well as the results of surveys and interviews conducted by the California Alliance to Combat Trafficking and Slavery Task Force. This report collects and analyzes data from California's nine regional task forces, the National Human Trafficking Resource Center hotline, arrest and conviction records, and trafficking victim assistance programs. Between mid-2010 and mid-2012, California's regional task forces initiated over 2,500 investigations, identified nearly 1,300 victims of human trafficking, and arrested nearly 1,800 individuals.

Recommendations

1. Gather Comprehensive Human Trafficking Information: California needs a central clearinghouse to coordinate and compile human trafficking information from local, state, and federal law enforcement agencies and governments, as well as non-governmental organizations. It is important for any data collection effort to take special care to ensure that all partners share common working definitions of key terms, and to address the relative dearth of information about labor trafficking as compared to sex trafficking.
2. Utilize California's Fusion Center System for Human Trafficking Information Sharing: California lacks a centralized mechanism for the collection, analysis, and dissemination of human trafficking information. California's State Threat Assessment System (STAS) provides critical tactical and strategic intelligence about trends and emerging patterns relating to criminal activity across the state, and ensures that first responders and policy makers are provided with relevant and timely situational awareness, as well as information on traffickers' current tactics and techniques. In coordination with the Attorney General's Office, California's anti-trafficking task forces

should partner with other local, state, and federal law enforcement and the STAS to improve California's human trafficking information sharing environment.

Chapter 4 – Holding Traffickers Accountable: Law Enforcement Investigations and Prosecutions

Human trafficking is often hidden in plain sight. Victims may appear at first glance to be willing prostitutes or laborers who are legally compensated. The business of sex trafficking, in particular, has moved online. Traffickers use the Internet to increase their reach, both in recruiting victims through social media and finding clients via advertisements posted on classified advertizing websites such as Backpage.com. In addition to moving online, increasingly sophisticated, highly-funded criminal organizations have also turned to trafficking human beings. Traditional law enforcement tools should be supplemented with innovative investigative techniques to combat these emerging challenges. For example, while technology is being used to perpetrate human trafficking, that same technology can provide a digital trail – a valuable investigative tool if law enforcement can quickly and efficiently monitor, collect, and analyze online data and activities. Several research and development efforts are currently underway to determine how law enforcement can use technology to combat human trafficking.

In addition to exploring new investigative tools, it is recommended that all peace officers in a law enforcement agency receive baseline training in human trafficking and that, when possible, expertise is developed through the use of vertical prosecution units and partnerships with regional task forces and victim service providers. A victim-centered approach that avoids treating victims as perpetrators will help law enforcement ensure victims have access to resources and assistance to rebuild their lives, and that they are able to cooperate with law enforcement and support efforts to bring their traffickers to justice.

Recommendations

1. Tailor Law Enforcement and Prosecution Operations to Handle Human Trafficking Cases: Human trafficking is a serious crime that involves increasingly sophisticated criminal actors and requires an equally sophisticated and coordinated law enforcement response:
    a. Cross-Unit Training: Baseline human trafficking training can help every peace officer within a law enforcement agency, as well as other government entities outside the criminal law enforcement context, learn how to identify instances of human trafficking that they may encounter in the course of their duties.
    b. Cross-Unit Coordination: Human traffickers often engage in a variety of other criminal activity such as drug dealing or money laundering, which may be investigated primarily by specialized law enforcement units. Various units within a law enforcement agency need to collaborate to identify and investigate human trafficking. For example, a gang unit may investigate a drug trafficking case

only to discover that the gang is also trafficking human beings. Likewise, a unit that specializes in white-collar crime may come across a forced labor situation while investigating suspicious business activity or money laundering.

c. Specialized Expertise: Appoint (an individual (or a team)) to specialize in human trafficking and handle referrals from other units. Traditionally, vice units are charged with investigating and working with prosecutors to charge commercial sex cases. However, to draw on all skill sets needed to effectively identify victims and disrupt increasingly sophisticated, organized criminal networks engaged in trafficking, agencies should consider handling human trafficking cases outside of routine vice operations. It is also recommended that, where possible, a vertical prosecution model be employed.

These approaches to developing human trafficking expertise are especially important for smaller or remote departments with limited resources and those that lack access to a regional task force. Regular interactions and partnerships with victim service providers can prove useful at every stage of an investigation or prosecution. It is recommended that law enforcement and prosecutors invite these partners to participate in any encounter with a victim – from the first post-rescue meeting to interviews and court appearances.

2. Leverage Technology to Combat Trafficking: Law enforcement has not harnessed technology as effectively as criminal traffickers. To address that situation, at least two efforts are recommended:

   a. Track How Traffickers Operate: Law enforcement training is needed on how traffickers use technology to recruit victims and avoid law enforcement detection, with particular attention given to online gaming communities, social networking sites, online classifieds, job recruitment sites, and the use of mobile phones.

   b. Exploit Technology for Investigations: Through collaboration, law enforcement, non-governmental organizations, technology companies, and academia can provide technical assistance and training for law enforcement on the new technologies that law enforcement can use to improve investigation tactics.

3. Leverage Cross-Border Partnerships to Fight Trafficking on Multiple Fronts: To combat dangerous criminal partnerships between local and transnational gangs, the Attorney General's Office should collaborate with other border states, the federal government, and Mexican authorities to share information and best practices for law enforcement in both countries to recognize common signs and patterns of human trafficking and provide support and services to victims.

Chapter 5 – Victim-Centered Approach: Protecting and Assisting Victims of Human Trafficking

By its nature, human trafficking presents significant obstacles to those who seek to protect and assist victims. Identifying the crime can be difficult because traffickers often isolate victims from their families, communities, and the public. A victim-centered approach has already started to take hold in California and should continue to be adopted. The victim-centered approach begins with training law enforcement, first responders, and non-traditional first identifiers on how to recognize and respond to human trafficking. In a 2-year period ending June 2012, California's nine regional task forces trained over 25,000 law enforcement personnel, prosecutors, victim service providers, and other first responders. Second, it is important that victims are aware of and have access to critical services to meet their immediate safety, health, and housing needs. Third, the Internet, social media, and mobile devices provide new avenues for outreach to victims of human trafficking. Governmental and non-governmental actors should embrace these new technologies to identify and assist victims.

Finally, California can promote the victim-centered approach by permitting human trafficking victims to expunge records of a conviction that resulted from forced labor or services, ensuring that California Victim Compensation Program (CalVCP) benefits are fairly applied to victims of human trafficking, and offering trafficking caseworkers confidentiality privilege training.

Recommendations

1. Improve Health Care Providers' Ability to Help Victims:
   a. Training for First Responders and Health Care Professionals: Health care providers, academia, and the victim services community should work together to develop appropriate training that helps first responders and health care professionals identify human trafficking victims, determine victims' mental health and medical needs, and access available resources.
   b. Mandatory Reporting: Human trafficking is not a mandated reportable offense for medical professionals. The Legislature may consider legislation to make human trafficking a mandated reportable event for medical professionals.

2. Improve Victims' Ability to Seek Help:
   a. Accessible Information Online: Many victims of human trafficking have Internet access. Internet companies should collaborate with law enforcement and community groups to develop online tools to give victims access to help and to generally raise public awareness of human trafficking.
   b. Caseworker Confidentiality Privilege: The California Evidence Code provides that a trafficking victim has a privilege to refuse to disclose and to prevent others from disclosing confidential communication between the victim and a human trafficking

caseworker. This privilege can be asserted only if the human trafficking caseworker who receives the communication has received specialized training in the counseling of human trafficking victims. There is, however, no such standardized training program in California. A standardized training program would aid human trafficking caseworkers in offering the benefits of privileged communication to the victims they serve.

3. Improve Services and Benefits Available to Victims:
   a. Long-Term Centers: There is a continuing need for safe, long-term shelter for trafficking victims. Key leaders and policy makers in California should explore public and private options for creating long-term centers that provide housing and comprehensive services tailored to meet the needs of trafficking victims, especially male victims and victims under age 18.
   b. Access to Legal Services: The provision of legal services for trafficking survivors has not kept up with the demand for assistance. The legal community in California (*e.g.*, bar associations, legal assistance organizations, and *pro bono* attorneys) can help by creating regional and statewide networks of legal service providers who are proficient in assistance, benefits, and immigration options for human trafficking victims and who can train and mentor other legal service providers to assist NGOs and victims. The need for legal services in rural and underserved populations of California is an issue especially worthy of examination.
   c. Eligibility for CalVCP Benefits: The factors for denial of CalVCP benefits may be overly broad as applied to victims of human trafficking. The California Victim Compensation and Government Claims Board, which administers CalVCP, is encouraged to re-evaluate the eligibility of human trafficking victims for benefits and propose any appropriate modifications to ensure the program is fairly applied for victims of human trafficking.
   d. Awareness of Services: Human trafficking victims and victim service providers are not always connected with county health and social service programs. Including county victim assistance, health, and social service agencies in local or regional human trafficking coalitions can help coordinate outreach and education about the resources available for human trafficking victims in the region, and how victims can access those resources.

4. Help Victims Rebuild:
   a. Conviction Records: Human trafficking victims who are coerced by traffickers into commercial sex may be prosecuted for crimes like prostitution in connection with their victimization. The Legislature may wish to consider legislation permitting human trafficking victims to seal and expunge records of a conviction that results from coercion into forced labor or services.

Chapter 6 – Prevention and Public Education: Reducing Demand for Human Trafficking

To create a future without human trafficking in California and across the world requires, in addition to the efforts described in previous chapters, targeted efforts to address the demand for exploitive labor and sexual services. There are currently efforts underway to study and develop innovative technologies to prevent and disrupt human trafficking online. For example, organizations have produced mobile apps designed to help consumers leverage their purchasing power and hold corporations accountable for ensuring humane and legal supply chains for their products. In addition, California has enacted laws to prohibit state contractors from engaging in human trafficking by, for example, requiring state contractors to certify that they comply with California labor laws and that the goods they provide were not produced by sweatshop or child labor. With greater understanding of the crime, and a clear tool or means to make a difference, consumers and businesses alike will be more likely to take steps to diminish the demand for forced labor.

Recommendations

1. Promote Clean Supply Chains: California retailers and manufacturers of all sizes should consider creating policies to disclose their efforts to limit human trafficking in their supply chains, even if they fall beneath the $100 million corporate revenue threshold contained in the California Transparency in Supply Chains Act. This will provide consumers with the opportunity to use their purchasing decisions as a tool to eradicate human trafficking.

2. Strengthen Restrictions on State Contractors: Consistent with recently enacted federal contracting requirements, it is recommended that the Legislature consider prohibiting state and local government contractors from engaging in suspicious employment practices that are hallmarks of trafficking, including the use of misleading or fraudulent practices during the recruitment of employees. Examples of these practices include making material misrepresentations about key terms of employment or living conditions, charging employees recruitment fees, and destroying or otherwise limiting an employee's access to his or her identity documents, such as passports or driver's licenses.

3. Increase Public Awareness: To raise awareness of this crime, public and private anti-trafficking partners can mount a coordinated, comprehensive public awareness campaign to improve awareness of human trafficking amongst the general public.

End Notes:

[1] "Human Trafficking Fact Sheet," U.S. Department of Health & Human Services, accessed October 26, 2012, *http://acf.hhs.gov/programs/orr/resource/fact-sheet-human-trafficking*.

[2] Patrick Belser, "Forced Labour and Human Trafficking: Estimating the Profits," (Geneva: International Labour Office, 2005), 18, accessed October 26, 2012, *http://ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081971.pdf*.

[3] "Human Trafficking Fact Sheet," U.S. Department of Health & Human Services, accessed October 26, 2012, *http://acf.hhs.gov/programs/orr/resource/fact-sheet-human-trafficking*.

[4] "A Serious Problem - Around the World and in the USA," Coalition to Abolish Slavery and Trafficking, accessed October 26, 2012, *http://castla.org/key-stats*.

The State of

Human Trafficking in California

Part I
Background

1 The Crime of Human Trafficking

"Slavery is founded in the selfishness of man's nature – opposition to it, is his love of justice."

President Abraham Lincoln, October 16, 1854

Human trafficking is a modern form of slavery. It involves controlling a person through force, fraud, or coercion to exploit the victim for forced labor, sexual exploitation, or both. Human trafficking strips victims of their freedom and violates our nation's promise that every person in the United States is guaranteed basic human rights. It is also a crime.

To lay the foundation for an examination of the state of human trafficking in California today, this chapter explores the crime from a variety of angles. Along with an overview of the definitions of human trafficking and its various types, this chapter also explores emerging trends – including the increased participation by transnational gangs who move guns, drugs, and human beings across the border with Mexico, as well as domestic street gangs that set aside their traditional rivalries to profit from the sale of young women. This chapter also describes another key theme of this report: the use by traffickers of technology and social media to recruit victims and facilitate the crime.

Definitions of Human Trafficking

With the passage of AB 22 in 2005, the California Legislature defined human trafficking as "all acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of persons, within national or across international borders, through force, coercion, fraud or deception, to place persons in situations of slavery or slavery-like conditions, forced labor or services, such as forced prostitution or sexual services, domestic servitude, bonded sweatshop labor, or other debt bondage."[1] As codified in the California Penal Code, anyone who "deprives or violates the personal liberty of another with the intent . . . to obtain forced labor or services" is guilty of human trafficking.[2] Depriving or violating a person's liberty includes "substantial and sustained restriction of another's liberty accomplished through fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reason-

ably believes that it is likely that the person making the threat would carry it out."[3] Forced labor or services include "labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, or coercion, or equivalent conduct that would reasonably overbear the will of the person."[4]

Federal law defines human trafficking as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age"; or "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."[5]

Both state and federal definitions include a critical aspect of this crime: victims are exploited by "force, fraud, or coercion." In the context of human trafficking, force typically involves physical and/or sexual abuse, as well as isolation and confinement. It is important to note, however, that this crime does not require physical force, physical bondage, or physical restraint. Coercion is also measured as a psychologically-based form of control, which may be exerted through threats of harm to the victim and his or her family or threats of deportation. Fraud can occur when a trafficker deceives a victim, often with the promise of a legitimate job – only to force him or her into slavery.

Human trafficking takes several forms. It may involve recruiting, smuggling, transporting, harboring, buying, or selling a person for prostitution, domestic servitude, sweatshop labor, migrant work, agricultural labor, peonage, bondage, or involuntary servitude. While human trafficking often involves the smuggling of human beings across international borders, numerous Americans are trafficked within the United States every year.

Types of Human Trafficking

Sex Trafficking
Sex trafficking is the act of forcing, coercing, or transporting a person for the purpose of a commercial sex act. These crimes are primarily committed against women and children. Sex trafficking can occur in residential brothels, brothels disguised as massage parlors, strip clubs, and via online escort services and street prostitution.

Labor Trafficking
Labor trafficking is the act of forcing a person to work for little or no money. It can include forced labor in underground markets and sweatshops, as well as legitimate businesses such as hotels, factories, restaurants, construction sites, farming, landscaping, nail salons, and traveling sales crews.

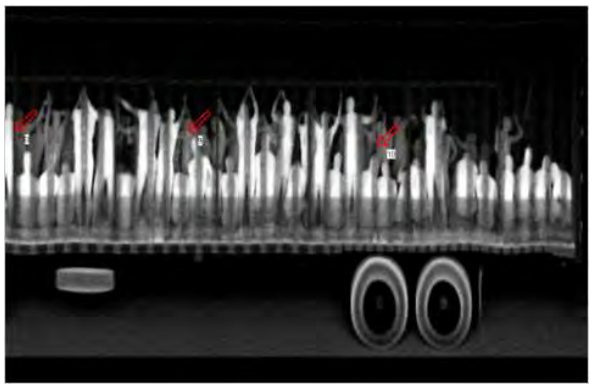
Domestic Servitude
A form of labor trafficking, domestic servitude often involves women who are forced to live and work in the homes of employers who confiscate their legal documents and prevent them from leaving. Domestic workers can be U.S. citizens, lawfully-admitted foreign nationals, or undocumented immigrants.

Domestic Servitude

In November 2010, a woman received a 37-month prison sentence for forcing a Chinese woman to work without pay as a domestic servant in her Fremont home. The trafficker forced the victim to cook, clean, and perform child care services. The trafficker, who was 62 at the time of her sentencing, physically abused the victim and confiscated her passport, visa, and other documents. She also admitted to telling the victim that she needed to remain inside the house because she was an illegal alien.[6]

Human Trafficking and Smuggling: Different Crimes

Though they are often confused, human trafficking and smuggling are separate and fundamentally different crimes. Human trafficking is a crime against the person whereas smuggling is a crime against the state. Smuggling occurs when a person voluntarily requests or hires a person, known as a smuggler, to transport him or her across a border for a fee.[7] At least theoretically, a person who is smuggled into the United States is free to leave upon payment of a prearranged fee, while a victim of human trafficking is enslaved to supply labor or services. Unlike smuggling, the crime of human trafficking does not require travel or transportation of the victim across borders. Thus, human trafficking can (and does) occur domestically, with victims who are born and raised in California and other states.



A photograph provided by the Government of Chiapas depicts an X-ray view of a semi-truck loaded with 513 individuals. Once these individuals and others like them reach the United States, they may be trafficked.

It is possible for a person who has been smuggled into the United States to be trafficked in the United States. In some cases, individuals are smuggled into the United States or brought here under lawful temporary work visas, and are then trafficked.[8] In such situations, the trafficker typically claims that the person owes more than the original price to bring him or her into the country, with the victim pressured to pay off the false debt.

Economic Drivers of Human Trafficking

The United States is widely regarded as a destination country for modern slavery. The U.S. Department of State estimates that 14,500 to 17,500 victims are trafficked into the United States each year.[9] This figure does not include victims who are trafficked within the country each year.

Labor Trafficking

Working with a co-conspirator in the Philippines, a Paso Robles couple lured victims to the United States with the promise of good jobs. After arriving in this country, the victims worked in one of the couple's four elder care facilities – often on 24-hour-shifts. They were paid less than minimum wage and told they needed to pay off their "debt" to the traffickers. The victims slept on sofas, and in closets and an unheated garage, and were kept in line with threats of phone calls to the police or immigration authorities. After an observant and concerned member of the community reached out to law enforcement, the victims were rescued. In 2012, the labor traffickers were sentenced to 18 months in federal prison.[10]

Victims of human trafficking can be involved in agricultural and construction labor, hotel and motel cleaning services, organized theft rings, pornography, prostitution, restaurant and domestic service, servile marriage (mail-order brides), and sweatshops, among other work.

The root causes of international human trafficking identified in the 2007 *Human Trafficking in California* report are still key motivators. The underlying economic and social conditions in "source" and "destination" countries serve to create both the supply and demand for the global trade in persons.

In "source" countries, key "push" factors that help to create a ready supply of potential victims include poverty and an unstable political structure. Women are disproportionately impacted by global poverty – and make up the majority of human trafficking victims. Although an impoverished background is a factor in human trafficking since it is also an indicator of vulnerability, many victims of human trafficking are not from impoverished backgrounds.

The dominant "pull" factors that serve as a magnet for human trafficking in "destination" countries include the demand by certain industries for cheap labor due to fierce competition in the increasingly global economy.

The same principles apply to domestic human trafficking: among other factors, poverty and instability within a family or community can make men, women, and children vulnerable to trafficking.

Increased Role of Domestic and Transnational Gangs

Street gangs are evolving into sophisticated, organized criminal enterprises motivated primarily by high profit. They are increasingly migrating to commercial sexual exploitation to fund their operations. The prevailing wisdom among these criminals is that human trafficking is more profitable and has a lower risk of being detected than drug or weapons trafficking.[11] While a trafficker can sell a gun or drugs once before investing additional resources to replenish his supply, he can sell the same person over and over. Human beings provide a renewable

Domestic and Gang Sex Trafficking

In 2011, 38 members of the Oceanside Crips Enterprise – made up of three separate Crip gang sets – were charged with a racketeering conspiracy, including the prostitution of minors and adults. The defendants allegedly set aside traditional gang distinctions and collaborated to expand their territory against rival gangs and engage in the sex trafficking of girls and women, along with attempted murder, kidnapping, and other crimes.

According to the indictment, the Enterprise operated within a "pimping" subculture known as "The Game," in which victims, often runaways or otherwise vulnerable girls, were recruited on MySpace, Facebook, and Twitter. Once under the gang members' control, the girls were kept locked in a hotel for 12 hours a day and forced to work as prostitutes. Victims were routinely given drugs and alcohol and physically abused or humiliated for violating the strict rules of "The Game."[12]

source of profits. Girls and women are treated as property, and pimps reinforce their ownership by branding them with tattoos of symbols or the pimp's name.[13]

Some domestic street gangs, including the Bloods and Sureños, have set aside their conflicts and territorial disputes in the interest of organized criminal collaboration. As a result, gangs that were traditionally rivals are increasingly working together to profit from forced prostitution and forced labor of minor and adult victims. According to the FBI's 2011 National Gang Threat Assessment report, transnational criminal organizations such as Mara Salvatrucha, or MS-13, and Somali gangs have also turned to human smuggling and human trafficking. [14]

The low-risk, high-reward nature of human trafficking has enticed transnational gangs to partner with domestic street gangs in the United States. The Mexican drug trafficking organizations control the smuggling routes and the street gangs in the United States have knowledge of local contacts and criminal activity hot spots. These gangs join forces to smuggle victims across the border from Mexico and then traffic them in the United States. Mexican drug trafficking organizations supply the smuggled victims, while local gangs exploit them once they arrive by forcing them into servitude to repay the smuggling fee, which may have increased upon arrival in the United States. According to the State Threat Assessment Center, Mexican cartels – with their easy access to individuals seeking entrance into the United States – have a readily available source of victims to supply the domestic human trafficking trade. These alliances give criminal gang networks both international reach and local expertise at moving people and evading law enforcement, a dangerous combination for public safety.

Highlighting the scope of the problem, in 2012, special agents with the U.S. Immigration and Customs Enforcement's Homeland Security Investigations worked with 148 federal, state, local, and international law enforcement to arrest 637 gang members from 168 gangs – more than 40 percent of whom were affiliated with human smuggling and trafficking. The arrests spanned 150 cities in the United States and Honduras.[15]

Human trafficking is a significant concern in Mexico as well. The Procuraduría General de la República de Mexico – Office of the Attorney General of Mexico – reported to the Mexican Congress recently that there were at least 47 criminal networks engaged in sex trafficking. It estimated 800,000 adults and 20,000 children are annual victims of human trafficking in Mexico. Two of the Mexican states identified as routes for trafficking – Baja California and Chihuahua – share borders with the United States.[16]

This tunnel, discovered in 2011, was used for trafficking drugs across the border and resembles other tunnels that can be used for the trafficking of persons. It ran more than 600 yards and was equipped with electric rail cars, lighting, reinforced walls, and wooden floors. The tunnel also had hydraulic doors and an elevator.

Mexican cartels build and operate underground cross-border tunnels for trafficking guns, drugs, and human beings into California. From 2007 to 2011, more than 75 cross-border trafficking and smuggling tunnels were discovered, most of them in California and Arizona. [17] The highly sophisticated nature of some of these tunnels is further evidence of extremely well-funded, meticulous, and organized operations.

In California, traffickers take advantage of the state's borders, major international airports and ports and major interstate (and intrastate) highways to move victims to where they can be exploited for the highest prices. These profit-driven criminal enterprises will continue to engage in human trafficking as long as the rewards are high and the risks remain low.

Human Trafficking At-A-Glance

20.9 million = estimated # human trafficking victims worldwide at any time, including:

14.2 million – labor exploitation

4.5 million – sexual exploitation

2.2 million – state imposed forced labor

55% of forced labor victims are women and girls

98% of sex trafficking victims are women and girls[18]

Domestic and Gang Sex Trafficking

"It made me money. I was tired of living on the streets," a former teen prostitute named "R.C." told 10News in San Diego. R.C. was 15-years-old and living in a homeless shelter when she was recruited by pimps from the gang "Pimpin' Hoes Daily" (PhD). She was told she would never want for anything again. But, as she testified in March 2005, her pimp gave her only enough money to eat and survive while pocketing hundreds of dollars every day. Before she returned home to her mother, she endured brutal beatings, including one in which she was stuffed into the trunk of a Cadillac.[19]

Who are the Victims of Human Trafficking?

Victims of human trafficking include not only men and women lured into forced labor by the promise of a better life in the United States, but also boys and girls who were born and raised here in California. A victim of this crime could be a man who is a farm worker, a woman trapped in domestic servitude, or a child forced into prostitution.

Approximately three out of every 1,000 persons worldwide were in forced labor at any given point in time between 2002 and 2011.[20]

Victims of human trafficking represent a range of backgrounds in terms of age, nationality, socioeconomic status, and education, but one characteristic that they usually share is some form of vulnerability.[21] They are often isolated from their families and social networks. In some cases, victims are separated from their country of origin, native language, and culture. Victims who are undocumented immigrants often do not report abuses to the authorities out of distrust of law enforcement, and/or fear of arrest, injury to family members, deportation, or other serious reprisals. Many domestic victims of sex trafficking are underage runaways and/or come from backgrounds of sexual and physical abuse, incest, poverty, or addiction.

Who are the Perpetrators of Human Trafficking?

Traffickers are those who recruit, harbor, obtain, and provide victims to buyers of labor or sexual services. Traffickers operate out of both legitimate and illegitimate businesses. They can be labor brokers, agricultural growers, restaurant and hotel managers, construction site supervisors, factory owners, and employers of domestic servants. They can also be involved in illegal enterprises, such as brothels, child pornography, pimping, gang networks, and organized crime.[22]

Traffickers are men and women of all races and nationalities. Like perpetrators of sexual assault and abuse, they may know their victims as family members, intimate partners, or acquaintances; however, they can also be strangers. In many cases, traffickers and their victims share the same national, ethnic, or cultural background, which allows the trafficker to exploit the vulnerabilities of their victims.[23]

Domestic Sex Trafficking

For more than a year, a Sacramento man recruited teenage girls to work as prostitutes by promising them drugs, money, and a family-like environment. The man, along with his wife, used websites to advertise the victims and controlled them through physical force and threats of violence. The man was arrested in August 2011 when police responded to a motel near the San Francisco airport and found him with a 19-year-old and two 16-year-olds. He pleaded guilty and was sentenced to nine years in federal prison.[24]

Domestic traffickers focus on easy targets for exploitation. They often recruit vulnerable children and teens from junior high and high schools, courthouses, foster and group homes, bus and train stations, shopping malls, homeless shelters, halfway houses, bars, parks, and playgrounds.[25] Members of the Work Group noted that truant teens are also a frequent target for recruiters.

Gangs and the "Pimp" Subculture

As practiced by some gangs, the pimp subculture includes a strict set of rules. Polaris Project, a nonprofit dedicated to ending modern-day slavery, developed a guide for service providers and law enforcement that describes some of the rules and terminology of the pimp subculture. The girls and women under a pimp's control are often required to meet daily quotas; if the dollar amount is not met, she may face punishment in the form of beatings or verbal, psychological, and emotional abuse.[26]

To protect his identity and establish his role as the authority figure, a pimp often requires the girls and women under his control to call him "Daddy," while each individual is referred to as a "wife-in-law" or as "family."[27]

The girl or woman who has the longest history with the pimp, or who is favored by him, is sometimes known as the "Bottom Bitch" or the "Bottom." She is middle management. Her role is typically to help control the other women and girls through threats or force. Often the "Bottom Bitch" is also forced to recruit new victims.[28]

As organized gangs have discovered, prostitution is a highly profitable business. Polaris Project conducted an informal study to estimate the wages of a pimp who controlled four young women and girls. One of his victims, a teenage girl, was forced to meet quotas of $500 per night, seven days a week. Based on these quotas, the trafficker made over $600,000 in one year.[29]

A common form of recruitment involves the techniques of what is known as a "Romeo Pimp," who entices his victims with gifts and affection and presents himself as a boyfriend.

Domestic Sex Trafficking

In June 2011, a transient woman from Texas accepted a ride and motel room from a man in San Jose. The next morning, he demanded money and ordered her to prostitute to repay the debt. When she refused, he threatened and assaulted her. At that point, he had already posted an ad for her services online and set up a client in San Francisco. The woman escaped from the room and asked motel staff to call 911. After his arrest, investigators searched the man's computer and discovered explicit photographs of a 17-year-old girl from a group home who he was actively exploiting as a prostitute. The trafficker was sentenced to more than nine years in prison.[30]

The "Romeo Pimp" uses flattery to lure victims. For young victims and those who have experienced neglect or abuse, this may be their first exposure to positive attention. The false sense of security and promises of wealth can be especially seductive to an emotionally or financially vulnerable child or teen.

Once a "Romeo Pimp" has gained a victim's trust, he systematically breaks down her resistance, support systems, and self-esteem. Victims are coerced into submission through gang rape, confinement, beatings, torture, cutting, tattooing, burning, branding, being deprived of basic needs, and threats of murder.

"Romeo Pimp" – From a Dating Website to Backpage.com

"I field my hustle so you can make $1,000 a day. So how much did you make today? $680? That means you owe me $340 because my time is money."

– From a recorded phone call between a Long Beach man and one of the five women he was accused in a federal complaint of forcing into prostitution.

At least five women cooperated with law enforcement in a sting operation at a Santa Ana hotel, and each told a similar story of meeting a man through an online dating website and being wooed by him. The women said they believed they were entering into a monogamous relationship with the defendant before he began physically abusing them. The women told investigators he kept them locked in a motel room, said he would send nude photos of them to their families, and even threatened to kill one of their children.

He allegedly forced the women to work as high-end prostitutes and perform sexual services for $300 per hour. Investigators told KTLA News in Los Angeles they responded to ads on Backpage.com and spoke with five victims who said they were being forced into prostitution. After detectives arrested the defendant, the human trafficking case was turned over to the FBI task force.[31,32]

International Sex Trafficking

Though previously deported from the United States, a Mexican national returned to California in 2008 to run an outdoor brothel in a remote San Diego-area canyon. He separately seduced two younger women from his hometown, introducing each woman to his family as his "wife" before coercing them into prostitution and transporting them to California. At his 2010 trial, the women testified that he used their love for him as a means of control, along with threats of violence and beatings. The man was sentenced to more than 20 years and ordered to pay $1.4 million in restitution.[33]

Means and Methods of Human Trafficking

Victims of human trafficking in all its forms are often reluctant to report their situation or attempt to escape. Foreign national victims may be fearful or mistrustful of law enforcement as a result of their illegal status or experiences in their home countries. Traffickers exploit these fears to maintain control, and will often confiscate a victim's passport or legal and travel documents. Traffickers also tell victims if they attempt to escape or seek help from the authorities, they will be imprisoned or deported. Victims, who may have been promised good jobs in the United States, can be found working for little or no pay in the commercial sex trade, as well as sweatshops, traveling sales crews, hotels, factories, restaurants, construction sites, farming, landscaping, and nail salons.

Victims of domestic servitude are purchased or coerced by an individual and/or head of household to cook, clean, perform childcare, elder care, gardening, and other household work. They are often kept under lock and key, which makes identifying and rescuing these victims especially difficult.

In many cases of human trafficking, an exploiter intentionally deconstructs a victim's identity, starting with a new name and false identification. The trafficker dominates every facet of a victim's life and will often ply victims forced to work as prostitutes with drugs and alcohol to ensure their cooperation and dependence. Traffickers also ensure compliance by threatening to harm or kill a victim and his or her loved ones.

To keep sex trafficking victims disoriented and less likely to know where to seek help, traffickers will move them from city to city. Popular destinations are large and/or diverse cities or those with major highway and interstate corridors. The interstate infrastructure of major metropolitan areas allows traffickers to easily transport women from Sacramento to Las Vegas – or between San Diego and Los Angeles. Constant movement also facilitates the covert nature of the crime and keeps it hidden from law enforcement. Traffickers market the victims, who are most often young women, as "new in town" or "in town for the weekend," thus maintaining an ever-changing "product line."

Online classified advertisements for sex services allow clients not only to order a young woman who is "new in town," but also according to preferences in skin, hair, and eye color, as well as ethnicity, age, height, and body type. Racial and ethnic stereotypes are frequently used in online ads, with Native American women marketed as "Pocahontas"[34] and African American women as "Brown Sugar." Victims of sex trafficking are profoundly dehumanized. Women and children – and, in some cases, men – are treated by traffickers and clients alike as expendable commodities. Clients are often free to do as they please with human beings who are seen as "products," from refusing to wear a condom to inflicting brutal beatings and other forms of degradation.

Role of Technology in Human Trafficking

As discussed by the Work Group, technology and social media have transformed human trafficking in California and reshaped the way traffickers control victims, exchange and launder money, and connect with underground partnerships and organized crime syndicates.

Social networking sites provide unprecedented access to potential victims from around the world. Traffickers take advantage of the anonymity of online recruitment to lure unsuspecting victims into supposedly legitimate jobs, only to place them into bonded slavery. They also groom and recruit victims from Facebook and other sites.

Along with recruiting victims, traffickers use technology to reach a wide client base for prostitution services. The perceived anonymity of online transactions has emboldened traffickers to openly recruit, buy, and sell their victims.[36]

Nowhere is the growth of sex trafficking on the Internet more apparent than on classified-advertisement sites. During a hearing of the U.S. House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security in 2010, lawmakers voiced significant concern about advertisements for sex trafficking on online classified-advertisement sites. Pressure

Businesses as Facilitators of Human Trafficking

Human trafficking can be facilitated by businesses that promote the crime or accept bribes to remain silent. Examples include hotels and motels, landlords, labor brokers, taxi and other transportation services, classified advertising websites, and banks.

In 2011, a major sex trafficking ring was shut down in San Diego when 38 members of the Oceanside Crips Enterprise were arrested for pimping and prostituting women and girls. Charges were also filed against the owners of a motel in Oceanside who, according to the indictment, set aside rooms apart from the rest of their legitimate customers where girls and women were housed, charged the gang members/pimps a higher rate for the rooms where "dates" or "tricks" took place, and warned the gang members of inquiries by law enforcement.[35]

from citizens, anti-trafficking groups, the media, and federal lawmakers led Craigslist.org to remove the "adult services" section from its site within the United States in September 2010, and, by December 2010, Craigslist had removed all adult service sections from its site worldwide.[37]

But the problem remains, and unscrupulous websites like Backpage.com fill the void. While Backpage.com has touted its "aggressive" efforts to moderate and filter its content to the National Association of Attorneys General,[38] it actively opposes lawmakers' efforts to require the company to more closely monitor the advertisements placed on its sites. In 2012, the State of Washington passed a bill to protect minors from being sold for sex. The law, which was designed to protect minors from being sexually exploited via advertisements on Backpage and in other publications, added new penalties for posting sex ads featuring minors. Backpage.com sued to stop the law from being enacted, claiming that, "[the obligations of SB 6521] would bring the practice of hosting third-party content to a grinding-halt."[39] Since Craigslist removed its adult services section, Backpage.com has reportedly increased its prostitution-ad revenue by 23.3 percent as compared with the previous year.[40]

Conclusion

Human trafficking involves the use of force, fraud, or coercion to place a person in a situation of slavery. This fast-growing crime includes sex trafficking and forced labor, and its victims are men, women, and children who represent a wide range of ages, nationalities, and socioeconomic statuses. Like their victims, traffickers can be domestic or international. In recent years, the low-risk, high-profit nature of the crime has attracted organized criminal enterprises – including transnational gangs who move guns, drugs, and human beings across the border with Mexico and domestic street gangs that set aside their traditional rivalries to profit from the sale of young women. The perpetrators of this crime are also using increasingly sophisticated methods to exploit victims and evade law enforcement. The following chapters further describe the ways in which California has responded to these threats to public safety, the challenges we face in the fight to end human trafficking, and recommendations for improving these efforts.

End Notes:

[1] California Penal Code § 236.1 (2012); see also "What is Human Trafficking?," California Department of Justice, accessed October 26, 2012, *http://oag.ca.gov/human-trafficking/what-is*.

[2] California Penal Code § 236.1(a) (2012).

[3] California Penal Code § 236.1(d)(1) (2012).

[4] California Penal Code § 236.1(e) (2012). At the time of printing, there is an initiative measure currently on the ballot, Proposition 35, that would change, among other things, several provisions of § 236.1.

[5] 22 U.S.C. § 7102(8) (2012).

[6] Federal Bureau of Investigation, "California Woman Sentenced to More Than Three Years in Prison for Human Trafficking Charge, Daughter, Son-In-Law Sentenced on Immigration Charges" news release, November 17, 2010, *http://fbi.gov/sanfrancisco/press-releases/2010/sf111710.htm*.

[7] 8 U.S.C. § 1324 (2012).

[8] U.S. Department of State, Trafficking in Persons Report, (June 2012), 360, accessed October 26, 2012, *http://state.gov/j/tip/rls/tiprpt/2012/*.

[9] U.S. Department of State, Trafficking in Persons Report, (June 2004), 23, accessed October 26, 2012, *http://state.gov/j/tip/rls/tiprpt/2004/*.

[10] U.S. Department of Justice, "Paso Robles Couple Sentenced to Federal Prison in Case Involving Smuggled Aliens who Worked Under Abusive Conditions," news release, February 13, 2012, *http://justice.gov/usao/cac/Pressroom/2012/028.html*.

[11] Ami Carpenter and Stacey Cooper, "Transnational Gang Activity in the San Diego/Tijuana Border Region. Final Report of the Gangs: Regional Activity and Presence (GRPA) Project," University of San Diego, (forthcoming).

[12] U.S. Department of Justice, "Members and Associates of Oceanside Crip Street Gangs and One Hotel Charged with Racketeering Conspiracy Relating to Prostitution of Minors and Adults, and Other Crimes and Criminal Forfeiture," news release, April 18, 2012, *http://justice.gov/usao/cas/press/cas11-0418-Traylor.pdf*.

[13] Amita Sharma, "Pimps Recruiting Underage Girls in San Diego Through Force and Coercion," KPBS (San Diego, CA), October 31, 2011, *http://kpbs.org/news/2011/oct/31/pimps-recruiting-underage-girls-san-diego-county-t/*

[14] "2011 National Gang Threat Assessment – Emerging Trends," Federal Bureau of Investigation, accessed October 26, 2011, *http://fbi.gov/stats-services/publications/2011-national-gang-threat-assessment*.

[15] U.S. Department of Homeland Security, "637 Gang Members and Associates Arrested During Project Nefarious," news release, April 25, 2012, *http://ice.gov/news/releases/1204/120425washingtondc.htm*.

[16] Letter from Sergio Martínez Escamilla, Managing Director, Gen. Dep't of Pub. Policies & Inter-Inst. Coordination, to Antonio Hernandez Legaspi, Head of the Legislative Liaison Unit of the Ministry of the Interior, March 12, 2012, (translated from Spanish).

[17] U.S. Department of Homeland Security, "Highly Sophisticated Cross-Border Drug Tunnel Discovered Near San Diego," news release, November 30, 2011, *http://ice.gov/news/releases/1111/111130sandiego.htm*.

[18] U.S. Department of State, Trafficking in Persons Report, (June 2012), 47, accessed October 26, 2012, *http://state.gov/j/tip/rls/tiprpt/2012/*.

[19] "Former Teen Prostitute Testifies Against Pimp," 10News (San Diego, CA), March 2, 2005, *http://10news.com/news/former-teen-prostitute-testifies-against-pimp*.

[20] International Labour Organization, "ILO Global Estimate of Forced Labour: Results and Methodology," (Geneva: International Labour Office, 2012), 13, accessed October 26, 2012, *http://ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf*.

[21] "The Victims," Polaris Project, accessed October 26, 2012, *http://polarisproject.org/human-trafficking/overview/the-victims*.

[22] "The Traffickers," Polaris Project, accessed October 26, 2012, *http://polarisproject.org/human-trafficking/overview/the-traffickers*.

[23] Ibid.

[24] U.S. Department of Justice, "Sex Trafficker Sentenced to Nine Years in Prison," news release, April 19, 2012, *http://justice.gov/usao/can/news/2012/2012_04_19_singh.sentenced.press.html*.

[25] Polaris Project, "Domestic Sex Trafficking: The Criminal Operations of the American Pimp," (Washington, D.C., Polaris Project), available online at: *http://polarisproject.org/resources/resources-by-topic/sex-trafficking*.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid.

[30] "Man Accused of Forcing Women into Prostitution Sentenced to Nine Years," KTVU (San Jose, CA), June 9, 2012, *http://ktvu.com/news/news/crime-law/man-accused-forcing-women-prostitution-sentenced-n/nPQKw/*.

[31] Vikki Vargas, "Long Beach Man Accused of Forcing Women into Prostitution," NBC (Southern California), May 1, 2012, *http://nbclosangeles.com/news/local/Long-Beach-Roshaun-Kevin-Nakia-Porter-Accused-Human-Trafficking-Orange-County-Pimp-149777675.html*.

[32] "Long Beach Man Accused of Running Sex Trafficking Ring," KTLA (Los Angeles, CA), May 2, 2012, *http://.ktla.com/news/landing/ktla-sex-trafficking-ring-arrest,0,6720854.story*.

[33] U.S. Department of Homeland Security, "Man Tied to Outdoor Brothel Sentenced to More than 20 Years for Sex Trafficking," news release, July 26, 2010, *http://ice.gov/news/releases/1007/100726sandiego.htm*.

[34] Benjamin Thomas Greer, "Hiding Behind Tribal Sovereignty: Rooting Out Human Trafficking in Indian Country," Journal of Gender, Race, and Justice 16 (forthcoming 2013).

[35] U.S. Department of Justice, "Members and Associates of Oceanside Crip Street Gangs and One Hotel Charged with Racketeering Conspiracy Relating to Prostitution of Minors and Adults, and Other Crimes and Criminal Forfeiture," news release, April 18, 2012, *http://justice.gov/usao/cas/press/cas11-0418-Traylor.pdf*.

[36] danah boyd, et al., "Human Trafficking and Technology: A Framework for Understanding the Role of Technology in the Commercial Sexual Exploitation of Children in the U.S.," (Microsoft Research Connections 2011), 3, accessed October 26, 2012, *http://research.microsoft.com/en-us/collaboration/focus/education/htframework-2011.pdf*.

[37] Mark Latonero, "Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds," (USC Annenberg School for Communication & Journalism, Center on Communication Leadership & Policy, September 2011), 22, n.128, accessed October 26, 2012, *https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking_FINAL.pdf*.

[38] Letter from Samuel Fifer, Attorney for Village Voice Media, to Hedda Litwin, National Association of Attorneys General, "Response of Backpage.com to NAAG Letter of August 31, 2011," September 23, 2011, available online at: *http://thestranger.com/images/blogimages/2011/09/27/1317168662-backpage_response_to_naag.pdf.*

[39] Sara Jean Green, "New State Law Targeting Sex-Related Ads On Websites Faces Court Test," Seattle Times, July 20, 2012, *http://seattletimes.com/text/2018728919.html*.

[40] Mark Whittaker, "Backpage.com Prostitution-Ad Revenue Hits Monthly High," AIM Group, December 2, 2011, *http://aimgroup.com/2011/12/02/backpage-com-prostitution-ad-revenue-hits-monthly-high/.*

2 California's Response to Human Trafficking

"In recent years we've pursued a comprehensive approach reflected by the three Ps: prosecution, protection, and prevention. Well, it's time to add a fourth: partnership. The criminal network that enslaves millions of people crosses borders and spans continents. So our response must do the same. So we're committed to building new partnerships with governments and NGOs around the world, because the repercussions of trafficking affect us all."

Secretary of State Hillary Rodham Clinton, June 16, 2009

As the most populous state and a diverse border state with major international harbors and airports, California remains a major site of domestic and international human trafficking. This report, like the 2007 report of the California Alliance to Combat Trafficking and Slavery, aims to not only explore the scope of human trafficking in California, but also to provide an overview of the state's response to the crime.

The fundamental framework used by the United States and the world to combat human trafficking is a "3P" paradigm – prevention, protection, and prosecution. In 2009, the "fourth P" – partnership – was announced by Secretary of State Hillary Rodham Clinton as a critical new piece of the anti-human trafficking strategy advanced worldwide by the U.S. Department of State's Office to Monitor and Combat Trafficking in Persons.[1]

This chapter addresses California's response under the 4P paradigm, from collaborative work to bring traffickers to justice to training programs to provide a broad range of Californians with tools to identify and assist victims of human trafficking. This chapter also discusses efforts to develop cross-border partnerships with Mexican authorities around shared priorities to combat human trafficking.

California's Regional Anti-Human Trafficking Task Forces

Today, California has nine regional anti-human trafficking task forces – three more than existed at the time of the 2007 report. These task forces employ a comprehensive, victim-centered approach and are made up of law enforcement and local, state, and federal prosecutors, as well

as other governmental leaders and nongovernmental organizations (NGOs). As part of their work to combat human trafficking, the task forces also provide training to a variety of audiences on how to identify and respond to the crime.

California's regional task forces have received funding from a variety of sources, including the U.S. Department of Justice (U.S. DOJ) and the California Emergency Management Agency (Cal EMA), which used American Recovery and Reinvestment Act grant funds in 2009 to supplement the existing six task forces and establish three new regional task forces.[2]

California's nine regional anti-human trafficking task forces include:

- **East Bay Human Trafficking Task Force (Oakland)**
  (Established in 2004)

  The East Bay task force is led by the Oakland Police Department in partnership with the Alameda County District Attorney's Human Exploitation and Trafficking (H.E.A.T.) Unit, and Bay Area Women Against Rape.

- **Fresno Coalition Against Human Trafficking (Fresno)**
  (Established in 2010)

  The Fresno Coalition Against Human Trafficking is a joint effort between the Fresno Police Department, the Fresno County Economic Opportunities Coalition, and the Marjaree Mason Center.

- **Los Angeles Metro Area Task Force on Human Trafficking (Los Angeles)**
  (Established in 2004)

  The Los Angeles task force, which is led jointly by the Los Angeles Police Department and the Coalition to Abolish Slavery and Trafficking (CAST), is comprised of representatives of federal and local law enforcement, prosecution agencies, and social service providers. It also coordinates with one of the FBI's Innocence Lost task forces.

- **North Bay Human Trafficking Task Force (San Francisco)**
  (Established in 2005)

  The North Bay task force operates under the leadership of the San Francisco Police Department, in collaboration with the Standing Against Global Exploitation (SAGE) Project, and the Asian Anti-Trafficking Collaborative.

- **Orange County Human Trafficking Task Force (Westminster)**
  (Established in 2004)

  The Orange County task force is a collaboration of law enforcement, NGOs, faith-based organizations, and the community, with leadership provided by the Westminster Police Department, Community Service Programs, the Anaheim Police Department, the FBI, the Public Law Center, and the Salvation Army. In 2010, Cal EMA provided this task force

with an additional $1.2 million grant to help develop a statewide training program on the trafficking of minors for law enforcement and other first responders.

- **Riverside County Anti-Human Trafficking Task Force (Riverside)**
  (Established in 2010)

  The Riverside task force includes the Riverside County Sheriff's Department, the Riverside District Attorney's Office, Million Kids, and Operation SafeHouse.

- **Sacramento Innocence Lost Task Force (Sacramento)**
  (Established in 2010)

  The Sacramento task force operates as one of the FBI's Innocence Lost task forces through a partnership between the FBI and the Sacramento County Sheriff's Department, along with Courage to Be You and the Sacramento Rescue and Restore Coalition.

- **San Diego North County Anti-Trafficking Task Force (San Diego)**
  (Established in 2004, re-organized in 2010)

  The San Diego Sheriff's Department, Vista Substation leads this task force, which works in collaboration with the Bilateral Safety Corridor and the U.S. Attorney's Office.

- **San Jose/South Bay Human Trafficking Task Force (San Jose)**
  (Established in 2005)

  The San Jose task force is led primarily by the San Jose Police Department, which partners with Community Solutions and other agencies and organizations to raise awareness and provide resources to victims of trafficking.

For additional resources, including contact information for the task forces and NGOs with which they work, see Appendix B. The Human Trafficking page on the Attorney General's website has additional resources: *http://oag.ca.gov/human-trafficking/fighting.*

Cross-Border Partnerships

California and Mexico share not only a border, but also law enforcement concerns, especially around transnational gangs and the trafficking of guns, drugs, and human beings. The following are key efforts by the California Attorney General's Office and the Conference of Western Attorneys General to foster cross-border partnerships that will enhance our capacity to fight human trafficking:

- **Office of California-Mexico Bilateral Relations**
  Created with existing resources in June 2012, this office in the California Department of Justice aims to further collaboration between legal and law enforcement officials in California and Mexico on issues of shared concern, including human trafficking.

✤ California/Mexico Anti-Human Trafficking Accord

In September 2012, Attorney General Harris and Mexico Attorney General Marisela Morales Ibáñez signed an accord to increase coordination of law enforcement resources targeting the sale and trafficking of human beings across the California-Mexico border. The accord calls for closer integration on human trafficking issues between the two offices and the sharing of best practices for law enforcement to recognize instances of human trafficking and provide support and services to victims.

✤ California Anti-Money Laundering Alliance

This San Diego-based team of forensic investigators provides technical and logistical support to combat transnational gang-related financial crimes along the California/Mexico border. Created in September 2012 with a $3.5 million grant from the Southwest Border Anti-Money Laundering Alliance, the team will initially be comprised of California Department of Justice special agents who will provide high-level intelligence and assessments of the transnational gang threats facing the state.

✤ CWAG Alliance Partnership

California is an active member in the Conference of Western Attorneys General (CWAG), which is made up of 15 western states, three Pacific territories, and 13 associate member states. CWAG's primary purpose is to provide a forum to cultivate knowledge, cooperate on subjects of mutual concern, and coordinate actions to improve the quality of members' legal services.

In 2006, CWAG initiated the Alliance Partnership to promote bi-national collaboration and training between state attorneys general in the United States and Mexico, the Attorney General of Mexico, the Council of State Governments, the National Association of Attorneys General (NAAG), the U.S. State Department's Bureau of International Narcotics and Law Enforcement Affairs, the U.S. Agency for International Development, and other public and private entities.

- In 2008, the Alliance Partnership sponsored a bi-national conference – the model for conferences and trainings held every year since – in order to explore emerging criminal trends on both sides of the border and allow for information-sharing in terms of investigation and prosecution practices, as well as ideas for legislation and victim services programs. The conference was attended by representatives from the offices of attorneys general in CWAG member states, attorneys general in border and other states of Mexico, and the office of the Mexico Attorney General.
- In 2011, CWAG and the Arizona State University North American Center for Transborder Studies produced a bi-national, multi-state survey on human trafficking legislation and collaboration, along with a 2011 report that examines existing and potential legislation and administrative actions by key U.S.-Mexico state-level government stakeholders.
- In March 2012, CWAG partnered with Western Union to bring 16 Mexican attorneys general, five state assistant attorneys general, and several prosecutors to NAAG's

2012 Presidential Summit, *Pillars of Hope: Attorneys General Unite Against Human Trafficking*. Through this initiative, NAAG members signed a letter calling for Village Voice Media to limit sex trafficking and prostitution advertisements on its website, Backpage.com. (See Appendix C)

- In July 2012, the CWAG annual conference, hosted by California Attorney General Harris, included panels made up of human trafficking experts from CWAG member states and Mexico. The Attorney General of Mexico, 17 state attorneys general from Mexico, and 14 U.S. attorneys general attended the conference in Anaheim.

Federal and Interstate Efforts

The federal government has made progress in fighting human trafficking, as have states working in collaboration with one another. Examples of these efforts include:

- **Trafficking Victims Protection Act (TVPA) of 2000**

  In 2000, Congress enacted the Trafficking Victims Protection Act of 2000 (TVPA), Public Law 106-386, to prosecute traffickers, protect victims, and prevent human trafficking. TVPA was the first comprehensive federal law to address the crime of human trafficking and it created new law enforcement tools to, among other things, strengthen the prosecution and punishment of traffickers and make victims of trafficking eligible for benefits and services under federal and state programs once they become certified by the U.S. Department of Health and Human Services. (See Chapter 5).

  The Trafficking Victims Protection Reauthorization Act of 2003 (H.R. 2620), the Trafficking Victims Protection Reauthorization Act of 2005 (H.R. 972), and the Trafficking Victims Protection Reauthorization Act of 2008 (H.R. 7311) also provide strong tools to combat human trafficking. These pieces of legislation authorized the establishment of the President's Interagency Task Force to Monitor and Combat Trafficking in Persons to assist in the coordination of anti-trafficking efforts.

  To date 49 of the 50 states have enacted legislation to criminalize human trafficking.[3]

- **The President's Interagency Task Force to Monitor and Combat Trafficking in Persons**

  The President's Interagency Task Force to Monitor and Combat Human Trafficking coordinates federal efforts to combat human trafficking. The Task Force is chaired by the Secretary of State and includes representatives from the following federal agencies: The Attorney General's Office/Department of Justice, the Department of Labor, the Department of Health and Human Services, the Department of Homeland Security, the National Intelligence Agency, the U.S. Agency for International Development, the Department of Defense, the National Security Agency, the Department of Transportation, Department of Education, the Domestic Policy Council, the Equal Employment Opportunity Commission, the Federal Bureau of Investigation, and the Office of Management and Budget.

- **President Obama's Anti-Human Trafficking Initiatives (September 2012)**

  In September 2012, President Obama announced several initiatives to combat human

trafficking. First, the Administration will provide training and guidance to federal and state law enforcement so that they are better equipped to detect trafficking. There will also be an increased focus on providing victims with financial assistance, through a partnership with Humanity United and the fiscal support of Goldman Sachs Foundation. The Partnership for Freedom Innovation Awards will provide $6 million to local communities to develop collaborative and comprehensive solutions to help trafficking victims.

President Obama also issued an executive order strengthening the federal government's zero-tolerance policy by, among other things:

(A) expressly prohibiting federal contractors, contractor employees, subcontractors, and subcontractor employees from engaging in any of the following types of trafficking-related activities:

(i) using misleading or fraudulent recruitment practices during the recruitment of employees, such as failing to disclose basic information or making material misrepresentations regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, living conditions and housing (if employer provided or arranged), any significant costs to be charged to the employee, and, if applicable, the hazardous nature of the work;

(ii) charging employees recruitment fees; or,

(iii) destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity documents, such as passports or drivers' licenses.[4]

✣ Federal Grant Funds

In the last decade, federal grant funding has been made available from the U.S. DOJ's Bureau of Justice Assistance and Office of Victims of Crime, the U.S. Department of Health & Human Services (DHHS), and the Department of State's Office to Monitor and Combat Trafficking in Persons. These grants support local, state, and tribal law enforcement agencies in their efforts to form task forces, conduct training, coordinate the investigation and prosecution of traffickers, and build partnerships with victim service providers and private entities.

In 2007, DHHS provided funding to Polaris Project to create the National Human Trafficking Resource Center Hotline. Other grants have supported NGOs nationwide to establish "rescue and restore coalitions," provide referral and direct services to victims of human trafficking, and conduct training and public awareness activities. Several law enforcement agencies and NGOs have received federal funding – either directly from federal agencies or through Cal EMA – to coordinate and collaborate on anti-human trafficking efforts, facilitate information and intelligence sharing, provide cross-training, share promising practices, provide services to victims, and increase public awareness.

✣ Federal Prosecution

In 2011, U.S. DOJ prosecuted 125 cases of labor and sex trafficking. A total of 118 defendants were charged in forced labor and adult sex trafficking cases, representing a

19 percent increase over the number of defendants charged in such cases in 2010 – and the highest number ever charged in a single year. During the same period, the U.S. DOJ secured 70 convictions in forced labor and adult sex trafficking cases.[5]

The following describes key federal anti-human trafficking efforts in FY 2011:[6]

- 40 U.S. DOJ-led task forces reported more than 900 investigations that involved more than 1,350 suspects.
- U.S. DOJ charged 42 cases involving forced labor and sex trafficking of adults by force, fraud, or coercion. Of these, half involved primarily labor trafficking and half involved primarily sex trafficking, although many involved a combination of both.
- At the end of FY 2011, the FBI had 337 pending human trafficking investigations with suspected adult and foreign minor victims.
- The average prison sentence imposed for federal trafficking crimes during FY 2011 was 11.8 years. Sentence terms imposed ranged from 10 months to 50 years.
- The Department of Homeland Security (DHS) Federal Law Enforcement Training Center trained over 2,000 state, local, and federal officers in human trafficking.
- DHS suspended, proposed debarment of, or debarred five companies and eight individuals for involvement with forced labor.
- DHS made three criminal arrests resulting in eight convictions in child sex tourism cases.

- **Innocence Lost Task Forces**

  The FBI, in partnership with U.S. DOJ, established the Innocence Lost Program in 2003 to investigate and prosecute cases of child sex trafficking in the United States. As of 2012, there are 47 dedicated task forces and working groups across the country, comprised of federal, state, and local law enforcement. The efforts of these task forces have led to the rescue of over 2,100 children and the conviction of over 1,000 pimps.

- **National Association of Attorneys General (NAAG) – "Pillars of Hope" Initiative**

  The 2011 NAAG Presidential Initiative focused on the nationwide epidemic of labor and sex trafficking. The "Pillars of Hope" Initiative had four main objectives to fight the crime of human trafficking: To gather more data to track state arrests and prosecutions; to raise awareness to reduce the demand; to promote strong state statutes and forceful state prosecutions; and to mobilize communities to increase care for victims.[7]

  In 2012, the California Attorney General's Office developed a toolkit that describes California's innovative approach to restitution. *Providing Restitution to Victims of Human Trafficking: A Legislative Toolkit* was distributed to all attorneys general through NAAG.

Victim Service Providers

In addition to the work done by law enforcement and other governmental organizations, NGOs contribute a great deal to the fight against human trafficking. NGOs throughout

California provide a range of services to the victims of this crime, including shelter, legal aid, immigration status assistance, medical and health services, interpretation services, and mental health counseling.

A list of key NGOs in California is included in Appendix D and available at *http://oag.ca.gov/human-trafficking/help*. The Attorney General's website also includes links to websites available in 18 languages.

Training Programs

The 2007 report identified the need for law enforcement, NGOs, health and social service providers, and other first responders to be trained on how to identify and assist victims of human trafficking. To date, thousands of individuals have been trained, including representatives of victim service providers, legal and medical professionals, law enforcement, and other first responders. There are many Peace Officer Standards and Training (POST)-certified courses that address various aspects of the crime, including how to identify victims, collaborate with victim resource providers, and develop human trafficking cases.

Trainings that have been (and continue to be) offered throughout California include:

- **Regional Task Force Training**
  From July 2010 to July 2012, the task forces trained over 25,000 law enforcement personnel, prosecutors, victim service providers, and other first responders.

  The 2007 report recommended that local law enforcement, health and social services agencies, and community organizations replicate promising strategies from existing collaborative models and work together for cross-training purposes to coordinate services and benefits. An example of such an effort is the Alameda County District Attorney's annual H.E.A.T. Watch conference, which provides useful information and promising strategies that can be replicated by other organizations and agencies.

- **POST 2008 Guidelines and "Human Trafficking Update" Training**
  POST now offers its 2008 guidelines in PDF format on its website. The POST guidelines, *Law Enforcement Response to Human Trafficking*, are presented in a format that allows law enforcement personnel to follow a systematic process when conducting human trafficking investigations. The guidelines are available at: *http://lib.post.ca.gov/Publications/human_trafficking.pdf.*

  POST produced a 2-hour "Human Trafficking Update" DVD course in 2010 for use by law enforcement agencies in California as a companion to their guidelines. It is designed to help peace officers recognize trafficking indicators and use best practices in working with victims, conducting interviews, and collecting evidence. The course also includes information on the legal issues surrounding human trafficking and available resources.

- **Statewide Law Enforcement Minor Sex Trafficking Training Program**
  In 2010, Cal EMA funded the Human Trafficking of Minors: Statewide Law Enforcement

Training Program, which is administered by the Westminster Police Department. The 8-hour training is POST-certified and has been used to train 831 law enforcement and first responders across the state. It includes segments on how to identify the signs of trafficking in minors and how to investigate these cases, including techniques to preserve data from cell phones, computers, and other devices. The training includes suggestions on how to prosecute human trafficking cases using state and federal trafficking laws.

One of the 2007 report recommendations called for training that specifically addressed the civil relief available for victims. The statewide training also includes information on victim assistance, including the T- and U-Visa process for immigrant or refugee victims. Cal EMA funds the training program with support from Children's Justice Act funds, part of the Federal Crime Victims Fund, which is made up of fines and fees collected from defendants convicted of federal crimes.

✣ Coalition to Abolish Slavery and Trafficking (CAST) Training

CAST provides training to other NGOs, law enforcement, and prosecutors with an emphasis on working with victims, building trust, and identifying resources. It also offers training to non-traditional partners in the fight against human trafficking, including:

- *Investigators with the State Board of Equalization and the Franchise Tax Board* on how to identify potential trafficking victims and/or incidences when visiting a business to monitor compliance with state tax laws;
- *(Non-prosecuting) attorneys and other legal service providers* on how to identify victims. The training also provides an overview of the legal framework surrounding human trafficking, including how victims can apply for immigration relief and civil remedies, and access available resources;
- *Social service providers who work for community-based organizations* on how to identify victims. The training also provides an overview of the legal framework, issues of cultural competency, professional boundaries, working with survivors, maintaining appropriate case files, accessing local resources to assist victims, and building a network of response;
- *Victim-witness coordinators, rape crisis centers, and domestic violence organizations* on how to identify victims. The training also provides an overview of the legal process in human trafficking-related matters and how to network with other agencies to build an appropriate response; and,
- *Retail and manufacturing businesses* on the implementation of the California Transparency in Supply Chains Act, which calls for designated businesses to post on their websites policies describing the extent, if any, that the companies work to eliminate trafficking and forced labor from their supply chains.

CAST has also developed a pro bono training and resource manual for attorneys and provides training for volunteer attorneys twice a year in the Los Angeles area. CAST currently works with a network of over 30 firms to provide legal services to trafficking victims. Additionally, CAST has partnered with other legal service providers in Fresno, Sacramento,

the Inland Empire, Orange County and San Francisco to provide similar pro bono and legal service trainings.

- **Training by Victim Services Agencies, NGOs and others**

  Organizations such as CAST (Los Angeles), the Bilateral Safety Corridor Coalition (San Diego), the Asian Pacific Islander Anti-Trafficking Collaborative (San Francisco), the Fresno County Economic Opportunities Commission (Fresno), the Sacramento Rescue and Restore Coalition (Sacramento), the Community Service Programs (Orange County), the South Bay Coalition to End Human Trafficking (San Jose), and others have developed models, protocols, training, and advocacy efforts to support human trafficking victims.

- **North and Central California Anti-Trafficking Team (NCCATT) Training**

  Created in 2010, the NCCATT is administered by the U.S. Attorney's Office for the Eastern District of California. The Team hosted its first daylong training for law enforcement in January 2011 and has conducted training throughout the district to provide basic human trafficking information, as well as networking opportunities for law enforcement from local, state, and federal agencies, prosecutors, and other first responders. The Regional Threat Assessment Center in Sacramento and the State Threat Assessment Center are partners in this training effort, which uses an intelligence-led approach modeled after the Center's Terrorism Liaison Officer training. Since 2011, the NCCATT has trained more than 300 law enforcement personnel and other first responders.

- **California Narcotic Officers Association (CNOA) Training**

  Since January 2010, the CNOA has presented a Human Trafficking Course on six separate occasions with a total attendance of 650 students. The training consists of an introduction to the crime of human trafficking, the differences between human smuggling and trafficking, the emerging connection of Mexican drug cartels and gangs to human trafficking, an examination of case studies, and how to conduct investigations.

- **California District Attorneys Association (CDAA) Training**

  Since 2008, CDAA has offered or sponsored several workshops, training sessions, and webinars on the basics of human trafficking, including how to prosecute cases and work with NGOs and victims. CDAA also published an orientation guide on human trafficking and has produced articles on trends and emerging issues. This training was part of the 2007 report recommendations.

- **Judicial Officer Training**

  In 2011, the Administrative Office of the Courts (staff agency of the Judicial Council) and the Center for Families, Children, and the Courts conducted two forums on human trafficking. The forums, one of which was designed for judicial officers and community advocates, focused on the issue of the commercial sexual exploitation of minors. The development of a training program for judicial officers was one of the recommendations of the 2007 report.

✤ Airport Personnel Training

Several airports in California have launched anti-trafficking awareness programs. In 2012, Congresswoman Jackie Speier and David Palmatier of the U.S. Department of Homeland Security joined Airline Ambassadors International (AAI) to provide training for airline and airport personnel to help identify human trafficking victims on commercial airlines. AAI developed the industry specific training after identifying human trafficking on four separate flights in 2009.

✤ Training for Mexican NGOs

Since 2010, CAST has provided more than 40 hours of training to five NGOs working on human trafficking in Mexico. Training topics included: how to identify and interview victims of human trafficking, best practices in victim services, and building a network for response. CAST also provided technical assistance to help the NGOs form and strengthen anti-trafficking task forces, coordinate victim services, develop outreach and education strategies to reach remote indigenous communities, and implement screening tools to help outreach workers identify instances of human trafficking among migrant agricultural laborers. Additionally, CAST has facilitated meetings of NGOs in Mexico, U.S. federal and state prosecutors, and the National Human Rights Commission to increase coordination between government and civil society at the local level. CAST also convenes a monthly teleconference call to connect a network of six agencies that address human trafficking from various angles.

✤ Bilateral Safety Corridor Coalition (BSCC)

The BSCC is an alliance of over 60 government and nonprofit agencies in the United States and Latin America that is convened in and along the U.S.-Mexico Border Region to combat slavery and human trafficking. The BSCC has hosted eight international conferences and trained law enforcement, prosecutors, medical personnel, social service providers, and human rights advocates in Mexico (especially in Tijuana and other areas of Baja). Training topics have included: how to identify various forms of human trafficking, the trafficking routes in Mexico, the root causes of human trafficking, and ways to work collaboratively to develop effective responses. The BSCC has also signed Memoranda of Understandings with Mexican agencies, including the Commission on Human Rights in Tijuana, to coordinate efforts and facilitate partnerships.

Legislative Efforts

Legislation Enacted in California

One of the key findings of the 2007 report was that the State Legislature should identify potential funding sources (i.e., asset forfeiture funds, fines and penalties, assessments, the General Fund, etc.) to fund legal and social services for human trafficking victims. Since 2005, a wide array of legislation has been introduced, including measures to criminalize sex and labor trafficking, encourage training for peace officers on human trafficking, provide financial assistance to victims, strengthen asset forfeiture statutes, require companies to disclose their efforts to eradicate trafficking in their supply chains, and provide victims with better access to education.

In 2007, because of the problem of prison overcrowding, the California State Senate adopted the Receivership/Overcrowding Crises Aggravation (known as ROCA) policy, which effectively prohibits legislation that would increase sentences for human trafficking. Perhaps as a result, legislators have pursued more creative approaches to combat human trafficking. Recent legislation falls into four major categories: (1) penalty provisions; (2) asset forfeiture; (3) civil nuisance; and, (4) victim resources.

Penalty Provisions

The 2007 report recommended that the Legislature identify sources of potential funding for non-governmental victim services organizations. In response, laws have been enacted to increase fines for trafficking and direct those fines to victim service providers.

Assembly Bill (AB) 17 (Swanson, 2009)	Increases the maximum amount of additional authorized fines to $20,000 for any person convicted of procuring a child under 16 years of age.
AB 12 (Swanson, 2011)	Requires that a person convicted of seeking the sexual services of a prostitute under 18 years of age pay an additional fine not to exceed $25,000.

Asset Forfeiture

The Legislature has found asset forfeiture to be an effective way to punish and deter criminal activities and organized crime.[8] To this end, the Legislature has fought human trafficking by using the same tool. In its most basic form, criminal forfeiture allows prosecutors to ask the court to freeze all proceeds from the crime and, if the person is convicted, to have those proceeds forfeited.

AB 17 (Swanson, 2009)	Expands the definition of criminal profiteering to include abduction or procurement by fraudulent inducement for prostitution.
AB 90 (Swanson, 2011)	Expands the definition of criminal profiteering to include abduction or procurement by fraudulent inducement for prostitution.
Senate Bill (SB) 1133 (Leno, 2012)	Expands the scope of property subject to forfeiture in human trafficking cases and provides a formula to redirect those resources to community groups that aid victims of human trafficking.

Civil Nuisance Abatement

City attorneys have found nuisance abatement to be an effective tool to hold property owners accountable for crimes committed on their property. As a result, the Legislature has strengthened nuisance abatement statutes.

SB 677 (Yee, 2010)	Authorizes real property used to facilitate acts of human trafficking to be declared and treated as a nuisance, allowing the property to be seized.
AB 2212 (Block, 2012)	Expands red light abatement law to include instances of human trafficking.

Victim Resources

A recurrent concern expressed by anti-human trafficking advocates is the lack of resources available to victims. The absence of adequate funding for victim outreach, protection, and rehabilitation inhibits the prosecution of human trafficking because victims are unable or unwilling to come forward. The Legislature has taken a multi-faceted approach to providing victims with much needed support and resources.

AB 764 (Swanson, 2011)	Allows an individual taxpayer to contribute a portion of their tax return to the Child Victims of Human Trafficking Fund.
AB 1956 (Portantino, 2012)	Expands the California Voluntary Tattoo Removal Program to serve individuals, between 14 and 24, who were tattooed for identification in human trafficking or prostitution.
AB 2040 (Swanson, 2012)	Allows a person, who was adjudicated as a ward of the court following a conviction for an act of prostitution, to have his or her record sealed or expunged without having to show rehabilitation or the absence of a subsequent conviction for a crime involving moral turpitude.
AB 2466 (Blumenfield, 2012)	Allows a court to order the preservation of the assets and property of criminal defendants charged with human trafficking.
SB 1193 (Steinberg, 2012)	Requires businesses, transit hubs, and other locations that are the most likely sites of sex and labor trafficking to post notices publicizing human trafficking resources.

California Transparency in Supply Chains Act

In 2007, the California Alliance to Combat Trafficking and Slavery Task Force noted that governments, corporations, and businesses play a major role in influencing fair labor practices and should exert their leadership to prevent forced labor. The report included a recommendation that California industries establish a code of conduct to forbid human trafficking-related abuses and assure workers' rights throughout their own operations and in those of their suppliers and labor contractors.

Senate Bill 657 (Steinberg, 2010) established the California Transparency in Supply Chains Act of 2010 to encourage corporate disclosure of efforts to eliminate human trafficking from

supply chains. This law requires large businesses to make public what policies, if any, they have in place to address human trafficking in their supply chains. While the legislation gave the California Department of Justice enforcement authority over this requirement, no funding accompanied this authority.

See Appendix E for a list of chaptered human trafficking legislation, 2007-2012.

Legislative Hearings

Both California and federal legislators have taken an active role in increasing public awareness of human trafficking. In 2009, California State Senators Mark DeSaulnier and Ellen M. Corbett held a Joint Hearing on Slavery and Trafficking in Los Angeles. This hearing focused on California's role—as the world's ninth largest economy—in the global problem of human trafficking.

In 2010, the Congressional Subcommittee on Crime, Terrorism and Homeland Security held a hearing on the sex trafficking of minors within the United States. Representative Jackie Speier testified about the plight of human trafficking victims and the role of the Internet in human trafficking. Shortly after this hearing, Representative Speier launched the San Mateo County Zero Tolerance initiative – a collaborative partnership between law enforcement officials, community members, and non-profit partners. The goals of the initiative are to raise community awareness, to ensure that trafficking victims have the resources they need, and to bring traffickers to justice.

Additionally, former California Attorney General and current Representative Dan Lungren hosted a series of congressional hearings and community awareness forums in Sacramento and Washington, D.C. Their purpose was to highlight the issue of human trafficking and to examine effective methods to fight human trafficking.

Conclusion

Across the state, a number of important efforts are underway to combat human trafficking. Today, California has nine regional anti-human trafficking task forces that, along with local and federal efforts, have increased investigations and prosecutions of the crime. Across the state, more than 25,000 law enforcement personnel, first responders, medical staff, and others have received training on how to recognize and respond to human trafficking and the Legislature has enacted new laws to increase fines for traffickers and help victims rebuild their lives. Public, nonprofit, and private entities have also launched innovative projects and partnerships to identify and assist victims of this crime. Based in part on discussions of the Work Group, the following chapters examine areas for further development and provide recommendations on how California can strengthen these efforts.

End Notes:

[1] "Four 'Ps': Prevention, Protection, Prosecution, Partnerships," U.S. Department of State, accessed October 26, 2012, *http://state.gov/j/tip/4p/index.htm*.

[2] "Local, State and Federal Officials Take New Steps to Strengthen Fight Against Human Trafficking," California Emergency Management Agency, accessed October 26, 2012, *http://calema.ca.gov/NewsandMedia/_layouts/DispItem.aspx?List=f1e85c6a-fa43-4225-9050-2b846c19cb73&ID=8&RootFolder=%2FNewsandMedia%2FLists%2FLatest%20News&Web=9ce220de-6375-45c8-9565-f1a49b0cad7f*.

[3] Polaris Project, "West Virginia Becomes 49th State to Criminalize Human Trafficking," news release, April 5, 2012, *http://polarisproject.org/media-center/press-releases/589-west-virginia-becomes-49th-state-to-criminalize-human-trafficking*.

[4] Exec. Order No. 13,627, 77 Fed. Reg. 60,029 (October 2, 2012).

[5] U.S. Department of State, Trafficking in Persons Report, (June 2012), 361, accessed October 26, 2012, http://state.gov/j/tip/rls/tiprpt/2012/.

[6] Ibid., 361-365.

[7] "Giving a Voice to the Voiceless: 'Pillars of Hope' Presidential Initiative to Tackle Human Trafficking," National Association of Attorneys General, accessed October 26, 2012, *http://naag.org/giving-a-voice-to-the-voiceless-pillars-of-hope-presidential-initiative-to-tackle-human-trafficking.php*.

[8] California Penal Code § 186.1 (2012).

The State of

Human Trafficking in California

Part II
Challenges and Recommendations

3 Identifying the Scope of Human Trafficking in California

"To put the scale of this problem in its historical context: today more people are trafficked each year than the total number of those trafficked in the 350 years of the transatlantic slave trade. People talk about the abolition of slavery. But slavery has not been abolished. It continues on an unprecedented scale and with unparalleled barbarity."

UK Foreign and Commonwealth Office Minister Hugo Swire, October 24, 2012

One of the primary purposes of this report is to collect and disseminate data on the nature and extent of human trafficking in California. While the 2007 report identified known and potential sources of California-specific human trafficking data, the data reported in 2007 were limited to surveys and interviews undertaken by the California Alliance to Combat Trafficking and Slavery Task Force. The charts and tables contained in this chapter were created with data collected from many of the sources identified but not reported in the 2007 report, including information from California's regional task forces, the National Human Trafficking Resource Center hotline, arrest and conviction records, and trafficking victim assistance programs.

Along with the development of these data sources, the understanding of the global scope of human trafficking has expanded. In 2005, the International Labor Organization (ILO) estimated there were 12.3 million victims. In June 2012, the ILO released its second global estimate and, using an improved methodology and greater sources of data, estimated there are 20.9 million human trafficking victims worldwide at any time – 16.4 million labor exploitation/state-imposed forced labor and 4.5 million sexual exploitation victims.[1]

California's regional task forces have identified nearly 1,300 victims of human trafficking in the past two years. These task forces have reported that over half of the human trafficking victims receiving services are victims of sex trafficking and, when able to identify the victims' country of origin, reported that approximately seven out of ten human trafficking victims are from the United States. Since human trafficking was made a felony in California in 2006, arrests and convictions for human trafficking have been steadily increasing.

It is important to note that the charts and tables contained in this chapter provide only a snapshot of the entire picture of human trafficking in California. For example, while each of

the state's regional task forces has a unique scope, some focus largely on sex trafficking. This form of human trafficking tends to have a higher profile in the public eye, as well as greater investigative funding opportunities, than other forms of modern slavery. And sex trafficking represents the majority of trafficking cases investigated by federally-funded task forces in the United States, or roughly eight in ten cases reported to the Human Trafficking Reporting System.[2] However, the ILO estimates that, at least with respect to human trafficking victims worldwide, 78% are victims of forced labor and 22% are victims of forced sexual exploitation.[3] In addition, many victim service providers in the United States report that a majority (64%) of the foreign victims they serve are labor trafficking victims. Such discrepancies raise the question of whether, and to what extent, the nature of human trafficking in the U.S. is different from trafficking worldwide, as well as the extent to which labor trafficking is underreported in this country. Similarly, questions remain about the preponderance of domestic victims identified by the task forces, and to what extent such numbers reflect the actual demographics of victims in California or are a factor of higher reporting levels for domestic victims.

Information to comprehensively answer these questions is not currently available. Although progress has been made in tracking, collecting, and disseminating data on human trafficking in California, significant challenges remain in understanding and calculating the nature and extent of human trafficking in the state. Statistical data on human trafficking, when available, may be understated, unreliable, or inconsistent due to the covert nature of the crime and high levels of under-reporting. On the other hand, in some cases the same incident may be counted more than once due to overlap in data collection by agencies and other victim service providers. Often, data collection efforts do not share a common approach, such as collecting data under common categories or with shared definitions of key terms. Funding or public attention may drive the focus of anti-trafficking efforts and related data reporting. Furthermore, potential cases of human trafficking may be investigated and prosecuted under a variety of related penal codes, such as pimping, pandering, prostitution, or other existing labor laws, making it difficult to identify trafficking cases from within the other criminal activity in the data. Thus, while the data presented below offer important insights into human trafficking in California, additional research is needed to draw more definitive conclusions.

Scope of Trafficking in the United States

The United States is widely regarded as a destination country for human trafficking. The U.S. Department of State estimates that 14,500 to 17,500 of victims are trafficked into the United States each year.[4] This figure does not include victims who are trafficked within the country each year.

Data from the Human Trafficking Reporting System

Designed to track the performance of federally-funded task forces, the Human Trafficking Reporting System (HTRS) collects data on suspected human trafficking incidents, suspects, and

victims from human trafficking task forces across the United States that are funded by the U.S. Department of Justice (U.S. DOJ). Using these data, the U.S. DOJ's Bureau of Justice Statistics reported that 42 federally-funded human trafficking task forces opened 2,515 suspected incidents of human trafficking for investigation between January 2008 and June 2010.[5] Approximately eight out of ten of the suspected incidents reported to the HTRS were classified as sex trafficking, including more than 1,000 incidents with allegations of prostitution or sexual exploitation of a child.[6] Around one out of ten of the suspected incidents opened for investigation were categorized as labor trafficking.[7] The HTRS project team identified a number of data quality issues in the reporting from the task forces and determined that only 18 of the 42 task forces provided high data quality. Among the 389 incidents confirmed to be human trafficking by high data quality task forces, 83% of victims in sex trafficking incidents were identified as U.S. citizens, while 67% of labor trafficking victims were identified as undocumented immigrants and 28% as qualified immigrants.

Thus, the picture of human trafficking presented by data reported to the HTRS indicates that the majority of investigated cases involve sex trafficking of U.S. citizen victims, and that the majority of investigated labor trafficking cases involve undocumented immigrant victims. It is premature to conclude from these data, however, that such percentages reflect the breakdown of actual cases of trafficking, rather than simply those that are investigated and reported to the HTRS. For example, task forces that were housed in the vice unit of a law enforcement agency – the unit that typically pursues prostitution cases – reported that 89% of their cases were sex trafficking while 73% of cases investigated by task forces located outside the vice unit were sex trafficking. Thus, the general focus of the investigative body appears to have an impact on the composition of its trafficking cases. In addition, a majority (64%) of the foreign victims served by victim service providers funded by the Office for Victims of Crime between January 2008 and June 2009 were labor trafficking victims. Such data suggest there may be some degree of statistical selection bias both in terms of the victims who received help from those service providers – commonly, labor trafficking victims – and the types of cases – usually, sex trafficking – pursued by law enforcement. In addition, because these service providers focused on foreign national victims, the discrepancy could also suggest a different composition of citizen-versus-non-citizen victims between law enforcement and service providers.

Potential Future Data from the Uniform Crime Reporting Program

The Federal Bureau of Intelligence's (FBI) Uniform Crime Reports (UCR) Program is a nationwide, cooperative statistical effort of nearly 18,000 city, county, college and university, state, tribal, and federal law enforcement agencies voluntarily reporting data on crimes. The FBI administers the UCR Program to assess and monitor the nature and type of crime in the United States and to generate reliable information for law enforcement use. Beginning in January 2013, the national UCR Program will begin collecting offense and arrest data related to human trafficking.[8] Once underway, it will provide a new source of nationwide data on human trafficking in the United States.

Scope of Trafficking in California

California's Nine Regional Task Forces

As described in Chapter 2, California has nine regional anti-trafficking task forces which bring together law enforcement and prosecutors at the local, state, and federal levels, as well as other governmental leaders and NGOs to create a victim-centered, collaborative approach to human trafficking. Goals of the task forces include increasing the number of investigations initiated, increasing the number of individuals identified as victims of human trafficking, and increasing the number of individuals arrested for human trafficking.

California's regional task forces report quarterly to California Emergency Management Agency (Cal EMA) on progress toward meeting these and other goals. The graphs shown here were created with data reported by the task forces to Cal EMA between July 1, 2010 and June 30, 2012. While some of the task forces received funding and thus reported to Cal EMA prior to the third quarter of 2010, the charts presented here start at July 1, 2010, by which time eight out of the nine task forces were reporting to Cal EMA.[9] The data from the San Jose/South Bay Human Trafficking Task Force is not included in the charts until July 1, 2011 since the San Jose Police Department did not begin receiving a grant award and thus did not begin reporting to Cal EMA until the third quarter of 2011.

Chart 1 shows the number of investigations initiated by the task forces, Chart 2 shows the number of individuals identified as victims of human trafficking, and Chart 3 shows the number of arrests reported by the task forces. In the two years between July 1, 2010 and June 30, 2012, California's task forces initiated 2,552 investigations, identified 1,277 victims of human trafficking, and arrested 1,798 individuals. The sheer number of victims identi-

Chart 1

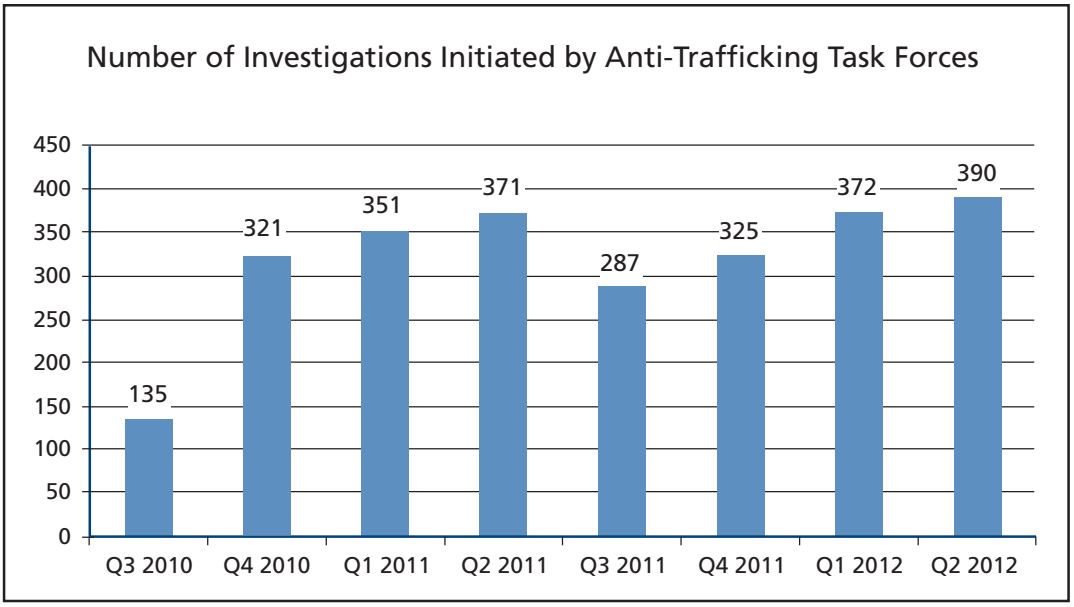


Chart 2

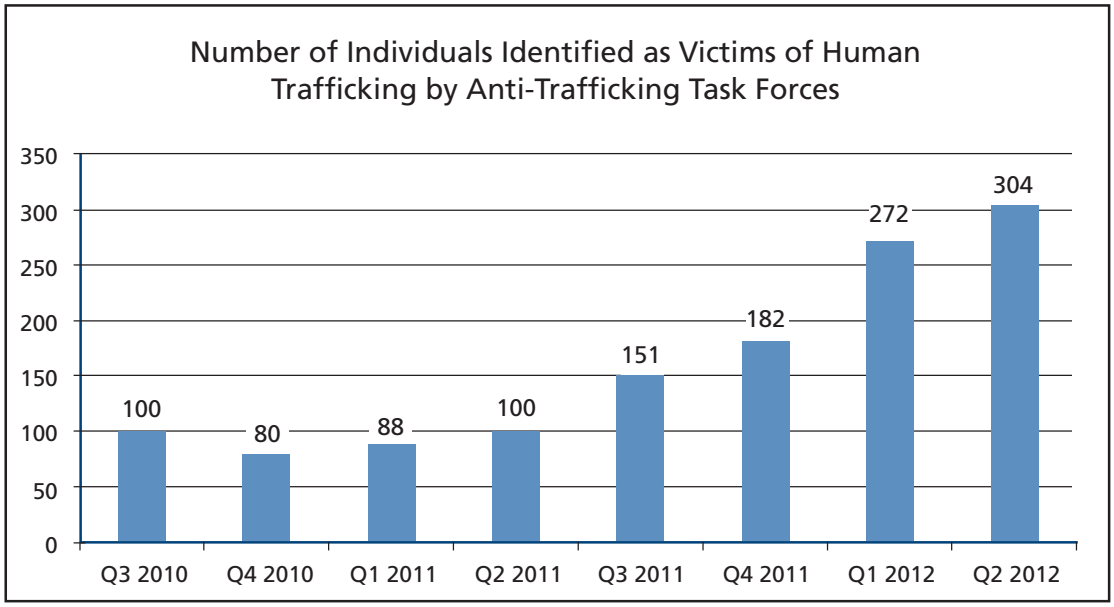
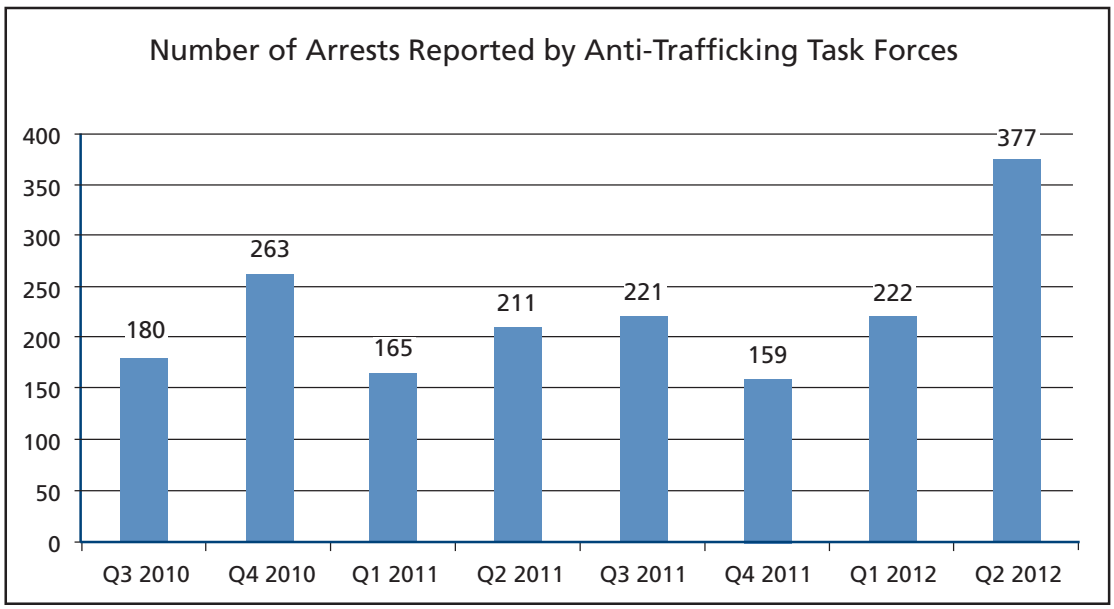


Chart 3



fied – nearly 1,300 in just two years – bears emphasis because the actual number of victims is certain to be significantly larger, as these data do not represent the entire scope of human trafficking in California. In addition to the fact that numerous cases likely go under-identified and under-reported, these task forces are not the only entities in the state investigating human trafficking cases, identifying victims, and arresting traffickers.

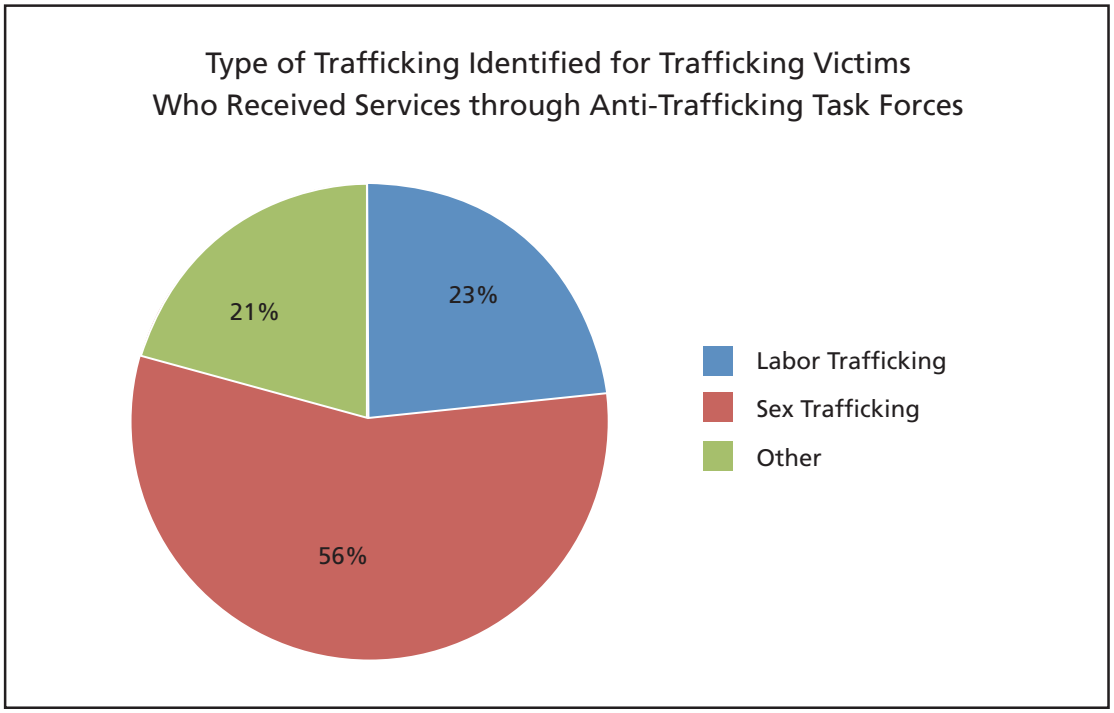
In general, the number of investigations initiated, number of victims identified, and number of arrests reported by anti-trafficking task forces have been increasing. Between the third quarter of 2010 and the second quarter of 2012, the number of investigations per quarter has increased from 135 to 390, the number of victims identified per quarter has increased from 100 to 304, and the number of arrests reported per quarter has increased from 180 to 377.

Unfortunately, national data from the same time period have not been released that can be used to compare with California's task force data. The data detailed on page 49 from the HTRS were collected prior to task force reporting to Cal EMA, and may not have been collected using the same definitional framework as the California task force reporting.

As shown in Chart 4, California's regional task forces also identified the type of trafficking involved in the instances in which victims received services. Between October 1, 2009 and June 30, 2012, 56% of the trafficking victims who received services from the task forces were victims of sex trafficking, while 23% were victims of labor trafficking. In 21% of cases, task forces reported the type of trafficking as "other" without classifying the type of trafficking; no further information is available as to what kinds of cases fall into this category.

More research is needed to determine whether the low percentage of labor trafficking victims receiving services as reported by the task forces is a reflection of the prevalence of sex trafficking in California or due to under-reporting of labor trafficking. It should be noted that the Work Group expressed concern that labor trafficking is under-identified and under-reported; this may

Chart 4



explain the low percentage of labor trafficking victims receiving services in California. The Work Group's concerns are further supported by ILO data, which indicate that the majority of global trafficking is comprised of labor, rather than sex, trafficking. Thus, as with the national data, the reported breakdown of trafficking types raises further questions as to whether certain kinds of trafficking are more common or simply more commonly reported.

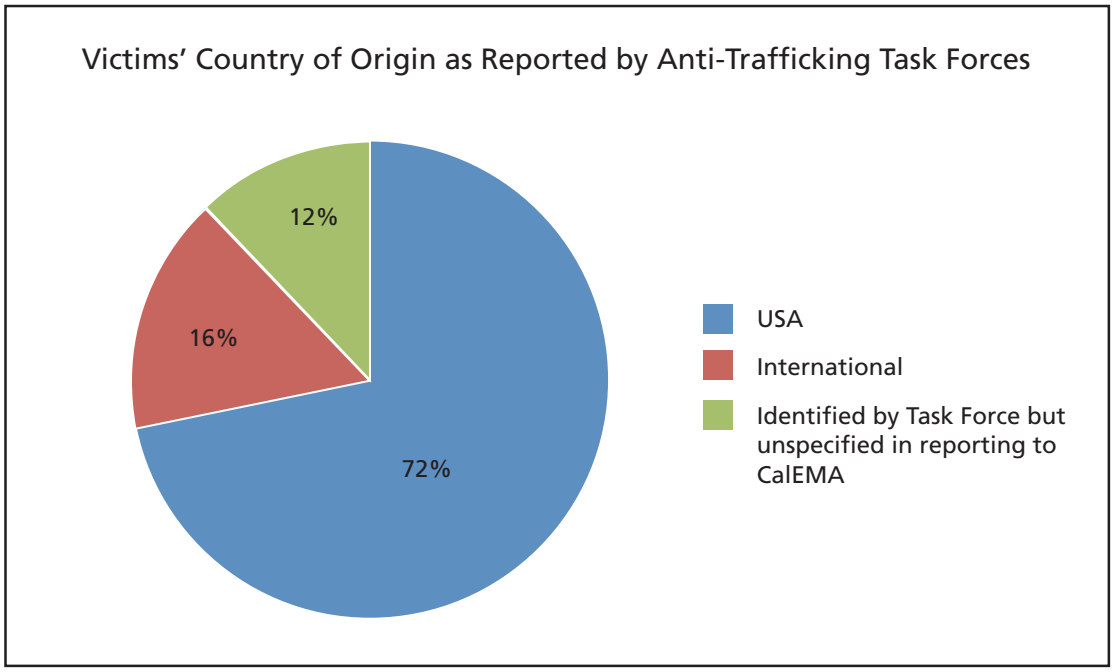
Of the victims identified, the task forces were able to determine over 1,000 human trafficking victims' country of origin between October 1, 2009 and June 30, 2012. This reflects a subset of the total number of trafficking victims identified during this same time period, as task forces did not identify every victim's country of origin.

As shown in Chart 5, 72% of the human trafficking victims whose country of origin was identified by the task forces are from the United States. More research is needed to determine whether these percentages reflect the actual proportion of domestic and international victims of human trafficking in California. It could be the case, for example, that task forces are more likely to come into contact with domestic victims or that international victims are more hesitant to identify their country of origin.

National Human Trafficking Resource Center Hotline (NHTRC)

Funded by the U.S. Department of Health & Human Services (DHHS), the non-profit Polaris Project began operating the NHTRC hotline in 2007 to take reports of potential trafficking victims, of potential locations where trafficking is suspected, and of other suspicious behavior.

Chart 5

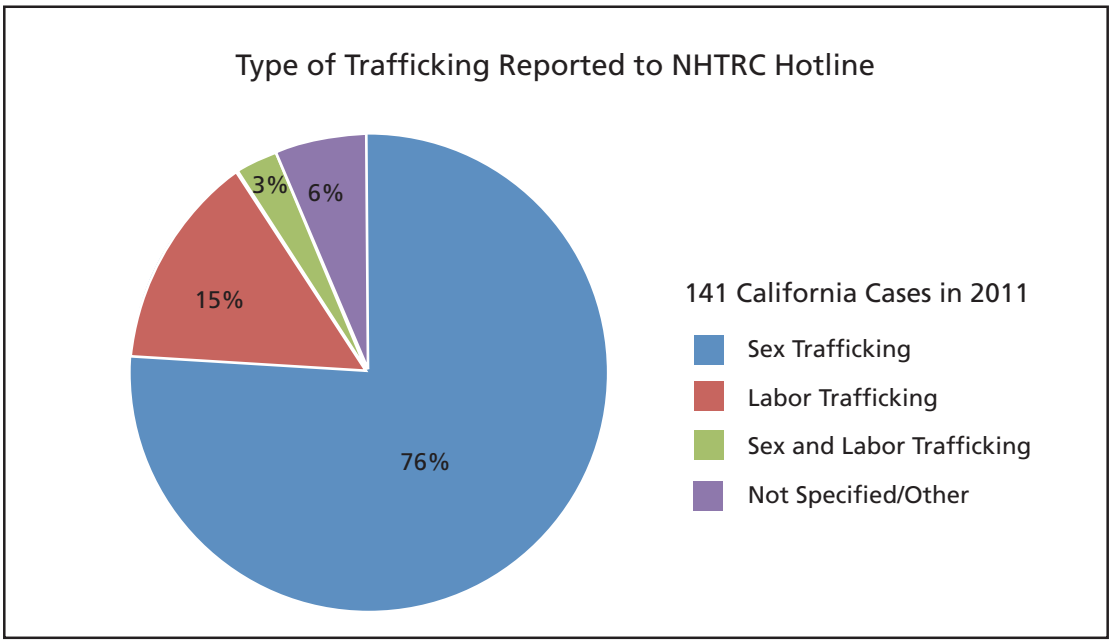


While the hotline receives reports of potential human trafficking in almost every state, the highest numbers of cases and/or victims reported are in California.[10] In 2011, the NHTRC hotline received 19,427 calls, of which 1,869 calls, or about 10%, came from California. From these calls and from calls received from outside the state, NHTRC identified 141 cases in California with a "high level of critical information" and demonstrating "key indicators relevant to identifying a human trafficking situation."[11] Chart 6 represents the type of trafficking reported in those 141 cases.

Chart 6 shows that 76% of these cases are classified as sex trafficking, while only 15% of the cases are classified as labor trafficking. The preponderance of sex trafficking as compared to labor trafficking is somewhat similar to the data reported by California's regional task forces as shown in Chart 4. However, as with the data about trafficking type from California's task forces, more research is needed to determine whether the low percentage of labor trafficking cases reported to the NHTRC hotline reflects the proportion of trafficking types in California or whether it is due to the under-identification and under-reporting of labor trafficking.

A key recommendation of the 2007 report called for state and local agencies to encourage the public to report human trafficking to hotlines. Since the creation of the NHTRC hotline in 2007, the California Attorney General's Office, Cal EMA, the California Department of Social Services (CDSS) and many local law enforcement agencies, social service organizations, and NGOs have developed brochures, factsheets, web pages, and resource cards to promote the NHTRC hotline and/or their own regional hotlines to help encourage the reporting of human trafficking or suspect activity. This has yielded a significant number of suspected human trafficking reports

Chart 6



A Call to the NHTRC Hotline Connects Victims with Services (Courtesy of the NHTRC Hotline)

A community member met a distraught young woman in the bathroom of a restaurant near her office in San Francisco. The young woman, Kelly, said that she lived in a motel where her pimp forced her to engage in prostitution. Kelly confided in the woman that she had secretly saved $200 so she could leave the situation, but was afraid of doing so for fear that her pimp would come after her. Kelly asked the woman for help.

The woman was unsure what to do, but had seen a poster for the NHTRC and recommended that Kelly call the hotline. Kelly had to leave, as her pimp had arranged for her to meet with a client that evening, but asked the woman to call the NHTRC on her behalf. She also saved the NHTRC hotline number in her phone.

With the help of the NHTRC, the woman connected with a local service provider to make a plan for the evening and coordinate emergency shelter in case Kelly needed a safe place to stay that night. Kelly called the hotline later that evening; because her pimp was nearby, she was unable to speak for very long, but she gave permission for law enforcement to be involved in helping her leave. Early the next morning, law enforcement helped Kelly safely leave the hotel and connect with a service provider. Kelly is currently receiving services and helping law enforcement to pursue a case against her pimp.

to the NHTRC. In 2011, the NHTRC hotline answered a total of 19,427 calls and connected 2,945 potential victims of human trafficking to services and support.[12]

The California Attorney General's Office and other local, state, and federal agencies and organizations have also posted information on their websites about the indicators or signs of human trafficking, such as signs of physical abuse or evidence of control. This information is made available to assist the public in identifying potential victims.

Arrest and Conviction Records

California Penal Code 236.1

Human trafficking became a separate reportable crime under California Penal Code § 236.1 in January 2006 and is just one of the many criminal statutes available to law enforcement to prosecute conduct associated with human trafficking. The California Department of Justice, Division of Criminal Justice Information Systems (CJIS), collects data on both arrest and case dispositions on charges under § 236.1. Table 1 shows the number of arrests and convictions reported to CJIS under § 236.1 from January 1, 2007 to September 30, 2012.[13] Because conviction records relate back to the date of arrest regardless of the year of conviction, it is likely that future convictions will increase the number of convictions reported for earlier years.

Table 1

Number of Arrests and Convictions in California Under § 236.1 (Human Trafficking)

Year	Number of Arrests	Number of Convictions
2007	33	10
2008	34	18
2009	52	19
2010	76	17
2011	133	28
2012 (through 9/30/12)	113	21
Total	**441**	**113**

Between January 1, 2007 and September 30, 2012, CJIS reports a total of 441 arrests and 113 convictions for human trafficking in California under § 236.1. According to the CJIS records, § 236.1 convictions have been reported in the following counties: Alameda, Los Angeles, Monterey, Riverside, Sacramento, San Diego, San Francisco, Santa Barbara, and Santa Clara. Fifty-two convictions, representing 46% of the total convictions between January 1, 2007 and September 30, 2012, were from Alameda County.

As Table 1 indicates, the number of arrests and convictions under § 236.1 has been steadily growing during this time. Indeed, through the first three quarters of 2012, human trafficking arrests are above the roughly 100 expected at this point in the year if 2012 merely kept pace with 2011. Similarly, convictions are on pace with 2011 numbers, and given the likelihood of 2012 arrests leading to convictions in 2013, convictions can be expected to increase further in the coming months.

Other Statutes

Although the use of § 236.1 to charge and prosecute human trafficking cases is steadily increasing, § 236.1 records alone do not capture all potential human trafficking cases prosecuted in California. Indeed, members of the Work Group noted that the majority of human trafficking cases are charged and prosecuted using alternative penal code sections. For example, in the context of sex trafficking, California's pimping and pandering laws sometimes allow for longer sentences than do human trafficking laws.[14] Pimping and pandering prosecutions require proof of fewer legal elements than human trafficking, making the likelihood of conviction greater.[15] In addition, whereas a human trafficking conviction is eligible for probation, pimping and pandering convictions are not.[16]

Table 2 shows the number of arrests and convictions in California from January 1, 2007 to September 30, 2012 under selected sections of the penal code, some of which may be human trafficking cases. Given the greater volume of cases prosecuted under these statutes, the number of human trafficking convictions under § 236.1 may be dwarfed by potential human trafficking cases prosecuted under different, and potentially more advantageous, sections of the penal code.

Table 2

Number of Convictions in California
Under Selected Sections of the California Penal Code

Year	§ 266h (Pimping)	§ 266i (Pandering)	§ 266j (Procuring a minor for lewd or lascivious act	§ 267 (Abducting a minor for prostitution)	§ 311.4 (Use of minor for obscene matter)	§ 653.22(A) (Loitering with intent to commit prostitution)
2007	67	49	8	0	26	1469
2008	69	52	6	0	38	1,596
2009	59	43	3	0	39	1,675
2010	64	41	0	0	27	1,471
2011	71	35	6	0	31	1,582
2012 (Through 9/30/12)	74	43	2	1	33	1,088
Total	**404**	**263**	**25**	**1**	**194**	**8,881**

Convictions obtained by Alameda County's Human Exploitation and Trafficking (H.E.A.T.) Unit, a part of Alameda's H.E.A.T. Watch program, demonstrate the incomplete picture of human trafficking captured by convictions under § 236.1 alone. A key component of the H.E.A.T. Watch program is to vigorously prosecute traffickers and ensure that they receive the maximum sentence supported by the facts and the law. Between January 1, 2006 and August 31, 2012, the H.E.A.T. Unit obtained 179 convictions using a variety of sections of the penal code, including human trafficking, pimping and pandering, sexual assault, and kidnapping laws. Of these 179 convictions, only 52 convictions, or about 29%, were convictions under § 236.1. Such alternative prosecution strategies highlight the challenge, identified in the 2007 report, of tracking the full scope of law enforcement activity regarding these crimes.

Government Benefit Programs

Victims Served by the Trafficking and Crime Victims Assistance Program

Apart from law enforcement data, another source for measuring the scope of human trafficking in California is the Trafficking and Crime Victims Assistance Program (TCVAP), a state-funded

program that provides cash assistance and social services to eligible non-citizen victims of human trafficking, domestic violence, and other serious crimes in California. For a description of the TCVAP benefits available to trafficking victims, see Chapter 5. Two aid programs are available for trafficking victims: TCVAP Cash Assistance for single adults and families without children and TCVAP CalWORKs for families with children. The Refugee Programs Bureau of CDSS administers TCVAP Cash Assistance and TCVAP CalWORKs.

Table 3 lists the number of trafficking victims served by TCVAP Cash Assistance and TCVAP CalWORKs in the past two State fiscal years.

Table 3

Number of Trafficking Victims in California Served by TCVAP

Year	TCVAP Cash Assistance	TCVAP CalWORKs	Total
7/2010-6/2011	79	156	**235**
7/2011-6/2012	118	124	**242**

In the 2010-2011 fiscal year, a total of 235 trafficking victims were served by TCVAP Cash Assistance and TCVAP CalWORKs; increasing to 242 in the 2011-2012 fiscal year. Such benefits, while no doubt meaningful for the hundreds of beneficiaries, reach only a small portion of the 1,300 identified victims in California. It is not clear from available information whether this gap is due to victim ineligibility, lack of victim awareness of the available services, or other factors.

Certification and Eligibility Letters for Non-Citizen Human Trafficking Victims

Human trafficking victims who are not US citizens or lawful permanent residents may be eligible to receive federally-funded benefits and services provided for under the Trafficking Victims Protection Act of 2000 and the Trafficking Victims Protection Reauthorization Acts of 2003, 2005, and 2008. Foreign adult victims of trafficking receive an official letter of certification from the Office of Refugee Resettlement (ORR). Foreign victims of trafficking under the age of 18 do not need to be certified in order to receive services and benefits; instead the ORR issues a letter stating that the child is a victim of trafficking and is therefore eligible for benefits. A certification or eligibility letter grants the victim access to federal benefits and services to the same extent as refugees. For a description of these benefits and services, see Chapter 5.

Table 4 lists the number of adult certification letters and child eligibility letters issued to foreign national human trafficking victims in California.

Table 4

Certification and Eligibility Letters Issued to Foreign National Human Trafficking Victims in California

Federal Fiscal Year	Adult Certification Letter	Child Eligibility Letter	Total
10/2005 - 9/2006	27	2	**29**
10/2006 - 9/2007	66	4	**70**
10/2007 - 9/2008	57	2	**59**
10/2008 - 9/2009	32	11	**43**
10/2009 - 9/2010	57	17	**74**
10/2010 - 9/2011	88	24	**112**
10/2011 - 9/2012	79	0	**79**

Though the total number of certification letters has increased from 27 in 2006 to 79 in 2012, these numbers reflect only a small portion of the identified human trafficking victims in California. As with Table 3 above, it is not clear whether the small number of victims currently benefiting from this program stems from the eligibility criteria, lack of awareness, or other factors.

Maximizing California's Information Sharing Environment

State Threat Assessment System

As the data above indicate, there is currently no single agency or system with the primary responsibility for calculating California's exposure to human trafficking. Although the above-presented data is a helpful starting point for analyzing the scope of trafficking in California, it is important to seek new and better ways of measuring the problem.

California's State Threat Assessment System (STAS) fusion centers are currently working to build upon their already substantial operating capabilities and subject matter expertise within this domain and should be considered an essential partner with a capacity to support statewide research, information aggregation and analysis of human trafficking data. The STAS plays an important role in a number of areas that are essential to coordinated anti-trafficking efforts, from data collection to the collecting and sharing of best practices. The STAS is also instrumental in providing situational awareness, trend and strategic analysis, and case support to law enforcement in California.

The six centers comprising the STAS serve as an information sharing platform to support the robust analysis and dissemination of critical crime information and phenomena to local, state,

federal, tribal, and private sector partners. The STAS has four regional fusion centers in Los Angeles, Sacramento, San Diego, and San Francisco; an urban area fusion center in Orange County; and the State Threat Assessment Center, the State's designated fusion center.

The STAS has the capability to capture information on human trafficking activity across the state and to provide tactical analytical support for local investigations. Over the last few years, fusion centers have begun to capture data and Suspicious Activity Reports indicating human trafficking. The STAS is in a unique position in California's intelligence and data sharing environment to expand and enhance its effort at collaborating with the regional task forces in fighting human trafficking.

The STAS is already positioned to receive and analyze local, regional, statewide and national information, and law enforcement is already accustomed to receiving information from and providing information to the STAS members. Therefore, employing the STAS as a conduit to centralized reporting for human trafficking information is a smart and ready-made solution to the current lack of a single entity in California with the responsibility for comprehensive regional and statewide human trafficking information gathering and reporting.

Conclusion

It is clear from the data reported in this chapter that human trafficking is a substantial problem facing California. In just two years of reporting, California's nine regional anti-trafficking task forces initiated over 2,500 investigations, identified almost 1,300 victims of human trafficking, and arrested almost 1,800 individuals. In addition, convictions under the human trafficking statute have risen steadily in recent years. Although great strides have been made since the 2007 report in gathering and reporting data related to human trafficking additional information and analysis is still needed to understand how human trafficking in California differs from modern slavery worldwide.

Recommendations

1. **Gather Comprehensive Human Trafficking Information:** California needs a central clearinghouse to coordinate and compile human trafficking information from local, state, and federal law enforcement agencies and governments, as well as non-governmental organizations. It is important for any data collection effort to take special care to ensure that all partners share common working definitions of key terms, and to address the relative dearth of information about labor trafficking as compared to sex trafficking.
2. **Utilize California's Fusion Center System for Human Trafficking Information Sharing:** California lacks a centralized mechanism for the collection, analysis, and dissemination of human trafficking information. California's State Threat Assessment System (STAS) provides critical tactical and strategic intelligence about trends and emerging patterns relating to criminal activity across the state, and ensures that first responders and policy makers are provided with relevant and timely situational awareness, as well as information on traffickers' current tactics and techniques. In coordination with the Attorney General's Office, California's anti-trafficking task forces should partner with other local, state, and federal law enforcement and the STAS to improve California's human trafficking information sharing environment.

End Notes:

[1] International Labour Organization, "ILO Global Estimate of Forced Labour: Results and Methodology," (Geneva: International Labour Office, 2012), 13, accessed October 26, 2012, *http://ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf*.

[2] Bureau of Justice Statistics, "Characteristics of Suspected Human Trafficking Incidents, 2008-2010," (U.S. Department of Justice, April 2011), 3, accessed October 26, 2012, *http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf*.

[3] International Labour Organization, "ILO Global Estimate of Forced Labour: Results and Methodology," (Geneva: International Labour Office, 2012), 13, accessed October 26, 2012, *http://ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf*.

[4] U.S. Department of State, Trafficking in Persons Report, (June 2004), 23, accessed October 26, 2012, *http://state.gov/j/tip/rls/tiprpt/2004/*.

[5] Bureau of Justice Statistics, "Characteristics of Suspected Human Trafficking Incidents, 2008-2010," (U.S. Department of Justice, April 2011), 1, accessed October 26, 2012, *http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf*.

[6] Ibid.

[7] Ibid.

[8] Federal Bureau of Investigation, Criminal Justice Information Service Division, "Uniform Crime Reporting (UCR): State Program Bulletin," (U.S. Department of Justice, August 2011), 5, accessed October 26, 2012, *http://ag.nd.gov/BCI/UCR/StateBulletin/2011/08-11.pdf*.

[9] The Riverside County Anti-Trafficking Task Force uses a slightly different reporting period than the other eight task forces; data from the Riverside County Anti-Trafficking Task Force are grouped with the reporting quarter that most closely overlaps with its reporting period. Additionally, the California Emergency Management Agency's reporting database is a working document; these numbers are subject to change when new information from the anti-trafficking task forces' Progress Reports is entered.

[10] National Human Trafficking Resource Center, "Increasing Awareness and Engagement: Strengthening the National Response to Human Trafficking in the U.S.: Annual Report 2011," (2012), available online at: *http://polarisproject.org/resources/hotline-statistics*.

[11] National Human Trafficking Resource Center, "National Human Trafficking Resource Center (NHTRC) Data Breakdown: California State Report January 1st, 2011 to December 31st, 2011," (2012), available online at: *http://polarisproject.org/state-map/california*.

[12] National Human Trafficking Resource Center, "Increasing Awareness and Engagement: Strengthening the National Response to Human Trafficking in the U.S.: Annual Report 2011," (2012), available online at: *http://polarisproject.org/resources/hotline-statistics*.

[13] This information is reported to the California Department of Justice, Division of Criminal Justice Information Systems (CJIS) by each county in California; it is possible that there are additional arrests and convictions that have not been reported to CJIS by the counties.

[14] For example, the sentencing structure under California Penal Code § 236.1(a) (human trafficking of a person over the age of 18) allows for up to 5 years imprisonment, while the sentencing structure under California Penal Code § 266h (pimping involving a person engaged in prostitution who is older than 16) and California Penal Code § 266i (pandering involving a person engaged in prostitution who is older than 16) allow for up to 6 years imprisonment.

[15] California Penal Code §§ 236.1, 266h, 266i (2012).

[16] See California Penal Code § 1203.065(a) (2012) (indicating human trafficking is a probation eligible offense because it does not appear on the non-probation eligible offenses list).

4 Holding Traffickers Accountable: Law Enforcement Investigations & Prosecutions

"The time has come to harness the power of technology to go after those using it to enslave others."

California Attorney General Kamala D. Harris, September 20, 2011

As discussed in earlier chapters, human trafficking is often hidden in plain sight. Victims may appear at first glance to be willing prostitutes or legally-compensated laborers. Adding to the challenge, much of trafficking activity has moved online, providing further opportunities for traffickers to increase their reach, both in terms of recruiting victims through social media and finding clients through online - classified advertisements. Moreover, traffickers have substantial criminal resources at their disposal, including the networks of transnational and local street gangs working in collaboration. Traditional law enforcement tools should be supplemented with innovative investigative techniques to combat these emerging challenges.

This chapter describes two key challenges in the fight against human trafficking and the opportunities they present: the role of sophisticated, highly-funded criminal organizations in human trafficking, and traffickers' increasing use of technology. It also describes how law enforcement agencies can design a successful strategy to combat trafficking by organizing their departments to fit the unique characteristics of these cases.

The Role of Transnational and Local Street Gangs in Human Trafficking

Human trafficking is not confined to a single jurisdiction. As Chapter 1 discussed in detail, both local and transnational gangs are playing an increasing role in human trafficking. Attracted by high profits – an estimated $32 billion per year world wide – and low risk – a relatively low conviction rate and short time of incarceration – gangs are coming to recognize that the sex trade and prostitution provide a lower penal and detection-risk alternative to drug or weapons trafficking.[1] Indeed, human trafficking is the fastest growing criminal enterprise in the 21st century.[2]

It is the duty of law enforcement to increase the risks traffickers face when they enslave people by redoubling efforts to bring them to justice. To that end, cooperation across sectors

of government and across jurisdictions is essential. Successful investigations and prosecutions in California often involve one common element: law enforcement partnerships spanning across jurisdictional lines.

To give just two examples, in the Oceanside Crips Enterprise case discussed in Chapter 1, the charges came out of an 18-month investigation spearheaded by U.S. Immigration and Customs Enforcement (ICE), the Federal Bureau of Investigation (FBI), the Oceanside Police Department, the San Diego County Sheriff's Department, and the Escondido Police Department.[3] Similarly, a 2010 case against a Fremont woman who forced a victim to work as an unpaid domestic servant was a joint effort between the FBI and ICE Homeland Security Investigations, and arose from a referral by the Fremont Police Department in coordination with the San Jose/South Bay Human Trafficking Task Force.[4]

Cooperation is especially crucial in the context of transnational gangs. As Chapter 2 described, California has begun to forge cross-border partnerships with Mexican authorities to track transnational gangs' criminal activity and combat their multi-jurisdictional crimes. These efforts are just the first steps in protecting victims and the public from these criminal enterprises. Maintaining and strengthening these partnerships is vital to disrupting a substantial revenue source for transnational organized crime.

Traffickers' Use of Technology

As described in Chapter 1, traffickers use technology to recruit victims, find clients, and avoid law enforcement detection. This is an important and daunting challenge for law enforcement not addressed in the 2007 report. A report released by the University of Southern California (USC) Annenberg School for Communication and Journalism entitled *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds* describes how the efficiency and anonymity of social networking sites and online classified sites facilitates human trafficking by connecting buyers and sellers at an unprecedented scale while minimizing risk.[5] Similarly, *The National Strategy for Child Exploitation Prevention and Interdiction*, issued by the U.S. Department of Justice, notes that the profitability of child prostitutes has increased because online advertising and Internet-enabled cell phones enable traffickers and pimps to reach a larger client base; social networking and classifieds websites are now representing an increasing portion of the sale of victims.[6] In the context of sex trafficking, it also makes the transaction simpler and less immediately visible for "johns," who can view several available prostitutes online and receive "house calls" rather than having to appear in person to complete the transaction. Technology thus improves both sides of the risk/reward scale from the perspective of both traffickers and customers: it makes their activity harder to track while simultaneously generating more profit.

Opportunities for Law Enforcement to Leverage Technology

Nonetheless, technology offers just as many opportunities for law enforcement as it does challenges, and law enforcement should exploit available technology to its investigative advantage.

While technology is being used to perpetrate human trafficking, that same technology can provide a digital trail. This digital footprint offers greater potential opportunity for tracking traffickers' and johns' communications, movements, and transactions than their previous offline cash transactions, if law enforcement can find ways to quickly and efficiently process the volumes of data available. The USC Annenberg report identifies several areas in which law enforcement can build evidence by aggregating the public data available on the Internet. One of its highlighted case studies focused on Twitter, suggesting that, with the help of computational linguistics – a hybrid field of linguistics and computer science – and a human trafficking expert familiar with the nuanced terms of the traffickers' trade, law enforcement could focus on accounts with unusually high numbers of posts using suspect words.[7] Aggregating data by computer would allow law enforcement to identify patterns much more quickly than an individual could do alone. The study also suggests that automated web-crawling can flag suspect ads for review more quickly than a human moderator.[8] Furthermore, law enforcement could enlist the help of the public. By using crowdsourcing technology to consolidate tips from non-law enforcement sources, law enforcement could discover cases that individual investigation alone would not have identified.[9]

In addition, new imaging technology can alert law enforcement to patterns that traditional text-based data searches are unable to reach. Microsoft's PhotoDNA fingerprinting technology – free to law enforcement – matches images of victims posted online and integrates them with the Child Exploitation Tracking System, helping law enforcement to quickly identify and rescue victims without duplicating efforts. Similarly, facial recognition technology can allow law enforcement to search for a victim's or trafficker's face across multiple images posted online or in various databases.

Several efforts have developed across sectors to leverage this and other technology. For example, the USC Annenberg Center on Communications Leadership and Policy (CCLP) has developed prototype software, focusing on the detection of online sex trafficking of juveniles. (The report cautions, however, that law enforcement should temper their use of various technological tools by evaluating whether these tools have the potential to cause victims inadvertent harm and encroach on rights of privacy, security, and freedom of expression.) In addition, some technology companies are also contributing to law enforcement efforts by helping streamline access to and use of the company's own technology and online information. Facebook, for instance, has created a set of guidelines for law enforcement agencies if they wish to access information maintained by Facebook. Law enforcement agents must explicitly state which of three types of requests they intend to make: preservation, formal legal, or an emergency request. Each of these requests requires agents to provide specific information. Facebook explains the process by which it evaluates each request and what data can or will be released and the legal process required.[10] Setting such guidelines not only creates transparency for Facebook users, but it helps law enforcement by explaining the type of specificity that is needed for Facebook to comply with their requests efficiently. The Facebook Law Enforcement Guidelines can be accessed at*, http://facebook.com/safety/groups/law/guidelines.*

Despite this and other progress, the technology gap between traffickers and law enforcement remains. Further research and development efforts are necessary to close this gap. In November 2011, USC's Annenberg CCLP hosted a summit attended by representatives from the Attorney General's Office, the U.S. Department of Justice, social media companies, and NGOs to explore a governmental and industry partnership to leverage technology and information. The primary purpose of the meeting was to explore how technology, including social networking sites, online classifieds, cell phones, and other tools, can be used to help combat human trafficking. Participants who later convened for the Work Group discussed several focus areas for further research. Some of these areas include investigating the role mobile phones play in trafficking labor from one country to another, identifying search terms that johns use online, and creating an online "hub" where law enforcement can share real-time information and best practices. Members of law enforcement have intimated that it is essential for officers to have access to tools to quickly and efficiently *use* information, rather than simply gain access to volumes of data that is not useful without a significant time investment before that data is useful.

Another avenue for assistance is the Attorney General's eCrime Unit. The eCrime Unit in the California Department of Justice focuses on crimes that include a substantial technology component, including online child pornography networks and individuals who commit sex crimes against children using the Internet or social media. Formed in 2011, the eCrime Unit investigates and prosecutes cybercrime, identity theft, computer theft, intellectual property theft, and other technology crimes. The eCrime Unit has a role to play in assisting local law enforcement with combating human trafficking – a crime that crosses county, state, and international borders and involves technology in ways that require a sophisticated response. Just as the California Department of Justice provides investigative skills and forensic resources to assist local law enforcement in combating organized transnational gangs, the eCrime Unit can play a role in helping local law enforcement combat human trafficking online. By partnering with technology companies and academic institutions, the eCrime Unit can help to develop tools to ensure that local law enforcement can focus limited resources to effectively target human trafficking online.

Of course, an important piece of any effort to address crime includes not just investigating and prosecuting the crimes that are already in progress, but also deterring and preventing crimes from occurring in the first place. To that end, Chapter 6 includes additional discussion of the ways in which technology companies and nonprofits are helping to develop strategies to disrupt and thwart the online marketplace for trafficking.

Designing a Successful Strategy to Combat Human Trafficking

Generating Leads – Multidisciplinary Cooperation

Human trafficking involves a wide variety of clandestine activities, from sex trafficking to forced labor to domestic servitude. It is therefore recommended that various divisions in a law enforcement agency share in the responsibility of developing leads. Gang units may investigate a drug trafficking case only to discover that the gang is also trafficking human

beings. Vice units, which are customarily tasked with investigating prostitution cases, may approach a case as prostitution only to discover it is sex trafficking. Units specializing in white-collar crimes may come across a forced labor situation while investigating suspicious business activity, unusual financial transactions, or money laundering. What initially appears as a migrant smuggling operation may evolve into a debt bondage case demanding further investigation. The problem is too widespread and takes too many forms for the responsibility of identification to fall upon any one unit. To effectively address trafficking in all its forms demands a comprehensive and unified approach. It requires a baseline level of knowledge across all units of a given department so that any peace officer is positioned to identify a possible human trafficking enterprise. It also, as described above, requires collaboration across jurisdictional lines of criminal law enforcement agencies in different nations, states, and counties.

Similarly, government agencies outside of criminal law enforcement have frequent access to valuable intelligence that can be leveraged in the fight against slavery. There are many points of contact between businesses and regulatory agencies at the state and local level, including the Labor Commissioner, the Division of Labor Standards Enforcement, the Board of Equalization, and city attorney and county counsels' offices. Civil regulatory agencies have an opportunity to identify human trafficking; for example, an agency performing code enforcement might encounter suspicious behavior that yields a new criminal investigative lead. Like their criminal law enforcement counterparts, these government entities need training to identify potential signs of trafficking, and various government agencies need a clearinghouse for investigative information arising from the underground economy to ensure information related to human trafficking is identified, shared, and prioritized.

Finally, because trafficked victims may encounter numerous members of the community outside government entirely, raising awareness in the private and nonprofit communities will both help generate leads for law enforcement and deter businesses from engaging in or supporting these crimes in the first place. For example, cooperation with community groups and first identifiers increases the likelihood that victims will come forward and cooperate. Chapter 5 describes the importance of training both government and non-government personnel to recognize the signs of human trafficking, and lists some groups' existing efforts to raise awareness. In addition, educating members of the business community about human trafficking can help them monitor their own supply chains. Chapter 6 discusses the importance of these efforts to decrease demand for human trafficking by deterring manufacturers and retailers from passively benefitting from these criminal enterprises.

Pursuing Leads – The Need for Expertise

Although *all* members of a law enforcement agency should keep watch for human trafficking leads and obtain baseline training in identifying potential victims, personnel with comparatively little expertise in the area may benefit from having specialists or a task force to whom they can refer a potential case. That is where a human trafficking task force and a vertical prosecution team are very effective.

First Identifiers Are Not Always Law Enforcement

In 2006, a Peruvian woman came to the Bay Area on a three-month visitor's visa to work as a nanny. The trafficker, a real estate agent in Walnut Creek, promised the victim her own bedroom in a large house and, after the cost of her airline ticket was deducted, $600 per month. Instead, she received no wages and was forced to work seven days a week and provide care for three children in a Walnut Creek apartment. The trafficker rationed her food, cut her off from Spanish-speaking media, and confiscated her visa, passport, and Peruvian identification. After nearly two years of enslavement, the woman escaped with help from acquaintances and people she met at the local elementary school. The trafficker was sentenced to five years in prison.[11]

A human trafficking task force may be comprised of law enforcement specializing in human trafficking investigations and community partners that provide victim care. California's nine regional task forces are described in Chapter 2.

Vertical prosecution units typically involve one or more attorneys who handle cases of one particular type from arraignment to conviction, and sometimes even partner with law enforcement at the investigation stage. (For example, many departments already have designated vertical prosecution units for domestic violence cases and child abuse cases.) A vertical prosecution unit specializing in human trafficking would help staff build long-term partnerships with other agencies and with the community at large. For example, some prosecutors have built close enough relationships with law enforcement agencies to get involved even before the completion of the investigation stage. This early involvement allows prosecutors to give valuable feedback on the key evidence that law enforcement should seek to collect. Similarly, prosecutors who repeatedly work on these cases are more likely to develop ongoing partnerships with the community organizations that provide victim services and to have a working familiarity with how to connect victims to appropriate resources.

Integrating a multidisciplinary investigative approach with task forces and vertical prosecution units allows law enforcement to achieve an investigative scope that is broader than what a specialized investigative team might achieve on its own. And at the same time, the task force and vertical prosecution model allows a few repeat players to build expertise in human trafficking investigation and prosecution. By combining a multidisciplinary approach with a task force/vertical prosecution referral system, where possible, a law enforcement agency can generate leads from a broad base of sources while benefiting from the expertise of a few key specialists.

In practice, a task force and vertical prosecution team could interact with a multidisciplinary investigation in several different ways. For instance, if a case involves multiple components (for example, a gang investigation that involves a drug-trafficking component, as well as

a sex trafficking component), then the original investigators may choose to retain the case while bringing in a human trafficking task force to participate as one part of the investigation. If investigators in a unit that typically does not encounter human trafficking scenarios unexpectedly come across a rescue situation, a task force or vertical prosecution team may come in after the first responders have already concluded an on-the-spot investigation and directed victims to appropriate services. In some cases, the victim will escape on his or her own, and contact a shelter or a non-profit organization that will then refer the case situation to a partnering task force. Because it may take time, even for properly trained law enforcement and victim service providers, to distinguish between coercive or voluntary situations, there is no one right moment at which a task force or a vertical prosecution team may become involved in an investigation.

Maintaining a Victim-Centered Approach

The above-described model allows law enforcement to investigate and prosecute human trafficking cases while maintaining a victim-centered approach, which is key to successfully prosecuting these crimes. As the 2007 report also acknowledged, it is crucial for law enforcement – not just community groups – to identify and treat victims of human trafficking as victims, rather than mistakenly labeling them as criminals. Such an approach can admittedly be difficult to execute in practice. For example, even with a sincere desire to help victims, many peace officers have commented that it can be difficult to distinguish between voluntary participants and coerced victims. For example, a forced labor victim may feel honor-bound to insist that he or she is working voluntarily, even if it is for below minimum wage (or for nothing at all). Moments of uncertainty may also occur when illegal immigration and prostitution can be confused with human trafficking. A victim of sex trafficking may distrust law enforcement, fear retribution, or suffer from psychological manipulation that causes her to divert blame away from the perpetrator.

Investigating human trafficking cases outside the vice unit can improve outcomes for victims. Traditionally, vice units are charged with investigating and working with prosecutors to charge prostitution cases. As a result, officers in those units often experience difficulty viewing someone charged with prostitution as also a potential victim of human trafficking. Unless we disrupt this pattern, it can lead to law enforcement mistakenly viewing a trafficking victim as a criminal. To draw on all skill sets needed to effectively identify victims and disrupt increasingly sophisticated, organized criminal networks engaged in trafficking, agencies should consider handling human trafficking cases outside of routine vice operations.

Designating a specialized team (or in small departments, a specialized individual) to handle human trafficking cases maximizes law enforcement's ability to follow a victim-centered approach. Specialization makes it easier for a team to learn how to identify the difference between coercive trafficking situations and voluntary illegal activity. Seasoned human trafficking teams may change initial interrogation tactics, so that investigators do not inadvertently alienate individuals who may turn out to be victims upon further investigation. Subject-specific trainings can help equip officers with key questions to ask or indicators to recognize without establishing an an-

tagonistic relationship with the potential victim. A victim-centered approach may also require sensitivity regarding how law enforcement treats victims after identifying them. For example, because victims may not understand the distinction between being placed under custody for their own protection and being arrested for wrongdoing, it is recommended that law enforcement take special caution to separate victims from the criminal context where possible.

Most importantly, specialized teams can develop relationships and build trust with victim service providers and partner with them to encourage victims to cooperate willingly in the investigation and prosecution of traffickers. Law enforcement officers are improving their skills at connecting victims with help as soon as they are identified. Some departments and all of the regional task forces have established strong working relationships with community partners that provide victim services. Some law enforcement agencies aim to arrange for the victim's first significant post-rescue encounter to be with a professional trained to provide for the victim's needs rather than a member of law enforcement. Many law enforcement agencies have already established relationships with community partners and regularly bring them in as part of the team when conducting a rescue operation.

Victim-centered investigation strategies also respect the space and time needed for victims to recover from the situations they have endured. Investigators and prosecutors should approach any interview with a victim with sensitivity. Victims often feel anxious about confronting their former exploiters, going to court, testifying, or even meeting a prosecutor. In order to help alleviate victim anxiety, some prosecutor's offices designate a victim advocate to accompany the victim during interviews. Consistent with the California Victims' Bill of Rights, prosecutors and community partners working with victims should maintain regular lines of communication (for example, sharing court dates, giving updates on the victim's concerns and well-being, and explaining the prosecution process).

Putting the victim first not only benefits the victim, it also improves the chances of a successful prosecution. As many law enforcement officers have reported, trafficking victims are often unwilling to serve as witnesses for the prosecution. The reasons are many. They may distrust the government, be fearful of retaliation against themselves or their families, or be wary of placing themselves under legal scrutiny when they have participated in illegal acts (albeit by coercion). Psychologically groomed to tolerate unacceptable behavior, they may not fully understand that the perpetrators did something wrong. Or if they do understand that a wrong was done to them, they may wish to distance themselves from it and move on with their lives.

Bringing in victim services early on dramatically improves the chances that the victim will cooperate with the prosecution. One investigator even surmised that, without his task force's partnership with NGOs and victim service providers, few victims would willingly participate in prosecution proceedings. Without organizations that provide specialized services, victims would have to turn to homeless shelters or return to isolating environments where they could become re-victimized or a target for retaliation. Early encounters with community partners

(as opposed to law enforcement) can also build crucial early credibility for the government in establishing itself as an ally rather than a foe. Ongoing intervention by organizations that provide for physical needs and offer counseling and positive integration into the community can help victims break free of their perceived dependence on the perpetrator. With time and distance away from their traffickers, victims are more likely to see through the trafficker's psychological manipulations and realize that they do not owe any loyalty to their subjugators.

Some NGOs and prosecutors involved in this post-rescue process have adopted the practice of waiting until the victim is ready to cooperate before involving him or her in the prosecution of the trafficking case. Anecdotally, investigators report that the recovery period may vary widely, but following this practice yields prosecutorial benefits. Cooperating complainants acting on their own volition are more likely to be reliable witnesses than those subpoenaed against their will. Their willingness to testify on their own accord can also shield against defense accusations of coaching or prosecutorial pressure.

Conclusion

Human trafficking, a rapidly growing and evolving criminal enterprise, presents unique challenges for law enforcement. Traffickers are often participants in widespread criminal networks of local and transnational gangs, and they are also using technology to increase their reach and profit potential while minimizing their exposure to criminal prosecution. However, that same technology can provide a digital trail - a valuable investigative tool if law enforcement can quickly and efficiently monitor, collect, and analyze online data and activities. Similarly, law enforcement can leverage its own available network of government agencies – both within California and across state and national borders – as well as private and nonprofit groups, to gather useful intelligence and successfully prosecute traffickers. Law enforcement and prosecutors should organize their efforts to take advantage of a range of vigilant sources to generate leads, on the one hand, and specialists with expertise in human trafficking, on the other. Finally, as part of its overall mission, law enforcement should adopt a victim-centered approach that ensures victims have access to needed aid so that they can rebuild their lives and help bring their traffickers to justice.

Recommendations

1. **Tailor Law Enforcement and Prosecution Operations to Handle Human Trafficking Cases:** Human trafficking is a serious crime that involves increasingly sophisticated criminal actors and requires an equally sophisticated and coordinated law enforcement response:

   a. **Cross-Unit Training:** Baseline human trafficking training can help every peace officer within a law enforcement agency, as well as other government entities outside the criminal law enforcement context, learn how to identify instances of human trafficking that they may encounter in the course of their duties.

   b. **Cross-Unit Coordination:** Human traffickers often engage in a variety of other criminal activity such as drug dealing or money laundering, which may be investigated primarily by specialized law enforcement units. Various units within a law enforcement agency need to collaborate to identify and investigate human trafficking. For example, a gang unit may investigate a drug trafficking case only to discover that the gang is also trafficking human beings. Likewise, a unit that specializes in white-collar crime may come across a forced labor situation while investigating suspicious business activity or money laundering.

   c. **Specialized Expertise:** Appoint an individual (or a team) to specialize in human trafficking and handle referrals from other units. Traditionally, vice units are charged with investigating and working with prosecutors to charge commercial sex cases. However, to draw on all skill sets needed to effectively identify victims and disrupt increasingly sophisticated, organized criminal networks engaged in trafficking, agencies should consider handling human trafficking cases outside of routine vice operations. It is also recommended that, where possible, a vertical prosecution model be employed.

   d. **Leverage External Partnerships:** By working closely with local community groups and victim service providers, law enforcement agencies can draw from their expertise. This is especially important for smaller departments that have limited resources to form a separate human trafficking unit and those located in parts of the state that do not have a regional task force. Regular interactions and partnerships with victim service providers can prove useful at every stage of an investigation or prosecution. It is recommended that law enforcement and prosecutors invite these partners to participate in any encounter with a victim – from the first post-rescue meeting to interviews and court appearances.

2. **Leverage Technology to Combat Trafficking:** Law enforcement has not harnessed technology as effectively as criminal traffickers. To address that situation, at least two efforts are recommended:

    a. **Track How Traffickers Operate:** Law enforcement training is needed on how traffickers use technology to recruit victims and avoid law enforcement detection, with particular attention given to online gaming communities, social networking sites, online classifieds, job recruitment sites, and the use of mobile phones.

    b. **Exploit Technology for Investigations:** Through collaboration, law enforcement, non-governmental organizations, technology companies, and academia can provide technical assistance and training for law enforcement on the new technologies that law enforcement can use to improve investigation tactics.

3. **Leverage Cross-Border Partnerships to Fight Trafficking on Multiple Fronts:** To combat dangerous criminal partnerships between local and transnational gangs, the Attorney General's Office should collaborate with other border states, the federal government, and Mexican authorities to share information and best practices for law enforcement in both countries to recognize common signs and patterns of human trafficking and provide support and services to victims.

End Notes:

[1] Ami Carpenter and Stacey Cooper, "Transnational Gang Activity in the San Diego/Tijuana Border Region. Final Report of the Gangs: Regional Activity and Presence (GRPA) Project," University of San Diego, (forthcoming).

[2] U.S. Department of Health & Human Services, "Fact Sheet: HHS Fights to Stem Human Trafficking," news release, August 15, 2006, *http://hhs.gov/news/factsheet/humantrafficking.html*; "Conference puts focus on human trafficking, fastest growing criminal industry," United Nations High Commissioner for Refugees, October 11, 2010, *http://unhcr.org/4cb315c96.html*.

[3] Federal Bureau of Investigation, "Members and Associates of Oceanside Crip Street Gangs and One Hotel Charged with Racketeering Conspiracy Relating to Prostitution of Minors and Adults and Other Crimes and Criminal Forfeiture," news release, April 18, 2011, *http://fbi.gov/sandiego/press-releases/2011/sd041811.htm*.

[4] Federal Bureau of Investigation, "California Woman Sentenced to More Than Three Years in Prison for Human Trafficking Charge, Daughter, Son-In-Law Sentenced on Immigration Charges" news release, November 17, 2010, *http://fbi.gov/sanfrancisco/press-releases/2010/sf111710.htm*.

[5] Mark Latonero, "Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds," (USC Annenberg School for Communication & Journalism, Center on Communication Leadership & Policy, September 2011), 17-19, accessed October 26, 2012, *https://technologyandtrafficking.usc.edu/files/2011/09/Human Trafficking_FINAL.pdf*.

[6] U.S. Department of Justice, Project Safe Childhood, "The National Strategy for Child Exploitation Prevention and Interdiction," (August 2010), 32-33, accessed October 26, 2012, *http://justice.gov/psc/docs/natstrategyreport.pdf*.

[7] Mark Latonero, "Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds," (USC Annenberg School for Communication & Journalism, Center on Communication Leadership & Policy, September 2011), 28, accessed October 26, 2012, *https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking_FINAL.pdf*.

[8] Ibid., 29-30.

[9] Ibid., 32-33.

[10] "Information for Law Enforcement," Facebook, accessed October 26, 2012, *http://facebook.com/safety/groups/law/guidelines*.

[11] U.S. Department of State, "Walnut Creek Woman Found Guilty of Trafficking Nanny from Peru," news release, October 9, 2009, *http://www.state.gov/m/ds/rls/130528.htm*; Henry K. Lee, "Woman Gets 5 Years for Enslaving Nanny," San Francisco Chronicle, April 15, 2010, *http://sfgate.com/crime/article/Woman-gets-5-years-for-enslaving-nanny-3267463.php*.

5 Victim Centered Approach: Protecting & Assisting Victims of Human Trafficking

"I freed a thousand slaves. I could have freed a thousand more if only they knew they were slaves."

Harriet Tubman (1822-1913)

The nature of human trafficking presents significant obstacles to those who seek to protect and assist victims. As noted in earlier chapters of this report, identifying the crime can be difficult because traffickers often isolate victims from their families, communities, and the public. Victims are sometimes kept locked behind closed doors.

Victims of human trafficking can also be hidden in plain sight. They may have a seemingly legal job at a legitimate hotel, factory, or restaurant, but are actually working for little or no money.

To maintain control, traffickers feed and exploit a victim's fears, using violence or threats of violence against a victim and his or her loved ones. Traffickers may tell victims that if they attempt to escape or seek help from the authorities, they will be imprisoned or deported. Traffickers may also take advantage of social and cultural stigma that results from the victimization by threatening to expose the circumstances to the victims' family and friends.

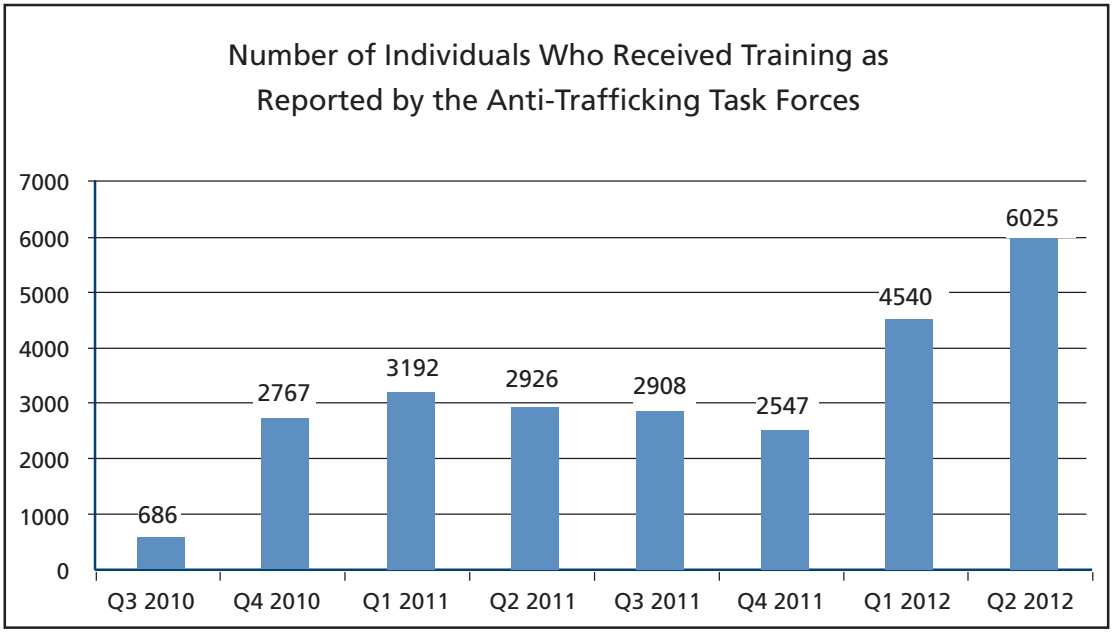
Those who suffer from labor or sexual exploitation are not likely to self-identify or report themselves as victims of human trafficking. Even when trafficking victims recognize their situation, they may not know what services are available or how to reach out for help.

Building on the discussion in Chapter 4 of the ways in which law enforcement agencies can work with each other, other government agencies, and victim service providers to bring traffickers to justice, this chapter examines some of the current efforts in California to protect and assist victims of human trafficking.

Human Trafficking Training with a Victim-Centered Approach

The foundation for a victim-centered approach is appropriate training for law enforcement and other first responders in how to recognize and respond to incidents of human trafficking. The regional task forces funded by California Emergency Management Agency (Cal EMA) report quarterly on the number of individuals who receive human trafficking training through the task forces.[1] As shown in Chart 7, California's nine regional task forces have trained 25,591 law enforcement personnel, prosecutors, victim service providers, and other first responders between July 1, 2010 and June 30, 2012.

Chart 7



One reason why victim-centered training is important for law enforcement is because individuals who have been trafficked may not always be identified by law enforcement as victims. Human trafficking victims may be charged with prostitution in connection with their victimization, for example. In order to address this problem, the Legislature might consider additional legislation permitting human trafficking victims to seal and expunge records of a conviction that result from forced labor or services.

Training for First Responders, Health Care Professionals, and Non-Traditional First Identifiers

In addition to training law enforcement, the task forces and NGOs provide training on human trafficking to non-law enforcement first responders. Fire fighters, emergency medical professionals, and health care professionals are often in a unique position to encounter and identify

victims of trafficking. In emergencies, first responders may be given access to victims and locations that are not accessible to law enforcement. Health care professionals may encounter trafficking victims when they observe chronic or severe health problems; victims typically only receive care, if at all, when their condition becomes advanced. These professionals must have the necessary knowledge to identify the signs of human trafficking and to support their patient-victims' needs. Medical professionals are encouraged to report suspicious activity (though not required by law to do so), and the Legislature might consider legislation to make human trafficking a mandated reportable event for medical professionals.

The Work Group noted the need for additional training tailored for first responders and other health care professionals. Information is available, including an article to help nurses recognize the signs of trafficking[2] and a tool kit for health care providers produced by the Office of Refugee Resettlement that provides tips for identifying and helping victims of human trafficking, among other information.[3] Health care providers, academia, and the victim service community can work together to develop training that addresses how first responders and other health care professionals might identify potential human trafficking victims, determine victims' mental health and medical needs, and access available resources.

Beyond first responders and health care professionals, a broad range of community members are in a position to encounter potential human trafficking victims. Training programs are also capitalizing on opportunities to train these non-traditional first identifiers. For example, as noted in Chapter 2, Airline Ambassadors International (AAI) has offered training for airline and airport support personnel after identifying human trafficking on four separate flights in 2009. In another example, the nonprofit Truckers Against Trafficking developed a website, mobile application, and hotline to help members of the trucking and travel plaza industries to identify and report instances of human trafficking. (See Chapter 6) Another potentially fruitful set of first identifiers are investigators who work for administrative agencies that inspect for health, labor, or tax code violations. These investigators should also receive training on how to identify potential instances of human trafficking.

Other potential first identifiers targeted by the National Human Trafficking Resource Center (NHTRC) for awareness and training include hotel/motel staff, labor rights organizations, restaurant associations, neighborhood associations, and faith-based organizations. For example, the NHTRC hotline identified taxi drivers and educational professionals as sources of valuable information regarding potential trafficking cases.[4] In the case of taxi drivers, Polaris Project, which runs the NHTRC hotline, found that taxi services are utilized by traffickers as a means of transporting victims to and from locations where sex or labor trafficking occurs. As a result, taxi drivers are ideal first identifiers because they often have an exact description and location of a victim.

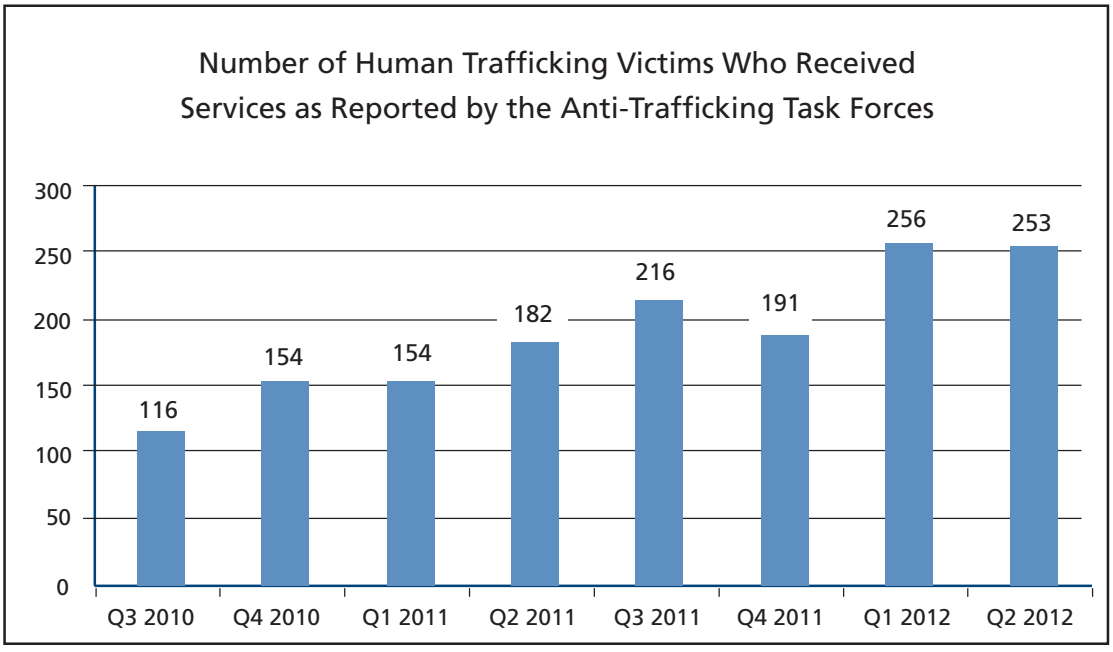
For a list of questions to help identify the signs of a human trafficking victim, see Appendix F.

Comprehensive Services for Victims

NGOs throughout California provide a range of services to victims of human trafficking. Once free from their exploiters, victims often require comprehensive services, starting with immediate safety, health, and housing needs. Victims' medical needs may include treatment for injuries resulting from beatings or torture, treatment for malnourishment, treatment for sexually transmitted diseases, or substance abuse treatment. Trafficking victims' mental health needs include counseling, treatment and recovery services for post-traumatic stress disorder, depression, anxiety, self-blame, suicidal thoughts or attempts, or other mental trauma. Victims may also have a need for legal services, witness protection, and interpreters. Finally, trafficking victims may need education and life skills training. (For a list of NGOs in California, see Appendix D.)

California's nine regional task forces have played an important role in connecting victims of human trafficking to services. Services provided to trafficked victims include: shelter, intensive case management, safety planning, crisis intervention, victim advocacy, interpretive services, mental health treatment, support in family reunification and/or preservation, medical care, dental care, substance abuse treatment, assistance with educational needs, life skills training, transportation, and assistance with obtaining visas, among other services. The task forces report quarterly to Cal EMA on progress toward meeting the goal of providing comprehensive services to human trafficking victims.[5] As Chart 8 shows, the task forces have connected 1,522 victims with services between July 1, 2010 and June 30, 2012. As this number is larger than the 1,277 victims identified by the task forces during this same period (see Chapter 3), it is likely that some individual victims are counted more than once when separate organizations provide services to the same victim.

Chart 8



Members of the Work Group reported that they have seen an increase in trafficking victims, both male and female, and that as a result, there is a continuing need for shelter and support services for trafficking victims of both genders. Safe, long-term shelter is particularly scarce for male and underage sex trafficking victims. Minors who are sex trafficked are often temporarily housed in the juvenile justice system or in group or foster homes because of a lack of safe housing alternatives. These facilities typically do not have the resources young trafficking victims need to recover. Because of this continuing lack of shelter and support services, leaders and policy makers in California should explore public and private options for creating long-term centers that provide housing and comprehensive services tailored to meet the needs of trafficking victims, especially male victims and victims under age 18.

The provision of legal services for victims of human trafficking has not kept up with the demand for assistance. The 2007 report recommended efforts to encourage attorneys to obtain training to work on a *pro bono* basis with organizations that serve human trafficking victims. Organizations across the state responded by conducting training for attorneys on the need for legal services for human trafficking victims, including the Asian Pacific Islander Legal Outreach (San Francisco) and the Legal Aid Foundation (Los Angeles). Strive2Free, a Sacramento-based non-profit, was formed by legal professionals to learn more about human trafficking and provide legal services for victims. The Coalition to Abolish Slavery and Trafficking (CAST) has also developed an 8-hour *pro bono* training and resource manual for attorneys and provides training for volunteer attorneys twice a year in the Los Angeles area. Despite these efforts, human trafficking victims' legal needs are still not adequately met. The legal community in California (e.g., bar associations, legal assistance organizations, and pro bono attorneys) should create regional and statewide networks of legal service providers who are proficient in services, benefits, and immigration options for human trafficking victims and who can train and mentor other legal service providers to assist NGOs and victims. These networks should examine the need for legal services in rural and underserved populations of California and establish ways to help meet those needs. For example, members of the Work Group identified Native American and LGBT populations, among others, as underserved groups in need of services related to human trafficking.

Finally, members of the Work Group expressed concern that a standardized training program for human trafficking caseworker confidentiality privilege does not exist in California. The California Evidence Code provides that a trafficking victim has a privilege to refuse to disclose and to prevent others from disclosing a confidential communication between the victim and a human trafficking caseworker. Victims are more likely to interact freely and openly with caseworkers who are able to assure them that the information they are sharing is confidential. One way that a qualified caseworker could be classified as a "human trafficking caseworker" and thus offer the benefits of confidential communication as provided for by the California Evidence Code is through specialized training in the counseling of human trafficking victims.[7] However, a standardized training program for caseworker confidentiality is not currently available. A standardized training program would aid human trafficking caseworkers in offering the benefits of privileged communication to the victims they serve.

Crime Victim and Witness Assistance Programs Available for Human Trafficking Victims

There are many crime and witness assistance programs available for victims of human trafficking in California. However, members of the Work Group reported that human trafficking victims and victim service organizations are not always connected with these county, health and social service assistance programs. Often this was due to a lack of understanding and awareness of the benefits and services available to assist trafficking victims. County victim assistance, and health and social service agencies should be included in local or regional human trafficking coalitions to coordinate outreach and education about the resources available for human trafficking victims in the region, and how victims can access those resources.

Trafficking Victims Protection Act and Trafficking Victims Protection Reauthorization Act

Human trafficking victims who are not United States citizens or lawful permanent residents may be eligible to receive federally-funded benefits and services provided for under the Trafficking Victims Protection Act of 2000 (TVPA) and the Trafficking Victims Protection Reauthorization Acts of 2003, 2005, and 2008.[8] (See Table 4, "Certification and Eligibility Letters Issued to Foreign Human Trafficking Victims in California," for the number of trafficking victims in California receiving benefits under this program from 2006 to 2011.) The TVPA makes housing, health care, education, job training, and other federally funded social services programs available to assist trafficking victims.

In passing the TVPA, Congress created the "T" and "U" nonimmigrant status, also known as T visa and the U visa.[9] The T Visa provides immigration protection to victims of trafficking; the U Visa provides immigration protection to crime victims who have suffered substantial mental or physical abuse as a result of the qualifying crime. These visas allow victims to remain in the United States to assist law enforcement agencies in an investigation or prosecution of human trafficking or other qualifying crime.

Unaccompanied Refugee Minors Program

Non-citizen minors who are identified as trafficking victims by the Office of Refugee Resettlement (ORR) are eligible to participate in the Unaccompanied Refugee Minors (URM) program.[10] The URM program provides foster care and other services to minors, including those who are trafficking victims, who are in the U.S. alone without a parent or close relative willing or able to care for them.

At the time of the 2007 report, minors could receive URM services through just one site in California, the Catholic Charities of Santa Clara County. The 2007 report included a recommendation that ORR consider funding a second URM program site, preferably in Southern California. In 2008, the ORR and the California Department of Social Services established a second URM site, operated through the Crittenton Services for Families and Children (CSFC)

in Fullerton in Orange County.[11] To date, CSFC has provided services to 15 minor victims of human trafficking, including 10 minors who are currently in the program.

Trafficking and Crime Victims Assistance Programs

The state-funded Trafficking and Crime Victims Assistance Program (TCVAP) provides benefits and services to non-citizen trafficking victims who have not yet been certified by the ORR to receive federal benefits and services under the TVPA.[12] Benefits and services available to trafficking victims through this program include cash assistance, food stamps, medical assistance, and refugee social services to assist with adjustment and facilitate self-sufficiency. (See Table 3, "Number of Trafficking Victims in California Served by TCVAP" for the number of trafficking victims in California receiving benefits under this program from July 2010 to June 2012.)

Victim Compensation Program

The California Victim Compensation Program (CalVCP) provides victims and their families with compensation to help cover the cost of treatment and other support services.[13] If a person meets eligibility criteria, CalVCP will compensate many types of services when the costs are not covered by other sources. Eligible services include medical and dental care, mental health services, income loss, funeral expenses, rehabilitation, and relocation. Funding for CalVCP comes from restitution fines and orders, penalty assessments levied on persons convicted of crimes, and traffic offenses and matching federal funds.

Despite the benefits of CalVCP, the program's eligibility criteria for benefits may be too restrictive when applied to trafficking victims and could lead to the denial of benefits for many of these victims. The regulations governing CalVCP permit the denial of benefits to a victim who was involved in the events leading to the qualifying crime.[14] Factors that are considered include whether the conduct of the victim caused, resulted in, or reasonably could have led to the qualifying crime and whether the victim was negligent and placed him or herself in a position to be injured or victimized. While the regulations also provide for factors to be considered to mitigate or overcome involvement in the events leading to the qualifying crime,[15] the potential denial of benefits to trafficking victims when applying these regulations is problematic. CalVCP is committed to serving human trafficking victims but members of the Work Group voiced concern that some victims may none the less fall through the cracks of their eligibility criteria. The denial factors could be re-evaluated to ensure the program is fairly applied.

California Witness Relocation and Assistance Program

The California Witness Relocation and Assistance Program (CalWRAP) provides protection for witnesses and their families, friends or associates who are endangered due to ongoing or anticipated testimony in gang, organized crime, narcotic trafficking cases, or in other cases that have a high degree of risk to the witness.[16] Because some human trafficking cases involve

gangs and organized crime or other situations that present a high degree of risk, witnesses in human trafficking cases may be eligible to receive protection through CalWRAP.

California Victim/Witness Assistance Program

The Victim/Witness Assistance Program is administered by the California Emergency Management Agency and provides comprehensive services to assist victims and witnesses of violent crime, including human trafficking, through Victim and Witness Assistance Centers in each of California's 58 counties.[17] Forty-seven of these Centers are in District Attorney's Offices, eight are in Probation Departments, and three are in community-based organizations. Services provided by the Victim and Witness Assistance Centers include crisis intervention, emergency assistance, resource and referral assistance, direct counseling, victim of crime claims, property return, orientation to the criminal justice system, and restitution.

Harnessing Technology to Connect with Victims and Potential Victims of Human Trafficking

To reach victims and potential victims of human trafficking as effectively as traffickers, it is critical that government entities and others focus on new ways to use technology and social media for education and outreach, which should be available in multiple languages and an easy-to-access format. Below are some examples of efforts to leverage technology in service of victims.

Internet Search Terms and Website Widgets

Of all ways that the Californians who called the National Human Trafficking Resource Center (NHTRC) hotline in 2011 reported having found the hotline, a web search was the most common. To ensure that those searching the web for assistance related to human trafficking are connected with the hotline, the Attorney General's Office launched a project in 2012 with Yahoo!, Microsoft Bing, and Polaris Project, which runs the NHTRC hotline, to provide Internet users with the NHTRC hotline number when they search for specific words or phrases in the Yahoo! and Bing search engines. If key search terms such as "human trafficking" are entered on Yahoo! Search, Internet users will see a banner that states: "Call the National Human Trafficking Resources Center at 1-888-373-7888 to report sex trafficking, forced labor, or to get help." Similarly, if terms like "human trafficking" are searched through Bing, an ad titled "Report Human Trafficking" appears along with "Call the National Human Trafficking Resource Center at 1-888-373-7888." The goals of these initiatives are to quickly identify victims of human trafficking by connecting survivors and community members to resources and support, and to raise public awareness about human trafficking.

The California Attorney General's Office has also created a website widget for download to allow operators of any website to display a banner with the NHTRC hotline. This widget can be found on the Attorney General's website at *http://oag.ca.gov/widgets/human-trafficking*.

National Human Trafficking Resource Center Hotline – Text Short Code

Polaris Project is partnering with the DNA Foundation to develop a text short code to allow victims who are unable to make an audible call to text an easy-to-remember number to reach out for help. The text short code is expected to be introduced to the public in 2013.

Conclusion

Although the nature of human trafficking makes it difficult to identify, protect, and assist victims of trafficking, efforts are already underway in California to train law enforcement and other first responders on how to recognize and respond to human trafficking. In the two years between July 1, 2010 and June 30, 2012, California's nine regional task forces have provided training for over 25,000 law enforcement personnel, prosecutors, victim services providers, and other first responders. Still, further efforts are needed to train non-traditional first identifiers who may be in a position to encounter human trafficking victims. Identifying and assisting victims of human trafficking should be a broad effort, and as such, training is needed across the board in California's professional communities.

Human trafficking victims have a broad range of needs including safety, health, and housing needs and a need for legal services, witness protection, and interpreters. While over 1,500 victims have been connected with services between July 1, 2010 and June 30, 2012, there is still more to be done to adequately meet the needs of human trafficking victims in our state. There are continuing deficiencies in the availability of long-term shelter and legal services and in the awareness of available benefits. Further, more can be done in California to promote the victim-centered approach, including permitting human trafficking victims to seal and expunge records of a conviction that resulted from forced labor, or services, ensuring that CalVCP benefits are fairly applied to victims of human trafficking, and making sure that human trafficking caseworkers receive standardized training to offer privileged communication to the victims they serve.

Recommendations

1. Improve Health Care Providers' Ability to Help Victims.

   a. Training for First Responders and Health Care Professionals: Health care providers, academia, and the victim services community should work together to develop appropriate training that helps first responders and health care professionals identify human trafficking victims, determine victims' mental health and medical needs, and access available resources.

   b. Mandatory Reporting: Human trafficking is not a mandated reportable offense for medical professionals. The Legislature may consider legislation to make human trafficking a mandated reportable event for medical professionals.

2. Improve Victims' Ability to Seek Help.

   a. Accessible Information Online: Many victims of human trafficking have Internet access. Internet companies should collaborate with law enforcement and community groups to develop online tools to give victims access to help and to generally raise public awareness of human trafficking.

   b. Caseworker Confidentiality Privilege: The California Evidence Code provides that a trafficking victim has a privilege to refuse to disclose and to prevent others from disclosing confidential communication between the victim and a human trafficking caseworker. This privilege can be asserted only if the human trafficking caseworker who receives the communication has received specialized training in the counseling of human trafficking victims. There is, however, no such standardized training program in California. A standardized training program would aid human trafficking caseworkers in offering the benefits of privileged communication to the victims they serve.

3. Improve Services and Benefits Available to Victims.

   a. Long-Term Centers: There is a continuing need for safe, long-term shelter for trafficking victims. Key leaders and policy makers in California should explore public and private options for creating long-term centers that provide housing and comprehensive services tailored to meet the needs of trafficking victims, especially male victims and victims under age 18.

   b. Access to Legal Services: The provision of legal services for trafficking survivors has not kept up with the demand for assistance. The legal community in California (*e.g.*, bar associations, legal assistance organizations, and *pro bono attorneys*) can help by creating regional and statewide networks of legal service providers who are proficient in assistance, benefits, and immigration options for human trafficking victims and who can train and mentor other legal service providers to

assist NGOs and victims. The need for legal services in rural and underserved populations of California is an issue especially worthy of examination.

c. **Eligibility for CalVCP Benefits:** The factors for denial of CalVCP benefits may be overly broad as applied to victims of human trafficking. The California Victim Compensation and Government Claims Board, which administers CalVCP, is encouraged to re-evaluate the eligibility of human trafficking victims for benefits and propose any appropriate modifications to ensure the program is fairly applied for victims of human trafficking.

d. **Awareness of Services:** Human trafficking victims and victim service providers are not always connected with county health and social service programs. Including county victim assistance, health, and social service agencies in local or regional human trafficking coalitions can help coordinate outreach and education about the resources available for human trafficking victims in the region, and how victims can access those resources.

4. Help Victims Rebuild.

a. **Conviction Records:** Human trafficking victims who are coerced by traffickers into commercial sex may be prosecuted for crimes like prostitution in connection with their victimization. The Legislature may wish to consider legislation permitting human trafficking victims to seal and expunge records of a conviction that results from coercion into forced labor or services.

End Notes:

[1] There are additional human trafficking training programs in California that are not included in the task force reporting to the California Emergency Management Agency. Therefore, these data reflect only a segment of all of the human trafficking training in California.

[2] Donna Sabella, "The Role of the Nurse in Combatting Human Trafficking: Learn How to Recognize the Signs that Someone is Being Trafficked and How to Safely Intervene," American Journal of Nursing 111, (February 2011).

[3] "Rescue and Restore Campaign Tool Kits," Office of Refugee Resettlement, accessed October 26, 2012, *http://acf.hhs.gov/programs/orr/resource/rescue-restore-campaign-tool-kits*.

[4] National Human Trafficking Resource Center, "Increasing Awareness and Engagement: Strengthening the National Response to Human Trafficking in the U.S.: Annual Report 2011," (2012), available online at: *http://polarisproject.org/resources/hotline-statistics*.

[5] There non-governmental organizations in California providing services to victims of human trafficking that are not included in the task force reporting to the California Emergency Management Agency. Therefore, these data reflect only a segment of all the victims identified and provided services or assistance in California.

[6] California Evidence Code § 1038 (2012).

[7] California Evidence Code § 1038.2 (2012).

[8] U.S. Department of Health & Human Services, "Services Available to Victims of Human Trafficking: A Resource Guide for Social Services Providers," (May 2012), accessed October 26, 2012, *http://www.acf.hhs.gov/sites/default/files/orr/traffickingservices_0.pdf*.

[9] "Victims of Human Trafficking and Other Crimes," U.S. Citizenship and Immigration Services, accessed October 26, 2012, *http://uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=829c3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=829c3e4d77d73210VgnVCM100000082ca60aRCRD*.

[10] "About Unaccompanied Refugee Minors," Office of Refugee Resettlement, accessed October 26, 2012, *http://acf.hhs.gov/programs/orr/programs/urm/about*.

[11] "Human Trafficking Victims," California Department of Social Services, accessed October 26, 2012, *http://cdss.ca.gov/refugeeprogram/PG1268.htm*.

[12] Ibid.

[13] "California Victim Services," Victim Compensation and Government Claims Board, accessed October 26, 2012, *http://vcgcb.ca.gov/victims/*.

[14] California Code of Regulations, Title 2, § 649.52. (2012).

[15] California Code of Regulations, Title 2, § 649.57. (2012).

[16] "California Witness Relocation and Assistance Program," State of California Department of Justice, accessed October 26, 2012, *http://oag.ca.gov/witness-protection*.

[17] The California Emergency Management Agency, "Victim/Witness Assistance Program," available online at: *http://calema.ca.gov/PublicSafetyandVictimServices/Documents/JLBC%20pieces/VW%20Final%20JOAM.pdf*.

6 Prevention & Public Education: Reducing Demand for Human Trafficking

"Having heard all of this you may choose to look the other way but you can never say again that you did not know."

William Wilberforce, English abolitionist (1759-1833)

This report examines the state of human trafficking in California, in part, by looking to the past to determine how the crime has changed. These pages also provide a look at the current landscape of human trafficking – especially the impact of gangs and technology – and explore how legislators, law enforcement, technology companies, academics, and the general public can improve efforts to hold traffickers accountable and assist victims.

To create a future without human trafficking in California and across the world requires targeted efforts to address the demand for exploitive labor and coerced sexual services. Addressing the root causes of this crime is a critical challenge and there is a need for greater focus on prevention. As various public and private partners collaborate to adopt new approaches to identify and follow human trafficking online for purposes of investigation and prosecution, there may be opportunities to use technology and social media to attack this crime at its source and prevent it from occurring in the first place. There are currently efforts underway to study and develop innovative technologies to prevent and disrupt human trafficking online.

In the last five years, a number of campaigns have effectively increased awareness among Californians that human trafficking exists here in the 21st century. Though there are gaps in this understanding and further work to raise awareness, a foundation has been laid upon which public outreach can build. This chapter highlights a few of the efforts underway to impact the demand for human trafficking and notes the need for more work to develop innovative prevention efforts.

Harnessing Technology to Disrupt Online Human Trafficking

The logistics of the commercial sex trade, from the advertisement of services to the arrangement of meetings, has moved from street corners and alleys to online and mobile spaces. As noted in Chapter 4, law enforcement needs to adopt as nimble an approach to the use

of technology as traffickers. However, it is not the sole obligation of law enforcement to combat trafficking and, in this area in particular, there is a need for partnership that includes community members, businesses, regulators, technology companies, and others.

As Chapter 4 discussed, nonprofit foundations, technology companies, and academic institutions have started to join forces in the search for ways to leverage technology to assist law enforcement. The following are a few efforts underway to study and develop innovative technologies to prevent and disrupt human trafficking online.

DNA Foundation's Technology Task Force

In 2010, the Demi and Ashton (DNA) Foundation established a Technology Task Force of more than 20 top technology companies, including Google, Facebook, Microsoft, Yahoo!, Twitter, Blekko, Salesforce, BlueCava, Connotate, Digital Reasoning, Irdeto, Conversion Voodoo, Palantir, Mocana, Square, and Symantec.

The Technology Task Force members have collaborated to create anti-trafficking programs, including a deterrence program to help dissuade past and future offenders of online child sexual exploitation. If an individual searches online for child pornography and enters key phrases, a preventive message appears on the screen.

In 2012, the Technology Task Force also created a "sound practices guide" with resources for new technology companies to help prevent, identify, remove, and report sexual exploitation on their networks. In addition, the Task Force is currently funding research to assist companies with identifying online indicators of human trafficking.[1]

Microsoft Research and Microsoft Digital Crimes Unit

In June 2012, the Microsoft Research and Microsoft Digital Crimes Unit awarded six grants to research teams that aim to study the use of technology in commercial child sex trafficking.[2] Among other topics, these grants were awarded to teams who will research how "johns" search for victims online; how technology has changed the recruiting, buying, and selling process in trafficking; and the clandestine language used in web advertising to facilitate child sex trafficking. This research will serve as the foundation for future development of technology to help thwart the activities of child traffickers and those who do business with them.[3]

USC Annenberg School for Communication & Journalism – "Human Trafficking Online"

As discussed in Chapter 4, USC Annenberg School for Communication & Journalism hosted a summit in 2011 to explore how technology can be used to combat human trafficking. A research report out of the USC Center on Communication Leadership & Policy, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, included several recommendations relevant to prevention, including: "Media and technology companies

can use their distribution channels and services to increase awareness of trafficking online"; and, "Companies can make the terms of their service prominently visible on their sites and empower conscientious consumers to police the sites they visit daily."[4]

Public Education to End Human Trafficking

While there is greater public awareness of human trafficking now than in 2007, there remain gaps in understanding. Some Californians see human trafficking through a limited lens, as a crime involving international sex trafficking alone – and not one that encompasses members of their communities, from a teenage girl forced into prostitution to a worker in the local nail salon. Yet, the data from California's regional task forces (presented in Chapter 3) suggest that 72% of identified victims are American. Without fully understanding the nature and proximity of the crime, Californians are not in a position to take steps to join the fight to end human trafficking.

As members of the Work Group noted, there is a need for a comprehensive media campaign on human trafficking that is clear, informative, and provides action items to get members of the general public engaged and involved.

Consumer Awareness

One simple way that individuals can fight human trafficking is through their purchasing power. As noted in the 2007 report, consumers play a critical role in holding corporations accountable and spurring them to action. Consumers use sets of criteria when they make purchasing decisions, from the price and quality of a product to whether it was produced locally or in the United States. If consumers see a lack of forced labor as a key factor in the decision to purchase a product, and move information to track which companies benefitted from such labor, companies would have a significant incentive to ensure and demonstrate humane supply chains to their customers and investors.

There are a number of new smart phone applications designed to help consumers understand their relationship to human trafficking and take steps to make a difference:

- Slavery Footprint (smart phone app): Call + Response, a nonprofit organization dedicated to ending modern slavery, partnered with the U.S. State Department's Office to Monitor and Combat Trafficking in Persons to develop a smart phone application to inform people about the forced labor behind the products of their everyday lives. Launched in 2012, users can visit the website or download the free Slavery Footprint app to take a brief survey and calculate how many slaves they "own" based on their lifestyle. Users of the app send a message to a company to learn about its position on forced labor and let stores know about their interest in slavery-free products by using the Slavery Footprint "check-in" feature on Facebook. While the app currently uses information based on raw materials and not brands, later versions will allow consumers to enter specific brands. *(http://slaveryfootprint.org/)*

- **Made In A Free World (platform to "use the free market to free people"):** Launched by Slavery Footprint in September 2012, Made In A Free World (MIAFW) is a platform designed to help companies respond to consumer demand to eradicate forced labor in their supply chains. MIAFW provides brands with a blueprint to investigate their suppliers to identify high-risk areas for trafficking. *(http://madeinafreeworld.com/)*

- **Free2Work (smart phone app):** Created by Not For Sale and supported by the International Labor Rights Forum, Free2Work is a smart phone app that enables a consumer to scan a product's barcode to see whether the company has effective policies to address the use of forced or child labor in its supply chain. Free2Work grades companies on a scale of A to F based on their efforts to prevent and address forced and child labor. *(http://free2work.org/)*

In addition to smart phone apps that provide consumers with information to make conscientious decisions about the products they purchase, there are also online resources to help individuals to identify and assist victims of human trafficking. The nonprofit Truckers Against Trafficking developed a website, mobile app, and hotline to help members of the trucking and travel plaza industries to identify and report instances of human trafficking. The organization aims to educate members of the trucking industry about sex trafficking through posters in truck stop and rest areas, as well as the distribution of wallet cards (available in English, Spanish, and French Canadian). Truckers Against Trafficking also produced a training DVD for truck stop and travel plaza employees and truck drivers. *(http://truckersagainsttrafficking.org/)*

These efforts to raise awareness – of how to make conscientious purchasing decisions and to identify the crime and assist victims – are critical first steps in the fight against human trafficking. But, as long as the crime happens, more needs to be done.

California Transparency in Supply Chains Act of 2010

In 2009, a U.S. Department of Labor report identified 122 goods from nearly five dozen countries that were believed to be produced by forced labor or child labor.[5]

The report, which was required by the Trafficking Victims Protection Reauthorization Acts of 2005 and 2008, listed the goods and the 58 countries where they were produced – starting with carpets from Afghanistan and ending with cotton from Uzbekistan. The report also listed 11 goods believed to be produced by child labor in Mexico, including pornography, along with everyday items like coffee and onions.

Through the unintentional purchase of goods and products with forced labor in their supply chains, California consumers and businesses inadvertently promote the crime of human trafficking. To help consumers make informed and conscientious purchasing decisions, the Legislature passed the California Transparency in Supply Chains Act of 2010.

Enacted on January 1, 2012, the law requires any retailer or manufacturer with annual worldwide revenues of more than $100 million to disclose its efforts to eradicate slavery and human trafficking from its supply chains for tangible goods offered for sale in California.[6]

By adopting codes of conduct for their suppliers and sub-contractors, retailers and manufacturers use economic leverage to influence labor practices within their supply chain. Companies are also able to demonstrate responsible supply chains to consumers who, empowered with information, are more likely to choose goods and products from supply chains untainted by human trafficking.

Eliminating Forced Labor from Contractors with the State of California

California has laws in place to prohibit state contractors from engaging in human trafficking. California Public Contract Code, section 6108, requires state contractors to certify that they comply with California labor laws and that goods they provide were not produced by sweatshop, or other forms of forced labor.

However, the State of California might consider expanding its law to more fully address the use of forced labor by state contractors. In September 2012, President Obama issued an Executive Order to strengthen the federal government's policy with regard to human trafficking. The order expressly prohibits federal contractors, contractor employees, subcontractors, and subcontractor employees from engaging in any of the following types of trafficking-related activities:

- The use of misleading or fraudulent recruitment practices during the recruitment of employees;
- Charging employees recruitment fees; and,
- Destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity documents, such as passports or drivers' licenses. [7]

Truckers Against Trafficking

"Thank God what saved me was that truck driver that called in and said, 'Hey, this is whoever at the TA truck stop, and we have some girls out here that look pretty young.'"

– A young woman who, at 14 or 15, was snatched off the street in Toledo by a pimp and forced into prostitution. She was rescued by a driver at a truck stop in Detroit who called 911 after she knocked on his door.

The young woman shared her story in a video created to educate truck drivers, and employees of truck stops and travel plazas, about domestic sex trafficking. The head of the nonprofit that produced the video, Truckers Against Trafficking, told an NPR reporter that the man who made the phone call to rescue that girl is like so many truckers: "…really wanting to do the right thing, ready to go and just needing to know who to talk to about this."[8]

Expanding California law to include similar provisions will ensure that businesses that exploit workers are not rewarded and will set an important precedent as a zero-tolerance policy for industry and business owners in California to follow with regard to forced labor in their supply chains.

Conclusion

The work of cutting off demand for human trafficking is complex and requires a range of partners working together around a shared rejection of products and services obtained by force, fraud, or coercion. While technology and social media is being leveraged in innovative ways to provide consumers with information and a way to connect with companies, for example, there remains a need to explore new methods of raising awareness about the nature and proximity of human trafficking. With greater understanding of the crime, and a clear tool or means to make a difference, consumers and businesses alike will be more likely to take steps to diminish the demand for forced labor.

Recommendations

1. Promote Clean Supply Chains: California retailers and manufacturers of all sizes should consider creating policies to disclose their efforts to limit human trafficking in their supply chains, even if they fall beneath the $100 million corporate revenue threshold contained in the California Transparency in Supply Chains Act. This will provide consumers with the opportunity to use their purchasing decisions as a tool to eradicate human trafficking.

2. Strengthen Restrictions on State Contractors: Consistent with recently enacted federal contracting requirements, it is recommended that the Legislature consider prohibiting state and local government contractors from engaging in suspicious employment practices that are hallmarks of trafficking, including the use of misleading or fraudulent practices during the recruitment of employees. Examples of these practices include making material misrepresentations about key terms of employment or living conditions, charging employees recruitment fees, and destroying or otherwise limiting an employee's access to his or her identity documents, such as passports or driver's licenses.

3. Increase Public Awareness: To raise awareness of this crime, public and private anti-trafficking partners can mount a coordinated, comprehensive public awareness campaign to improve awareness of human trafficking amongst the general public.

End Notes:

[1] "Tech Task Force," Demi and Ashton Foundation, accessed October 26, 2012, *http://demiandashton.org/tech-task-force.*

[2] Samantha Doerr, "Microsoft Names Research Grant Recipients in Fight Against Child Sex Trafficking," June 13, 2012, *http://blogs.technet.com/b/microsoft_on_the_issues/archive/2012/06/13/microsoft-names-research-grant-recipients-in-fight-against-child-sex-trafficking.aspx.*

[3] "Shedding Light on the Role of Technology in Child Sex Trafficking," Microsoft News Center, July 18, 2012, *http://microsoft.com/en-us/news/features/2012/jul12/07-18childsextraffickingresearch.aspx.*

[4] Mark Latonero, "Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds," (USC Annenberg School for Communication & Journalism, Center on Communication Leadership & Policy, September 2011), accessed October 26, 2012, *https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking_FINAL.pdf.*

[5] U.S. Department of Labor, Bureau of International Labor Affairs, Office of Child Labor, Forced Labor, and Human Trafficking, "The Department of Labor's List of Goods Produced by Child Labor or Forced Labor; Report Required by the Trafficking Victims Protection Reauthorization Acts of 2005 and 2008," (2009), available online at: *http://dol.gov/ilab/programs/ocft/PDF/2009TVPRA.pdf*

[6] California Civil Code, § 1714.43. (2012).

[7] Exec. Order No. 13,627, 77 Fed. Reg. 60,029 (October 2, 2012).

[8] "With a Phone Call, Truckers Can Fight Sex Trafficking," National Public Radio (NPR), October 19, 2012, *http://npr.org/2012/10/19/163010142/with-a-phone-call-truckers-can-fight-sex-trafficking*

The State of

Human Trafficking in California

Part III
Appendix

A Human Trafficking Work Group Participants

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   (415) 905-5050
   http://sagesf.org

5. **Orange County Human Trafficking Task Force**

   Westminster Police Department
   (714) 898-3315

   Community Services Programs
   (949) 250-0488
   http://cspinc.org/Human%20Trafficking

6. **Riverside County Anti-Human Trafficking Task Force**

   Riverside County Sheriff's Department
   (951) 239-2139

   Operation SafeHouse, Riverside
   (951) 351-4418
   http://operationsafehouse.org

7. **Sacramento Innocence Lost Task Force**

   Sacramento County Sheriff's Department & Federal Bureau of Investigation
   (916) 874-3916

   Courage To Be You/Courage House, Rocklin
   (916) 652-4248
   http://couragetobeyou.org

   Sacramento Rescue & Restore Coalition
   A program of the Sacramento Employment and Training Agency
   (916) 263-3800
   http://sacramentorescueandrestore.net

8. **San Diego North County Anti-Trafficking Task Force**

   San Diego Sheriff's Department, Vista Substation
   (619) 336-0770

   North County Lifeline, Vista
   (760) 726-4900
   http://nclifeline.org

   Bilateral Safety Corridor Coalition, San Diego/National City
   (619) 336-0770
   http://bsccoalition.org

9. **San Jose/South Bay Human Trafficking Task Force**

   San Jose Police Department
   (408) 277-4322

   Community Solutions
   Morgan Hill
   (408) 779-2113
   http://communitysolutions.org

Letter to Backpage.com

National Association of Attorneys General

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Washington Attorney General

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August 31, 2011

Mr. Samuel Fifer
Counsel for Backpage.Com, LLC
SNR Denton US
233 South Wacker Drive
Suite 7800
Chicago, IL 60606-6306

Re: Backpage.com's ongoing failure to effectively limit prostitution and sexual trafficking activity on its website

Mr. Fifer:

This letter is in response to Backpage.com's assurances, both public and in private, concerning the company's facilitation of the sexual exploitation of children, and prostitution. As our state's chief law enforcement officers, we are increasingly concerned about human trafficking, especially the trafficking of minors. Backpage.com is a hub for such activity.

While Backpage.com professes to have undertaken efforts to limit advertisements for prostitution on its website, particularly those soliciting sex with children, such efforts have proven ineffective. In May, for example, a Dorchester, Massachusetts man was charged for forcing a 15-year-old girl into a motel to have sex with various men for $100 to $150 an hour. To find customers, the man posted a photo of the girl on Backpage.com. He was later found with $19,000 in cash. In another example, prosecutors in Washington state are handling a case in which teen girls say they were coerced, threatened and extorted by two adults who marketed them on Backpage.com.

We have tracked more than 50 instances, in 22 states over three years, of charges filed against those trafficking or attempting to traffic minors on Backpage.com. These are only the stories that made it into the news; many more instances likely exist. These cases often involve runaways ensnared by adults seeking to make money by sexually exploiting them. In some cases, minors are pictured in advertisements. In others, adults are pictured but minors are substituted at the "point of sale" in a grossly illegal transaction.

Nearly naked persons in provocative positions are pictured in nearly every adult services advertisement on Backpage.com and the site requires advertisements for escorts, and other similar "services," to include hourly rates. It does not require forensic training to understand that these advertisements are for prostitution. This hub for illegal services has proven particularly enticing for those seeking to sexually exploit minors.

In a meeting with the Washington State Attorney General's Office, Backpage.com vice president Carl Ferrer acknowledged that the company identifies more than 400 "adult services" posts every month that may involve minors. This figure indicates the extent to which the trafficking of minors occurs on the site – the actual number of minors exploited through Backpage.com may be far greater. The company's figures, along with real world experience, demonstrate the extreme difficulty of excising a particularly egregious crime – the sexual exploitation of minors – on a site seemingly dedicated to the promotion of prostitution.

On a regional basis, there has been no change in postings for prostitution services on Backpage.com. For example, between July 28 and August 1, the Missouri Attorney General's Office on behalf of the Attorneys General Working Group conducted a review of adult content on Backpage.com. This review revealed numerous daily postings for "escort" services in the Adult>Escorts section. On Sunday, July 31, in the St. Louis-area alone, there were one hundred and three (103) new postings for such services. Other regional examples include:

- On August 1, the Washington State Attorney General's Office found one hundred and forty two (142) advertisements that are obviously for prostitutes in the Seattle area; and
- On August 2, even the Connecticut State Attorney General's Office found advertisements for prostitutes in the Connecticut area on the Springfield, Massachusetts and Rhode Island pages, circumventing Backpage.com's omission of a Connecticut adult section.

Missouri investigators further confirmed that Backpage.com's review procedures are ineffective in policing illegal activity. On July 28 and July 29, investigators flagged twenty five (25) new postings advertising prostitution in the St. Louis, Kansas City, Springfield, Columbia, and Jefferson City areas. By August 1, at least four days later, only five of these postings, or less than a quarter, had been removed.

The prominence of illegal content on Backpage.com conflicts with the company's representations about its content policies. Backpage.com claims that it "is committed to preventing those who are intent on misusing the site for illegal purposes."[1] To that end, Backpage.com represents that it has "implemented strict content policies to prevent illegal activity," and that the company has "inappropriate ad content removed."[2] Backpage.com also requires those who post "adult services" advertisements to click a link indicating they agree not to "post any solicitation directly or in 'coded' fashion for any illegal service exchanging sexual favors for money or other valuable consideration."[3] However, a cursory look at a relevant section demonstrates that this guideline is not enforced.[4]

In fact, in a meeting with the Washington State Attorney General's Office, Village Voice Media Board Member Don Moon readily admitted that prostitution advertisements regularly appear on Backpage.com. This shows that the stated representations about the site are in direct

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[1] Backpage.com, Safety and Security Enhancements, http://blog.backpage.com/ (last visited August 05, 2011).
[2] *Id.*
[3] See Backpage.com, Posting Rules, http://posting.seattle.backpage.com/gpvbase/classifieds/PostAdPPI.html/usa/posting.seattle.backpage.com/?section=4381&category=4443&cc=usa&serverName=posting.seattle.backpage.com&supercityRegion=Seattle (last visited August 05, 2011).
[4] See Backpage.com, Seattle Escorts, http://seattle.backpage.com/FemaleEscorts/ (last visited August 05, 2011).

conflict with the reality of Backpage's business model: making money from a service illegal in every state, but for a few counties in Nevada.

Based on an independent assessment by the AIM Group, Backpage.com's estimated annual revenue from its adult services section is approximately $22.7 million. This figure, along with information you provided to the Working Group, indicates that Backpage.com devotes only a fraction of the revenue generated from its adult section advertisements to manual content review. We believe Backpage.com sets a minimal bar for content review in an effort to temper public condemnation, while ensuring that the revenue spigot provided by prostitution advertising remains intact. Though you have stated "all new ads are moderated by a staff member,"[5] there appear to be no changes in the volume of prostitution advertisements resulting from this "moderation."

As a practical matter, it is likely very difficult to accurately detect underage human trafficking on Backpage.com's adult services section, when to an outside observer, the website's sole purpose seems to be to advertise prostitution. That is why Craigslist's decision to shut down its adult services section was applauded as a clear way for it to eradicate advertising on its website that trafficked children for prostitution. It is also why we have called on Backpage.com to take similar action.

Furthermore, in lieu of a subpoena, the Working Group asks that Backpage.com provide additional information so that we may better understand the company's policies and practices. As noted earlier, Backpage.com represents that it has "strict content policies to prevent illegal activity."[6] We ask that Backpage.com substantiate this claim by:

1. Describing in detail Backpage.com's understanding of what precisely constitutes "illegal activity," including whether Backpage.com contends that advertisements for prostitution services do not constitute advertisements for "illegal activity;"
2. Providing a copy of such policies, including but not limited to the specific criteria used to determine whether an advertisement may involve illegal activity;
3. Providing the list of the prohibited terms for which Backpage.com is screening;
4. Describing in detail the individualized or hand review process undertaken by Backpage.com, including the number of personnel currently assigned to conduct such review;
5. Stating the number of advertisements in its adult section, including all subsections, submitted since September 1, 2010;
6. Stating the number of advertisements, in its adult section, including all subsections, submitted since September 1, 2010, which were subjected to individualized or hand review prior to publication; and
7. Stating the number of advertisements in its adult section, including all subsections, submitted since September 1, 2010, rejected *prior to* publication because they involved or were suspected to involve illegal activity.

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[5] Letter from Samuel Fifer, Attorney, SNR Denton, to Attorneys General Working Group (Jan. 27, 2011).
[6] Backpage.com, *supra* note 1.

Backpage.com's further represents that it has "inappropriate ad content removed."[7] We ask that Backpage.com substantiate this claim by:

8. Describing the criteria used to determine whether a published advertisement should be removed due to actual or suspected illegal activity;
9. Providing a copy of such policies that detail the criteria used to determine whether a published advertisement should be removed due to actual or suspected illegal activity;
10. Describing in detail the criteria Backpage.com uses, including but not limited to the number of user reports required, before a published advertisement is subjected to further review;
11. Providing a copy of such policies that detail the criteria Backpage.com uses, including but not limited to the number of user reports required, before a published advertisement is subjected to further review;
12. Stating the number of published advertisements posted since September 1, 2010 in its adult section, including all subsections, that Backpage.com has subjected to post publication review;
13. Stating the number of published advertisements posted since September 1, 2010 in its adult section, including all subsections, that Backpage.com removed following post publication review;
14. Stating the number of published advertisements posted since September 1, 2010 in its adult section, including all subsections, that Backpage.com *did not* remove following post publication review;
15. Stating the number of published advertisements posted since September 1, 2010 that were not subjected to further review by Backpage.com despite the receipt of user reports.

Lastly, Backpage.com also represents that it is "partnering with law enforcement and safety advocates/experts."[8] We request that Backpage.com support this assertion by:

16. Identifying the specific "law enforcement [agencies] and safety advocates/experts" with whom Backpage.com has partnered and describing the actions taken by Backpage.com in connection with such partnerships;
17. Stating the number of advertisements submitted since September 1, 2010 that Backpage.com has reported pre-publication to local, state or federal law enforcement agencies, or to the National Center for Missing and Exploited Children's Cyber Tipline, because of actual or suspected illegal activity;
18. Stating the number of user reports of suspected exploitation of minors and/or human trafficking Backpage.com requires before subjecting a published advertisement to further review;
19. Stating the number of published advertisements posted since September 1, 2010 that Backpage.com removed in response to such user reports;
20. Stating the number of published advertisements posted since September 1, 2010 that Backpage.com reported to local, state or federal law enforcement agencies, or to the National Center for Missing and Exploited Children's Cyber Tipline, as a result of such reports; and

[7] Backpage.com, *supra* note 1.
[8] Backpage.com, *supra* note 1.

21. Stating the number of published advertisements posted since September 1, 2010 that Backpage.com *did not* remove following a review prompted by user reports.

The National Association of Attorneys General requests Backpage.com's response on or before September 14, 2011.

Respectfully,

George Jepsen
Attorney General of Connecticut

Chris Koster
Attorney General of Missouri

Rob McKenna
Attorney General of Washington

Luther Strange
Alabama Attorney General

John J. Burns
Alaska Attorney General

Tom Horne
Arizona Attorney General

Dustin McDaniel
Arkansas Attorney General

Kamala Harris
California Attorney General

John W. Suthers
Colorado Attorney General

Joseph R. "Beau" Biden III
Delaware Attorney General

Pam Bondi
Florida Attorney General

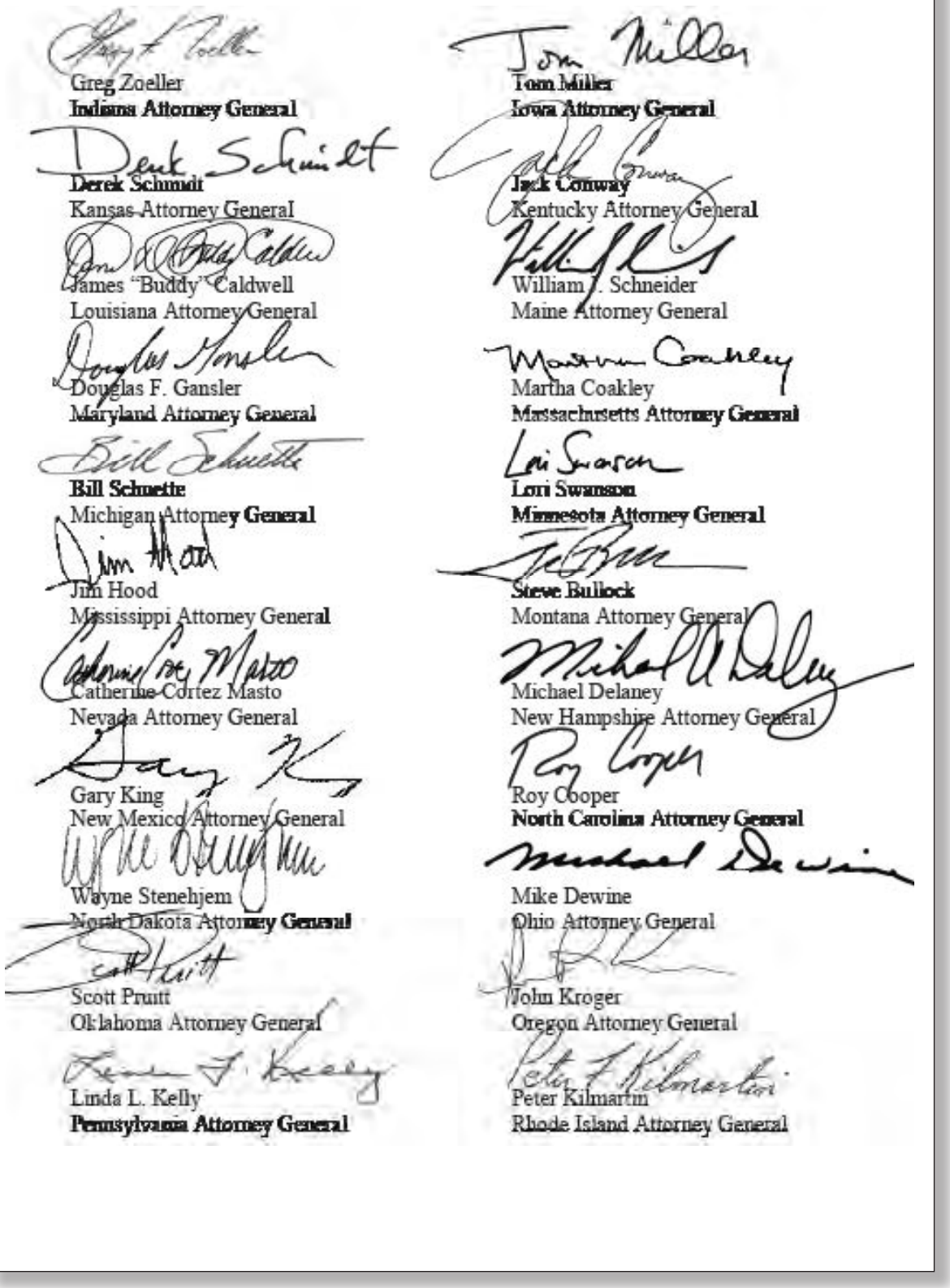
Sam Olens
Georgia Attorney General

Lenny Rapadas
Guam Attorney General

David Louie
Hawaii Attorney General

Lawrence Wasden
Idaho Attorney General

Lisa Madigan
Illinois Attorney General



Greg Zoeller
Indiana Attorney General

Derek Schmidt
Kansas Attorney General

James "Buddy" Caldwell
Louisiana Attorney General

Douglas F. Gansler
Maryland Attorney General

Bill Schuette
Michigan Attorney General

Jim Hood
Mississippi Attorney General

Catherine Cortez Masto
Nevada Attorney General

Gary King
New Mexico Attorney General

Wayne Stenehjem
North Dakota Attorney General

Scott Pruitt
Oklahoma Attorney General

Linda L. Kelly
Pennsylvania Attorney General

Tom Miller
Iowa Attorney General

Jack Conway
Kentucky Attorney General

William J. Schneider
Maine Attorney General

Martha Coakley
Massachusetts Attorney General

Lori Swanson
Minnesota Attorney General

Steve Bullock
Montana Attorney General

Michael Delaney
New Hampshire Attorney General

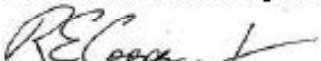
Roy Cooper
North Carolina Attorney General

Mike Dewine
Ohio Attorney General

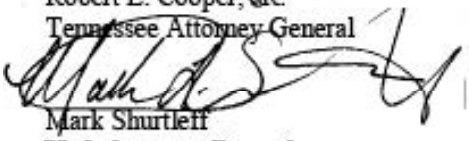
John Kroger
Oregon Attorney General

Peter Kilmartin
Rhode Island Attorney General

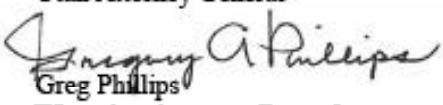
Alan Wilson
South Carolina Attorney General



Robert E. Cooper, JR.
Tennessee Attorney General

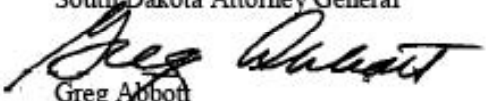


Mark Shurtleff
Utah Attorney General

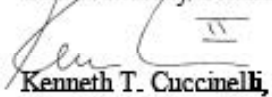


Greg Phillips
Wyoming Attorney General

Marty J. Jackley
South Dakota Attorney General



Greg Abbott
Texas Attorney General



Kenneth T. Cuccinelli, II
Virginia Attorney General

D NGOs Working with Victims of Human Trafficking in California

Asian Anti-Trafficking Collaborative, San Francisco

(Partnership of Asian Pacific Islander Legal Outreach, Asian Women's Shelter Donaldina Cameron House and Narika)

Works with the North Bay Human Trafficking Task Force. Provides legal representation, social services, and access to emergency shelters for victims of human trafficking.

http://endtrafficking.wordpress.com

(415) 567-6255

Asian Pacific American Legal Center, Los Angeles

Provides legal representation, help in securing permanent housing/work, and aid in acquiring permanent residency for immigrants who were trafficked here for domestic work and sexual servitude.

http://apalc.org

(213) 977-7500

Asian Women's Shelter, San Francisco

Provides a shelter program, case management, and access to health and legal services for female victims of trafficking.

http://sfaws.org/home.aspx

(415) 751-7110 • Hotline: (877) 751-0880, available 24 hours a day

Bilateral Safety Corridor Coalition, San Diego/National City

Works with the San Diego North County Anti-Trafficking Task Force. Provides crisis intervention, help in reintegrating into daily life, as well as services such as shelter, legal aide, medical services, and counseling for victims of human trafficking.

http://bsccoalition.org/team.html

(619) 336-0770 • Hotline: (619) 666-2757, available 24 hours a day

Bay Area Women Against Rape, Oakland

Works with the East Bay Human Trafficking Task Force. Provides counseling, advocacy, and referrals to victims of human trafficking.

http://bawar.org
(510) 430-1298 • Hotline: (510) 845-7273, available 24 hours a day

Coalition to Abolish Slavery and Trafficking (CAST), Los Angeles

Works with the Los Angeles Metropolitan Area Task Force on Human Trafficking. Provides social, legal and shelter services in one location, including physical and psychological health care, help in filing for T-Visas, and job training for victims of human trafficking.

http://castla.org
(213) 365-1906 • Hotline: (888)-539-2373, available 24 hours a day

Community Service Programs, Santa Ana

Works with the Orange County Human Trafficking Task Force and provides victim assistance and services to all victims of crime.

http://cspinc.org
(949) 250 -0488, ext. 246

Community Solutions, Morgan Hill

Works with the San Jose/South Bay Human Trafficking Task Force. Provides a 24-hour crisis line, counseling, legal advocacy, court accompaniment, and confidential shelter for male, female and minor victims of human trafficking.

http://communitysolutions.org/
(408) 779-2113 • Hotline: 1-877-363-7238, available 24 hours a day

Courage to Be You, Rocklin

Works with the Sacramento Innocence Lost Task Force and others. Provides in-house shelter and support for female minors aged 11-17 who are victims of commercial sex exploitation.

http://couragetobeyou.org
(916) 335-9043

Fresno County Economic Opportunities Commission, Fresno

The Commission recently received a grant to help human trafficking victims and coordinates with the Fresno Coalition Against Human Trafficking.

http://fresnoeoc.org/
(559) 263-1000

Marjaree Mason Center, Fresno

Works with the Fresno Coalition Against Human Trafficking. Provides in-house shelter, educational assistance, crisis support, and counseling for female and minor victims of human trafficking.

http://mmcenter.org
(559) 237-4706 • Hotline: (800) 640-0333, available 24 hours a day

My Sister's House, Sacramento

Provides in-house shelter, counseling, basic provisions and help finding gainful employment. Although it is oriented towards serving the needs of Asian and Pacific Islander women, My Sister's House will not turn anyone away.

http://my-sisters-house.org
(916) 930-0626 • Hotline: (916) 428-3271, available 24 hours a day

Opening Doors, Sacramento

Provides assistance in finding safe shelter, health care, legal assistance, educational opportunities, business loans and employment for victims of human trafficking.

http://openingdoorsinc.com
(916) 492-2591

Operation SafeHouse, Riverside and Thousand Palms

Works with Riverside County Anti-Human Trafficking Task Force. Provides shelter, education, therapy, and employment assistance for male and female victims under the age of 21.

http://operationsafehouse.org
(951) 351-4418 • Hotline: (800) 561-6944, available 24 hours a day

Sacramento Employment and Training Agency (SETA), Sacramento

The agency recently received a grant from the U.S. Dept. of Health and Human Services to administer the Sacramento Rescue & Restore Coalition, which will help coordinate services to better identify and protect human trafficking victims, raise awareness about the issue in the Sacramento area, and create a network among NGOs and local government entities.

http://sacramentorescueandrestore.net/
(916) 263-1555 • Hotline: (866) 920-2592, available 24 hours a day

SAGE Project (Standing Against Global Exploitation), San Francisco

Works with North Bay Human Trafficking Task Force. Provides advocacy, healthcare, victim-centered therapy, and education to anyone who is in the sex industries or has left the sex industries.

http://sagesf.org/
(415) 905-5050

WEAVE, Sacramento

Works in conjunction with the Sacramento Rescue and Restore Coalition and the Sacramento Innocence Lost Task Force. Provides in-house emergency shelter, 24-hour support and transportation to obtain medical care, food, and clothing.

http://weaveinc.org

(866) 920-2952 • Hotline: (916) 920-2952, available 24 hours a day

E Chaptered Human Trafficking Legislation – 2007 to 2012

2007

Assembly Concurrent Resolution 28 (Ma, of 2007). Creates a National Day of Human Trafficking Awareness on January 11th of each year.

2008

Assembly Bill 499 (Swanson, of 2008). Authorizes the Alameda County District Attorney to create a pilot project to develop a model addressing the needs and effective treatment of commercially sexually exploited minors who have been arrested or detained by local law enforcement. (Pilot was extended by Assembly Bill 799 (Swanson, of 2011).)

Assembly Bill 1278 (Lieber, of 2008). Prohibits any provision of a contract that siphon future wages in exchange for the costs of transporting an individual to the U.S.

Assembly Bill 2810 (Brownley, of 2008). Requires law enforcement agencies to use due diligence to identify victims of human trafficking and allows any person who claims to have been forced to commit prostitution because they are a victim of human trafficking to have their name and address kept confidential.

2009

Assembly Bill 17 (Swanson, of 2009). Increases the maximum amount of additional authorized fines to $20,000 for any person convicted of procurement of a child under 16 years of age.

2010

Assembly Bill 1844 (Fletcher, of 2010). Provides that any person who commits human trafficking involving a commercial sex act where the victim of human trafficking was under 18 years of age shall be punished by a fine of not more than $100,000 to be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund services for victims of human trafficking.

Senate Bill 677 (Yee, of 2010). Authorizes real property used to facilitate acts of human trafficking to be declared and treated as a nuisance, allowing the property to be seized.

Senate Bill 657 (Steinberg, of 2010). Requires retail sellers and manufacturers that conduct business in California and make over $100 million in gross receipts to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale.

Senate Concurrent Resolution 76 (Corbett, of 2010). Encourages the Legislature, businesses and organizations to bring visibility and support to efforts to recognize and combat human trafficking and slavery.

2011

Assembly Bill 12 (Swanson, of 2011). Requires that a person who is convicted of seeking the sexual services of a prostitute under 18 years of age pay an additional fine not to exceed $25,000.

Assembly Bill 90 (Swanson, of 2011). Expands the definition of criminal profiteering to include any crime in which the perpetrator causes a person under 18 years of age to engage in a commercial sex act.

Assembly Bill 764 (Swanson, of 2011). Allows an individual taxpayer to contribute a portion of their tax return to the Child Victims of Human Trafficking Fund.

Assembly Concurrent Resolution 6 (Donnelly, of 2011). Recognizes the month of January as National Slavery and Human Trafficking Prevention Month, and also recognizes February 1, 2011, as California's Free From Slavery Day.

Senate Bill 557 (Kehoe, of 2011). Authorizes the cities of San Diego and Anaheim, and the counties of Alameda and Sonoma, until January 1, 2014, to establish family justice centers (FJCs) to assist victims of domestic violence, sexual assault, elder abuse, human trafficking, and other victims of abuse and crime.

Senate Bill 861 (Corbett, of 2011). Prohibits a scrutinized company from entering into a contract with a state agency for goods or service

2012

Assembly Bill 1899 (Mitchell, of 2012). Gives students, who are noncitizen victims of trafficking, the same exemption from nonresident tuition and eligibility to apply for and participate in state and institutional financial aid programs at the California State University (CSU) and the California Community Colleges (CCC) as that extended to students granted refugee status, and requests the University of California (UC) to adopt similar policies.

Assembly Bill 1956 (Portantino, of 2012). Expands the California Voluntary Tattoo Removal Program to serve individuals, between 14 and 24, who were tattooed for identification in human trafficking or prostitution.

Assembly Bill 2040 (Swanson, of 2012). Allows a person, who was adjudicated as a ward of the court or convicted of an act of prostitution, to have his or her record sealed or expunged without having to show that he or she has not been subsequently convicted of an offense involving moral turpitude or has been rehabilitated.

Assembly Bill 2212 (Block, of 2012). Provides that every building or place used for the purpose of human trafficking, or upon which acts of human trafficking are held or occur, is declared a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

Assembly Bill 2466 (Blumenfield, of 2012). Allows a court to order the preservation of the assets and property by persons charged with human trafficking.

Senate Bill 1091 (Pavley, of 2012). Adds human trafficking to the list of crimes for which a prosecuting witness may have up to two support persons while testifying.

Senate Bill 1133 (Leno, of 2012). Expands the scope of property subject to forfeiture and provides a formula to redirect those resources to community groups that aid victims of human trafficking.

Senate Bill 1193 (Steinberg, of 2012). Requires businesses, transit hubs, and other locations that are the most likely sites of sex and labor trafficking to post a notice that publicizes human trafficking resources.

F How to Recognize the Signs of Human Trafficking

A crucial component of identifying victims and connecting them to resources is educating law enforcement, prosecutors, medical personnel, NGOs, and members of the public on what constitutes a victim. The Attorney General's website has information on how to identify victims, including links to fact sheets for law enforcement, the general public, health care providers, and others: *https://oag.ca.gov/human-trafficking/identify*

Polaris Project has a checklist of potential indicators of human trafficking at *http://polarisproject.org/humantrafficking/recognizing-the-signs*

If you see any of these red flags, contact the National Human Trafficking Resource Center hotline at **1-888-3737-888.**

- Is the individual free to leave or come and go as he/she wishes?
- Is the individual under 18 and providing commercial sex acts?
- Is the individual in the commercial sex industry and does he/she have a pimp/manager?
- Is the individual unpaid, paid very little, or paid only through tips?
- Does the individual work excessively long and/or unusual hours?
- Is the individual not allowed breaks or suffers under unusual restrictions at work?
- Does the individual owe a large debt and is unable to pay it off?
- Was the individual recruited through false promises concerning the nature and conditions of his/her work?
- Do high security measures exist in the work and/or living locations (e.g. opaque windows, boarded up windows, bars on windows, barbed wire, security cameras, etc.)?
- Is the individual fearful, anxious, depressed, submissive, tense, or nervous/paranoid?
- Does the individual exhibit unusually fearful or anxious behaviour after bringing up law enforcement?
- Does the individual avoid eye contact? (though this may be cultural)
- Does the individual lack health care?
- Does the individual appear malnourished?

- Does the individual shows signs of physical and/or sexual abuse, physical restraint, confinement, or torture?
- Does the individual have few or no personal possessions?
- Is the individual not in control of his/her own money, have no financial records, or bank account?
- Is the individual not in control of his/her own identification documents (ID or passport)?
- Is the individual not allowed or able to speak for themselves (a third party may insist on being present and/or translating)?
- Does the individual have claims of just visiting and the inability to clarify where he/she is staying/address?
- Does the individual lack of knowledge of whereabouts and/or do not know what city he/she is in?
- Does the individual experience a loss of sense of time?
- Does the individual have numerous inconsistencies in his/her story?

QR code

Use your smart phone to scan this QR code to go to the Attorney General's Human Trafficking web page.

UCLA LAW REVIEW

The Racial Roots of Human Trafficking

Cheryl Nelson Butler

ABSTRACT

This Article explores the role of race in the prostitution and sex trafficking of people of color, particularly minority youth, and the evolving legal and social responses in the United States. Child sex trafficking has become a vital topic of discussion among scholars and advocates, and public outcry has led to safe harbor legislation aimed at shifting the legal paradigm away punishing prostituted minors and toward greater protections for this vulnerable population. Yet, policymakers have ignored the connection between race and other root factors that push people of color into America's commercial sex trade.

This Article argues that race and racism have played a role in creating the epidemic of sex trafficking in the United States and have undermined effective legal and policy responses. Race intersects with other forms of subordination including gender, class, and age to push people of color disproportionately into prostitution and keep them trapped in the commercial sex industry. This intersectional oppression is fueled by the persistence of myths about minority teen sexuality, which in turn encourages risky sexual behavior. Moreover, today's antitrafficking movement has failed to understand and address the racial contours of domestic sex trafficking in the United States and even perpetuates the racial myths that undermine the proper identification of minority youth as sex trafficking victims. Yet, the Obama administration has adopted new policies that raise awareness about the links between race and sex trafficking. These policies also facilitate the increased role of minority youth as leaders and spokespersons in the antitrafficking movement. Their voices defy stereotypes about Black sexuality and call upon legislators and advocates to address some of the unique vulnerabilities that kids of color face with respect to sex trafficking.

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INTRODUCTION

In the past decade, human trafficking has been identified as a major criminal justice problem in the United States.[1] And while most of the attention has focused on international trafficking, domestic sex trafficking of minors[2] is not only prevalent, but a strong nexus also exists between sex trafficking and race.[3] First, an estimated 200,000 to 300,000 minors are trafficked annually from and within the United States,[4] a statistic that has dominated the conversation among

1. PRESIDENT'S INTERAGENCY TASK FORCE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, COORDINATION, COLLABORATION, CAPACITY: FEDERAL STRATEGIC ACTION PLAN ON SERVICE FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 2013–2017, at 1–5 (2014) [hereinafter COORDINATION, COLLABORATION, CAPACITY], *available at* http://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf ("[T]he International Labour Organization estimates that more than 20 million men, women, and children are victimized by forced labor and sex trafficking worldwide, including in the United States.").
2. Domestic minor sex trafficking, a term coined by Shared Hope International, refers to "the commercial sexual exploitation of [minors] within U.S. borders." LINDA A. SMITH ET AL., SHARED HOPE INT'L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN iv–v (2009), *available at* http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf [hereinafter SHARED HOPE INT'L 2009].
3. *See* U.S. DEP'T OF JUSTICE ET AL., COORDINATION, COLLABORATION, CAPACITY: FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 2013–2017, at 1, 5 (2014), http://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf.; U.S. DEP'T OF HEALTH & HUMAN SERVS. ADMIN. FOR CHILDREN, YOUTH & FAMILIES, GUIDANCE TO STATES AND SERVICES ON ADDRESSING HUMAN TRAFFICKING OF CHILDREN AND YOUTH IN THE UNITED STATES 1 (2013), http://www.vawnet.org/summary.php?doc_id=4219&find_type=web_sum_GC ("Among the diverse populations affected by human trafficking, children are at particular risk for sex trafficking and labor trafficking."). For research on the prevalence of human trafficking in the United States, see generally RICHARD J. ESTES & NEIL ALAN WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO (2001), www.hawaii.edu/hivandaids/Commercial%20Sexual%20Exploitation%20of%20Children%20in%20the%20US,%20Canada%20and%20Mexico.pdf.; INST. OF MED. & NAT'L RESEARCH COUNCIL, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES: A LEGAL GUIDE FOR THE LEGAL SECTOR 1 (2014) ("However, much of this attention [on commercial sexual exploitation and sex trafficking of minors] has focused internationally. This international focus has overshadowed the reality that commercial sexual exploitation and sex trafficking of minors may also occur every day within the United States.").
4. The U.S. Senate estimates that 200,000 to 300,000 domestic minors are at risk for sexual exploitation each year. S. Res. 340, 113th Cong., at 1 (2014), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113sres340ats/pdf/BILLS-113sres340ats.pdf; Improving Out-

scholars, advocates, and the media.[5] Indeed, public outcry has led to safe harbor legislation aimed at shifting the legal paradigm away from punishing prostituted minors and toward greater protections for this vulnerable population.[6] When it comes to race, statistics from the Federal Bureau of Investigation (FBI) indicate that over half of minors arrested on prostitution charges in America are Black.[7] Likewise, Shared Hope International, a nonprofit organization, has found that most of the identified victims in Texas cities are racial minorities and come from households with vulnerable socioeconomic status.[8]

Policymakers have ignored the connection between race and other root factors that push minority and poor youth into America's commercial sex trade,[9] and advocates have argued that the role of race and racism in making children vulnerable to domestic child sex trafficking has not been fully addressed to date.[10]

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comes for Youth at Risk for Sex Trafficking Act, S. 1518, 113th Cong., at 2 (2013) ("Recent reports on sex trafficking estimate that hundreds of thousands of children and youth are at risk for domestic sex trafficking.").

5. For scholarship on the new shifting legal paradigm and emerging jurisprudence for domestic child sex trafficking, see Cheryl Nelson Butler, *Bridge Over Troubled Water: Safe Harbor Legislation for Sexually Exploited Minors*, 94 N.C. L. REV. 102 (forthcoming 2015).

6. *See generally* Butler, *supra* note 5; Megan Annitto, *Consent, Coercion, and Compassion: Emerging Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 21–25 (2011); Tamar R. Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1059 (2011); Cheryl Nelson Butler, *Sex Slavery in the Lone Star State: Does the Texas Human Trafficking Legislation of 2011 Protect Minors?*, 45 AKRON L. REV. 843, 874–81 (2012) (discussing early safe harbor provisions within the Texas antitrafficking statute).

7. *See* Jackie Jones, *Black Teens Majority of Sex Traffic in U.S.*, NEW AMERICA MEDIA (May 30, 2007), http://newamericamedia.org/news/view_article.html.

8. CHILDREN AT RISK, THE STATE OF HUMAN TRAFFICKING IN TEXAS (Richard Sanborn et al. eds. 2013).

9. Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INTERN. L.J. 216, 247 (2007) (discussing how prior antitrafficking campaigns such as the White Slavery Campaign focused on the kidnapping and sexual exploitation of white American and European women, not Black women); Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 607–08 (2009) (footnote omitted) ("[Otherness] causes Western leaders to overlook the extent to which human trafficking related abuses occur within their own borders at the hands of their own citizens.").

10. SOROPTIMIST, PROSTITUTION IS NOT A CHOICE 3–4 (2010), *available at* http://www.soroptimist.org/whitepapers/WhitePaperDocs/WPProstitution.pdf.; Jamaal Bell, *Race and Human Trafficking in the US.: Unclear and Undeniable*, HUFFINGTON POST (May 10, 2010),http://www.huffingtonpost.com/jamaal-bell/race-and-human-traffickin_b_569795.html ("However a link that is rarely discussed in open forums about human trafficking is racial discrimination."); Scott Alessi, *The Surprising Face of Human Trafficking*, U.S. CATHOLIC: BLOG, http://www.soundslides.uscatholic.org/blog/2011/08/surprising-face-human-trafficking ("When you hear the words 'human trafficker,' what do you picture? Whatever image those words conjure up in your mind, your first thought is probably not a 23-year-old, five-foot-five white male in Providence, Rhode Island. But that's exactly who was sentenced to 10 years in prison this week for trafficking young women from New York to Rhode Island, imprisoning them and forcing them into prostitution."); *Sex Trafficking's Black and Brown Victims*, ROOT (Sept. 26, 2013), http://

This Article contends that the time is ripe for policymakers to truly consider the connection between race and child prostitution in the United States.[11] Building upon emerging legal scholarship that has begun to explore the racial contours of the human trafficking epidemic, this Article argues that the modern-day commercial sex industry perpetuates a long and bitter history of sexual exploitation and racial subordination with respect to people of color. This is especially true when it comes to the sexual exploitation of minors. First, race intersects with other forms of subordination including gender, class, and age to push kids of color into prostitution and keep them there. In particular, this intersectional oppression also includes the persistence of myths about minority teen sexuality, which encourages risky sexual behavior like prostitution.[12] Second, this historical legacy and its continued existence not just in the modern sex trafficking industry, but also in the antitrafficking movement, belies America's claim to a postracial society.[13] America's antitrafficking movement has historically used the rhetoric and imagery of African slavery to garner outrage toward prostitution and trafficking. Yet, notwithstanding the use of such rhetoric, the antislavery movement denied protection to people of color. Instead, antitrafficking laws targeted racial minorities for stigmatization and prosecution. The Obama era, however, has created new opportunities to reconsider the role of race and racism in perpetuating sex trafficking. First, the President's administration has acknowledged a link between sex trafficking and race and ethnic discrimination. Second, Black activists have been more active in the antitrafficking movement. Their voices defy stereotypes about Black sexuality and call

newamericamedia.org/2013/09/sex-traffickings-black-and-brown-victims.php ("The speaker, who says she met her pimp when she was 11 years old, is seen in shadow to protect her identity. But you can tell that she's black, and she sounds like she's still young.").

11. *See* Emily Chaloner, *Anybody's Daughter? How Racial Stereotypes Prevent Domestic Child Prostitutes of Color From Being Perceived as Victims*, 30 CHILD. LEGAL RTS. J. 48, 48, 53 (2010).

12. In New York City, for example, a disproportionate number of the women and girls exploited for sex (up to 50 percent) are Black and Latina. JANICE G. RAYMOND & DONNA M. HUGHES, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 9, 40 (2001).

13. Some legal scholars have addressed the role of race in domestic prostitution and sex trafficking. *See, e.g.*, Karen E. Bravo, *The Role of the Transatlantic Slave Trade in Contemporary Anti-Human Trafficking Discourse*, 9 SEATTLE J. SOC. JUST. 555, 572 (2011) (exploring how "the efforts to combat white slavery in the late nineteenth and early twentieth centuries are progenitors of the dominant conceptual and legal frameworks applied to the modern traffic in human beings"); Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1370 (2013) (exploring how racial discrimination in Cook County, Illinois, put Black children at risk for coerced prostitution); Chaloner, *supra* note 11; Katie Beran, Note, *Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform*, 30 LAW & INEQ. 19, 24–26 (2012). For a discussion on whether on whether our criminal justice policies reflect a post-racial society, see Ian F. Haney Lopez, *Post Racial Racism: Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010).

upon legislators and other advocates to address some of the unique vulnerabilities that these minors face with respect to prostitution.

Part I of this Article explores the racial roots of America's modern-day commercial sex industry. This Part explores how racial constructs of Blacks and Native Americans were used to justify slavery and colonization. These women, for example, were stigmatized as jezebels with an insatiable appetite for sex.

Part II argues that the racial ideologies formulated during slavery and colonization were perpetuated in order to justify targeting people of color for sexual exploitation in America's modern-day commercial sex industry. Racial fetishes drive the supply of, and demand for, commercial sex with people of color. Structural racism also coerces people of color to engage in prostitution. As a key example, the music industry uses cultural images of prostitution and pornography to frame minority youth as sexual miscreants and normalize their participation in the commercial sex industry.

Part III explores how race and racism shaped the antitrafficking movement. In various ways, earlier antitrafficking movements, such as the "white slavery" campaign, intentionally excluded nonwhite women from legal protection. Moreover, legislation like the Mann Act, was used to persecute, rather than protect, people of color.

Part IV then examines the ways in which the modern antitrafficking movement continues to marginalize African Americans and other people of color. In particular, advocates and state actors have a tendency to identify Black people as criminals, as opposed to victims of trafficking.

Part V examines efforts in the Obama era to confront the nexus between race and sex trafficking. While disparate treatment based on race remains a problem, recent policy changes suggest an effort to focus more on this issue of disproportionality. The Obama administration and the antitrafficking movement have begun to encourage leadership by minority youth in the antitrafficking movement, a critical step toward protecting all persons from sexual trafficking.

I. THE RACIAL ROOTS OF HUMAN TRAFFICKING

A. African Slavery

Historically, people of color have been systematically exploited and trafficked for sex. To justify the sexual exploitation of Black slaves, White society

constructed Black females as "Jezebels"—"innately oversexed and overly fertile."[14] The Jezebel myth framed slave women as the epitome of sexual immorality; thus, "Black women came to represent the modern Jezebel who, like her Biblical counterpart, was a symbol of lust, sexual immorality, 'innate wickedness,' and even 'disobedience to God.'"[15] This stereotype created a "gendered allegory of sexual racism"[16] and deemed Black women unworthy of legal protection from sexual exploitation.

During slavery, this racialized sexual exploitation of Black women took several forms and served various purposes. First, the label was used to justify the pervasive rape, sexual assault, and abuse of Black women during slavery. In particular, white men used the Jezebel stereotype to characterize Black women and girls as exhibiting an insatiable appetite for free and loose sex, thereby excusing white men's unlimited sexual access to and abuse of Black women, which was an inherent part of slavery.[17] Second, the sexual stereotyping of Black women during slavery served an economic purpose. Characterizing Black women as Jezebels justified the forced use of Black women as breeders of slave children.[18] Third, white men used rape "against [Black women] not only as individuals, but as a weapon of political terror."[19] In this way, rape and sexual exploitation furthered slavery's central purpose to "degrade, dehumanize, and

14. Verna L. Williams, *The First (Black) Lady*, 86 DENV. U. L. REV. 833, 840 (2009).
15. Butler, *supra* note 13, at 1385.
16. Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following* Brown v. Board of Education, 47 DUKE L.J. 399, 402–03 (1997) (discussing how racial stereotypes about sexuality formulated during slavery were later used to oppose integration and the *Brown* decision).
17. *See* Butler, *supra* note 13, at 1385–86; Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment, in* DIRECTIONS IN SEXUAL HARASSMENT 462–63 (Catherine MacKinnon & Reva B. Siegel eds., 2002) ("Foregrounding the interplay between slavery's political economic structure and its sexual norms . . . sheds light on the plantation complex as a vast workplace and one of the earliest American sites of institutionalized sexual harassment. The labor relation as defined by slavery incorporated sexual relations for purposes of pleasure, profit, punishment, and politics."); Zanita E. Fenton, *An Essay on Slavery's Hidden Legacy: Social Hysteria and Structural Condonation of Incest*, 55 HOWARD L.J. 319, 320 (2012).
18. *See generally* Butler, *supra* note 13, at 1385–86 (describing the stereotypes of Black women involved in prostitution in the early days of the juvenile court system); Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuses, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 116 (2005) (explaining the exploitation of female slaves' sexual and reproductive vulnerability, partly by characterizing them as "lascivious and immoral").
19. Adrienne D. Davis, *Three Snapshots of Scholarly Engagement: Catharine MacKinnon's Ethical Entrenchment, Transformative Politics, and Personal Commitment*, 46 TULSA L. REV. 15, 20 (2010).

subjugate."[20] Thus, slavery gave America an ideology for the systemic depiction and use of Black women as designated sexual deviants or targets of sexual abuse.[21]

Further, the Jezebel stereotype fueled society's designation of the white woman as the "True Woman."[22] True Women were white, pious, chaste, and domestic. At the heart of patriarchy and white supremacy was the theory that "womanhood required whiteness: a 'lady' must be white." [23] In this way, "true womanhood," which recognized White females as the ideal of womanhood, depended on the denigration of Black womanhood.[24] To further perpetuate this system, "the prostitution of Black women allowed White women to be the opposite: Black 'whores' make White 'virgins' possible."[25]

In seeking to affirm white women, these stereotypes often harmed them. The Cult of True Womanhood constrained white female sexuality.[26] For example, society considered sexual relations between white ladies and Black men as "morally transgressive" and therefore the law forbade such liaisons.[27] Furthermore, the culture of sexual abuse of Black women furthered a general culture of

20. *See* Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1643 (2012).
21. *See* Davis, *supra* note 17, at 462–63.
22. *See* Williams, *supra* note 14, at 837 ("Yet, for all the professionalization of the First Lady's office much of the job consists of performing an identity: namely, to epitomize "true" American womanhood. . . . These responsibilities, substantive and stylistic in nature, also carry the mark of traditional domesticity, and the gendered expectations that comprise it.").
23. Bela August Walker, *Fractured Bonds: Policing Whiteness and Womanhood Through Race-Based Marriage Annulments*, 58 DEPAUL L. REV. 1, 3 (2008); *see* Williams, *supra* note 14, at 834 ("Unlike her husband, whose biracial background and international upbringing made fitting him into the Black male trope trickier, Mrs. Obama was an authentically and stereotypically Black woman: angry, sassy, unpatriotic, and uppity. Painting Mrs. Obama in this light, her critics essentially asked: How can Michelle Obama be First Lady when she's no lady at all?") (citations omitted).
24. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 7 (2000) ("From mammies, jezebels, and breeder women of slavery . . . ubiquitous Black prostitutes and ever-present welfare mothers of contemporary popular culture, negative stereotypes applied to African-American women have been fundamental to Black women's oppression"); Walker, *supra* note 23, at 3 (arguing that marriage annulments reflected certain racialized sexual norms: "The courts worked to protect the stability of whiteness and white society by protecting the image of white womanhood. The white husbands who claimed their wives were colored threatened the heart of racial norms and stereotypes upholding the racial system: the symbol of white womanhood. Men required white women as a demonstration of their whiteness."); *see* Williams, *supra* note 14, at 835 ("Thus, for example, in this system, white women have privilege based on their race; white femininity is the gold standard that other women must meet. Therefore, if the First Lady exemplifies femininity and true womanhood, it stands to reason that Black women would and should be excluded from attaining that status.") (citations omitted).
25. COLLINS, *supra* note 24, at 7–8.
26. Zanita E. Fenton, *An Essay on Slavery's Hidden Legacy: Social Hysteria and Structural Condonation of Incest*, 55 HOWARD L.J. 319, 324 (2012).
27. *Id.* at 326.

sexual abuse that affected white families. Specifically, the sexual improprieties among white masters and slaves created slippery slopes, which facilitated a culture of sexual exploitation of white women and children in the form sexual incest and rape.[28] Finally, as white wives grew resentful of the sexual liaisons between their white husbands and Black female slaves, the growing schisms between white and Black women limited the ability of either group to work together to challenge patriarchy.[29]

After slavery, American laws enforced and perpetuated derogatory racial stereotypes about Black sexuality. Jim Crow laws enforced the ideology of white supremacy by perpetuating these racialized notions of womanhood.[30] For example, laws justified the racial segregation of black and white women in railroad cars on the grounds that black women were too sexually deviant and morally inferior to sit in the same railroad cars as ladies.[31]

The sexual objectification and exploitation of minority males has also been shaped by racial myths of the slavery era. During slavery, a major strategy for racial subjugation of Black males was to stereotype them as sexual deviants.[32] Yet, at the same time, slavery subjected Black men to sexual abuse and exploitation.[33] Today, police still racially profile young Black and Latino males as hypersexual and sexually degenerate.[34] An "unwarranted fear of Black men" persists in Amer-

28. *Id.*
29. *Id.*
30. Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 UCLA WOMEN'S L.J. 1, 8 (1993) ("To prevent [racial] mixing, white women and Black men had to be segregated from each other to prevent them from establishing an affinity for one another. This theory legitimized every type of segregation possible—from Jim and Jane Crow laws to the prevention of casual social contact between white women and Black men.") (footnotes omitted); Lori A. Tribbett-Williams, *Saying Nothing, Talking Loud: Lil' Kim and Foxy Brown, Caricatures of African-American Womanhood*, 10 S. CAL. R. L. & WOMEN'S STUD. 167, 179–81 (2000) (discussing *Robinson v. Memphis & Charleston R.R. Co.*, 109 U.S. 3, 5, 25–26 (1883), in which the "defendant established a 'ladies' car on its train, to distinguish White women from 'other' [Black/whorish] women").
31. Kenneth Mack, *Law, Society, Identity and Making of the Jim Crow South: Travel & Segregation on Tennessee Railroads, 1875-1905*, 24 L. & SOC. INQ. 377, 378 (1999) ("Taking her seat in the nonsmoking rear coach which, according to the railroad, was reserved for 'white ladies and gentlemen,' she refused the conductor's request that she move to another car. The conductor, aided by two other men, physically ejected her from the car, in the process tearing her dress but suffering a serious bite wound inflicted by [her] in return.").
32. Thomas A. Foster, *The Sexual Abuse of Black Men Under American Slavery*, 20 J. HIST. SEXUALITY 445, 451–52 (2011).
33. *Id.* at 448–49.
34. *See e.g.*, *End Racial Profiling Act: Hearing on S. 1670 Before the S. Comm. on the Constitution, Civil Rights & Human Rights*, 112th Cong. (2012) (statements of Sen. Dick Durbin, chairman, and Sen. Benjamin L. Cardin, member, S. Comm. on the Constitution, Civil Rights & Human Rights).

ican law and society.[35] Finally, sexual stereotypes about men of color have also been shaped by the desire to sexually exploit and subjugate this group.[36] Beginning in slavery, Black male bodies became sights of both "desire" and "horror."[37] Black men were stereotyped as "particularly sexual, prone to sensual indulgence, and desiring white women," and these stereotypes "served to demonize and define the population of black men."[38]

Slavery also subjected Black males to various forms of sexual abuse and exploitation[39] by both white men and white women.[40] As historian Thomas A. Foster has argued, the sexual assault on Black males "took a wide variety of forms, including physical penetrative assault, forced reproduction, sexual coercion and manipulation, and psychic abuse."[41] In slavery, whites imposed sexual stereotypes on Black men in order to justify pervasive sexual abuse and exploitation. For example, forced breeding had the particularly "dehumanizing effect of labeling [Black male slaves] as 'stock men' or 'bulls.'"[42] As part of forced breeding, Black males were coerced to rape Black women.[43] Moreover, forced breeding denied Black males both a fatherly role to their biological offspring as well as the opportunity to commit to one woman.[44]

Slavery also stigmatized Black children as targets for sexual abuse and commercial sexual exploitation. Slaveowners purchased Black men, women, and children, for breeding purposes.[45] Slave children were also subjected to sexual abuse and exploitation.[46] One Black slave, Harriet Jacobs, describes how slave children were not spared from sexual terrorism at the hands of their masters.[47]

35. CHARLES J. OGLETREE, JR., THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA 191 (2010).
36. *See* Athena D. Mutua, *Theorizing Progressive Black Masculinities*, *in* PROGRESSIVE BLACK MASCULINITIES? (Athena D. Mutua ed., 2006), *available at* http://ssrn.com/abstract=2109939.
37. Foster, *supra* note 32, at 448.
38. *Id.* at 451.
39. *Id.* at 448.
40. *Id.* at 449 (examining how some light-skinned black men were singled out by their white mistresses to have sexual relations with them).
41. *Id.* at 447.
42. *Id.* at 455.
43. *Id.*
44. *Id.* at 454–55.
45. Colleen A. Vasconcellos, *Children in the Slave Trade*, CHILDREN & YOUTH IN HIST., http://chnm.gmu.edu/cyh/teaching-modules/141 (last visited May 29, 2015) ("As the plantocracy purchased more breeding women and children in order to save their economic interests, traders modified their ideas of profit and risk and ideas of child worth changed throughout the Atlantic World.").
46. *See* HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL (L. Maria Child ed., 2nd ed. 2003).
47. *See id.*

Jacobs was born a slave in 1813 and was taught to read and write by her first Mistress. When Harriet was fourteen years old, her Mistress died.[48] As a result, Jacobs was bequeathed to live in a home where she was subjected to persistent sexual harassment and abuse by her new Master and jealous bouts of rage and emotional abuse by her new Mistress. The entirety of Chapter 5 of the iconic narrative focuses on Jacob's anguish over the sexual abuse:

> But I now entered on my fifteenth year—a sad epoch in the life of a slave girl. My master began to whisper foul words in my ear. Young as I was, I could not remain ignorant of their import. I tried to treat them with indifference or contempt . . . But he was my master. I was compelled to live under the same roof with him—where I saw a man forty years my senior daily violating the most sacred commandments of nature. He told me I was his property; that I must be subject to his will in all things.[49]

According to Jacobs, her personal experiences of sexual abuse and exploitation was not uncommon; rather, it was part and parcel of the slave experience—a horror that many slave women and girls endured. In Jacobs' reflection on a reunion between herself and a slave mistress with whom she had played as a child, Jacobs compared the sex hierarchies for white women and Black women in the slave society. While white women were destined for marriage and legal protection from sexual exploitation, Black slave women, in contrast were destined for sexual concubinage at the hands of white men:

> How had those years dealt with her slave sister, the little playmate of her childhood? She also was very beautiful; but the flowers and sunshine and love were not for her. She drank the cup of sin, and shame and misery, whereof her persecuted race are compelled to drink.[50]

In other words, Black women and girls were systematically marked for sexual degradation and abuse.

Furthermore, Jacobs emphasizes how all Black women were excluded from the law and cultural notions of sexual virtue that protected white women. In Jacobs' words: "No matter whether the slave girl be as black as ebony or as fair as her Mistress. In either case, there is no shadow of law to protect her from insult, from violence, or even from death; all these are inflicted by friends who bear the shape of men."[51] Specifically, Jacobs maintains that she engaged in sexual liaisons

48. *See id.* at 44–48.
49. *Id.* at 44–45.
50. *Id.* at 48.
51. *Id.* at 45.

with her master because she was forced or coerced to do so.[52] In this way, Jacob's narrative refutes the stereotype that sexual relations between slave women and their masters were due to sexual immorality on the part of the slave woman. Notwithstanding her anguish, she "resolved never to be conquered" psychologically or spiritually.[53]

Jacobs also argues that slavery was uniquely abusive because this sexual abuse served not only a personal purpose for masters who indulged, but also an economic one. The sexual abuse of black women was profitable particularly where slave masters fathered other children:

> The secrets of slavery are concealed like those of the Inquisition. My master was, to my knowledge, the father of eleven slaves. But did mothers dare to tell who was the father of their children? Did the other slaves dare to allude to it, except in whispers among themselves? No, indeed! They knew too well the terrible consequences.[54]

Here, Jacobs points out that sexual exploitation of black women also served as a tool of racial subordination as it terrorized not only the female slaves, but also the black male slaves who were silenced from challenging the sexual abuse, as well as the black children, raised without knowing—or raised without wanting to know—the identity of their fathers.[55]

B. Slavery's Aftermath

After slavery, American laws enforced and perpetuated derogatory racial stereotypes about Black sexuality in order to enforce the continued sexual exploitation of Black people as a class. However, in the aftermath of slavery, the sexual objectification of Black people extended beyond the mere expression of sexual stereotypes; although freed from antebellum slave plantations, they were still subjected to these stereotypes. They were systemically targeted, coerced and fraudulently induced to engage in prostitution. Several laws and customs developed to shape a prostitution underclass along racial lines.

As the American commercial sex industry flourished at the turn of the twentieth century, Black communities were segregated to vice districts where the

52. *See id.* at 86 ("Pity me and pardon me, O virtuous reader! You never knew what it is to be a slave, to be entirely unprotected by law or custom; to have the laws reduce you to the condition of a chattel, entirely subject to the will of another.").
53. *Id.* at 31.
54. *Id.* at 55.
55. *See id.*

lure of prostitution and illegal crime was ever present.[56] For example, in its iconic study, THE NEGRO IN CHICAGO: A STUDY OF RACE RELATIONS AND A RACE RIOT, the Chicago Race Commission acknowledged the findings of the Chicago City Council Commission on Crime, which stated that, "first among the causes [for prostitution] should be named the unfavorable home conditions . . . often when the home is degraded there are conditions of crowding, and poverty which lead to misfortune."[57] Too often, the State sanctioned and protected the proliferation of prostitution and related illegal activity within segregated Black neighborhoods.[58] American laws and customs structured society such that people of color were targeted and steered into prostitution.

Moreover, other forms of structural racism fostered a growing commercial sex industry with Black prostitutes. The Chicago Race Commission found that Black females encountered employment discrimination and unemployment not faced by their white counterparts, were pushed into prostitution as a means of economic survival; in the words of the Commission:

> The greater liability of Negroes to unemployment introduces another factor. A plant official told the commission that his plant had dismissed more than 500 Negro girls for business reasons. These girls, it was stated, could not easily find re-employment and were therefore probably exposed to certain necessities and temptations from which white girls of comparable status are exempt.[59]

Likewise, as discussed in Part III, Black women seeking to escape the South, migrated North in search of work opportunities were steered and coerced into prostitution by employment agencies.[60] Black female migrants were often denied the legal protection and social services offered to white women to shield the latter from sexual coercion by sex traffickers.[61]

Even though the Chicago Commission and Chicago government agencies acknowledged these various forms of structural inequality, it nevertheless suggested that white citizens stereotyped Black people as being prone to crime based

56. KEVIN J. MUMFORD, INTERZONES: BLACK/WHITE SEX DISTRICTS IN CHICAGO AND NEW YORK 22–23, 27 (1997); *see generally* Butler, *supra* note 13.

57. THE CHICAGO COMMISSION ON RACE RELATIONS: THE NEGRO IN CHICAGO: A STUDY OF RACE RELATIONS AND A RACE RIOT, 331 (1919), *available at* https://books.google.com/books?id=3kErAAAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false [hereinafter THE CHICAGO COMMISSION].

58. KHALIL GIBRAN MUHAMMED. THE CONDEMNATION OF BLACKNESS 227 (2010) ("Behind the borders of segregated black communities, many officials participated directly as patrons and protectors of illegal activity.").

59. THE CHICAGO COMMISSION, *supra* note 57, at 332.

60. *See* discussion *infra* Part III.

61. *Id.*

on moral deficiencies, as opposed to societal factors.[62] For example, the Commission "in its inquiry [it] met the following current beliefs among whites in regards to the Negro criminal: that the Negro is more prone than the white to commit sex crimes, particularly rape."[63]

In response to these public fears about Black female sexuality and criminality, public lynching became a pervasive means of policing and condemning Black sexuality.[64] The prevalence of lynching persisted for almost a century after slavery ended.[65] Lynching was justified by stereotyping Black males as rapists and sexual savages.[66] Lynching also controlled the sexuality of Black men by limiting their access to sexual relations with white women.[67] These stereotypes dehumanized people of color by framing them as "others," outsiders unworthy of full citizenship in civil society.[68] Modern society continues to perpetuate the stereotype of the "'bad Black man' who is crime-prone and hypersexual."[69]

In addition to the stereotyping of Black men as sexual predators, white society stigmatized Black females as consenting prostitutes. In the aftermath of slavery, white society resurrected its racial construct of Black females as Jezebel, the erotic sex object. Although free from slavery, Black females were entrapped by the myth that they were naturally suited for prostitution.[70] This stereotype

62. THE CHICAGO COMMISSION, *supra* note 57, at 331.
63. *Id.*
64. MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH CENTURY SOUTH 1–6 (1997).
65. *See* IDA B. WELLS-BARNETT, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (1892), *reprinted in* AFRICAN AMERICAN CLASSICS IN CRIMINOLOGY & CRIMINAL JUSTICE 21, 21–38 (Shaun L. Gabbidon et al. eds., 2002) (providing a reprint of an 1892 series of editorials about the true causes of lynch law in the South that forced the paper that printed them to shut down); Anders Walker, *The Violent Bear It Away: Emmett Till and the Modernization of Law Enforcement in Mississippi*, 46 SAN DIEGO L. REV. 459, 461 (2009) (discussing how the lynching of fourteen year old Emmett Till in the 1950s galvanized the modern Civil Rights Movement).
66. Butler, *supra* note 13, at 1377–79; *see* Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 745–62 (2002); Emma Coleman Jordan, *Crossing the River of Blood Between Us: Lynching, Violence, Beauty, and the Paradox of Feminist History*, 3 J. GENDER RACE & JUST. 545, 554 (2000); Wriggins, *supra* 92, at 107–08 (discussing lynching and its stereotypes that Black male sexuality was "wanton and bestial, and that Black men are wild, criminal rapists of white women.").
67. Hodes, *supra* note 125, at 1–6.
68. *Id.*
69. Frank Rudy Cooper, Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy, 39 U.C. DAVIS L. REV. 853, 876–80 (2006); see also Ann C. McGinley, Hillary Clinton, Sarah Palin, and Michelle Obama: Performing Gender, Race, and Class on the Campaign Trail, 86 DENV U. L. REV. 709, 709 (2009).
70. Cheryl Nelson Butler, *A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America*, 27 YALE L. & FEMINISM 95, 126 (2015) (discussing America's stigmatization of Black females as consenting prostitutes as an impetus for the founding of Black women's club movement).

became so entrenched that it shaped American law and culture in a myriad of ways. As I have discussed in other works, this "prostitution myth," the stigmatizing claim that Black females and their communities favored prostitution, motivated Black communities to organize civil rights and civic organizations to counter this cruel accusation.[71] For example, Jim Crow laws enforced these racialized notions of womanhood and sexual virtue.[72] The State justified the racial segregation of Black and white women in railroad cars on the grounds that Black women were too sexually deviant and morally inferior to sit in the same railroad cars as ladies.[73] This forced segregation of Black people also reflected the stereotype that as jezebels, Black females were predisposed to engage in prostitution.[74] Thus, these stereotypes coupled with the structural racism that pushed minority populations into vice, set the stage for marginalization of these groups within the movement.

C. Sexual Colonization

To further understand the creation of a prostitution underclass based on race and racism, it is important to look beyond the binary of "black and white."[75]

71. Butler, *supra* note 13, at 1340; Dorothy Roberts, *Prisons, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1492 (2012)("A popular mythology promoted over centuries portrays black women as unfit to bear and raise children. The sexually licentious Jezebel, the family-demolishing Matriarch, the devious Welfare Queen, the depraved pregnant crack addict accompanied by her equally monstrous crack baby—all paint a picture of a dangerous motherhood that must be punished and regulated.").

72. Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 UCLA WOMEN'S L.J. 1, 8 (1993) ("To prevent [racial] mixing, white women and Black men had to be segregated from each other to prevent them from establishing an affinity for one another. This theory legitimized every type of segregation possible—from Jim and Jane Crow laws to the prevention of casual social contact between white women and Black men.") (footnotes omitted); Lori A. Tribbett-Williams, *Saying Nothing, Talking Loud: Lil' Kim and Foxy Brown, Caricatures of African-American Womanhood*, 10 S. CAL. R. L. & WOMEN'S STUD. 167, 179–81 (2000) (discussing *Robinson v. Memphis & Charleston R.R. Co.*, 109 U.S. 3, 5, 25–26 (1883), in which the "defendant established a 'ladies' car on its train, to distinguish White women from 'other' [Black/whorish] women").

73. Kenneth Mack, *Law, Society, Identity and Making of the Jim Crow South: Travel& Segregation on Tennessee Railroads, 1875-1905*, 24 L. & SOC. INQ. 377, 378 (1999) ("Taking her seat in the nonsmoking rear coach which, according to the railroad, was reserved for 'white ladies and gentlemen,' she refused the conductor's request that she move to another car. The conductor, aided by two other men, physically ejected her from the car, in the process tearing her dress but suffering a serious bite wound inflicted by [her] in return.").

74. *See* Vednita Carter, *Prostitution and the New Slavery*, *in* NOT FOR SALE: FEMINISTS RESISTING PROSTITUTION AND PORNOGRAPHY 85–6 (Rebecca Whisnant & Christine Stark eds. 2004) ("Pornographic videos and magazines perpetuate the myth that all Black women are whores.").

75. Within critical race legal scholarship, the phrase "beyond black and white" has been used to look beyond the traditional paradigm of "white on black" racism to consider the experiences of other

In other words, America's prostituted underclass has been formed not only by racialized gender stereotypes based in slavery but also through the historical sexual colonization of Native American, Asian, and Latino people.

Similar to the Black American experience in slavery, Native American children have been historically targeted and seasoned for prostitution and sex trafficking in the United States.[76] Native Americans endured systemic sexual exploitation as part of their colonization by American troops.[77] For example, as part of its program to force Native American tribes to assimilate into American society, the U.S. government sanctioned practices that included sexual abuse and prostitution.[78] The federal government removed Native American children from their native lands and placed them in "boarding schools" and urban cities where they were indoctrinated with American culture.[79] In these government-sanctioned boarding schools, sexual abuse of Native Americans was a common means to forcibly strip them of their native culture, language, and religion.[80] Officials further denigrated Native American women and girls by exposing them to and normalizing sexual abuse and subjecting those who resisted colonization to "rape, physical abuse, and racist verbal abuse from colonists."[81] This systematic forced assimilation also pushed Native American minors into prostitution.[82] Similar to the subordination of Black female slaves, American settlers and troops used racialized sexual stereotypes to justify this systemic sexual exploitation.[83]

racial minorities. *See, e.g.*, Harvey Gee, *Beyond Black and White: Selected Writings by Asian Americans Within the Critical Race Theory Movement*, 30 ST. MARY'S L.J. 759 (1999).

76. Alexandra (Sandi) Pierce and Suzanne Koepplinger, *New Language, Old Problem: Sex Trafficking of American Indian Women and Children* 1, NAT'L ONLINE RESEARCH CTR. ON VIOLENCE AGAINST WOMEN (2011), http://www.vawnet.org/Assoc_Files_VAWnet/AR_NativeSexTrafficking.pdf ("The selling of North America's indigenous women and children for sexual purposes has been an ongoing practice since the colonial era.").

77. Id. at 2 ("In the United States, military troops overseeing the nation's westward expansion targeted Native women for sexual assault, sexual mutilation, and slaughter.").

78. MELISSA FARLEY ET AL., GARDEN OF TRUTH: THE PROSTITUTION AND TRAFFICKING OF NATIVE WOMEN IN MINNESOTA 13 (2011), *available at* www.prostitutionresearch.com/pdfs/Garden_of_Truth_Final_Project_WEB.pdf (describing what is known to scholars as the "boarding school era" or "relocation era") (internal quotations omitted).

79. *Id.*

80. *Id.*

81. FARLEY ET AL., *supra* note 78, at 12; Andrea L. Johnson, *A Perfect Storm: The U.S. Anti-Trafficking Regime's Failure to Stop the Sex Trafficking of American Indian Women and Girls*, 43 COLUM. HUM. RTS. L. REV. 617, 632 n.76 (2012).

82. FARLEY ET AL., *supra* note 78, at 14 ("An honest review of history indicates that European system of prostitution was imposed by force on tribal communities through nearly every point of contact between Europeans and Native people.").

83. Pierce & Koepplinger, *supra* note 76, at 2 ("There is evidence that early British surveyors and settlers viewed Native women's sexual and reproductive freedom as proof of their 'innate' impurity,

Subsequently, other people of color have experienced systemic and state-sanctioned abuse in the United States. Stereotypes of Asian women are still greatly influenced by the long history of colonization and racial subordination by Great Britain. Moreover, Asians have been eroticized within American culture.[84] In the late 1870s, Asian women were trafficked from Asia to California specifically to serve as prostitutes for the male gold mining community. In addition, Asian women were compelled to serve as sexual servants for U.S. soldiers during World War II, the Korean War, and the Vietnam War.[85] Robert Chang has argued, however, Asian women who were demonized as prostitutes in the nineteenth century "were reconfigured in the post-World War II era as potentially redeemable and admissible through marriage to American servicemen with the passage of the War Brides Act of 1945."[86] Yet, the dreams of many Asian American girls today are shattered when they are targeted based on race for grooming or for prostitution.[87]

Sexual colonization has also been part of the systemic racial subordination of Latinos in the United States. In particular, Latina women have often been sexually exploited and forced into prostitution as part of their experience as exploited agricultural workers.[88] For example, in the infamous "Reed Camps" of California, Mexican girls as young as seven were forced to provide sexual services to agricultural workers for over a decade.[89] In the United States, Latina women have historically been made vulnerable to sexual exploitation and have been forced to work as prostitutes.[90]

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and that many assumed the right to kidnap, rape, and prostitute Native women and girls without consequence.").

84. Stewart Chang, *Feminism in Yellowface*, 38 HARV. J.L. & GENDER 235, 235 (2015) (arguing that recent stereotypical portrayals of Asians on television "operated in the same historical tradition of portraying Asians as villains, exotic temptress and prostitutes in the American media"); Sunny Woan, *White Sexual Imperialism: A History of Asian Feminist Jurisprudence*, 14 WASH. & LEE J. CIV. RTS. & SOC. JUST. 275, 278–79, 306 (2008).

85. *Id.*

86. Chang, *supra* note 84, at 237.

87. *See* Patricia Leigh Brown, *In Oakland, Redefining Sex Trade Workers as Abuse Victims*, N.Y. TIMES, May 24, 2011, at A18(discussing an Oakland health clinic that was confronted with "an underground within an underground—the demand for Asian American girls, with Cambodian Americans among the most vulnerable").

88. *See* Marisa Silenzi Cianciarulo, *Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking*, 7 NEV. L. J. 826, 826 (2007).

89. *Id.*

90. *See* Daniela Gerson, *Smuggled Women, Modern Slaves, Tell Their Tales in New York*, N.Y. SUN (May 18, 2005), http://www.nysun.com/new-york/smuggled-women-modern-slaves-tell-their-tales/13991/.

II. LINKING THE PAST TO THE PRESENT: RACE AND COMMERCIAL SEX TRAFFICKING

A. Disproportionality

The racialized sexual exploitation of people of color that developed during slavery and colonization impacts cultural expectations and beliefs about the availability and use of children of color for commercial sex today. In fact, sex trafficking of minors remains a major and persistent part of the epidemic of human trafficking in the United States,[91] where the average age of entry into prostitution is twelve to fourteen years old[92]—well below the legal age of sexual consent (the average of which is sixteen years old[93]). Across the United States, juvenile courts have reported an increase in the number of cases involving prostituted minors.[94] While policymakers and scholars agree that underage girls are the bulk of the participants in the U.S. commercial sex industry,[95] boys make up a significant, but often invisible subsection.[96] Despite reports that the number of minority boys in prostitution is increasing, prostituted boys do not garner the same level of public concern as do girls who are sexually exploited; thus, they are ignored and neglected relative to sexually exploited girls.[97]

91. SHARED HOPE INT'L 2009, *supra* note 2.
92. S. Res. 340, *supra* note 4, at 1; SHARED HOPE INT'L 2009, *supra* note 2, at 30.
93. *See* Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 278–79 (2011); Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1140 (2012) ("All states have established a minimum age at which a minor may consent to sex, with the range from sixteen to eighteen years old and the most common age being sixteen.").
94. SHARED HOPE INT'L, DEMAND: A COMPARATIVE EXAMINATION OF SEX TOURISM AND TRAFFICKING IN JAMAICA, JAPAN, THE NETHERLANDS, AND THE UNITED STATES 101 (2007), http://sharedhope.org/wp-content/uploads/2012/09/DEMAND.pdf [hereinafter SHARED HOPE INT'L 2007].
95. *Id.* at 90.
96. *See* Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2010 UTAH L. REV. 1143, 1143–44 (2010) (arguing that the media and society fails to acknowledge that the sex trafficking of boys "represent[s] a major criminal enterprise in the United States, and around the world, with boys constituting up to 90% of the child prostitutes in some countries") (footnote omitted); *see also* FRANCES GRAGG ET AL., NEW YORK PREVALENCE STUDY OF COMMERCIALLY SEXUALLY EXPLOITED CHILDREN: FINAL REPORT 27 (2007), *available at* http://www.ocfs.state.ny.us/main/reports/csec-2007.pdf.
97. *See* GRAGG ET AL., *supra* note 96; ECPAT-USA, AND BOYS TOO 2 (2013), https://d1qkyo3pi1c9bx.cloudfront.net/00028B1B-B0DB-4FCD-A991-219527535DAB/ 1b1293ef-1524-4f2c-b148-91db11379d11.pdf (footnote omitted) ("The little notice given to boys primarily identifies them as exploiters, pimps and buyers of sex, or as active and willing participants in sex work, not as victims or survivors of exploitation.").

Indeed, children of color make up a disproportionate number of sexually exploited children in the United States.[98] For example, most of the sexually exploited persons in major Texas cities, such as Houston, are racial minorities and come from economically vulnerable backgrounds.[99] A recent study, *Prostituted Youth*, found that 50 percent of all streetwalking prostituted minors in New York City—the largest subgroup—consisted of Black minors, while another 25 percent were Latino.[100] A separate study found that up to 67 percent of underage prostitutes in New York were Black and another 20 percent were Latino.[101] This is a vastly disproportionate rate, since African Americans make up only 26 percent of the population in New York City.[102] This pattern of disproportionality also exists in California.[103] For example, in Alameda County, 66 percent of all youth referred to a community agency exclusively serving commercially sexually exploited children were African American.[104]

Statistics show that these racial profiles mirror a national epidemic. The U.S. Bureau of Justice Statistics determined that between 2008 and 2010, nonwhite children accounted for 358 of the 460 cases of child sex trafficking investigated by the U.S. Department of Justice, and a majority of these 358 confirmed victims were reported to be Black and Latino.[105] Likewise, a 2013 National Juvenile Prostitution Study found that a disproportionate number of child sex trafficking victims were African American.[106]

98. The Black & Missing Foundation reports that of the 635,155 children of all races who went missing in America in 2014, 36.8 percent of children ages seventeen and under are African American. *See Statistics,* BLACK & MISSING FOUND., http://www.blackandmissinginc.com/cdad/stats.htm#1 (last visited July 31, 2015).

99. *See, e.g.*, THE NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY & ESSENCE MAG., UNDER PRESSURE: WHAT AFRICAN-AMERICAN TEENS AREN'T TELLING YOU ABOUT SEX, LOVE, AND RELATIONSHIPS 3 (2011) [hereinafter UNDER PRESSURE].

100. MIA SPANGENBERG, PROSTITUTED YOUTH IN NEW YORK CITY: AN OVERVIEW (2001), http://www.hawaii.edu/hivandaids/Prostituted%20Youth%20in%20New%20York%20City%20%20%20%20An%20Overview.pdf.

101. GRAGG ET AL., *supra* note 96, at ii.

102. FURMAN CTR. FOR REAL EST. & URBAN POL'Y, THE CHANGING RACIAL AND ETHNIC MAKEUP OF NEW YORK CITY NEIGHBORHOODS 30 (2011), http://furmancenter.org/files/sotc/The_Changing_Racial_and_Ethnic_Makeup_of_New_York_City_Neighborhoods_11.pdf.

103. *Domestic Child Sex Trafficking and African American Girls*, RIGHTS4GIRLS, http://rights4girls.org/wp-content/uploads/r4g/2015/03/DCST-and-Af-Am-girls.pdf (last visited July 31, 2015) ("In Los Angeles County, 92% of girls in the juvenile justice system identified as trafficking victims were African-American, 62% of those children were from the child-welfare system, and 84% were from poor communities in the southeastern part of L.A. County.").

104. *Id.*

105. *Characteristics of Suspected Human Trafficking Incidents, 2008–2010*, BUREAU OF JUST. STATISTICS (Apr. 2011), http://www.bjs.gov/content/pub/pdf/cshti0810.pdf.

106. KIMBERLY J. MITCHELL ET AL., CRIMES AGAINST CHILDREN RESEARCH CTR., SEX TRAFFICKING CASES AGAINST MINORS 1 (2013). http://www.unh.edu/ccrc/pdf/CV313

B. Demand Based on Racial Fetish and Stereotypes

In the United States, both racialized sexual fetish and racial animus fuel the market in which mostly white men purchase commercial sex with people of color, including minors. While Black children are most likely to experience some form of sex trafficking, other children of color are similarly at a higher risk than their white counterparts. Native Americans in particular argue that a strong connection exists between colonization and a persistent targeting of native people for prostitution.[107] The sexual stereotypes that were used to justify colonization persist today as Native American minors are targeted for sexual exploitation.[108] Studies have found that a prostitution of Native American girls is increasing at "alarming rates."[109] In a groundbreaking study on Native women in prostitution, 75 percent of the women interviewed had sold sex in exchange for shelter, food, or drugs.[110] Thus, some young Native women perceive prostitution as an economic consequence of having lost their land, culture, and means of economic survival during colonization and subsequent deprivation of human rights and opportunity by the U.S. government.[111] As a result of the long history of racial oppression, today's Native women and girls, in Minnesota for example, still do not perceive that alternative employment options are available to them.[112]

Similarly, America's anti-immigrant culture facilitates the sexual exploitation and trafficking of immigrant girls.[113] In the United States, the rape of an immigrant minor can go unpunished,[114] as an undocumented victim may be

_Final_Sex_Trafficking_Minors_Nov_2013_rev.pdf ("Bulletin summarizing the finding of the National Juvenile Prostitution Study and finding that "36% were African American, which is quite disproportionate to the 14.5% of youth ages 10–19 in the general population who were African American.").

107. *Id.*

108. Pierce & Koepplinger, *supra* note 76, at 1 ("Native girls still are specifically targeted based on their race. The FBI recently noted, "There have been traffickers and pimps who specifically target Native girls because they feel that they're versatile and they can post them [online] as Hawaiian, as Native, as Asian, as you name it.").

109. Johnson, *supra* note 81, at 643 (2012); FARLEY ET AL., *supra* note 78.

110. *Id.* at 25.

111. *Id.* at 32–33.

112. FARLEY ET AL., *supra* note 78, at 3.

113. *See* LABOR COUNCIL FOR LATIN AMERICAN ADVANCEMENT, TRABAJADORAS: CHALLENGES AND CONDITIONS OF LATINA WORKERS 23, 45–46, 88 (2012), *available at* http://www.lclaa.org/images/pdf/Trabajadoras_Report.pdf [hereinafter TRABAJADORAS]; S. POVERTY LAW CTR., UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH 4 (2009); *see generally* Jennifer M. Chacón, *Tensions and Trade Offs: Trafficking Victims in the Era of Immigration Enforcement,* 158 U. PENN. L. REV. 2609, 1609–12 (arguing that anti-immigration sentiment undermines the goals of antitrafficking legislation).

114. S. POVERTY LAW CTR., *supra* note 113, at 4.

reluctant to report the crime.[115] Furthermore, 77 percent of working Latinas say that sexual harassment on the job is a major problem for them.[116] Statistics show that on and off the job, Latinas remain vulnerable to sexual assault and sex trafficking.[117] In one recent federal case, hundreds of Mexican girls were forced to work as sex slaves in San Diego.[118]

Finally, there is a strong correlation between robust tourist industries within certain American cities and the prevalence of prostitution of minority youth in those cities. In American cities with strong tourism industries, nonwhites represent a substantial number of sexually exploited minors.[119] For example, Black girls as young as ten and eleven years old compose a substantial number of the sexually exploited minors in Atlanta.[120] Furthermore, the internet has made all minors more vulnerable to prostitution.[121] It has allowed "buyers from beyond the ethnic community to access the sexual services of the normally closed system."[122] In other words, commercial sex networks that were traditionally only open to people of the same community or ethnic group become open to a larger Internet community.[123]

C. Maintaining Supply: The Sexual Objectification of Kids of Color

The culture of racialized sexual exploitation developed during slavery and colonization also continues to manifest itself in a modern American culture that encourages their participation in prostitution. Today, hypersexualized stereotypes about minority teens continue to drive their prostitution and sexual exploitation. Lawmakers presume that minors have consented to prostitution even when the minor is below the age of consent.[124] American society embraces the

115. *Id.* at 25.
116. *Id.* at 28.
117. *See* TRABAJADORAS, *supra* note 113, at 96; U.S. DEP'T OF JUSTICE, EXISTE AYUDA HELP EXISTS: FACT SHEET, http://www.ovc.gov/pubs/existeayuda/tools/pdf/factsheet_eng.pdf (last visited July 31, 2015).
118. Cianciarulo, *supra* note 77, at 826; Peter Landesman, *The Girls Next Door*, N.Y. TIMES (Jan. 25, 2004), http://www.nytimes.com/2004/01/25/magazine/25SEXTRAFFIC.html.
119. SHARED HOPE INT'L 2007, *supra* note 94, at 87, 98, 103–04 (describing the country of origin and ethnicity of victims of the commercial sex markets in U.S. cities such as Atlanta, Las Vegas, and Washington, D.C.); SPANGENBERG, *supra* note 100, at 4.
120. SHARED HOPE INT'L 2007, *supra* note 94, at 101.
121. Butler, *supra* note 5, 115–18.
122. SHARED HOPE INT'L 2007, *supra* note 94, at 87.
123. *Id.*
124. *See generally In re* B.W., 313 S.W.3d 818, 819 (Tex. 2010) (detailing how the lower courts in Texas found that a minor under the age of sixteen was still capable of consenting to prostitution).

stereotype that good girls do not engage in premarital sex.[125] Conversely, kids involved in prostitution are stereotyped as bad girls who have turned to prostitution as an act of rebellion against mainstream moral values.[126]

These stereotypes reflect a culture of "racialized gender," or oppression based upon the intersection of race and gender.[127] Specifically, kids of color are stereotyped as sexually aggressive, deviant, and predisposed toward risky sexual behavior such as prostitution. Society stereotypes nonwhite minors—Black and Latino kids in particular—as dysfunctional misfits whose inherently sexually promiscuous nature undermines the moral standards of the mainstream society.[128] The perceived hypersexuality of both teens and women of color is regarded as a societal threat, with such stereotypes often contributing to their sexual exploitation. Black girls today are perceived as "sexually promiscuous, lacking in morality of family values, and out of control."[129] These stereotypes persist in part because traditionally, social science research on the sexual behavior of minority teens often confirms, rather than challenges, these stereotypes. According to research, teens of color allegedly are more sexually promiscuous than their white counterparts.[130] One study, for example, found that 45.7 percent of all teenage girls between fifteen and nineteen years old had experienced sexual intercourse, while the rate was 61.2 percent for teenage Black girls.[131] Black teens are also alleged to have had more sexual partners.[132] Yet, without analysis as to the environmental factors that contribute to these disproportionate rates, these

125. Renée M. Landers, *Sexual Activity Between Minors, Prostitution, and Prosecutorial Discretion: What Difference Should Age and Sex Make?*, 53 BOSTON BAR J. 8, 11 (2009); *see* Todres, *supra* note 9 (discussing how cultural norms impact societal beliefs about a child's legal maturity to engage in adult activities including sex).

126. Todres, *supra* note 9; *see generally* Rebecca Hall & Angela P. Harris, *Hidden Histories, Racialized Gender, and the Legacy of Reconstruction: The Story of* United States v. Cruikshank, *in* WOMEN AND THE LAW STORIES (Elizabeth M. Schneider & Stephanie M. Wildman eds. 2011).

127. *See generally* Hall & Harris, *supra* note 126.

128. *See* Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN'S L.J. 303, 320–22 (2005); Dorothy E. Roberts, *Deviance, Resistance, and Love*, 1994 UTAH L. REV. 179, 180–190 (1994) [hereinafter Roberts, *Deviance*] (exploring the treatment of Black people as "outlaws" in criminal and commercial contexts, as well as how Black people view other Black people in these situations); Dorothy E. Roberts, *Prison, Foster Care, and the Systematic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1492 (2012) [hereinafter Roberts, *Prison*] (discussing the cultural mythology of unmarried Black women as "the ultimate irresponsible mothers-women who raises [sic] their children without the supervision of a man").

129. *See* Nash, *supra* note 128, at 320–22; Roberts, *Deviance*, *supra* note 128, at 184–85; Roberts, *Prison*, *supra* note 128, at 1492.

130. *See, e.g.*, THE NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, FACT SHEET: TEEN SEXUAL ACTIVITY, PREGNANCY AND CHILDBEARING AMONG BLACK TEENS 3 (2007), http://www.advocatesforadolescentmothers.com/files/AfrAmericans_2007.pdf.

131. *Id.*

132. *Id.*

statistics are misleading and, as such, contribute to the persistence of sexual stereotypes about minority teens.

Modern media and popular culture also contribute to the sexual objectification of minority youth, thereby increasing their vulnerability to sexual exploitation. Pornographic images of Black teens flood the Internet, mainstream music videos, and television.[133] The media stereotypes minority kids as prostitutes and sexual deviants[134] and sexually objectifies minority women and girls especially. In doing so, the media renders these groups more vulnerable to sexual exploitation.[135]

Youth in American society are bombarded with images of sex, violence, and materialism on television, in the movies, and through music lyrics. A groundbreaking new study found the following:

> In comparison to white characters on TV and in movies, black youth say that they are portrayed as less intelligent, more prone to failure, and less successful in relationships. Fewer than one in five (18%) say they often see themselves in the TV shows and movies they are watching, and seven in 10 say these TV shows and movies portray black youth as sexually aggressive.[136]

The same pop culture that immortalizes pimps as folkloric heroes also superficially glamorizes (but actually denigrates) girls who sell their bodies for pimps. The Jezebel stereotype of the slavery era is resurrected in the lyrics and persona of Black female rap artists and other cultural images.[137] Many of the top selling rap songs portray young women—especially Black young women—as glamorous prostitutes who seem empowered by their sexuality, but in actuality lack autonomy over their bodies and sexual images.[138] Further, while girls of all ethnicities are influenced by the media's encouragement of teen sexual activity, minority teens in particular perceive that the media disproportionately portrays them in a sexually stereotyped manner—that is, as lewd and sexually aggressive.[139]

133. Vednita Nelson, *Prostitution: Where Racism & Sexism Intersect*, 1 MICH. J. GENDER & L. 81, 83 (1993).
134. *See generally* NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010).
135. Vednita Nelson, *Prostitution: Where Racism & Sexism Intersect*, 1 MICH. J. GENDER & L. 81, 83 (1993).
136. *Id.* at 3.
137. For a discussion of the Jezebel stereotype, see *supra* notes 52–61 and accompanying text.
138. *See* Tribbett-Williams, *supra* note 32, at 183–85.
139. *See* UNDER PRESSURE, *supra* note 99, at 3.

For example, several legendary rap artists have at least one famous "pimpin'" song.[140] The leading contemporary artists, including Jay-Z, 50 Cent, Snoop Dogg, Tony Yayo, and the late Pimp C, all have hit pimp songs, embody pimp personae, or both. The lyrics indicate that some children and teens (under eighteen years old) voluntarily engage in prostitution to finance a variety of needs and desires, whether those needs are food, handbags, or money for school.[141] Rap lyrics also adversely impact public culture and discourse by perpetuating race and gender hierarchies.[142]

To be sure, rap music has been highly influential in shaping the cultural attitudes of generations of youth throughout the world. In many respects, rap music represents positive expressions of cultural and musical genius. Some strands of rap music, however, perpetuate the sexual exploitation of and violence against women.[143] Through listening to these negative strands of rap music, female minors are often seduced, manipulated, or exploited into joining a lifestyle of pimping and prostitution. Girls are particularly vulnerable to having their sexuality shaped by music videos of gangsta rap, a subgenre that tends to idolize pimp culture.[144] Some grow up to believe that a heightened sexual persona is a central part of their sexual identity as young Black girls.[145] While adults may

140. *See* Eithne Quinn, *'Who's the Mack?': The Performativity and Politics of the Pimp Figure in Gangsta Rap*, 34 J. AM. STUD. 115, 116 (2000).

141. Rapper 50 Cent raps about a pimp who hooks a girl by promising financial and emotional support. The pimp first pimps the girl in a strip club. She is "dancing for dollars [because she] has a thing for that Gucci, that Fendi, that Prada, that BCBG, Burberry, Dolce and Gabana." The pimp makes promises to the stripper to force her into prostituting herself on the street. She is told to "hit that track, catch a date, and come and pay the kid." Then he promises the girl, who is now his "bitch," that she should continue to bring the money so that they can "live the good life"; they will "splurge," "have a ball" and "tear up the mall." The pimp encourages the girl to isolate herself emotionally and to make her pimp the only "friend," "father," or "confidant" she needs. 50 CENT, *P.I.M.P., on* GET RICH OR DIE TRYIN' (Aftermath Entertainment 2003). The fact that P.I.M.P. is a major hit song indicates that lots of teens are singing about pimping. The proliferation of "pimpin'" culture influences youth in all communities. *See* Emma Lee, *Hooked on a Feeling: If I Was Having Meaningless Sex, It Might as Well Pay My Tuition*, ELLE (Apr. 29, 2008, 10:45 AM), http://www.elle.com/life-love/sex-relationships/advice/a9125/hooked-on-a-feeling-18993/ (documenting a college girl's self-promotion on Craigslist as an escort to earn spending money while in school).

142. Lolita Buckner Inniss, *A 'Ho New World: Raced and Gendered Insult as Ersatz Carnival & the Corruption of Freedom of Expression Norms*, 33 N.Y.U. REV. L. & SOC. CHANGE 43, 44 (2009).

143. *See* Abdul Ali, *Parenting in the Hip Hop Age of Lil Wayne, Wife Beaters, Domestic Violence and Misogyny*, WASH. POST (Jan. 6, 2012, 12:51 PM), http://www.washingtonpost.com/blogs/therootdc/post/parenting-in-the-hip-hop-age-of-lil-wayne-wife-beaters-domestic-violence-and-misogyny/2012/01/04/gIQA4ovDfP_blog.html.

144. *See* Quinn, *supra* note 129, at 116.

145. *See* Elizabeth Marshall, Jeanine Staples & Simone Gibson, *Ghetto Fabulous: Reading Black Adolescent Femininity in Contemporary Urban Street Fiction*, 53 J. ADOLESCENT & ADULT LITERACY 28, 29–35 (2009).

enjoy the music for mere jest and entertainment, children who are in search of an identity—whether they are living in the American inner city or the suburbs—will internalize the images and embrace the pimp, hustler, and prostitute personae as role models.

These images can have a negative impact on minority youth and sexual behavior. Cornel West has argued that the media "convinces young people that the culture of gratification—a quest for insatiable pleasure, endless titillation, and sexual stimulation—is the only way of being human."[146] Whereas youth of prior generations led the civil rights and other social movements of the 1960s, today's youth have been seduced by the media and corporate marketers to focus on "hedonistic values," "narcissistic identities," and other behaviors that distract them from advancing the social justice issues that are important to their communities.[147] Thus, the media's sexualized images encourage minority youth to see themselves as sex objects. Nearly three out of four surveyed black teens (72 percent) say that the "media sends the message that black girls' sex appeal is their most important quality."[148] Black males are portrayed as hypersexual and untrustworthy figures; 64 percent of teens feel "that the media sends the message that it is okay for black males to cheat in relationships."[149] The media's stereotyped sexual images of minority youth create social pressures for these youth to engage in sexual activity. They feel "*more* pressure to have sex from society (51 percent) and the media (48 percent) than they feel from their own partners (36 percent)."[150]

D. Structural Inequality

In addition to their sexual objectification in American culture, other forms of structural racism push people of color, particularly minors, into prostitution. Squarely imbedded within societal structures, race and gender discrimination makes minors targets for coerced prostitution at the hands of pimps, facilitators, or johns precisely because they are dependent on adults for survival.

My contention is that when this protection is denied due to discrimination, minors become the victims of abuse and neglect, with some engaging in "survival

146. CORNEL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 175 (2004).
147. *Id.*
148. *See* UNDER PRESSURE, *supra* note 99, at 3.
149. *Id.* at 6.
150. *Id.* at 2.

sex" as a means of finding necessities; lacking educational opportunities and often surrounded by poverty, vulnerable minors often find themselves in foster homes or under the custody of child protective services that increases their risk for sexual abuse and exploitation, which facilitates their entry into the commercial sex industry.[151]

Studies show that African American girls become trafficked at younger ages than their racial counterparts. They are more likely to experience poverty, and consequently more likely to be disconnected from schools and other community supports. African American girls experience physical and sex abuse at young ages and witness multiple forms of violence at higher rates than their white peers. In 2013, 26 percent of children in the foster care system were African Americans.[152]

III. THE RACIAL ORIGINS OF THE ANTITRAFFICKING MOVEMENT

Historically, the antitrafficking movement has ignored or otherwise failed to address the racial disproportionality of domestic sex trafficking. This Part illustrates how the efforts to portray sex trafficking as only involving white women has worked to further victimize people of color who are trafficking victims or at risk of being trafficked.

A. The "White Slavery" Campaign

American campaigns to end prostitution and sex trafficking have used the rhetoric of, and analogies to, transatlantic slavery to condemn modern sex trafficking; but have not adequately protected people of color or even acknowledged them as victims. For example, the "white slavery" campaign of the early 1900's, which led to the enactment of the Mann Act,[153] (originally known as the White Slave Traffic Act[154]) utilized morally charged rhetoric by analogizing prostitution with the history of African slavery in America. According to lawmakers who would sponsor the legislation, "the white slave trade was the business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes."[155]

151. *See generally* Butler, *supra* note70. For more on "survival sex," see Butler, *supra* note 5, at 1292.
152. Tanya A. Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 224 (2013).
153. *See* White-Slave Traffic Act ("Mann Act"), 18 U.S.C. §§ 2421–24 (1910).
154. *See* Todres, *supra* note 9, at 649.
155. Barbara Holden-Smith, *Lynching, Federalism & the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 61 (1996).

The use of the slavery rhetoric allowed "white slaves" to fit a certain paradigm. The legislative history of the White Slave Act speaks to the need to help women and girls "in captivity" by pimps and procurers.[156] They were presumed to be "held in bondage . . . without an opportunity to leave."[157] The white slavery campaign focused on protecting and policing "those women who are owned and held as property and chattle—whose loves are of involuntary servitude."[158]

But, on its face, the term "white slave" is clearly racially prescribed. This paradigm included racialized notions of who could be identified as a victim of exploitation. As Karen E. Bravo has explained:

> [S]ince the victimization of whites alone was targeted, leaving unchallenged the exploitation of white women, the racialized character of the fight against the eighteenth and early nineteenth century traffic helped undermine the effectiveness of the international instruments adopted to combat the trade by targeting only the sexual exploitation of a single racial group.[159]

Indeed, the white slavery campaign ignored the pervasiveness of sex trafficking of Black women and girls. For example, during the Great Migration, employment agencies in northern American cities recruited Black women from the South to come to Boston, Chicago, and New York for promised jobs in factories, department stores, and other reputable businesses. When many of the women arrived, however, their bags were confiscated and they were sent to work in brothels as prostitutes, or as maids. Some employment agencies in Chicago blatantly steered even college-educated Black women and girls into prostitution because it was legal to do so. Black girls, unlike white girls, were not protected by early pandering laws.[160]

This refusal to recognize women and girls of color as victims of forced prostitution perpetuates the Jezebel myth that Black women would always consent to sex.[161] Indeed, because the law "did little to discourage White men

156. Anne M. Coughlin, *From White Slaves to Domestic Hostages*, 1 BUFFALO CRIM. L. REV. 110, 111 (1997) (arguing that the legislative history of both the Mann Act and the Violence Against Women Act, of which the TVPRA is a part, both "invoke metaphors of captivity to describe the plight of the female subjects whom Congress was determined to protect").

157. BRIAN DONOVAN, WHITE SLAVE CRUSADES: RACE, GENDER, AND ANTI-VICE ACTIVISM, 1887–1917, at 72 (2006).

158. *See* SENATE IMMIGR. COMM., WHITE-SLAVE TRAFFIC, S Rep. No. 886, 61st Cong., 2d Sess. 11 (1910).

159. Bravo, *supra* note 13, at 574; *see also* Bravo, *supra* note 9.

160. Butler, *supra* note 13, at 1387.

161. CHERYL D. HICKS, TALK WITH YOU LIKE A WOMAN: AFRICAN-AMERICAN WOMEN, JUSTICE, AND REFORM IN NEW YORK, 1890–1935, at 91–93 (2010).

who were determined to have their way with Black women," the alleged rape of a Black woman—particularly at the hands of a White man—has traditionally not been recognized as a crime.[162] Further, the claim that, "Black women do not experience coerced sex in the sense that white women experience it. . . . reflect[s] a set of myths about Black women's supposed promiscuity which were used to excuse white men's sexual abuse."[163] These different experiences between Black and white women regarding rape alienated Black women from the first wave of the feminist advocacy for rape reform.[164] Today, "the criminal justice system continues to take the rape of Black women less seriously than the rape of white women."[165]

The intentional marginalization of women and girls of color was reflected not only in the rhetoric of the white slavery movement but also in the State's legal response. For example, state agencies created programs that only shielded white women from trafficking.[166] As Cheryl D. Hicks has argued, Progressive era efforts to protect white and Black women from sexual exploitation "proceeded from different motives and assumptions and were shaped by black and nonblack women's differing relations to the female labor market."[167] The conflicting ideologies of antitrafficking advocates Frances Kellor, a white female reformer, and Victoria Earle Matthews, an African American woman, reflect these distinctions.[168] Kellor and other white reformers "were anxious about the alleged increase in prostitution among white native-born and immigrant women [and] emphasized the involuntary character of their sexual exploitation by using the term 'white slavery.'"[169] In contrast, "Kellor and her cohort believed that enslavement made all black women less capable of leading moral, respectable lives. Thus, white reformers emphasized changing these women's labor efficiencies rather than transform the racially restrictive practices of the labor market and of social institutions."[170]

162. Jeffrey J. Pokorak, *Rape as Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities,* 7 NEV. L.J. 1, 8–11 (2006) (discussing charging disparities as a legacy of the historical refusal of the law to recognize the rape of black women as a crime).
163. Wriggins, *supra* note66, at 120.
164. ANGELA Y. DAVIS, WOMEN, RACE, AND CLASS 151 (1981) ("If black women have been conspicuously absent from the ranks of the contemporary anti-rape movement, it may be due, in part, to that movement's indifferent posture toward the frame-up rape charge as an incitement to racist aggression.").
165. FARLEY ET AL., *supra* note 78, at 17–18 (arguing that empirical data support the conclusion that women of color are overrepresented in American prostitution).
166. HICKS, *supra* note 161, at 91–93.
167. *Id.* at 92.
168. *Id.*
169. *Id.*
170. *Id.* at 93.

Rather than blame Black women for the culture of sexual exploitation waged upon them, Matthews, who was "haunted by the legacy of enslavement," "sought to show that young black girls were also the victims of sexual procurers and predators."[171] Matthews was mindful that young Black female migrants to northern cities were systemically denied employment opportunities and instead steered toward prostitution. Matthews warned Black scholars and leaders to focus upon race-based sex trafficking: "[M]any of the dangers confronting our girls from the South in the great cities of the North are so perfectly planned, so overwhelming in their power to subjugate and destroy that no woman's daughter is safe away from home."[172] Here, Matthews alluded to the structural racism and sexism that targeted black women and girls for prostitution and sex trafficking. To provide black women and girls with the same type of protection offered to their white counterparts, Matthews founded the White Rose Mission Working Girls Home in New York.[173] In Matthews' words, for "the young and unfriended [women] of other races, there are all sorts of institutions." But, for Black girls "there is nothing."[174] Unfortunately, but unsurprisingly, compared to their white counterparts, black reformers such as Matthews struggled to receive funding for their work on behalf of sexually exploited Black girls.[175] This disparity in resources reflected the racial confines of the white slavery campaign.

Some leaders of the white slavery campaign not only denied Black women and girls protection from forced or coerced prostitution,[176] but also blamed Black people for the rise in vice and prostitution.[177] In addition to the framing of Black women and girls as predisposed to consensual prostitution, the imagery of the Black male as a menacing pimp and a sexual threat in general was a central tenet of some White Slave crusaders.[178] When Francis Willard, the internationally renowned leader of the Women's Christian Temperance Union, warned white women and girls to stay away from "dark places," she alluded not only to the dangers of being present in Chicago's poorest neigh-

171. *Id.* at 92.
172. Seth Kramer, *Uplifting our "Downtrodden Sisterhood": Victoria Earle Matthews and New York City's White Rose Mission, 1897–1907*, J. AFRICAN AM. HIST. 243, 243 (2006).
173. HICKS, *supra* note 161, at 92.
174. Kramer, *supra* note 172, at 244.
175. DONOVAN, *supra* note 157, at 92–93.
176. *Id.* at 95 ("The construction of white womanhood in the white slavery narrative linked racial and sexual purity. Accordingly, investigators not only sought 'white' as opposed to 'colored' girls but also sexually innocent girls.").
177. DONOVAN, *supra* note 157, at 63 ("For Snead, Turner and Bell [leaders in the anti-vice crusade], the vice trade in Chicago threatened to shred the moral fabric of the city. They blamed white slavery on foreign influences and the growing presence of African Americans in Chicago.").
178. *Id.* at 48–49.

borhoods, but also the sexual threat that black men and women posed for white womanhood and white racial purity.[179] As Brian Donovan argues, "[i]nsofar as these neighborhoods housed a large percentage of the city's immigrants and African Americans, 'dark places' becomes more than a metaphor for sin; it carries a double meaning that links sexual practices and race."[180]

To conclude, white women and girls were not blamed for prostitution, but were instead framed as slaves who were worthy of rescue and protection. They were recognized as victims of white slavery, their agency to engage in prostitution having been robbed or coerced as a result of the evil influence of Black prostitutes.[181] Many of the most popular and notorious stories of white women found "consorting with the vilest kind of Negroes" involved alleged trickery and coercion by black pimps and madams. Indeed, Negros were "keepers of the dive into whose hellish place she had been entrapped by evil machinations."[182] Rather than stand trial, a white girl "found in a negro house of prostitution" was better off praying "for death to relieve her of a life that had become too painful to be borne."[183]

B. The Mann Act: How Antitrafficking Legislation Victimized, Rather Than Protected, Black People

Early antitrafficking legislation also reflected the inherent racism within the white slavery movement. The White Slave Act, enacted in 1910, threatened the prosecution of anyone who transported "any woman or girl for the purpose of prostitution" in interstate commerce.[184] As an alternative to prostitution, the legislators' intent was to give women "a fair chance" to become "good wives and mothers and useful citizens."[185]

But, in practice, the references to "any woman or girl" did not apply to females of color.[186] Arguably, the legislators felt no commitment to moving Black women out of roles as prostitutes and into roles as respectable wives or mothers. As Barbara Holden-Smith has noted, "[t]he focus of the congressional

179. *Id.*
180. *Id.* at 48.
181. *Id.* ("Although prostitution ultimately corrupted the moral and racial purity of white girls, the [Women's Christian Temperance Union] did not hold them responsible for their entry into the vice trade.").
182. *Id.*
183. *Id.*
184. Coughlin, *supra* note 156, at 110.
185. *Id.* at 115.
186. Bravo, *supra* note 13, at 574.

floor debates on Mann's bill was the mythical white farm girl who came to the city looking for adventure and found herself trapped in a life of sexual slavery."[187]

As such, the Mann Act was actually used to further police the sexuality of white women by prosecuting black men for engaging in consensual interracial relations.[188] The most infamous case involved the federal prosecution of World Boxing Champion Jack Johnson.[189] In 1908, when Johnson, an African American fighter, defeated World Heavyweight Champion Tommy Burns, a white man, whites throughout the world feared that Johnson's win would threaten the "myths of white physical and mental superiority" and desperately searched for a "Great White Hope" who could take the title back from Johnson.[190] Unable to find a "great white hope" to defeat Johnson, racial violence by whites against African Americans erupted throughout the United States.[191]

As Kevin Johnson has explained, the United States prosecuted Johnson under the Mann Act "for transporting across state lines a white woman, Belle Schrieber."[192] The prosecutors pursued the Mann Act charge, "even though Schrieber was an adult and, as she testified, her travels with Johnson were wholly consensual."[193] Department of Justice officials "acknowledged the impropriety of a Mann Act charge . . . [but] considering Johnson's fraternizing with a white woman "a crime against nature,"[194] they continued to "press its

187. Holden-Smith, *supra* note 142, at 67.

188. Committee to Pardon Jack Johnson, Petition for Pardon to the President of the United States 10–11 (2004), http://www-tc.pbs.org/unforgivableblackness/knockout/pardon_petition.pdf [hereinafter Petition for Pardon]. For additional legal scholarship on the social and legal prohibitions against interracial romantic relationships, *see* Angela Onwuachi-Willig, *What Would Be the Story of Alice & Leonard Rhinelander Today?*, 46 U.C. DAVIS L. REV. 939, 946–47 (2013) ("Although occurring almost a century ago, the lives of Alice and Leonard Rhinelander remain relevant in today's society. . . . [T]he *Rhinelander* narrative forecasts a strong lingering taboo against interracial marriage in general and black-white marriage in particular."); *see generally* Angela Onwuachi-Willig, *A Beautiful Lie: Exploring* Rhinelander v. Rhinelander *as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CALIF. L. REV. 2393 (2007); Rose Cuison Villazor, *The Other* Loving: *Uncovering the Federal Government's Racial Regulation of Marriages*, 86 N.Y.U. L. REV. 1361 (2011).

189. See Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 TEX. L. REV. 739, 753–55 (2006).

190. Petition for Pardon, *supra* note 188, at 5–7.

191. Petition for Pardon, *supra* note 188, at 9 ("For example . . . A white man slashed the throat of a black man in Houston who was cheering Johnson's triumph; two other blacks were killed in Little Rock as a result of an argument with a group of whites about the march. Other African-Americans were badly injured in New York City, New Orleans, Baltimore, St. Louis, Cincinnati, Los Angeles, and many other cities.").

192. *See* Johnson, *supra* note 176.

193. *Id.*

194. Petition for Pardon, *supra* note 191, at 15.

case."[195] In doing so, they used the Mann Act "for what was openly acknowledged by the Federal officials involved to have been the purpose of sending a message to African-Americans not to challenge the prevailing divide and taboo of the time."[196] Johnson argued that the trial "marked the first time the Mann Act was invoked to invade the personal privacy for two consenting adults and criminalize their consensual sexual behavior—a purpose nowhere found in the legislative history of the Mann Act."[197] Nevertheless, the Seventh Circuit rejected this claim, holding that the Mann Act could be used to criminalize any form of "sexual immorality."[198] Thus, the Mann Act upheld the customary views regarding the protection of white womanhood from unacceptable sexual liasions. Furthermore, the Johnson trial also reveals how the Mann Act was used to further denigrate, rather than protect or dignify, sexual relations with people of color. In short, only white women could be white slaves and prosecutors tended to foresee their traffickers as black.

IV. THE CONTEMPORARY ANTITRAFFICKING MOVEMENT

This Part explores several ways in which the modern antitrafficking movement continues to marginalize African Americans and other people of color. In several ways, the modern movement reflects the earlier racial biases of its predecessor, the white slavery movement. On the one hand, the proper identification of prostituted victims as people of color, and minors in particular, continues to be undermined by centuries old stereotypes about race. On the other hand, and discussed later in Part V, the Obama administration has taken some important steps to recognize the role of race and ethnicity in making people of color, including minority youth, more vulnerable to prostitution and sex trafficking in the United States.

A. Perpetuating the Myth of the Iconic White Female Victim

Perhaps as a result of the white slave campaign, the mainstream media portrays the iconic prostituted youth as white and suburban, thereby rending minority victims invisible. It is important to make the public aware that, indeed, sexual exploitation affects children of all races; yet one unintended consequence of doing so is that white kids have become the "iconic victims" of domestic trafficking,

195. *Id.* at 11.
196. *Id.* at 23.
197. *Id.* at 18.
198. *Id.*

while the racialized nature of sexual exploitation is ignored. Scholars and advocates have galvanized attention to sex trafficking by highlighting the victimization of young white middle class girls.[199] Cheryl Hanna's article, *Somebody's Daughter*, raises awareness to the fact that sex trafficking is not a crime that is limited to victims of any racial, geographic, or socioeconomic group in America.[200] To drive home her point, however, Hanna tells the true story of a "blond and beautiful" white teen named Christal from a "small, bucolic, lakeside college town in Vermont," which the locals called "God's country."[201] Christal is targeted in her hometown by a 25-year-old pimp named Jose "Ritchie" Rodriguez.[202] Rodriguez convinces Christal to run away and become his sex slave in a sleazy apartment on Zerega Avenue in the South Bronx. Christal is later found murdered.[203]

While Christal could be the poster child for sex trafficking in Vermont, it is unlikely that her face is that of the majority of sex trafficking victims in California, New York, or Texas. When Christal arrived at that seedy apartment in the South Bronx, she probably joined local Black and Latina girls who shared her exploitation, as would have been the case if her trafficker brought her to any major city in the United States. Advocates have to ensure that Hanna's intended message is not lost: Traffickers will victimize "anybody's daughter," a group that necessarily includes Black women and girls.[204] American girls of color should not remain marginalized in the modern-day sex trafficking campaigns' efforts to protect victims.

B. Failing to Identify People of Color as Crime Victims

Notwithstanding efforts to address the role of race, racial stereotypes about prostitution continue to undermine the juvenile justice system's ability to identify kids of color as trafficking victims. Racialized stereotypes that emerged during slavery and colonization shaped the juvenile court's response to issues of prostitution and sexual exploitation of minors.[205] Emerging within the first decades after slavery and within months of the U.S. Supreme Court's *Dred Scott* decision, the American juvenile justice system equated blackness with delinquency itself, thereby denigrating black children as inherently degenerate sexual

199. *See, e.g.*, Cheryl Hanna, *Somebody's Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love*, 9 WM. & MARY J. WOMEN & L. 1 (2010).
200. *See id.*
201. *Id.* at 2.
202. *Id.* at 2–3.
203. *Id.*
204. *Id.*
205. *See generally* Butler, *supra* note 13.

miscreants.[206] As part of this racialized jurisprudence, Black girls were stereotyped as sexual miscreants and prostitutes.[207] Notably, the early juvenile courts reinforced rather than challenged racial stereotypes that Black and immigrant girls were more prone to prostitution and sexual immorality.[208] Because the juvenile court system prejudged nonwhite girls as predisposed to prostitution and sexual immorality,[209] Black girls were punished more severely than white girls for sexual immorality.

Furthermore, white child savers were ineffective at, and at worst uncommitted to, protecting Black girls from sexual exploitation.[210] Even as reformers began white slave crusades to discourage young women from engaging in prostitution, Black girls were excluded from such efforts.[211]

State policies still fail to properly identify people of color as victims of child sex trafficking. The State Department has determined that the failure to properly identify victims of human trafficking is a major barrier to addressing the crime itself.[212] This undermines the efforts of the federal Trafficking Victims Protection Act and the U.N. Protocol's three-pronged commitment to prosecute traffickers, protect victims with services, and prevent future abuse.[213] A recent study confirmed that effective victim identification by state officials remains a major problem in the United States.[214]

206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *See supra* Part III.A.
212. U.S. DEP'T STATE, TRAFFICKING IN PERSONS REPORT 2013 (June 2013), http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm ("This Report estimates that, based on the information governments have provided, only around 40,000 victims have been identified in the last year. In contrast, social scientists estimate that as many as 27 million men, women, and children are trafficking victims at any given time. This shows that a mere fraction of the more than 26 million men, women, and children who are estimated to suffer in modern slavery have been recognized by governments as such and are eligible to receive the protection and support they are owed."); *Trafficking in Persons Reports 2012*, U.S. DEP'T STATE, http://www.state.gov/j/tip/rls/tiprpt/2012/192359.htm (last visited July 31, 2015) ("Myths and misperceptions about trafficking in persons and its complexities continue to hinder governments' ability to identify victims, provide them the services they need, and bring their traffickers to justice.").
213. U.S. DEP'T STATE, *supra* note 212 ("The lack of support and protection that results from inadequate victim identification tells only part of the story. Another consequence of the limited number of victims identified is that the traffickers who enslave and exploit millions are operating with impunity, beyond the reach of the law. It means that modern antitrafficking laws and structures go unused, existing as theoretical instruments of justice. It also stymies research and data collection critical to understanding trafficking's root causes.").
214. HEATHER J. CLAWSON & LISA G. GRACE, U.S. DEP'T HEALTH & HUMAN SERVS., FINDING A PATH TO RECOVERY: RESIDENTIAL FACILITIES FOR MINOR VICTIMS OF DOMESTIC SEX TRAFFICKING 3 (Sept. 2007), http://aspe.hhs.gov/hsp/07/Human

Given federal law's recognition that all prostituted minors are victims of human trafficking, this problem at the state level is all the more troubling.[215] In the United States, misidentification of victims normally manifests itself when state actors, such as law enforcement officers, stereotype trafficking victims as criminals instead of victims.[216] The collateral consequences of victim misidentification are severely detrimental for minors:

> When authorities misclassify or fail to identify victims the victims lose access to justice. Even worse, when authorities misidentify trafficking victims as illegal migrants or criminals deserving punishment, those victims can be unfairly subjected to additional harm, trauma, and even punishment such as arrest, detention, deportation, or prosecution. These failures occur too often, and when they do, they reinforce what traffickers around the world commonly threaten their victims: law enforcement will incarcerate or deport victims if they seek help.[217]

The State Department has asserted that "victim identification" is the first step to stopping modern-day slavery.[218] But the aggregate data suggests state policies allow it to persist: According to the State Department, social scientists estimate that over 27 million people are trafficked at any given time, yet only 40,000 human trafficking victims were identified in the past year.[219]

Even advocates and scholars who have attempted to bring attention to the horrors of human trafficking have disproportionately focused on white victims, thereby ignoring poor minority girls.[220] Although Hanna agrees that poor minority girls are victims of forced prostitution as well, her article raises public outcry over the issue of sex trafficking by highlighting only the plight of white victims. In the process, the prostituted Black and Latina girls are ignored, increasing the chances that they will be profiled as bad girls deserving punishment, rather than being identified as victims.

Minorities continue to be stigmatized and profiled as criminals generally[221] and these biases undermine the ability of police and other stakeholders to

Trafficking/ResFac/ib.pdf [hereinafter HEALTH & HUMAN SERVICES RESIDENTIAL FACILITIES STUDY].

215. Trafficking Victims Protection Act (TVPA), 22 U.S.C. §§ 7101–13, 7102(8) (2012).

216. U.S. DEP'T STATE, *supra* note 212.

217. *Id.*

218. *Id.*at 7.

219. *Id.*

220. *See* Hanna, *supra* note 199; Landesman, *supra* note 118.

221. *See* Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law Into the Criminal Justice System*, 54 HOW. L.J. 639 (2011); *see*

properly recognize when minority youth have not consented to prostitution and thus have been trafficked.[222] Judges, legislators, and others presume that girls from certain racial groups are "oversexed" and likely to consent to prostitution.[223] Legal scholars have argued that, in order to determine a rule for consent in the context of sex between adults and minors, "the possibility of consent based on differing cultural norms" should be considered.[224] Other scholars, including Angela P. Harris, have criticized the application of these theories.[225]

Police officers and other community stakeholders adopt the view that only a morally corrupt person would choose to be a prostitute.[226] Jonathan Todres has referred to this process as "othering," or the marginalization of one group as inferior and therefore unworthy of socialization within the dominant "superior" group.[227] This phenomenon is demonstrated by studies proving that in the United States, prostituted females of color are targeted by law enforcement officials for harassment and arrest more often than their white counterparts.[228] Ultimately, police are more likely to perceive a prostituted child of color as a criminal, as opposed to a victim of sexual assault or abuse.[229]

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generally Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135 (2009) (discussing how Latinos often are racially profiled in the United States).

222. *See* Todres, *supra* note 8, at 659 (arguing that "otherness" is a root cause of both inaction and the selective nature of responses to the prostitution and trafficking of people of color in the United States); *see generally* Berta Esperanza Hernández-Truyol, *The Gender Bend: Culture, Sex, and Sexuality—A LatCritical Human Rights Map of Latina/o Border Crossings*, 83 IND. L.J. 1283 (2008); Cianciarulo, *supra* note 88.

223. *See* Lewis Bossing, Note, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. Rev. 1205, 1241–42 (1998) (arguing that in order to determine a rule for consent in the context of sex between an adult and a minor, "different constructions of sexual normalcy based on the practices and beliefs of differing cultures" should be considered in evaluating whether a victim consents to sex or instead is a rape victim); *see also* Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 332–33 (2002) (discussing how age of sexual consent laws are not enforced against Black or working class girls "unless the welfare rolls are threatened by a resulting [unwanted] pregnancy" and are not enforced in cases involving white girls unless it is between "a white middle class girl and a working-class boy or a black boy, or an older man").

224. Bossing, *supra* note 223, at 1242.

225. *Id.* at 1241.

226. Sutherland, *supra* note 223, at 317. For an in-depth study of the hostile treatment of street prostitutes by law enforcement, see JUHU THUKRAL & MELISSA DITMORE, URBAN JUSTICE CENTER, REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 10 (2003), http://sexworkersproject.org/downloads/RevolvingDoor.pdf ("This research reveals that street-based sex workers in New York City experience problems of excessive police contact, violence at the hands of customers and sometimes from police themselves, and a lack of housing and intensive supportive services which can assist them in staying off the street.").

227. *See* COLLINS, *supra* note 24, at 70–72; Todres, *supra* note 8, at 609.

228. COLLINS, *supra* note 24, at 172, 190.

229. SHARED HOPE INT'L 2009, *supra* note 2.

Instead of recognizing minors as victims of sexual exploitation, the legal system too often profiles child prostitutes as criminals and juvenile delinquents. This practice has racial implications and perpetuates the multiple intersecting oppressions that push kids into prostitution in the first place. Conflicts over how to legally address the issue of children's agency in the context of sexual relations show that, as Annette Appell argues, the "law shapes . . . the space of childhood." Along these lines, the law shapes that space differently for children of different races and classes.[230] Racial and cultural biases also shape law enforcement's perspectives on what constitutes "force" and "coercion" on the one hand, and "agency" and "choice" on the other hand.[231] For example, cultural and language barriers undermine the willingness of minorities to testify against their victimizers and cooperate with the prosecution.[232] To law enforcement, this refusal to cooperate is sometimes misconstrued as choice and agency.[233]

Racial stereotypes also influence whether males are identified as trafficking victims and traffickers. Today, men and boys of color are also the victims of sex trafficking and other forms of sexual exploitation,[234] yet they are rarely perceived as victims.[235] The media and policymakers too often consciously neglect the fact that males are also sexually exploited in the United States.[236] This trend is exacerbated by race; police still profile Black and Latino males as hypersexualized rapists;[237] stereotypes have dominated in the absence of facts to the contrary.

Further, until recently, there was little modern statistical research on profiles of who perpetrates human trafficking within the United States.[238] Recent studies have highlighted that while most traffickers and accomplices are males who are older than victims (around 70 percent), a significant number of traffickers are female as well (at least 30 percent). The Department of Justice has also begun to determine the racial profiles of sex traffickers. A 2011 Department of Justice Re-

230. COLLINS, *supra* note 24, at 86, 90.
231. Brown, *supra* note 87, at A18.
232. *Id.* at 12.
233. *Id.*
234. Jones, *supra* note 104, at 1149. For reports on sex trafficking of boys, *see* Taya Moxley-Goldsmith, *Boys in the Basement: Male Victims of Commercial Sexual Exploitation*, 2 CHILD SEXUAL EXPLOITATION PROGRAM UPDATE 1 (Nov. 1, 2005), http://www.ndaa.org/pdf/child_sexual_exploitation_update_volume_2_number_1_2005.pdf.
235. Jones, *supra* note 104, at 1144.
236. *Id.*
237. I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345 (2010); N. Jerimi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1315 (2004).
238. DUREN BANKS & TRACEY KYCKELHAHN, U. S. DEP'T OF JUSTICE, CHARACTERISTICS OF HUMAN TRAFFICKING INCIDENTS, 2008-2010, at 2 (Apr. 2011), available at http://www.bjs.gov/ content/pub/pdf/cshti0810.pdf.

port found that sex traffickers are white, Black, Hispanic, and Asian, with no one racial group forming a majority.[239] Overall, research indicates there is no main prototype of a sex trafficker based on race, nationality, gender, or even age group.[240]

The failure to recognize prostituted people of color as trafficking victims, and the misidentification of people of color as perpetrators of trafficking has serious collateral consequences. In particular, racism increases the likelihood that state and local law enforcement officials will categorize these prostituted people of color as criminals as opposed to crime victims.[241] Minority women and girls are more likely to be criminally sanctioned for prostitution, rather than provided with victim services.[242] As Kimberlé Crenshaw recently noted, women of color are the targets of mass incarceration even though women have not been a major focus of the debates on mass incarceration.[243] As Crenshaw points out, this mass incarceration of women of color is the end result of the legal system's hyper-surveillance and social control over this group.[244]

The systemic failure of federal law enforcement personnel and others to accurately identify people of color as trafficking victims also means that fewer people of color are eligible for victim-centered services and resources. The sexual stigmatization of women of color has further contributed to this lack of access to resources.[245] For example, the sapphire stereotype, a modern variation of the Jezebel stereotype, is used to further stigmatize poor Black women. A sapphire is depicted as an emotionally untamed woman who is quick to mock and berate

239. *Id.* at 6.

240. As discussed above, 81 percent of traffickers are male and 19 percent are female. *Id.* at 7. Among sex trafficking suspects whose race was identified, blacks made up 62 percent, Hispanics 48. *Id.* Of child sex trafficking suspects, whites made up 17.6 percent, blacks 52.1 percent, Hispanics 26.1 percent and Asians 3.4 percent. ESTES & WEINER, *supra* note 3.

241. SHARED HOPE INT'L 2007, *supra* note 94, at 90.

242. *Id.*

243. Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race and Social Control*, 59 UCLA L. REV. 1418, at 1437–38 (2012); Roberts, *Prison*, *supra* note 128, at 1492 ("The sexually licentious Jezebel, the family-demolishing Matriarch, the devious Welfare Queen, the depraved pregnant crack addict accompanied by her equally monstrous crack baby—all paint a picture of a dangerous motherhood that must be regulated and punished.").

244. Crenshaw, *supra* note 243, at 1492.

245. *See* Walker, *supra* note 23, at 3; D. Wendy Greene, *Black Women Can't Have Blond Hair . . . in the Workplace*, 14 J. GENDER RACE & JUST. 405 (2011) (interpreting recent case law forbidding Black women to wear Blonde hair in the workplace as precluding Black women to evince characteristics of beauty, femininity and power reserved for white women); Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15 (2004) (arguing that the single sex education movement grew out of efforts to keep white girls from attending schools with Black boys in the post-segregation era in order to preserve notions of white femininity).

others. She is overemotional, loud, and angry. This harsh portrayal not only encourages Black women to stay passive and silent to avoid falling into the stereotype, but it also punishes those who voice their complaints.[246]

V. TURNING THE TIDE: THE IMPACT OF THE OBAMA ADMINISTRATION

A. Playing the "Slavery" Card to Address Race

As Professor Karen Bravo has argued, the use of rhetoric in modern antislavery campaign has resembled earlier American antitrafficking campaigns, which co-opted the imagery of slavery but still marginalized people of color.[247] Professor Bravo has written extensively on the tendency of scholars and advocates to compare modern-day sex trafficking to antebellum slavery and the misconceptions about the crime that ensues from the comparison.[248] The United States' use of the cultural imagery of African slavery to garner support for against trafficking has remained a major strategy in the modern movement.[249]

The election of the first Black president raises important questions about President Obama's use of slavery imagery and rhetoric to condemn modern-day human trafficking. It suggested a turning of the tide. Speaking to the world during the Clinton Global Initiative conference, President Obama called human trafficking "the injustice, the outrage . . . which must be called by its true name—modern slavery."[250] Obama acknowledged that referring to modern-day trafficking as "slavery" invoked inevitable comparisons to the enslavement of people of African descent here in America.[251] Recognizing the seriousness and profound meaning of such a comparison, President Obama explained:

> Now, I do not use that word, "slavery" lightly. It evokes obviously one of the most painful chapters in our nation's history. But around the world, there's no denying the awful reality. When a man, desperate for work, finds himself in a factory or on a fishing boat or in a field, working, toiling, for little or no pay, and beaten if he tries to

246. *See* McGinley, *supra* note 52, at 722; *see also* Williams, *supra* note 15, at 840.
247. Bravo, *supra* note 13, at 574; *see generally* Bravo, *supra* note 8.
248. *Id.*
249. *See id.*
250. *Press Release*: *Remarks By the President to the Clinton Global Initiative*, WHITE HOUSE (Sept. 25, 2012), http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative.
251. *See id.*

> escape—that is slavery. When a woman is locked in a sweatshop, or trapped in a home as a domestic servant, alone and abused and incapable of leaving—that's slavery.[252]

In addition to garnering disdain through the power of phrases such as "slavery," President Obama also invoked the symbolism of the Emancipation Proclamation:[253]

> Now, as a nation, we've long rejected such cruelty. [as slavery]. Just a few days ago, we marked the 150th anniversary of a document that I have hanging in the Oval Office—the Emancipation Proclamation. With the advance of Union forces, it brought a new day—that "all persons held as slaves" would thenceforth be forever free. We wrote that promise into our Constitution. We spent decades struggling to make it real. We joined with other nations, in the Universal Declaration of Human Rights, so that slavery and the slave trade shall be prohibited in all their forms.[254]

Similarly, in its 2012 Trafficking in Persons Report, the U.S. Department of State also evoked the memory and symbolism of the Emancipation Proclamation to compare human trafficking to antebellum slavery and call for its eradication. Similarly, as 2012 marked the 150th anniversary of the Emancipation Proclamation in 2012, Secretary of State Hillary Rodham Clinton also invoked both the moral and legal authority of the Thirteenth Amendment and reminded the world "that when the guns of the civil war fell silent," the United States had resolved to end slavery.[255] Connecting the past to the present, Secretary Clinton warned that, despite the adoption of the Thirteenth Amendment and other prohibitions, "the evidence shows that many men, women, and children continue to live in modern-day slavery through the scourge of trafficking in persons."[256]

252. *Id.*
253. *Id.*
254. *Id.*
255. Letter from Secretary of State Hillary Rodham Clinton, *in* 2012 TRAFFICKING IN PERSONS REPORT, U.S. DEP'T STATE (June 19, 2012), http://photos.state.gov/libraries/malaysia/99931/lrc/iif_tip-june2012.pdf ("Over the coming months we will celebrate the 150th anniversary of the Emancipation Proclamation, which Abraham Lincoln announced on September 22, 1862 and issued by Executive Order on January 1, 1863. In 1865, as the guns of the Civil War fell silent, the Congress passed and the states ratified as the 13th Amendment of the Constitution President Lincoln's commitment that 'neither slavery nor involuntary servitude shall exist in the United States.'").
256. *Id.*

In his comments to the 2012 Trafficking in Persons Report, Ambassador Luis CdeBaca drew an even more direct analogy between modern human trafficking and the enslavement of Black people in America:

> In the United States, chapters of our history are written in the voices of those who toiled in slavery. Whether through the memoirs of men and women who sought their freedom from a then-legal institution on the Underground Railroad or the impassioned pleas of African Americans and immigrants trapped in sharecropping and peonage in the years after the Civil War, slavery's brutal toll has been given witness time and again by those who suffered and survived.[257]

Ambassador Cdebaca also suggested that the Obama administration was concerned with learning from the past:

> What do they tell us? How do the voices of the past and present help inform our struggle against modern slavery? Our challenge as we face the 150th anniversary of Emancipation is . . . to apply history's lessons to the modern crime.[258]

Significantly, Cdebaca advises that "they tell us that victims of this crime are not waiting helplessly for a rescuer, but are willing to take the chance to get out once they know it is possible."[259] Here, the ambassador suggests that trafficking victims do not fit one paradigm, and that the slavery analogy is, at times, imperfect. Apparently, Ambassador Cdebaca suggests here that a commitment to eradicating modern trafficking means recognizing that some victims are not shackled, physically confined, or otherwise completely constrained by a pimp or procurer. Ambassador Cdebaca's comments also reflect the Obama administration's efforts to create new strategies for combating human trafficking—ones that move beyond merely using the symbolism and rhetoric of black slavery and towards solutions that help marginalized victims.

In several ways, the rhetoric employed by antitrafficking advocates evokes the analogy of slavery, but still marginalizes children of color. By equating sex trafficking with transatlantic slavery, advocates invoke powerful moral imagery that draws attention to some of the worst abuses suffered by trafficking victims but obscures the equally traumatic experience of others. These images suggest that victims are locked behind bars, held against their will in chained rooms, or moved around without knowledge of their whereabouts. Just as sexually exploited children are marginalized by referring to sex trafficking as a "hidden

257. *Letter from Ambassador Luis CdeBaca*, U.S. DEP'T STATE, http://www.state.gov/j/tip/rls/tiprpt/2012/192349.htm (last visited July 31, 2015).
258. *Id.*
259. Letter from Secretary of State Hillary Rodham Clinton, *supra* note 244.

crime," so too is their exploitation obscured by equating all sex trafficking with slavery. Modern sex trafficking of minors does not always look like chattel slavery. For example, some domestically exploited children who are forcibly pimped on the street are trafficked, but others move about to attend school (indeed, some are trafficked there) and otherwise exist normally in their communities. The problem, as Professor Janie Chuang points out, is that "equating trafficking with slavery risks inadvertently raising the legal threshold of trafficking by creating expectations of more extreme harms than required under the law."[260]

Chuang's argument is especially poignant with respect to domestic sex trafficking of children in the United States. Some minors, kids of color in particular, often do not fit the paradigm of the iconic victim. As scholar Dina Franchesca Haynes has argued, every sex trafficking victim is not "chained to a bed in a brothel."[261] In my view, this myth that frames the typical sex trafficking victim as a foreigner who is smuggled into the country and hidden away in a brothel obscures the reality that many victims of sex trafficking in the United States are American citizens. The myth is also particularly troubling for people of color because it implies that true victims of sex trafficking are those who are held against their will in an indoor location and will be rescued from such physical bondage or false imprisonment.[262]

B. Recognizing Vulnerabilities Based on Race and Other Factors

In contrast to the white slavery campaigns, the Obama administration has added teeth to its use of the imagery and symbolism of antebellum slavery. First, and foremost, the Obama administration has acknowledged that minors in the United States as a class are uniquely vulnerable to sex trafficking. In his Clinton Global Initiative speech, President Obama acknowledged that the prostitution of minors in his own country also amounts to "slavery." The President made clear "the bitter truth is that trafficking also goes on right here, in the United States . . . the teenage girl, beaten, forced to walk the streets. This should not be happening in the United States of America."[263]

260. Janie A. Chuang, *Rescuing Trafficking From Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1709 (2009).

261. Dina Franchesca Haynes, *(Not) Chained to a Bed in a Brothel: Conceptual. Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 351 (2007) ("Most victims of human trafficking are not 'rescued' by anyone. They are not found by law enforcement chained to a bed in a brothel. They are not rescued in law enforcement raids of restaurants or sweat shops.").

262. *Id.* at 349.

263. *Press Release*: *Remarks By the President to the Clinton Global Initiative*, *supra* note 239.

Furthermore, President Obama's commitment to fight human trafficking, both globally and at home, transforms mere use of catchy phrases in speeches. Instead, the Obama administration has recognized the unique vulnerabilities of certain groups to human trafficking as a result of bias and discrimination against the group as a class. For example, in its 2014 Trafficking in Persons Report, the State Department opined that "the cumulative effects of homophobia and discrimination make LGBT persons particularly vulnerable to traffickers who prey on the desperation of those who wish to escape social alienation and maltreatment."[264] The State Department also acknowledged that state action and policies reflect such biases against LGBT individuals and directly increase their vulnerability to human trafficking.[265] In response, President Obama has created a "Strategic Action Plan for Victim Services," which commits the federal government to a five-year plan where it will develop victim services for survivors of human trafficking.[266] As part of the plan, the Obama administration will develop special programs that address the bias and discrimination that make certain groups, such as LGBT individuals, more vulnerable to human trafficking.[267]

Moreover, the Obama administration has acknowledged that race and ethnicity make people vulnerable to sex trafficking. The 2014 Report, highlighted the plight of the Roma people, the largest ethnic minority in Europe,[268] and emphasized that discrimination based on the Roma's ethnicity shaped that vulnerability.[269] Specifically, the Roma "are particularly vulnerable to human trafficking due to poverty, multigenerational social exclusion, and discrimination including lack of access to a variety of social services, education, and employ-

264. U.S. DEP'T STATE, TRAFFICKING IN PERSONS REPORT 10 (June 2014), http://www.state.gov/documents/organization/226844.pdf.

265. *Id.* ("Biases and discrimination severely complicate proper identification of, and provision of care to, LGBT victims of human trafficking.").

266. *The Obama Administration's Record on Human Trafficking Issues*, WHITE HOUSE (Apr. 9, 2013), http://www.whitehouse.gov/the-press-office/2013/04/09/obama-administration-s-record-human-trafficking-issues; *see generally* COORDINATION, COLLABORATION, CAPACITY, *supra* note 1, at 1 ("The Plan lays out four goals, eight objectives, and contains more than 250 associated action items for victim service improvements that can be achieved during the next 5 years.").

267. *Topics of Special Interest*, U.S. DEP'T STATE, http://www.state.gov/j/tip/rls/tiprpt/2014/226646.htm (last visited July 31, 2015) ("As part of the *2013-2017 Federal Strategic Action Plan on Services for Victims of Trafficking in the United States*, U.S. agencies have committed to gathering information on the needs of LGBT victims of human trafficking. NGOs in the United States estimate LGBT homeless youth comprise 20 to 40 percent of the homeless youth population; these youth are at particularly high risk of being forced into prostitution.").

268. United States, Department of State, 2014 Trafficking in Persons Report 19 (2014).

269. *Id.* ("Victim protection services and prevention campaigns are often not accessible to the Romani community, as they are at times denied services based on their ethnicity or are located in isolated areas where services are not available.").

ment."[270] The State Department found that European governments do not adequately identify or protect the Roma people from trafficking.[271] Furthermore, trafficking campaigns have been used to persecute, as opposed to protect, Roma people: "[C]ombating trafficking has been used as a pretext to promote discriminatory policies against Romani, such as forced evictions and arbitrary arrests and detentions."[272]

The Obama administration has also acknowledged that indigenous people are more vulnerable to human trafficking.[273] Here, too, the State Department concluded that "worldwide, indigenous people are often economically and politically marginalized," and too often "may lack citizenship and access to basic services, including education" and that these factors "make them more vulnerable to both sex and labor trafficking."[274] Notably, the Department of State also recognized that indigenous minors are particularly vulnerable to prostitution and sexual exploitation.[275]

Finally, the Obama administration and Congress have taken legislative action to address ethnicity as a vulnerability to trafficking. The TVPRA of 2013 included for the first time a tribal provision that protects Native Americans from sex crimes.[276] Under the new provision, tribal prosecutors can now bring claims in tribal courts against non-Natives for sex abuse crimes against tribal members.[277]

But despite these advances, discourse on the nexus between structural racism and modern sex trafficking of African Americans has been slow to surface. In his Clinton Global Initiative speech, for example, President Obama did use the slavery analogy, but did not address the nexus between racial subordination and modern-day sex trafficking.[278]

Yet, the federal government has recognized that a nexus between racial stereotyping and victim identification does indeed exist. The U.S. Department of Health and Human Services has noted that proper identification of trafficking

270. *Id.* at 1.
271. *Id.*
272. *Id.*
273. *Id.* at 36.
274. *Id.*
275. *Id.*
276. Violence Against Women Reauthorization Act of 2013, § 904. Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of U.S.C. titles 8, 18, 22, 25, and 42).
277. *Id.*
278. *See Press Release*: *Remarks By the President to the Clinton Global Initiative*, *supra* note 239.

victims has been hindered by ethnic stereotypes.[279] In the 2013 Trafficking in Persons Report, the State Department acknowledges that ethnicity is a major risk factor for victimization.[280] Further, it seemed to acknowledge the role of intersectional oppression. Traffickers, the Report noted, "tend to prey on '"excluded populations."'[281] The 2013 Report added:

> Many trafficking victims come from backgrounds that make them reluctant to seek help from authorities or are otherwise particularly vulnerable—marginalized ethnic minorities, undocumented immigrants, the indigenous, the poor, persons with disabilities—whose experiences often make them reluctant to seek help from authorities.[282]

Significantly, the State Department has also acknowledged that the government is a major perpetrator of victim misidentification.[283]

C. People of Color Protesting Sexual Exploitation

Journalists, activists, artists, and survivors have all made efforts to change these trends. Advocates have challenged the antitrafficking movement to consider the experiences of people of color in the commercial sex industry. The "current approaches to human trafficking replicate many of the flaws of earlier approaches" including "a process of decision making that excludes critical voices."

Additionally, a commitment to challenging the stereotyping of people of color as prostitutes has been a major goal of Black feminist discourse.[284] This determination to "defend our name" has long been an impetus for the mobilization of women of color to challenge sexual oppression.[285]

Advocates of color have fought to be heard in the antitrafficking movement.[286] During the 2001 World Conference against Racism, human rights advocates recognized the "critical link between trafficking and racial discrim-

279. U.S. DEP'T HEALTH & HUMAN SERVS., IDENTIFYING VICTIMS OF HUMAN TRAFFICKING (Oct. 2011), http://www.justice.gov/sites/default/files/usao-ndia/legacy/2011/10/14/health_identify_victims.pdf.
280. TIP Report of 2013, at Introduction.
281. *Id.*
282. *Id.*
283. *Id.*
284. COLLINS, *supra* note 24, at 69 (discussing the challenging of these sexual myths as a major theme in feminist discourse by feminist scholars).
285. *See generally* Butler, *supra* note 13 (discussing the emergence of the National Association of Colored Women as a civil rights organization committed to challenging laws and policies based on sexual stereotypes, including the prostitution of Black women and the lynching of Black men).
286. U.N. DEP'T PUB. INFO., THE RACE DIMENSIONS OF TRAFFICKING IN PERSONS—ESPECIALLY WOMEN AND CHILDREN (Mar. 2001), http://www.un.org/WCAR/e-kit/trafficking_e.pdf.

ination."[287] A U.N. Report to the Conference ("World Conference Report") shed important light, finding that "trafficking is usually considered a gender issue and the result of discrimination on the basis of sex. It is rarely analyzed from the perspective of race discrimination."[288]

Adopting an intersectional approach, the World Conference Report recognized that racism often exacerbates gender and economic inequality.[289] The report added that "there has been little discussion of whether race and other forms of discrimination contribute to the likelihood of women and girls becoming victims of trafficking."[290] The World Conference Report determined that, "in the case of trafficking into the global sex industry, we are talking about the relatively prosperous countries paying for the sexual services of women of women and girls—and sometimes man [sic] and boys—from less wealthy countries . . . . It is a basic human rights issue because it involves such a massive and harmful form of discrimination."[291] Finally, the report found that "racist ideology fuels trafficking" and furthers the "'commoditization' of women's sexuality."[292] Further research by the United Nations has found that these intersectional oppressions continue to drive sex trafficking.[293]

African American civic organizations have partnered with other community stakeholders to raise awareness of the abuse and exploitation that people of color face in prostitution.[294] For example, the descendants of Frederick Douglass, the famed African American former slave and abolitionist, have joined the modern antitrafficking movement by raising awareness of the similarities between African antebellum slavery and modern-day sex trafficking.[295] Shandra McDonald-Buford, an award winning director, is one of several African American artists who have organized artistic projects to raise general awareness of sex trafficking

287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *See* SIGMA HUDA, REPORT OF THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS ASPECTS OF THE VICTIMS OF TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN 32 (2006).
294. For example, Phi Beta Sigma, the historically African American fraternity, began a public campaign called "Gentlemen Don't John." *See e.g.,* Krishana Davis, *Fraternity Raises Awareness about Sex Trafficking*, AFRO (Apr. 4, 2013), http://www.afro.com/fraternity-raises-awareness-about-sex-trafficking/.
295. *See e.g.*, FREDERICK DOUGLASS FAMILY INITIATIVES, HISTORY, HUMAN RIGHTS AND THE POWER OF ONE (2013), http://www.fdfi.org/docs/preview-nyc-2013.pdf.

and of the fact that black girls are disproportionately victimized.[296] Other organizations have raised national awareness about the broader issue of sexual abuse of Black women by police actors[297]—efforts that should keep the issue of race and trafficking in the forefront.

Likewise, minority news outlets have begun to focus on the pervasiveness of sex trafficking of children of color.[298] Cases involving minority children have begun to receive attention, particularly from minority journalists and scholars.[299] The recent independent film, *Black Girl Lost: The Sexual Exploitation of African American Girls*, has helped bring the sexual abuse of nonwhite girls out of the margins and into the forefront.[300] In 2007, musical artists Mary J. Blige and Snead O'Connor produced a remake of O'Connor's hit song, *This Is to Mother You*, in order to raise money for Harlem-based Girls Educational & Mentoring Services (GEMS).[301] GEMS is a nationally recognized group focused on rehabilitating sexually exploited girls, most of whom are ethnic minorities.[302]

Survivors of sexual exploitation have become more visible as advocates in the antitrafficking movement.[303] Leah Albright-Byrd, founder of Bridgett's

296. Yvette Caslin, *Sex Trafficking: 'Hands Off This Girl' Tackles the Epidemic in Georgia*, ROLLING OUT (Oct. 21, 2012 7:47 PM), http://rollingout.com/culture/sex-trafficking-hands-off-this-girl-tackles-the-epidemic-in-georgia/ (chronicle of the Hands Off This Girl video web series on child prostitution).

297. AFRICAN AMERICAN POLICY FORUM, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2015).

298. *See e.g.*, Annette Emery et al., *Human Trafficking: Black Girls Are Still Enslaved*, https://www.ctaafsc.org/ama/orig/2012_Conference/PPT/pdf/Human_Trafficking_Final__2-11-12.pdf. For additional examples of recent media coverage voicing concern about the sexual exploitation of minority children, see Jeannine Amber, *Black Girls for Sale*, ESSENCE 164 (Oct. 2010), http://www.jeannineamber.com/uploads/cgblog/id21/black_girls_for_sale_.pdf; Jamaal Bell, *Race and Human Trafficking in the U.S.: Unclear but Undeniable,* HUFFINGTON POST (May 10, 2010, 3:03 PM), http://www.huffingtonpost.com/jamaal-bell/race-and-human-traffickin_b_569795.html; Deidra Robey, *Shaniya's Story Reveals Widespread Sex Trafficking in Black Community*, THE GRIO (Nov. 18, 2009, 8:34 AM), http://thegrio.com/2009/11/18/no-one-can-imagine-what/; Malika Saada Saar, *The New Middle Passage*, THE ROOT (June 17, 2010, 12:41 PM), http://www.theroot.com/articles/culture/2010/06/sex_trafficking_of_girls_on_craigslist.html; Paul Shepard, *Somali Gangs in Minnesota Traded Girls for Sex*, WZAK CLEVELAND (Nov. 9, 2010, 3:15 PM), http://wzakcleveland.hellobeautiful.com/1419101/somali-gangs-in-minnesota-traded-girls-for-sex-video/.

299. *See, e.g.*, Valandra, *Reclaiming Their Lives and Breaking Free: An Afrocentric Approach to Recovery*, 22 AFFILIA 195, 197 (2007); Robey, *supra* note 294.

300. *See* Kinyofu Mteremeshi-Mlimwengu, *1st Awareness Event, Black Girl Lost, Drops Knowledge of Sexual Exploitation*, EXAMINER (July 10, 2011, 6:37 PM), http://www.examiner.com/article/1st-awareness-event-black-girl-lost-drops-knowledge-of-sexual-exploitation.

301. *Mary J Blige's Song to Benefit Victims of Sex Trafficking*, ESSENCE (Dec. 3, 2009, 12:59 PM), http://www.essence.com/2009/12/03/mary-to-the-rescue/.

302. *Id.*

303. *See e.g.,* RACHEL LLOYD, GIRLS LIKE US (2010); Kate Rosin, *Tina Frundt: A Survivor's Story*, SGI QUARTERLY (July 2011), http://www.sgiquarterly.org/feature2011jly-4.html (featuring the

Dream, is representative of a group of survivors who have founded advocacy organizations to raise awareness that women often experience prostitution as sexual abuse, not empowerment.[304] Albright-Byrd entered prostitution under the same coercive circumstances as many of her counterparts in the United States.[305] Albright-Byrd faced a "childhood marked by molestation, domestic abuse and a family saturated in addiction."[306] Attempting to escape the trauma of these circumstances, Albright-Byrd ran away from home when she was fourteen years old.[307] An older man manipulated her into a life of prostitution and sexual exploitation. At age eighteen, a "spiritual mother" showed her the path out of the prostitution lifestyle, and she enrolled in college. Other minors who were prostituted with her did not survive; inspired by the memory of a friend in prostitution who was murdered, she founded Bridgett's House to help others leave prostitution.[308]

Like Albright-Byrd, other antitrafficking advocates have framed prostitution as exploitation of—instead of empowerment for—people of color. Tina Frundt, the African American founder of Courtney's House in Washington, D.C., was thirteen years old when she met an older man on her walk to her neighborhood store in Chicago.[309] The older man named Tiger seduced her with gifts and promises of love and protection. Tiger then took her to Cleveland, Ohio, where he forced Frundt into prostitution.[310] Tina was forced to service up to eighteen men a day.[311] Police arrested Frundt and treated her as a criminal and delinquent. Nevertheless, she emerged as an award-winning advocate, opening

African American founder of Courtney's House in Washington, D.C.); *Our Founder,* BRIDGETT'S DREAM, http://www.bridgetsdream.org/our-founder.html (last visited June 10, 2015) (featuring Leah Albright-Bryd of "Bridgett's Dream"); Yvette Caslin, *Sex Trafficking: 'Hands off This Girl' Tackles the Epidemic in Georgia*, ROLLING OUT (Oct. 21, 2012 7:47 PM), http://rollingout.com/culture/sex-trafficking-hands-off-this-girl-tackles-the-epidemic-in-georgia/ (discussing the advocacy of African American survivors of sex trafficking in America); Taina Bien-Aime, *Still Time to Do the Right Thing,* HUFFINGTON POST (Sept. 22, 2008, 3:25 PM) http://www.huffingtonpost.com/taina-bienaime/still-time-to-do-the-righ_b_127870.html (article by African American director of Women's City Club and former executive director of Equality Now, two groups that advocate for victims of sex trafficking).

304. *See Our Founder, supra* note 299.
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. Kate Rosin, *Tina Frundt: A Survivor's Story,* SGI QUARTERLY (July 2011), http://www.sgiquarterly.org/feature2011Jly-4.html; Tina Frundt, *Slavery Ended in 1865? That Myth Puts Our Kids in Danger*, HUFFINGTON POST (July 20, 2011, 2:48 PM), http://www.huffingtonpost.com/tina-frundt/slavery-ended-in-1865-that_b_904680.html.
310. Frundt, *supra* note 309.
311. *Id.*

several resource centers for sexually exploited survivors.[312] She has served as a member of the Washington D.C. Anti-trafficking Task Force.[313]

People of color are advocating that policymakers take their experiences into account to formulate social policy concerning prostitution and sex trafficking.[314] Frundt and other advocates have even testified before Congress to address the societal myth that minors in prostitution are there by their own choice.[315] In Frundt's words:

> Specialized street outreach is a very important component because most victims of domestic minor sex trafficking do not self identify; they come to believe their trafficker's assertion that prostitution is their choice. And trafficking victims are under tight pimp control which prevents them from seeking out help. So Courtney's House goes to see them where they can – most often on 14th and K Streets just two blocks from the White House in our nation's capitol. We let the girls and boys know we are there for them when they are ready. [316]

Frundt further testified about the absence of shelter and specialized services for survivors of sexual exploitation.[317]

Other advocates have challenged the dominant narrative about people of color freely choosing prostitution. Shaquana, a young Black girl who survived prostitution, testified about her experience as a child prostitute before the Judiciary Committee's Subcommittee on Human Rights and the Law. At the age of fourteen, Shaquana was physically abused and manipulated so that she would sell her own body for a pimp, who she hoped would one day love her.[318] Shaquana was alone, with no one to turn to, because she worried about being judged. Further, she felt an absolute inability to make a change.[319]

When Shaquana was fourteen years old, she was arrested and sentenced to a juvenile detention facility. Jail only made her continue to think worse of herself.[320] However, GEMS allowed Shaquana to start feeling better about

312. *Id.*
313. *Id.*
314. *Id.*
315. Tina Frundt, Founder and Exec. Dir. Courtney's House, Testimony Before the House Committee on the Judiciary, Subcomm. on Crime, Terrorism and Homeland Sec. (Sept. 15, 2010) (transcript available at http://ftsblog.net/wp-content/uploads/2010/09/Tina-Frundt_written-testimony_SubcommitteeOnCrime_9-15-10.pdf).
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*

herself and helped her deal with the trauma of being exploited.[321] Once Shaquana was able to, she started volunteering with GEMS to aid other young victims of sex trafficking.[322] Shaquana is a role model for other teens who want to stand as agents of social change. Her testimony speaks to the profound "spirit injury" that results from sexual exploitation. But it also speaks to a determination to see oneself not solely as a victim but as an agent of change.

Despite this progress, others advocates feel there is more to be accomplished. Shahidah Simmons, producer of the documentary film, "*No!*" has expressed concern over the absence of public discourse about the sexual exploitation of minority youth in the United States. Simmons believes that the problem is ignored in part because the lives of minority children are not valued or considered worthy enough to protect or rescue. There should be no doubt that racism is an integral part of the sexual exploitation of minors in America—both female and male. And women of color remain at great risk of forced and coerced sexual exploitation. Because race and gender discrimination has played a historic role in the development of the American commercial sex industry, reports that suggest women of color do not account for a significant number of victims of sex trafficking should be viewed with caution.

CONCLUSION

This problem of victim identification highlights how the modern antitrafficking movement has not fully addressed the role of race in sexually exploiting vulnerable people of color in the United States. The modern stereotyping of people of color as prostitutes undermines the ability of community stakeholders to identify people of color as victims of coerced prostitution and other forms of sex trafficking. In these ways, the antitrafficking movement's marginalization of the role of race and racism in sexual exploitation perpetuates sex trafficking. As a result of the postracial rhetoric of the antitrafficking movement, including analogies to African slavery and the notion of only white child victims, unique approaches that are needed to support minority children remain absent. The old myth that minority children do not deserve help or that they are not victims remains well-told because mainstream media stories fail to identify them as victims.

There should be no doubt that race still plays a factor in the sex trafficking of kids and women in America, and that kids and women of color remain at

321. *Id.*
322. *Id.*

great risk of this type of forced and coerced sexual exploitation. In crafting legislative solutions to the problem of sex trafficking, no dimension—including race—should be overlooked.

U.S. COMMISSION ON CIVIL RIGHTS

SEX TRAFFICKING:
A GENDER-BASED CIVIL RIGHTS VIOLATION

BRIEFING
REPORT

SEPTEMBER 2014

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

MEMBERS OF THE COMMISSION

U.S. Commission on Civil Rights
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Sex Trafficking: A Gender-Based Violation of Civil Rights

A Briefing Before
The United States Commission on Civil Rights
Held in Washington, DC
Briefing Report

Letter of Transmittal

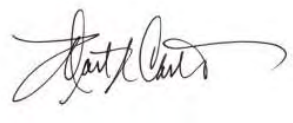
President Barack Obama
Vice President Joe Biden
Speaker of the House John Boehner

The United States Commission on Civil Rights (the "Commission") is pleased to transmit this report, *Sex Trafficking: A Gender-Based Violation of Civil Rights.* A panel of experts briefed members of the Commission on April 13, 2012 to examine the federal government's response to this issue of human trafficking from a gender-based discrimination perspective. The panelists discussed how the Federal Bureau of Investigation (FBI) does not list trafficking as a major crime category, how the U.S. Department of Health and Human Services (HHS) does not collect statistics on the scope of trafficking, and how difficult it is to collect and track accurate data on the prevalence of sex trafficking of minors versus adults. Based on that discussion, the Commission developed the findings and recommendations that are included in this report.

Among its findings, the Commission notes that the definitions of what is sex trafficking differ among United States executive agencies and state and local law enforcement authorities. Testimony showed that sex trafficking is clearly a violation of gender-based civil and human rights that enslaves women and girls in commercial sex and is rooted in gender-based discrimination. The Commission also noted that testimony showed that sex trafficking also enslaves men and boys, particularly gay and transgender individuals, in commercial sex and is discrimination on the basis of sexual orientation and is also rooted in social exclusion.

The Commission recommends that a model state law on trafficking be developed. The Commission also recommends that the federal government develop standard definitions of "sex trafficking" and related terms with input from involved federal agencies, state and local law enforcement entities, and the advocacy and scholarly sectors. In addition, the Commission suggests that the FBI should list trafficking as a major crime category; and HHS should collect statistics on the scope of trafficking, including a percentage of victims.

For the Commission,



Martin R. Castro
Chairman

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EXECUTIVE SUMMARY

The trafficking of persons has frequently been described as a "modern" or "Twenty-First Century" form of slavery. Enactment of the Victims of Trafficking and Violence Protection Act of 2000 (known as the Trafficking Victims Protection Act of 2000, TVPA)[1] provided the government with tools to address the problem of human trafficking, both domestically and worldwide. This Act authorized the establishment of the Department of State's Office to Monitor and Combat Trafficking in Persons (G/TIP or J/TIP) and the President's Interagency Task Force to Monitor and Combat Trafficking in Persons to assist in the coordination of anti-trafficking efforts. According to the Department of State, the U.S. government considers trafficking in persons to include all of the criminal conduct involved in forced labor and sex trafficking. Under the TVPA, trafficking in persons does not require actual movement of the victim.[2] It is the many forms of enslavement that lay at the heart of human trafficking. Individuals may be trafficking victims regardless of whether they once consented, participated in a crime as a direct result of being trafficked, were transported in the exploitative situation, or were simply born into a state of servitude.[3]

A panel of experts briefed members of the Commission on April 13, 2012 to examine the federal government's response to this issue of human trafficking from a gender-based discrimination perspective. Panel One consisted of a representative from a federal agency who spoke about the agency's efforts to combat sex trafficking and assist trafficking victims and a representative from the National Association of Attorneys General, who spoke about federal coordination and assistance to state and local efforts to address human trafficking. Panels Two and Three consisted of representatives from academia and nongovernmental organizations (NGOs) who discussed sex trafficking as a form of gender discrimination, federal efforts to eliminate sex trafficking, and ways to improve those efforts. One panelist spoke about her experience as a sex trafficking survivor.

The panelists discussed how the Federal Bureau of Investigation (FBI) does not list trafficking as a major crime category, how the U.S. Department of Health and Human Services (HHS) does not collect statistics on the scope of trafficking, and how difficult it is to collect and track accurate data on the prevalence of sex trafficking of minors versus adults. At the completion of their

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[1] Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101 et seq. (2012) (as amended by the Trafficking Victims Protection Reauthorization Act of 2003, the Trafficking Victims Protection Reauthorization Act of 2005, and the Trafficking Victims Protection Reauthorization Act of 2008).

[2] 22 U.S.C. § 7101(10) (2012).

[3] *See* U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, website, "What is Modern Slavery?" *available at* http://www.state.gov/j/tip/what/index.htm.

testimony, the panelists fielded questions from the Commissioners on such issues as definitions of trafficking, how and why trafficking victims are identified, the relationship between organized crime and human trafficking, the legalization of prostitution and its impact on the demand for commercial sex which adults initiate with underage partners, the amount and nature of law enforcement resources dedicated to sex trafficking and the need for additional investment, federal efforts to eliminate sex trafficking, and recommendations to enhance human trafficking enforcement.

Among its findings, the Commission notes that the definitions of what is sex trafficking differ among United States executive agencies and state and local law enforcement authorities. Testimony showed that sex trafficking is clearly a violation of gender-based civil and human rights that enslaves women and girls in commercial sex and is rooted in gender-based discrimination. The Commission also noted that testimony showed that sex trafficking also enslaves men and boys, particularly gay and transgender individuals, in commercial sex and is in discrimination on the basis of sexual orientation and is rooted also in social exclusion.

The Commission recommends that a model state law on trafficking be developed. The Commission also recommends that the federal government develop standard definitions of "sex trafficking" and related terms with input from involved federal agencies, state and local law enforcement entities, and the advocacy and scholarly sectors. In addition, the Commission suggests that the FBI should list trafficking as a major crime category; and HHS should collect statistics on the scope of trafficking, including a percentage of victims.

BACKGROUND

The trafficking of persons has frequently been described as a "modern" or "Twenty-First Century" form of slavery. Enactment of the Victims of Trafficking and Violence Protection Act of 2000 (known as the Trafficking Victims Protection Act of 2000, TVPA)[4] provided the government with tools to address the problem of human trafficking, both domestically and worldwide. This Act authorized the establishment of the Department of State's Office to Monitor and Combat Trafficking in Persons (G/TIP or J/TIP) and the President's Interagency Task Force to Monitor and Combat Trafficking in Persons to assist in the coordination of anti-trafficking efforts.

J/TIP directs the United States' efforts to develop and implement strategies to combat human trafficking by partnering with foreign governments. It also seeks to uphold the "3P" paradigm of protecting victims, preventing trafficking, and prosecuting traffickers through its pursuit of policies, partnerships and practices.[5] According to J/TIP, partnerships between federal, state, local and international law enforcement, government agencies, and non-governmental organizations have resulted in the effective implementation of strategies to combat human trafficking internationally and domestically. In addition, the President's Interagency Task Force to Monitor and Combat Trafficking,[6] a cabinet-level entity, coordinates federal efforts to combat human trafficking. More than a dozen different federal agencies, which have a role in anti-trafficking efforts, have participated on this task force in the past decade. Both J/TIP and the President's Interagency Task Force assist in the coordination of anti-trafficking efforts.

According to the Department of State, the U.S. government considers trafficking in persons to include all of the criminal conduct involved in forced labor and sex trafficking. Under the TVPA, trafficking in persons does not require actual movement of the victim.[7] It is the many forms of enslavement that lay at the heart of human trafficking. Individuals may be trafficking victims regardless of whether they once consented, participated in a crime as a direct result of being

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[4] Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101 et seq. (2012) (as amended by the Trafficking Victims Protection Reauthorization Act of 2003, the Trafficking Victims Protection Reauthorization Act of 2005, and the Trafficking Victims Protection Reauthorization Act of 2008).

[5] *See*, U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, website, "About Us," *available at* http://www.state.gov/j/tip/about/index.htm.

[6] 22 U.S.C. 7103. In 2003, a Senior Policy Operating Group was formed to "follow up on [Interagency Task Force] initiatives and to implement U.S. Government anti-trafficking policies and guidelines." *See* U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, "Fact Sheet," March 9, 2009, *available at* http://www.state.gov/g/tip/rls/fs/2009/120224.htm.

[7] 22 U.S.C. § 7101(10) (2012).

trafficked, were transported in the exploitative situation, or were simply born into a state of servitude.[8]

The TVPA recognizes that victims of human trafficking are overwhelmingly targeted on account of their gender. According to the Bureau of Justice Statistics, of the more than 2,500 human trafficking cases investigated between 2008 and 2010, four-fifths of the cases involved sex trafficking and 94 percent of the victims were female.[9] Sex trafficking occurs when a victim is coerced, forced, or deceived into prostitution. It can also occur when women and girls are forced to continue in prostitution through the use of debt bondage where the victims are forced to "pay off" their debt to the trafficker before they can be set free. The debt is purportedly incurred through the transportation, recruitment, or even "sale" of the victims.[10]

On April 13, 2012, the U.S. Commission on Civil Rights held a briefing to examine the federal government's response to this issue of human trafficking from a gender-based discrimination perspective. The Commission considers this to be a human rights[11] issue as well as a civil rights concern given the Commission's historic mandate on issues of discrimination.

The Commission sought and invited ten speakers to the briefing, including field experts and a survivor of sex trafficking, who provided a distinct and diverse array of viewpoints.

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[8] *See* U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, website, "What is Modern Slavery?" *available at* http://www.state.gov/j/tip/what/index.htm.

[9] 22 U.S.C. § 7101(a) ("The purposes of this chapter are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children"); 22 U.S.C. § 7101(b)(4) ("Traffickers primarily target women and girls"). In its most recent report, the Bureau of Justice Statistics found that in confirmed instances of human trafficking more than 90% of victims were female. Duren Banks & Tracey Kyckelhahn, *Characteristics of Suspected Human Trafficking Incidents, 2008-2010*, Bureau of Justice Statistics (Apr. 2011) at 6, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf.

[10] *See* U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, website, "What is Modern Slavery?" *available at* http://www.state.gov/j/tip/what/index.htm.

[11] Human rights are rights inherent to all human beings, irrespective of nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status. Everyone is equally entitled to their own human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law.

SUMMARY OF PROCEEDINGS

At the briefing, the speakers were divided into three panels. Panel One consisted of a representative from a federal agency who spoke about the agency's efforts to combat sex trafficking and assist trafficking victims and a representative from the National Association of Attorneys General, who spoke about federal coordination and assistance to state and local efforts to address human trafficking. Panels Two and Three consisted of representatives from academia and nongovernmental organizations (NGOs) who discussed sex trafficking as a form of gender discrimination, federal efforts to eliminate sex trafficking, and ways to improve those efforts. One panelist spoke about her experience as a sex trafficking survivor.

The panelists fielded questions from the Commissioners dealing with the following issues: (1) definitions of trafficking; (2) how and why trafficking victims are identified; (3) the relationship between organized crime and human trafficking; (4) the legalization of prostitution and its impact on the demand for commercial sex which adults initiate with underage partners; (5) the amount and nature of law enforcement resources dedicated to sex trafficking and the need for additional investment; (6) federal efforts to eliminate sex trafficking; and (7) recommendations to enhance human trafficking enforcement.

Panel One Presentations

Maggie Wynne*, *Director, Division of Anti-Trafficking in Persons, Office of Refugee Resettlement, Administration for Children and Families, U.S. Department of Health and Human Services

Miss Wynne stated that the U.S. Department of Health and Human Services (HHS) is required by the Trafficking Victims Protection Act of 2000 (TVPA) to: (1) provide certification of foreign victims of trafficking, so that trafficking victims are afforded the same benefits and services as are refugees, under any federal and state program; (2) establish and carry out programs to increase public awareness of the dangers of trafficking and the protections that are available for victims of trafficking; (3) train appropriate agency personnel in identifying victims of severe forms of trafficking and providing training for the protection of such victims; and (4) provide training to State and local officials to improve the identification and protection of such victims. In addition, HHS is authorized to provide services to assist potential foreign victims of trafficking in achieving certification.[12]

[12] Maggie Wynne, testimony, Briefing before the U.S. Commission on Civil Rights on Sex Trafficking: A Gender-Based Violation of Civil Rights, Washington, DC, Apr. 13, 2012, transcript, p. 10, (hereafter cited as *Briefing*

Miss Wynne said that the most important role of the Office of Refugee Resettlement (ORR) is the certification of trafficking victims. When the U.S. Citizenship and Immigration Services notifies ORR that it has made a bona fide T visa[13] determination or granted T nonimmigrant status to a victim of trafficking, ORR can issue the recipient a Certification or an Eligibility Letter to notify adult and child victims of their eligibility to access benefits and services they may need to recover from their experiences, allowing them to rebuild their lives in the United States. Similarly, when Immigration and Customs Enforcement notifies ORR that it has granted continued presence[14] to a victim of trafficking, who is assisting with a law enforcement investigation, ORR can act to get that victim connected to any necessary health care and social services. Miss Wynne stated that those benefits and services available to foreign victims of trafficking are the same as those available to refugees who arrive with the hope of finding employment, education, and a new life in America.[15]

Miss Wynne noted that unaccompanied child victims may be eligible for the Federal Unaccompanied Refugee Minors Program, which provides specialized, culturally-appropriate foster care in licensed-care settings according to the victims' individual needs.[16] She further noted that there are many federal and state health, nutrition, and social services programs available to potential recipients, regardless of their immigration status. Miss Wynne stated that ORR funds the National Human Trafficking Victim Assistance Program, which supports comprehensive case management services to foreign victims of trafficking and potential victims seeking certification in any location in the United States. Currently, ORR funds three grantees that are responsible for providing case management, referrals, and emergency assistance to victims of human trafficking and certain family members.[17]

Transcript), *available at* http://www.usccr.gov/calendar/trnscrpt/Sex-Trafficking-Briefing-Transcript_Final-8-2-13.pdf.

[13] A T visa is a type of visa allowing certain victims of human trafficking and immediate family members to remain and work temporarily in the United States if they agree to assist law enforcement in testifying against the perpetrators. A more detailed description of the eligibility requirements can be found at the U.S. Citizenship and Immigration Services website at http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status.

[14] "Continued presence" is a type of temporary immigration status offered to individuals who have been determined to be victims of trafficking. A more detailed description of the eligibility requirements can be found at http://www.dhs.gov/xlibrary/assets/ht-uscis-continued-presence.pdf.

[15] Wynne Testimony, *Briefing Transcript*, p. 11.

[16] *See* U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement, website, "About Unaccompanied Refugee Minors," *available at* http://www.acf.hhs.gov/programs/orr/programs/urm/about.

[17] Wynne Testimony, *Briefing Transcript*, pp. 12-13.

Miss Wynne spoke about ORR's efforts to improve victim identification and public awareness in human trafficking. She noted that the Division of Anti-Trafficking in Persons (ATIP) leads the Rescue and Restore Victims of Human Trafficking Campaign, which has established Rescue and Restore coalitions in many cities, regions, and states. These community action groups are comprised of NGO leaders, academics, students, law enforcement agents and others. Miss Wynne indicated that the Rescue and Restore Regional Program serves as a focal point for regional anti-trafficking efforts; and that ORR funds 11 regional partners who oversee a local anti-trafficking network. Miss Wynne also noted that ORR funds a National Human Trafficking Resource Center, which houses a national toll-free hotline for the human trafficking field in the United States.[18]

Miss Wynne stated that in addition to the training provided by its grantees, HHS directly provides training to its own staff, state and local officials, and entities receiving HHS funding. Each year, ATIP hosts several web-based trainings on human trafficking, which have at times focused on sex trafficking. Each of the 10 ACF Regional Offices throughout the United States has established an anti-trafficking point of contact. In addition, many of these regional offices are represented on local rescue and restore coalitions or DOJ anti-trafficking task forces.[19]

Miss Wynne concluded that by engaging in the aforementioned and other opportunities, HHS is expanding the capacity of potential intermediaries making them more knowledgeable about the trafficking of persons and how they can assist individuals who have been or may be exploited in commercial sex or forced labor.[20]

Greg Zoeller, Attorney General, State of Indiana and Representative, National Association of Attorneys General

Attorney General Zoeller stated that in August 2012, the National Association of Attorneys General (NAAG) adopted human trafficking as its national initiative and each attorney general was to go through his or her own statutes to see how he or she could contribute efforts to the cause. NAAG created the Pillars of Hope, which focused on four main pillars dealing with the challenges in the efforts of addressing human trafficking. They include: (1) gather more data that will track state arrests and prosecutions; (2) raise awareness to reduce the demand; (3) promote strong state statutes and forceful state prosecutions; and (4) mobilize communities to increase care for

[18] Ibid., 13-14. The hotline is available 24 hours a day, seven days a week at 1-888-373-7888.

[19] Ibid., 15.

[20] Ibid.

victims.[21] The goals go beyond cracking down on sex trafficking and aspire to end the demand for commercial sex.[22]

Attorney General Zoeller noted that when he and his staff looked through their statutes, they found some serious weaknesses. To address these weaknesses, Attorney General Zoeller wanted to be able to pass legislation before the 2012 Super Bowl game, in Indianapolis, to ensure that they were prepared to respond to human trafficking issues that would take place during this event.[23] Attorney General Zoeller is the co-chair of the Indiana anti-trafficking task force called the Indiana Protection for Abused and Trafficked Humans (IPATH). In preparation for the Super Bowl, Attorney General Zoeller indicated that his office and IPATH were responsible for training more than 3,400 individuals by holding 60 different human trafficking training sessions, performing 46 community outreach awareness activities, and distributing 2,700 copies educational materials. In addition to the aforementioned activities, post-game activities included making 68 commercial sex arrests, identifying two human trafficking victims, and identifying two potential trafficking victims who worked with Indiana law enforcement.[24]

Attorney General Zoeller noted that two weeks after the Super Bowl, a prosecutor in Marion County was the first to use Indiana's new statute on human trafficking. Attorney General Zoeller spoke about a victim who was a 14-year-old runaway from a troubled home. He talked about how the mother was determined to find her daughter and ultimately tracked her down in Indianapolis. Attorney General Zoeller indicated that typically, if the victim is not recovered, within a few years she will have been trafficked and prostituted into different cities. He noted that by the time she is age 18, or in some states age 16, she would likely have been arrested for prostitution because many law enforcement officers do not recognize that she is a victim of human trafficking and not a criminal. He further noted that by the time the victim is age 24, she would have spent a decade as a

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[21] More information on the Pillars of Hope campaign is *available at* http://www.naag.org/giving-a-voice-to-the-voiceless-pillars-of-hope-presidential-initiative-to-tackle-human-trafficking.php.

[22] Greg Zoeller, Attorney General, State of Indiana, and Member of the National Association of Attorneys General, Testimony, *Briefing Transcript*, pp. 16-17.

[23] For example, in Indiana, Backpage.com ads, one of many internet sites advertising escorts that are associated with prostitution and human trafficking, spiked from 17 Indianapolis escort ads on January 12 to 129 Indianapolis ads on February 3. It is well documented that an increased demand for commercial sex indicates increased risk for human trafficking. *Contra* Kate Mogulescu, "The Super Bowl and Sex Trafficking," *The New York Times*, Jan. 31, 2014 ("No data actually support the notion that increased sex trafficking accompanies the Super Bowl") and Maggie McNeill, "The Mythical Invasion of the Super Bowl Hookers," *Reason*, Jan. 26, 2014, *available at* http://reason.com/archives/2014/01/26/the-mythical-invasion-of-the-super-bowl.

[24] Zoeller Testimony, *Briefing Transcript*, pp. 17-18.

prostitute and, in all likelihood, by age 34 she would be dead since epidemiologists have concluded that the average age of death of persons used in commercial sex is 34.[25]

Attorney General Zoeller concluded that had the above scenario played out, it would be hard to determine at what point the victim actually stopped being a victim of human trafficking and chose to be in this "profession." He noted that for the better part of her life, society would have treated her as a criminal, possibly violating her civil rights sometime during her lifetime.[26]

Discussion

Chairman Castro indicated that the premise for holding this briefing is that sex trafficking victims are targeted based on gender. He asked the panelists for their perspectives on how trafficking victims are identified.[27] Both Miss Wynne and Attorney General Zoeller agreed that whether foreign or domestic, all victims are targeted for exploitation.[28] Miss Wynne indicated that the cases that come through her office deal with foreign victims of trafficking and involve child victims. To lure victims, traffickers offer alleged job opportunities, romance, relationships or schooling. Once the victims are brought here, they become dependent on the trafficker because they are here illegally and are unaware of the laws that can provide them protection. In essence, traffickers assess the vulnerabilities of those being exploited.[29] Attorney General Zoeller indicated that on the domestic front, trafficking victims are often runaways who come from either abusive or dysfunctional homes. He said that 83 percent of sex trafficking victims in the United States are citizens and that the average age at which they are first used in commercial sex is between 12 and 14.[30]

Commissioner Achtenberg asked Attorney General Zoeller to describe the relationship between organized crime and human trafficking. Attorney General Zoeller stated that the connection between the two is the opportunity to make money. He noted that there is little risk involved in transporting victims from city to city and if someone does get arrested, usually it is the prostitutes and not others involved in the criminal enterprise who go to jail. Attorney General Zoeller indicated

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[25] Ibid., 18-19. *See* John J. Potterat, Devon D. Brewer, Stephen Q. Muth, Richard B. Rothenberg, Donald E. Woodhouse, John B. Muth, Heather K. Stites and Stuart Brody, "Mortality in a Long-term Open Cohort of Prostitute Women," *American Journal of Epidemiology*, Vol. 159, Issue 8, pp. 778-785 (2004), *available at* http://aje.oxfordjournals.org/content/159/8/778.full .

[26] Zoeller Testimony, *Briefing Transcript*, p. 20.

[27] *Briefing Transcript*, pp. 20-21.

[28] Ibid., 21-23.

[29] Ibid., 21.

[30] Ibid., 22.

that he is starting to see more and more trafficking networks going beyond his own state and that is why he is anxious to work with the federal government, the U.S. Department of Justice in particular, to address the larger-scale criminal operation.[31]

Commissioner Gaziano asked Attorney General Zoeller and Miss Wynne what percentage of prostitutes in a given jurisdiction become part of an interstate network and what the estimates are for foreign trafficking victims, respectively. Attorney General Zoeller responded that good statistics do not exist and this critical lack of information is identified as an issue in NAAG's 2011-2012 key initiative, Pillars of Hope. He also noted that the FBI does not include human trafficking as a major crime category. [32] Commissioner Heriot agreed that reliable trafficking numbers would be beneficial.[33]

Miss Wynne stated that HHS does not collect statistics on the scope of trafficking or a percentage of victims. She noted that she can only report on the background of the victims who have received certification or eligibility letters. According to Miss Wynne, of the 564 victims of trafficking who received a certification or eligibility letter in the last reporting year, 45 percent were male, 75 percent were victims of labor trafficking, 19 percent were exploited through sex trafficking, and 6 percent were victims of both sex and labor trafficking. Miss Wynne noted that females made up 95 percent of victims of sex trafficking or victims of both labor and sex trafficking.[34]

Attorney General Zoeller said that although he has not focused much on the international side of trafficking, he does know that many women operating out of Indiana's "so-called" 24-hour Asian massage parlors are victims. He noted that these women rarely self-identify as victims and are often afraid to cooperate with law enforcement. The trafficker may be threatening her family members back home or may be controlling them through fear of beatings or by withholding their passport or identity documents. Because these women rarely go to the government for help, Attorney General Zoeller suggested that the ones who come to HHS for help may just be the tip of the iceberg.[35]

Commissioner Kladney asked Attorney General Zoeller how much law enforcement is dedicated to sex trafficking. Attorney General Zoeller said that there is an active vice squad in almost every major metropolitan area. He spoke about how vice units are trained to arrest the prostitute and

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[31] Ibid., 23-24.

[32] Ibid., 25-26; NAAG, 2012 Presidential Initiative, *Pillars of Hope: Attorneys General Unite Against Human Trafficking*, Jun. 23, 2011, *available at* http://www.naag.org/attorneys-general-unite-to-fight-human-trafficking.php.

[33] *Briefing Transcript*, p. 34.

[34] Ibid., 26-28. The 564 victims of trafficking include people from both the United States and other counties. In the previous year, 55 percent of trafficking victims were male.

[35] Ibid., 28-29.

"shake her down" to see if she will give information about somebody higher up in the organization. He said that he found it very frustrating that trafficked women are still categorized as prostitutes rather than victims. Commissioner Kladney asked Attorney General Zoeller if the Super Bowl training took into account that these women, especially the young girls, were actually victims. Commissioner Kladney also inquired as to whether Attorney General Zoeller or the Attorneys General of America have any proposals regarding treating these women like victims as opposed to criminals. Attorney General Zoeller stated that he was going to make an effort to have Indiana legislators address laws as they relate to prostitution, noting that there has to be a different treatment and view of prostitution.[36]

Commissioner Heriot noted that throughout the presentations the term "human trafficking" has been used in many ways, which prompted her to ask for a definition of trafficking.[37] Miss Wynne said that there are federal and state laws defining human trafficking and that the United Nations has its own definition. She noted that with respect to children and labor trafficking, there is force, fraud, or coercion involved. According to Miss Wynne, the federal definition of trafficking includes the recruiting, harboring, transporting, transferring, providing, or obtaining of individuals for labor or services through force, fraud, or coercion for the purpose of involuntary servitude, peonage, debt bondage, or slavery. The definition she provided for adult sex trafficking included harboring, transporting, providing, or obtaining a person for a commercial sex act through force, fraud, or coercion.[38] She noted that the definition of sex trafficking is not the same for a minor and that any minor induced to perform a commercial sex act is a victim of trafficking under federal law. Commissioner Heriot inquired as to what would fall under coercion that does not already fall under force or fraud. In response, Ms. Wynne said as far as she knows force is not defined; but coercion is defined as the threat or actual imposition of physical restraint or physical harm, either to the individual or to someone connected with the individual. Commissioner Gaziano noted that coercion also involves the threatened abuse of the law or legal process.[39]

Commissioner Heriot also queried why Attorney General Zoeller had to push legislation addressing human trafficking through before the Super Bowl. Attorney General Zoeller said that the Super Bowl acts as a magnet for prostitution activity. He noted that they followed backpage.com, where the majority of requests for prostitutes originate, and noticed an incredible spike of people looking for prostitutes. For example, on January 12th, there were 12 Backpage ads, but the day before the Super Bowl on February 3rd, there were 129 ads. Attorney General Zoeller noted that Indiana

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[36] Ibid., 29-34.

[37] Ibid., 34-36.

[38] Ibid., 36-37.

[39] Ibid., 38-39.

wanted to be prepared for both the good as well as the bad things that come into his state with such a large event.[40]

Commissioner Kladney said that he did not believe that underage individuals choose to go into the field of prostitution. Attorney General Zoeller said that by legal definition they cannot choose to do so.[41] Commissioner Kladney then asked Miss Wynne if any of HHS's NGOs and other organizations have had problems providing foreign language assistance for victims of international trafficking. Miss Wynne responded that she could not speak at length to this question, but indicated that several NGOs work with specific ethnic communities. She also noted that the National Human Trafficking Resource Center has access to a language line that they find very useful in responding to calls in languages that cannot be interpreted internally.[42]

When Attorney General Zoeller and Miss Wynne were asked what recommendations would they want the Commission to put forward to Congress to enhance human trafficking enforcement, Miss Wynne declined to comment; while Attorney General Zoeller responded that he would like the federal government to provide a few pilot programs, until an immigration bill is passed, under the auspices of which Indiana could have immigrants come into its state to work and the state would be responsible for assuring that those individuals exit.[43]

Commissioner Achtenberg asked Attorney General Zoeller if he had any recommendation as to how the FBI's crime statistics could be of greater assistance in providing information on the interstate trafficking of women. Attorney General Zoeller indicated that he has worked closely with the Justice Department and he is one of three attorneys general who serve on the Executive Working Group, which also includes three U.S. attorneys and three district attorneys. He noted that different states and the federal government all take different approaches to counting victims and therefore there are no consistent or useful statistics available. He indicated that there should be separate tracking for foreign and domestic trafficking, because many underage sex trafficking victims are domestic runaways.[44]

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[40] Ibid., 40.

[41] Ibid., 42-43.

[42] Ibid., 43.

[43] Ibid., 45-47.

[44] Ibid., 48.

Panel Two Presentations

Bridgette Carr, Professor and Director, Human Trafficking Clinic, University of Michigan Law School

Professor Carr spoke on the legal services the Human Trafficking Clinic at the University of Michigan Law School provides to victims of both sex and labor trafficking. She noted that current criminal justice practice in the United States fails to identify and protect victims of sex trafficking. Professor Carr said that law enforcement is well-versed in arresting and jailing criminals; but as a nation, unless we create a new model which supports victims rather than treating them as criminals, we will not be able to improve upon our response to and protection of victims.[45]

Professor Carr spoke about a case involving a 16-year-old girl who was brought to Michigan and allegedly exploited by an adult male trafficker. A family member found a picture of the girl in an online ad and called the local police. The police found the teen in a motel with an 18-year-old victim and the trafficker; all three were put in handcuffs. The 16-year-old was detained in a juvenile facility for three weeks and the 18-year-old was put in the county jail. According to Professor Carr, at no time was either young woman provided services for victims of human trafficking. Professor Carr noted that because of her experience with the criminal justice system, the 16-year-old did not want to participate in the prosecution of her trafficker. Despite health problems, efforts to squash the subpoena, and efforts to negotiate alternatives to in-person testimony with the local prosecution, the 16-year-old was forced to travel back to Michigan and participate in her trafficker's prosecution against her will.[46]

Professor Carr spoke about an instance in which a 14-year-old girl was apprehended after being sold for sex. Because under Michigan law a child under 16 years of age cannot be charged with prostitution, the 14-year-old was charged with possession of tobacco as a minor. In an effort to help, Professor Carr contacted the girl's public defender offering the resources of the clinic as well as information about shelters and programs to assist the 14-year-old. The girl's case was being transferred back to her city of former residence. According to Professor Carr, the former residence was a squatter house located in the city where the girl had first been recruited and sold by her trafficker. Professor Carr noted that the approach of the criminal justice system towards trafficked children is tragic, and ignoring a victim after his or her 18th birthday is both irrational and unacceptable.[47]

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[45] Bridgette Carr Testimony, *Briefing Transcript*, pp. 52-53.

[46] Ibid., 53-54.

[47] Ibid., 54-55.

Professor Carr spoke of yet another example where a woman was brutalized by her trafficker and sold for sex in multiple states. In one of the states where the woman was arrested and charged with prostitution, her trafficker hired a lawyer for her; however, the lawyer never spoke with the woman, only with her trafficker. The next day the trafficker took the woman to another state and sold her again. Professor Carr said that the woman finally escaped and came to the Human Trafficking Clinic seeking help. In trying to assist the woman in resolving the prostitution charge, the Clinic discovered that the woman's lawyer had entered a guilty plea on her behalf without her permission. Even though the woman is now in school, she is terrified that when she applies for a job, it will require a background check and her prostitution conviction will appear. Professor Carr and the Clinic have spent more than a year trying to expunge or vacate this conviction.[48]

Professor Carr noted that although arresting, detaining, and jailing victims of sex trafficking is unacceptable, it is happening throughout the nation. When organizations are looking for victims of human trafficking, Professor Carr tells them to go to the jails and talk to the adults and children who were apprehended for prostitution. She spoke about a project that began in March 2011 whereby women and men who are arrested for prostitution are interviewed to see if they are victims of human trafficking. Within the first six months, the project had represented 139 individuals, more than 40 individuals had disclosed trafficking histories, and an additional 35 individuals were identified as being at extremely high risk for trafficking. Professor Carr stated although advocates and victim service providers are not surprised by these statistics, the criminal justice system has not yet acknowledged this reality.[49]

Professor Carr stated that society must acknowledge that federal human trafficking law is insufficient to combat the problem and protect victims. She also said that state laws on prostitution and child welfare must be updated to protect human trafficking victims; resources should be used to help, rather than harm, victims; and access to comprehensive and independent legal services to all victims of human trafficking should be provided. She noted that the goals of a prosecution are often in conflict with those of the victim. [50]

Salvador Cicero, Member, Cook County Anti-Trafficking Task Force

Mr. Cicero said that Cook County, Illinois, has been designated as one of the biggest hot spots for both national and international trafficking.[51] He added that Illinois has a very good state human trafficking law because the people involved in creating the law were former prosecutors who

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[48] Ibid., 55-56.

[49] Ibid., 56-57.

[50] Ibid., 57-58.

[51] Salvador Cicero Testimony, *Briefing Transcript*, p. 60.

already had the experience. In 2010, when Illinois passed the Safe Children Act,[52] it became one of the first states to put forth comprehensive legislation to address the human trafficking of children under the age of 18. Among other provisions, the Act ensured that innocent children who are lured or coerced into prostitution will now be immune from criminal prosecution and will be placed in the child protection system instead of the criminal justice system. The Act also removed references to "juvenile prostitutes" in Illinois' criminal code. This landmark legislation provided police and prosecutors with the tools they needed to aggressively tackle human trafficking. For example, the law allowed the same legal tools used to fight groups selling drugs to be used against groups who traffic children. The Act also allowed officer-safety recordings to protect undercover officers during dangerous sex trafficking investigations. Additionally, it allowed law enforcement to impound any vehicle used for a variety of human trafficking and prostitution-related crimes. Mr. Cicero noted, however, that there needs to be a change of culture within law enforcement. He also pointed out that people needed to be educated in the area of trafficking. He thinks that the sex trafficking is related to broader problems in the field of gender relations, and he would like to see public schools do more to address these larger issues.[53]

Mr. Cicero agreed with previous speakers about the lack of services available for individuals who have been rescued from trafficking. He described the first victim that he rescued from trafficking as a 24 year old female who had been prostituted for 10 years and had no marketable job skills. Mr. Cicero found her a job, but she eventually ended up back on the streets. He acknowledges that while he failed miserably in this case, he learned from it.

Mr. Cicero spoke about how he contacted law enforcement, community representatives, the Salvation Army, and grantees receiving federal funds to inquire about services for trafficking victims. He was told there was not enough space for victims or services were not offered to victims. Mr. Cicero, as a result of a phone call from the Illinois State Guardian, participated in a meeting at the Cook County Juvenile Justice Center and the Salvation Army, the FBI, the Chicago Police, county courts, the Department of Children and Family Services, and several advocates like himself attended. The Cook County Anti-Trafficking Task Force was created and included local trafficking experts. The task force adopted the Partnership to Rescue Our Minors from Sexual Exploitation (PROMISE) program. This program is being run for the Salvation Army. The task force has obtained federal funding, operates a shelter and reinsertion program, and is revising a state anti-trafficking law.[54]

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[52] Public Act 96-1464.

[53] Cicero Testimony, *Briefing Transcript*, pp. 60-62.

[54] Statement of Salvador Cicero submitted to the U.S. Commission on Civil Rights, pp. 102-103.

Mr. Cicero spoke about the difficulty of using victims as witnesses to prosecute trafficking cases. He talked about the need to use wiretaps as an alternative evidence gathering tactic although as a defense attorney this is something that he has always been opposed to. He noted that this activity has been very effective in helping victims.[55]

Merrill Matthews, Texas State Advisory Committee to the U.S. Commission on Civil Rights

According to Dr. Matthews, Texas is at the forefront of human trafficking, both in numbers and in an attempt to address the problem. U.S. Department of Justice reports have identified El Paso and Houston as two of the major human trafficking cities. Dr. Matthews noted that Interstate 10, which goes from Houston through San Antonio to El Paso, apparently facilitates traffickers' ability to transport victims across the state. He stated that the attorney general estimates that one out of every five human trafficking victims travel through Texas; nearly 20 percent of all human trafficking victims that have been rescued were done so in Texas; and 38 percent of all calls to the National Trafficking Resource Center hotline were dialed from Texas.[56]

Dr. Matthews noted that in 2003, Texas was one of the first states to pass legislation on human trafficking. In 2008, as a follow-up, the attorney general produced a 92-page report which created a human trafficking prevention task force to look at some of the efforts to address this issue, identify the problem, and try to find resources.[57] In 2011, the Human Trafficking Prevention Task Force issued a report with recommendations,[58] which in Matthews' view turned out to be timely because Texas hosted the Super Bowl that year. Dr. Matthews spoke about the number of conferences that were held before the Super Bowl to try to create awareness of human trafficking, particularly because a number of people would rent out their houses as a way to make money and might not realize that their rented-out houses would be used as sites for trafficking. Dr. Matthews noted that the human trafficking problem was not as bad as expected at that time.[59]

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[55] Cicero Testimony, *Briefing Transcript*, pp. 63-64.

[56] Merrill Matthews Testimony, *Briefing Transcript*, pp. 65-66.

[57] Ibid., 66. *See* "The Texas Response to Human Trafficking," *available at* https://www.oag.state.tx.us/AG_Publications/pdfs/human_trafficking_2008.pdf.

[58] The entire report is available online at https://www.texasattorneygeneral.gov/files/agency/human_trafficking.pdf. Among the recommendations were calls for improved data collection concerning trafficking; heightened penalties for crimes related to underage prostitution which, among; removing the requirement that prosecutors have to prove force, fraud, and coercion in cases involving the trafficking of minors; and increasing the statute of limitations for victim lawsuits.

[59] Matthews Testimony, *Briefing Transcript*, pp. 66-67. See n 20, supra, for discussion of popular press articles claiming that these concerns have been exaggerated.

Dr. Matthews said that four areas in Texas received federal assistance through the Trafficking Victims Protection Act. The sheriff's department in one of those areas has been coordinating with other organizations to try to identify and provide assistance to the human trafficking victims in that area. Dr. Matthews said that he knew major cities would also be receiving federal funds so the task force called a number of medium-sized cities to ask if there were any efforts going on to identify human trafficking. The task force found that mid-sized cities appeared much less well-positioned to respond to trafficking.[60]

Karen Hughes*, *Lieutenant, Las Vegas Metropolitan Police Department

Lieutenant Hughes said that she oversees one of the largest teams of detectives in law enforcement that does vice-related investigations. She has two teams whose sole task is investigating sex trafficking cases. One team, the Innocence Lost Task Force, deals with children under the age of 18 and has been in existence since the mid-part of the last decade.[61] Law enforcement in Las Vegas, however, has been involved in domestic minor sex trafficking since 1994. The other task force, the Southern Nevada Human Trafficking Task Force, which Lieutenant Hughes formed three years ago, focuses on adult women who are also victims. Many of these women first become victimized between 12 and 14 years of age.[62]

Lieutenant Hughes said that trafficking victims are found on the streets (or "in a circuit") and they do not stay in cities very long, especially when law enforcement efforts are beefed up. Traffickers are more prevalent in areas where they can profit from their victims. She stated that Las Vegas is the prime area for traffickers to bring their victims and exploit them through a variety of venues, in particular hotels. Her biggest challenge is the internet because it provides many opportunities to traffickers to advertise escorts and escort services. She noted that there needs to be tougher laws with more restrictions on the escort business with regard to how they are allowed to operate.[63]

According to Lieutenant Hughes, coercion, force, and fraud come into play because of the demanding nightly quotas that victims are expected to meet. She said that these quotas drive the violence that is behind the sex trafficking industry. Theft also is a significant part of the trafficking industry. Lieutenant Hughes noted that the victims are trained to be thieves and they are put in these roles so that they themselves cannot turn on the traffickers. In other words, if these women become criminals, they are less likely to step forward and say, "I am a victim." Lieutenant Hughes said that

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[60] Ibid., 67-69.

[61] Karen Hughes Testimony, *Briefing Transcript*, pp. 69-70, 72.

[62] Ibid., 73.

[63] Ibid., 70-71.

threats and violence are very much a part of the manipulation that traffickers use against their victims.[64]

Lieutenant Hughes acknowledged that within the last five years, she has been able to change the mindset and the culture within her unit. She said that her detectives are victim advocates, something that is very unusual in law enforcement.[65]

Lieutenant Hughes stated that she is working with their Attorney General gathering statistics on trafficking. Those statistics are being shared with northern Nevada.[66] According to Lieutenant Hughes, in 2011, there were 131 victims under the age of 18 and approximately 74 percent of those victims were from Las Vegas. She noted that this percentage is extremely high; traditionally the percentage has been roughly 50 percent. Lieutenant Hughes said that traffickers are coming into Las Vegas and recruiting young women and young men right out of their high schools.[67]

Lieutenant Hughes further stated that gang affiliation is also a huge component of sex trafficking. She pointed to the need to work collaboratively with federal law enforcement and began working with the Internal Revenue Service about three years ago. The trafficking industry is all based on money. She said that assets should be seized from traffickers and put into victim services.[68]

Discussion

Chairman Castro asked Lieutenant Hughes if African Americans are being disproportionately targeted for victimization. Lieutenant Hughes said that last year she began working with the local clergy, particularly in minority communities. She noted that groups of clergy and pastors are now providing parenting forums because pimps are canvassing bus stops in expensive cars, such as Jaguars or Mercedes, and this is appealing to young girls that come from homes with limited resources.[69]

Commissioner Kladney noted that Lieutenant Hughes originally told him that the clergy, along with a school nurse actually approached her. He asked that she relate that story because he thought it showed how motivation can empower a community. In response, Lieutenant Hughes related an

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[64] Ibid., 71-72.

[65] Ibid., 74.

[66] Ibid., 72.

[67] Ibid., 74.

[68] Ibid., 75.

[69] *Briefing Transcript*, pp. 76-77.

incident that occurred about two years prior where she received a phone call from one of her peers within the Federal Bureau of Investigation who thought that his daughter was involved in sex or human trafficking. She asked him some basic questions about branding, tattooing, names, and boyfriends, all of the things that law enforcement use to identify the possibility of trafficking. She noted that all of the answers to her questions pointed to prostitution. Although the daughter had not been arrested yet, she was 18 and considered an adult. Although it is believed that most youth involved in this activity come from dysfunctional homes, Lieutenant Hughes stressed that many of the victims in Las Vegas come from very functional homes, as was the case of this peer's daughter. Lieutenant Hughes, along with her staff and the daughter's parents, worked towards identifying, incarcerating, and convicting the pimp. The daughter is now out of "the Game" but she is bitter, hates her parents and is in love with her pimp. She does not identify herself as a victim. Lieutenant Hughes said now that mother serves as a resource and helps to educate the public when she speaks to groups in Las Vegas.[70]

Commissioner Gaziano noted that while some counties in Nevada have legalized commercial sex, Las Vegas is not one of those jurisdictions. He asked Lieutenant Hughes and others whether a legal outlet for those wanting commercial underage sex would reduce the black market for commercial sex with teens and children.[71] Lieutenant Hughes adamantly stated that she is not a supporter of, nor would she ever entertain the discussion of, legalizing prostitution because of the physical and internal scars of victims.[72]

Commissioner Gaziano asked why Lieutenant Hughes thought that legalizing prostitution would not decrease the demand for commercial underage sex. Lieutenant Hughes said that juveniles and minors will always be a part of the demand for sex and she hopes that there will never be a law to legalize prostitution.[73] Mr. Cicero noted that framing prostitution as trafficking is dangerous because they are two different things. According to Mr. Cicero, nearly every country in the Western hemisphere has legalized prostitution and the Dominican Republic has regulated areas where the women who are prostitutes have housing. He also noted that in places like Mexico and Argentina if you are a prostitute you have to be registered. Mr. Cicero thinks that there is value in regulating prostitution, but said whether that helps in the trafficking area is a different question.[74] Professor Carr thinks that the buying of sex in the United States has been decriminalized and she went on to state that the risk of being arrested when you are a buyer of sex is extremely low. Professor Carr

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[70] Ibid., 78-79.

[71] Ibid., 80-81.

[72] Ibid., 81-82.

[73] Ibid., 84.

[74] Ibid., 84-87.

stated that we need to move past the position that unless the victim testifies, we have no evidence of prostitution. The cell phone with phone numbers of buyers, as well as computer IP addresses of buyers, can be used as evidence.[75] Dr. Matthews noted that decriminalizing prostitution would take some of the profit motive away and it may reduce violence but it would not necessarily reduce the incidence of prostitution.[76]

Chairman Castro asked what the federal government is doing now that it could be doing better; and what is it not doing that it should be doing. Mr. Cicero said that a joint task force with the U.S. attorney and the state attorney was created and when they do their investigations they figure out whether a case will be charged under state or federal law. Last year under this system, they rescued approximately 40 victims in one operation. However, Mr. Cicero noted that helping the victims is not going very well. He said that the National Immigrant Justice Center, based out of Chicago, was one of those organizations that were doing wonderful work for victims, but they lost their funding. He said that local people feel that the federal mandates are great, but there is a lack of funding.[77] Professor Carr stated that she thinks the human trafficking hotline is a fantastic resource and that they just received their 50,000th call. She thinks that at the federal level, lawyers could be made available for victims in cases involving U.S. citizens, just as they are for cases involving foreign national victims, because those citizens have a variety of legal needs including possible criminal liability. She noted that in light of the fact that the regulation of prostitution is left to the states, there is a limit to what the federal government can do on this issue.[78]

Commissioner Kladney said that 15 of the 17 counties in Nevada have legalized prostitution. He noted that pimps are still involved in legalized prostitution. Commissioner Kladney said that the women go to work for 25 days a month and they go home for five days. Their pimps are waiting at home for the money and violence still exists. He asked the panelists to comment on this. Mr. Cicero said that in countries such as Mexico, the law only allows the prostitution of oneself if you are over the age of 18 because you have the legal capacity to choose. He noted that pimping is outlawed in Mexico, so prosecutions would be for proxenetism.[79] Mr. Cicero said that the culture of pimping, the means of coercion, is not physical anymore. A cell phone, as well as voodoo, can and has been used as a means of force.[80]

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[75] Ibid., 87-88.

[76] Ibid., 89-90.

[77] Ibid., 92.

[78] Ibid., 93-94.

[79] Ibid., 94-95. Mexico does have a trafficking law as well.

[80] Ibid., 96.

Commissioner Kladney asked Lieutenant Hughes how many people were on her teams, if she needed more resources, and what kinds of resources were lacking. Lieutenant Hughes stated that in addition to the two previously mentioned teams that are dedicated to investigating sex trafficking cases, she has three additional teams. She noted that she needs simple things that would be beneficial for victims, such as a pair of eyeglasses for a victim whose vision is off or a kennel carrier for a victim who needs to be reunited with his/her family back in New York but the victim will not get on the plane without his/her animal. Lieutenant Hughes talked about the need for training, safe houses to harbor their victims, and funding to do long-term investigations.[81] Professor Carr agreed with Lieutenant Hughes about the need for safe houses to harbor victims. She further noted that until other options are available, the only choices that law enforcement have for placement of victims are jail or the streets.[82] Mr. Cicero said that in Illinois, the Department of Children and Family Services now has the legal authority to house under-aged rescued victims, and the change in law is working very well.[83]

Commissioner Heriot asked Lieutenant Hughes how often the testimony of a prostitute is needed in order to successfully prosecute a pimp. Lieutenant Hughes said that she does not feel that it is absolutely necessary for a victim to testify against his/her trafficker.[84] Commissioner Heriot asked Lieutenant Hughes to provide the number of cases in which she is positive that a person under investigation is guilty of pandering but the lack of testimony does not allow the case to be successfully prosecuted. Lieutenant Hughes said that it happens often, but she did not have those statistics readily available. According to Lieutenant Hughes, victims are reluctant to testify because they do not receive the necessary resources, help, or services that would allow them to feel comfortable doing so.[85]

Commissioner Kladney asked if there were any model statutes being drafted for prosecuting panderers. Mr. Cicero said that anti-slavery laws have been used to prosecute people successfully. Mr. Cicero is not aware of any model law at the state level, but he thinks such a law would be a great idea.[86] Professor Carr said that the Department of Justice and the Polaris Project both have model human trafficking laws. Those model laws, however, are based on the federal law and do not include much that is needed concerning prostitution, according to Professor Carr. Professor Carr

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[81] Ibid., 98-99.

[82] Ibid., 99-100.

[83] Ibid., 100.

[84] Ibid., 101-103.

[85] Ibid., 103-104.

[86] Ibid., 106-107.

noted that spotlights are not shown on innovative approaches to prosecuting cases and the work of Lieutenant Hughes needs to be spotlighted.[87]

Commissioner Kladney asked Professor Carr if she has thought about having her clinic work on a model statute. Professor Carr responded that she has been working with the state of Michigan to improve its human trafficking laws. She said that she could write some effective laws, but the problem is that those laws need to be enacted; and the prosecutors, district attorneys, and law enforcement would need to use them. She noted that there are already some strong laws on the books.[88] As an example, Professor Carr pointed out a sex trafficking case in which the victims did not want to participate, so the prosecutor brought the case based on tattoos because it is against the law to tattoo individuals under the age of 18. Professor Carr said the outcome of the case was numerous charges of aggravated assault and that the system could use more approaches such as this. Mr. Cicero said that creating good statutes is an issue of political will.[89]

Commissioner Gaziano spoke to Professor Carr's statement that commercial sex acts should be decriminalized. He said that while doing this may be fair and just, he believes that decriminalizing only half of the transaction does not take away the pimp's economic incentive and more young girls may be induced into the service. He then asked Professor Carr if she thought decriminalizing only half the transaction will change those who provide the service. Professor Carr responded she does not believe that decriminalizing the selling of sex will ever happen in the United States,[90] but would like the informal decriminalization that exists for buying to be extended to selling.[91] In response to Commissioner Gaziano's comment about his interest in international laws governing sex, Professor Carr said that Amsterdam has complete legalization and some evidence shows that victimization did increase.[92] She said that in Sweden the act is still illegal, but the sellers are decriminalized and victimization is decreasing. Professor Carr thinks there is an opportunity for states and cities to be leaders and innovators on this issue. She said that if either Amsterdam's or Sweden's model is used, it will be extremely important to track the data to see if the model is working.

Commissioner Heriot asked Professor Carr for clarification on her response to Commissioner Gaziano's question and what she meant by "victimization." Professor Carr responded that she was referring to human trafficking when she used the word victimization. Professor Carr said that in a

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[87] Ibid., 107-108.

[88] Ibid., 109-110.

[89] Ibid., 111.

[90] Ibid., 112.

[91] Ibid., 114.

[92] Ibid., 112, 115.

study that evaluated the question of whether sex trafficking decreased in light of the decriminalization of the selling of sex in Sweden, the response was yes.[93] Mr. Cicero added that Save the Children Sweden created the materials that he referred to for Nicaragua and El Salvador. He said that the Swedish experience is based on the idea that the person who has been exploited will not be punished; instead, the buyer will be punished. Mr. Cicero noted that the Swedes educate their public about not engaging in human trafficking and the penalty for buying sex.[94]

Commissioner Achtenberg asked Dr. Matthews to speak to the improvements that Texas has made in the arena of law enforcement. She also asked him if he could offer any observations about ways in which federal law and federal administration of the law could be improved for the benefit of Texas and victims of trafficking. Dr. Matthews said that in 2009, legislation that addressed some of the issues of decriminalizing sexual activity for children under 18 years of age was passed, but before that, minors arrested for illegal sexual activity were required to prove that they were coerced in order to be exonerated.[95] The legislation also requires the posting of notices of the national human trafficking hotline in overnight lodgings and other places where such crimes occur. Dr. Matthews noted that enough still has not been done, and that law enforcement lacks the real amount of resources that it needs to do its job. He pointed out that most of the efforts that have been achieved are the result of a federal grant as opposed to initiations from various cities and counties. Dr. Matthews does not think that addressing human trafficking is a big concern of smaller counties and middle-sized towns.[96]

Commissioner Kladney asked Dr. Matthews about the Texas border towns and the problem in trafficking. Dr. Matthews said that the Justice Department seems to think that Texas has addressed the trafficking problem somewhat, but the governor said that there is still a huge problem of people crossing the border. Dr. Matthews noted that Texas does not have a very good handle on illegal immigration and that they are now attempting to use drones and other methods to try to reduce some of the immigration and that a fair amount of trafficking is the result of people who are being brought across the border, but hard numbers do not exist.[97]

Commissioner Kladney asked if there is a lot of sex trafficking and Dr. Matthews acknowledged that there is. Dr. Matthews stated that when raids have taken place, illegal immigrants are normally the ones who are brought into custody. Dr. Matthews said that he is surprised at the amount of

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[93] Ibid., 116.

[94] Ibid., 117-118.

[95] Ibid., 119.

[96] Ibid.

[97] Ibid.

activity coming out of Houston, particularly because of its lack of proximity to the border. Lieutenant Hughes said that Las Vegas has illegal neighborhood brothels that cater specifically to clients of minority communities.[98] She noted that the young women and girls are being trafficked and smuggled into Clark County through border towns and the traffickers and smugglers are using the illegal neighborhood brothels, as young women and girls are brought into Clark County.[99]

Chairman Castro noted that the Bureau of Justice Statistics indicated that 94 percent of sex trafficking victims that they have encountered are women. Chairman Castro asked the panelists about a possible correlation between gender and victimization in the area of sex trafficking. Professor Carr said she thinks it is what the buyer wants, whether it is a preference for a certain ethnicity, age, or sex act.[100]

Panel Three Presentations

Mary Ellison, Director of Policy, Polaris Project

Ms. Ellison said that sex trafficking is clearly a violation of gender-based civil and human rights that enslaves women and girls in commercial sex and that in her view is rooted in gender-based discrimination. She stated that from an international human rights perspective, sex trafficking is a form of slavery and involuntary servitude, resulting in human rights violations. She believes women and girls should be afforded the right to security of person, effective remedies, equal protection of the laws, freedom from slavery, torture, and discrimination. She noted that the United States government has an obligation to promote and protect these rights and to exercise due diligence in prosecuting the perpetrators, protecting trafficked persons, and preventing human trafficking and modern-day slavery.[101]

According to Ms. Ellison, the Polaris Project currently serves 130 individuals: 118 females, 10 males, and one transgender person. She noted that 72 percent of the clients in the New Jersey office are sex trafficking victims, but not all of them are women and some of the women are labor trafficked. Ms. Ellison believes that labor trafficking is also a gender-based civil and human rights violation that enslaves women and girls in domestic servitude, hotels, restaurants, strip clubs, farms, and factories. In the District of Columbia, the Polaris Project serves 65 clients: 60 women and 5 men. Of these 65 clients, 22 are being sex trafficked. Ms. Ellison said that trafficking also enslaves

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[98] Ibid., 124.

[99] Ibid.

[100] Ibid., 122-123.

[101] Mary Ellison Testimony, *Briefing Transcript*, p. 127.

men and boys, particularly gay and transgender individuals, in commercial sex and is in her view rooted in discrimination on the basis of sexual orientation and is rooted also in social exclusion.[102]

According to Ms. Ellison, the Department of Health and Human Services has issued 541 letters certifying that individuals are entitled to benefits under the Trafficking Victims Protection Act. She said that 78 percent of those victims were labor trafficked, both males and females; and 12 percent were sex trafficked, all of whom were females.[103]

In closing, Ms. Ellison pointed out that January has been declared National Slavery and Human Trafficking Prevention Month. She said everyone needs to broaden his or her vision to look at human trafficking as a human rights abuse that affects women, men, boys and girls.[104]

Amy Rassen, Senior Advisor, the SAGE Project, Inc.

Ms. Rassen said that the SAGE Project was started by a survivor of sex trafficking and is unique in that many of the staff are survivors of commercial sexual exploitation.[105] Ms. Rassen stated that according to the United Nations, people are reported to be trafficked from 127 countries into 137 other countries. She noted that 40 percent of all victims are sexually exploited, others work in conditions of slavery and 98 percent of the victims are women and girls.[106]

Ms. Rassen noted that her presentation would focus on domestic sex trafficking of minors, which she feels is under-researched and largely overlooked. She reiterated that the FBI estimates that the average age of entry into the commercial sexual exploitation industry is 12; and experts at Shared Hope International estimate that 100,000 American juveniles are victimized through prostitution each year. According to the National Center for Missing and Exploited Children, one in five girls and one in ten boys in America will be sexually victimized before reaching age 18. According to Rassen, childhood sexual victimization is linked very closely with vulnerability to being trafficked.[107]

Ms. Rassen spoke about two trends within the domestic minor trafficking population. The first trend is early sexual abuse, which is very dominant, and the second trend is exposure to either or both the

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[102] Ibid., 128-130.

[103] Ibid., 130-131.

[104] Ibid., 131.

[105] Amy Rassen Testimony, *Briefing Transcript*, p. 131. SAGE is an acronym for Standing Against Global Exploitation.

[106] Ibid., 132.

[107] Ibid., 133-134.

juvenile justice and foster care systems, which are smoke signals for where victims or those at greatest risk of victimization can be found. Others at particularly high risk include youth who: (1) are runaways; (2) experience high poverty rates or domestic violence; and/or (3) possess poor academic skills. Ms. Rassen noted that traffickers are not only those individuals identified earlier, but also include parents, other family members, and sexual predators reaching out to girls on the internet.[108]

Ms. Rassen stated that the government has taken a strong stance in attempting to wipe out human trafficking through the Trafficked Victims Protection Reauthorization Act, the President's Inter-Agency Task Force to Monitor and Combat Trafficking in Persons, and through leadership within various federal agencies, such as the Office of Victims of Crime within the Department of Justice.[109] Ms. Rassen noted that the federal government can, for example, fund more programs to keep kids off the streets and protect them from online perpetrators via stronger Internet safety laws. She further noted that the government can also ensure access to safe, supportive housing as viable alternatives to incarceration. In her opinion, continued funding of the systems that support and monitor foster parent programs in particular is needed, as is additional support for youth as they age out of the child welfare system, something that states are considering, too.[110]

Rhacel Parrenas, Professor and Chair, Sociology Department, University of Southern California

Professor Parrenas spoke about how the Department of State in its Trafficking in Persons (TIP) report has labeled a group of migrant Filipina hostesses in Japan as sex-trafficked. According to her, this labeling has affected their migration and led to a 90 percent decline in the number seeking hostess jobs. Professor Parrenas said that when labeled, there were approximately 80,000 Filipina hostesses going to Japan per annum and since 2006, only 8,000 are going per annum.[111] She said that while many would consider the decline in numbers as a victory in the war on trafficking, she sees the drastic decline as a threat to hostesses' empowerment as women. Professor Parrenas said that the hostesses felt that the labeling has imposed unwarranted infringement on their liberty to migrate and work, placing their individual freedom at risk.[112]

Professor Parrenas spoke about how the false assumption that the hostesses had not been willing to come to Japan and were duped and forced to be in that situation resulted of the conflation of

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[108] Ibid., 134-136.

[109] Ibid., 136.

[110] Statement of Amy Rassen submitted to the U.S. Commission on Civil Rights, p.77.

[111] Rhacel Parrenas Testimony, *Briefing Transcript*, p. 137.

[112] Ibid., 138, 140.

prostitution and sex trafficking. Most never engaged in prostitution, but instead flirted with male customers via banter. They generally did not come to Japan against their will. She noted that this false assumption that hostesses are prostitutes is not based on empirical research and even the Government Accountability Office has critiqued the TIP report for being based on scant information.[113]

Professor Parrenas claims that the absence of due diligence on the part of the U.S. Department of State and the organizations to which they provide funding to help Filipina hostesses and the false claims of their sex trafficking violated their civil rights by: (1) eliminating the hostesses' jobs, forcing their return to a life of abject poverty in the Philippines; (2) making false claims of their trafficking; and (3) ironically, leaving them more vulnerable to what is labeled as severe forms of trafficking.[114]

Professor Parrenas said that claims based on scant information, the conflation of sex work and sex trafficking, and the use of one person's experience to generalize about an entire group's experience only results in the misunderstanding of the problem.[115]

Tina Frundt, Founder/Executive Director, Courtney's House

Ms. Frundt spoke about being a survivor of sex trafficking in the United States and as the founder of Courtney's House. She said that her original trafficking situation began in Chicago, Illinois, when she was in foster care.[116] Ms. Frundt said that at the age of 15, when she could no longer take what was happening to her, she went to the police for help and her help came in the form of being charged and sentenced to one year in juvenile detention. But before she served the year in the juvenile facility in Chicago, she spent time, at age 14, in Cook County jail.[117] While at the juvenile facility, Ms. Frundt tried to get help and instead was placed into prostitution rehabilitation, where she was found to be noncompliant with the drug component of that program, as it required her to write a drug statement in which she could not admit truthfully to drug usage in which she had never engaged. Ms. Frundt stated that because she denied taking

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[113] Ibid., 139.

[114] Ibid., 140-141.

[115] Ibid., 142.

[116] Tina Frundt Testimony, *Briefing Transcript*, p. 143.

[117] Ibid., 146. Ms. Frundt said she lied about her age and said she was an adult because the trafficker told her to and she had a fake ID that listed her as being 26 years of age. Ibid.

drugs, she was placed in Cook County Mental Health facility for 30 days and was heavily drugged.[118]

Ms. Frundt indicated that Courtney House services both boys and girls because she noticed that although there were many boys being trafficked, there were fewer services available to them. Courtney House works with youth ages 12 to 18 and provides support groups for ages 18 to 21. Ms. Frundt said that Courtney House does not provide housing at this time but does provide drop-in center services. She said there is no one size fits all set of services for survivors of sex trafficking because each person is trafficked in a different way.[119]

Ms. Frundt stated that Courtney House is currently trying to open a group home and has a For Survivor By Survivor hotline where 63 percent of their children call in for services.[120] Ms. Frundt noted this figure is based on street outreach done in Maryland, the District of Columbia, and Virginia and at local malls. She said they go out from 2:00 a.m. to 7:00 a.m. telling victims what types of services are available and providing assistance to victims to get them out of their situation immediately. Courtney House has more than 20 cases with whom they are currently working. Ms. Frundt said that 100 percent of its boys are in the foster care system and all were trafficked when they were between six and nine years of age. She stated that all the boys are in the system due to family-controlled trafficking and they may identify as gay and/or transgender. Ms. Frundt noted that many of the boys are sent to mental health facilities for gender identification issues.[121]

Discussion

Commissioner Achtenberg asked Ms. Rassen and Ms. Ellison to speak about the services that they offer to survivors of sexual exploitation and also the services they would like to offer if the resources were available.[122] Ms. Rassen replied that their services are fairly comprehensive, due in part to partnerships with the federal government. Ms. Rassen said that her organization provides services to girls and women. Key services include counseling, case management, life skills classes, support and education groups, and acupuncture, as well as presentations at high schools and training law enforcement personnel, teachers, social workers and others on identifying the signs of a victim of trafficking. She noted anyone who has been trafficked is

[118] Ibid., 146-147.

[119] Ibid., 143-144.

[120] Ibid., 144.

[121] Ibid., 145.

[122] *Briefing Transcript*, pp. 148-149.

considered a trauma victim. She said there is no point to providing only housing or mental health services; rather, the trauma has to be addressed so that the victim can move on to complete education and job training. Ms. Rassen's organization also goes out into the community jails and detention centers in San Francisco to form relationships with both children and adults. Upon release, they are connected to SAGE for resources and support. She noted that recently the San Francisco Sheriff's Department funded a position located at the San Francisco adult reentry center, thus enabling even easier access to SAGE for released victims. [123] In an effort to impact the demand side of people being victims of sex trafficking, SAGE runs a "Johns School" as a diversion program, in partnership with the District Attorney's Office. Men picked up by the police for solicitation spend one day in a classroom setting experiencing the impact of their behavior on the women solicited, their own families and the community at large. It was noted that studies show limited recidivism among the men who attend the Johns Schools.

Ms. Ellison responded that her organization has client services in the District of Columbia and Newark, New Jersey. She said they provide comprehensive case management which includes intake with their clients and identifying their needs, which range from social service to counseling to medical needs to housing, employment, job retention, and education. Ms. Ellison said that one of the challenges for her organization is finding housing for their survivors. While her organization receives funding from the Departments of Justice and Health and Human Services, some of the Health and Human Services' funding is used towards housing. She states that many times she has to use shelters or hotels—a situation that is not particularly constructive for sex trafficking victims, because it can often trigger the trauma that they have experienced if they were sex trafficked in a hotel setting.[124] Ms. Ellison noted that since December 2007, her organization has received 50,000 calls on the National Human Trafficking Resource Center Hotline from every state and territory in the United States, as well as from international locations. Based on these calls, housing, legal services, and comprehensive case management has been identified as the top three needs. She noted that there are fewer than 100 beds available specifically for trafficked children.[125] Ms. Rassen also noted that housing is a concern for her organization. She said that SAGE sees about 400 people a year, roughly 150 to 200 are children and the balance are adults. She agreed with Ms. Frundt's statement that a cookie-cutter approach will not work because although victims' experiences may sound the same, they are not.[126]

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[123] Ibid., 149-150.

[124] Ibid., 151.

[125] Ibid., 152-153.

[126] Ibid., 153.

Commissioner Gaziano noted that Ms. Rassen's written statement cited to experts at Shared Hope International estimating that 100,000 American juveniles are victimized through prostitution each year. He said that a different writing, citing the same study, estimated 100,000 to 300,000 minors at risk for being exploited. He said that he did not know how individuals are being defined as at risk. Commissioner Gaziano asked Ms. Rassen and Professor Parrenas if they agreed with Attorney General Zoeller about the state of statistics and if they could comment on the aforementioned number of minors at risk for being exploited. Professor Parrenas responded that she believes many scholars would agree with her that a great deal of the general knowledge about human trafficking or sex trafficking is based mostly on speculation.[127] She said that even the United Nation's Office of Drugs and Crime, which is responsible for human trafficking, basically admits on its website that a lot of what it says is speculation. Professor Parrenas noted that the crime occurs underground and you can only guess at what is going on. When one or two cases are found, they are used to speculate what is happening.

Professor Parrenas pointed out that as a scholar who has been really involved in labor and migration studies for more than a decade, she does not really see much of what is commonly viewed as human trafficking as involuntary, but rather as labor and migration. She noted that not acknowledging that a lot of these people want to do sex work is what is missing in the discussion of sex trafficking.[128] Ms. Frundt acknowledged that the statistics are not correct on girls because it is difficult to distinguish trafficked children from runaways and other populations that look like trafficked children, but are not. The statistics are also nonexistent on boys, and she announced that Courtney House will be releasing its own collection of research on them.[129]

Ms. Rassen stated that human trafficking numbers are an extrapolation from different variables. She said there are no mechanisms for tracking human trafficking, and only grantees of ORR and HHS have access to the national tracking system.[130] Ms. Ellison said that people have tried to collect numbers on human trafficking and a few years ago, Northeastern University in Massachusetts undertook a study to try to count the number of human trafficking victims. She said that within human trafficking there is both sex trafficking and labor trafficking; and each of these types of trafficking occur in different venues. Ms. Ellison said that within the sex trafficking arena, there are brothels, massage parlors, street prostitution, strip clubs, and truck stops; while on the labor trafficking side, the venues include hotels, restaurants, factories, farms,

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[127] Ibid., 156.

[128] Ibid., 158.

[129] Ibid., 159.

[130] Ibid.

and construction sites.[131] Because of the nature of human trafficking, Ms. Ellison stated that data is missing in many of these categories.[132] Commissioner Gaziano commented that there are other analogous crimes, such as drugs, where you have a transaction that neither side wants to report, but there seems to be reliable statistics. Even after Ms. Ellison talked about why sex trafficking data is hard to collect, Commissioner Gaziano still wondered if data on sex trafficking is just not being collected.[133]

Ms. Ellison noted that as of January 1, 2013, when reporting crime statistics to the uniform crime reports, states must also report human trafficking as an offense.[134] Commissioner Gaziano asked if there would be uniform definitions because individual state laws, as well as federal laws, are different. Ms. Ellison responded that the Uniform Law Commission was in the process of drafting a uniform state statute on human trafficking due to the differences in state definitions.[135]

Chairman Castro asked Ms. Rassen to speak about the impact technology has had on sex trafficking. Ms. Rassen said that she thinks technology has played a big part in the recruitment of girls and women. She stated that approximately one in seven children, 10 to 17 years of age, have been solicited for sex on the internet.[136] Ms. Rassen said not only has the internet been dangerous in this regard for girls, but for anyone who is being solicited. She suggested that the federal government address the use of the internet for solicitation and pairing up with predators. Ms. Rassen further suggested that the federal government become involved in the tactics and strategies that the fashion and media industry use in advertising because being hot and sexy leads 12- and 14-year-olds down the wrong path.[137] She also spoke about the need to allocate more funds into the foster care system.[138] She said that more after-school programs are needed to keep children off the streets. She feels that the TVPA needs to be reauthorized.

Chairman Castro asked if there were any recommendations for the federal government. Ms. Frundt suggested that the federal government address the demand side of sex trafficking, the men buying sex with children from traffickers.[139] Ms. Ellison discussed the need for

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[131] Ibid., 160-161.

[132] Ibid., 162-164.

[133] Ibid., 164.

[134] Ibid.

[135] Ibid., 165.

[136] Ibid., 166.

[137] Ibid., 167.

[138] Ibid., 167-168.

[139] Ibid., 168.

collaboration across government agencies, similar to the broadcasting of the President's Interagency Task Force on Human Trafficking where many of the secretaries from all government agencies were present and talking about their plans to address trafficking.[140] Ms. Ellison also mentioned funding and used the Department of Justice as an example of an agency that has seen a 600 percent increase in the number of cases that they plan to prosecute, but neither their funding nor the funding of other service providers has increased. Ms. Ellison noted the need for more training, in particular for government officials who may be interacting with trafficking situations.[141] Professor Parrenas spoke of the need for more funding for scholars doing research on vulnerable populations.[142]

Commissioner Heriot asked Professor Parrenas to explain how the Filipinas are able to finance their moves to Japan. Professor Parrenas stated that the majority of Filipino migrants are domestic workers and they go to more than 160 countries. She explained that the women and men are evenly divided among domestic workers, but two-thirds of all the women are domestic workers.[143] Professor Parrenas said a domestic worker has to pay $12,000 U.S. to go to Italy; $8,000 to go to Canada; $5,000 to go to Taiwan; and $3,000 to go to Hong Kong,[144] but that it would cost nothing to go to Jordan or Saudi Arabia because these are "undesirable locations."[145] She added that it usually does not cost anything to go to Japan, but the women who do so are required to train as a dancer or singer and they incur debt this way. Commissioner Heriot inquired as to who pays for their transportation. Professor Parrenas said the labor migrant broker from the Philippines, along with migrant brokers from Japan, ensures that the labor rights of the migrant are protected and the women become indebted to them for a certain time period.[146] When the women arrive in Japan, they are paid only a quarter of their wages; the remaining wages are paid to their brokers.[147] Professor Parrenas noted that this kind of labor migration is not just particular to the Filipinas, but globally for all migrant workers.[148]

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[140] Ibid.

[141] Ibid., 170.

[142] Ibid.

[143] *Briefing Transcript*, p. 174

[144] Ibid.

[145] Ibid., 174-175.

[146] Ibid., 175.

[147] Ibid.

[148] Ibid., 176.

Commissioner Gaziano asked the panelists to distinguish between prostitution and sex trafficking. He also asked for a "guesstimate" of the proportion of the commercial sex market that is prostitution and the proportion that is sex trafficking. Ms. Ellison replied that for a legal definition one could cite to the TVPA, as well as state laws. Ms. Ellison noted that under federal law, prostitution exists if an adult voluntarily engages in a commercial sex act, and there is no force, fraud, or coercion.[149] Sex trafficking exists if force, fraud, and coercion are used. If one is under 18 years of age, force, fraud, and coercion does not have to exist for the act to be considered sex trafficking. Ms. Ellison stated that not all prostitution is sex trafficking, but she also said that she did not know what the percentages were nor did she have any empirical evidence for guessing a number. According to Ms. Ellison, prostitution inherently has an element of gender-based discrimination, simply because it is a woman's body that is for sale.[150]

Ms. Ellison said society should better regulate prostitution so there would not be abuse and to ensure that individuals know what their rights are and have access to health care.[151] Conversely, Ms. Ellison said, on the opposite side of the argument, unless prostitution is abolished and this phenomenon of people buying and selling sex is undone, we cannot ever change the dynamics around prostitution or sex trafficking.[152] Ms. Frundt said that most survivors and most people involved in prostitution started at a much younger age, but she does not know the exact number. She said that what one is taught as a child carries over into adulthood. She stated that anytime one has a pimp that takes all of one's money, puts one on a website, and one gets nothing, that becomes a control mechanism.[153] She said that one's own mindset does not understand it because this is what one has been accustomed to for one's entire life. Ms. Frundt noted that if you legalized prostitution, pimps will still think of a way to be involved and make money, because they think like marketers.[154] Ms. Rassen agreed with Ms. Frundt that adults involved in trafficking do not feel exploited and think what they are doing is their choice, even though they have been beaten and raped. Ms. Rassen thinks that high-end escorts are a few of the only individuals who are able to make some kind of choice. She noted, however, that the individuals they see at SAGE are driven by events they have experienced and how they feel about themselves; they are not really able to make rational life choices.[155]

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[149] Ibid., 178.

[150] Ibid., 179

[151] Ibid.

[152] Ibid., 180.

[153] Ibid.

[154] Ibid., 181.

[155] Ibid., 182

Commissioner Kladney asked Professor Parrenas to elaborate on the four-or five-century-old process that brokers for labor have used. He wanted to know how much the employer pays the broker. Professor Parrenas noted that the amount of the payment depends on the country, but in Japan the employer does not pay the broker. Professor Parrenas spoke about Taiwan and how the broker receives three months of wages for domestic and factory workers.[156] Previously, Professor Parrenas called attention to the conditions of legal servitude that most migrant workers today face, even in the United States; and how these workers ought to be allowed to quit their jobs once they arrive at their destination and go to work for other employers. She noted that H-1B visa workers, who also pay a broker, are bound to their employer just as migrant workers are.[157] Professor Parrenas said the question is how to utilize the labor of migrant workers, reward them for that labor, but ensure that the risk of abuse is minimized.[158] Professor Parrenas stated that workers should be able to change employers if they find themselves in abusive situations. Commissioner Kladney asked Professor Parrenas who would enforce this and what mechanism she proposes. Professor Parrenas noted that she has not proposed a mechanism, but she feels that workers should be able to go their embassies to find a way to become free of their debt. Further, she expressed that direct employment should be a possibility, as it would minimize the need for migrant brokers.[159] Professor Parrenas said that both migrant brokers and employers can be abusive and the fact that workers will not quit because they owe money to the migrant broker is a worldwide problem.[160]

Commissioner Kladney inquired as to whether there is someone out there working on trying to create a better system. Ms. Ellison said that Polaris Project is a member of a national anti-trafficking coalition called the Alliance to End Slavery and Trafficking, which is a 12-member organization based in the United States. She said that one of the issues the coalition has been working on is foreign labor recruiters. Ms. Ellison said that exploitation and trafficking is definitely occurring just as Professor Parrenas stated.[161] Ms. Ellison said they get calls from workers about exploitation and trafficking occurring with the H-2A, H-2B, A-3, G-5 and J-1 visa

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[156] Ibid., 183.

[157] Ibid., 184. An H-1B visa is a non-immigrant visa that allows U.S. companies to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields such as in architecture, engineering, mathematics, science, and medicine.

[158] Ibid., 185.

[159] Ibid., 186.

[160] Ibid., 186-187.

[161] Ibid., 187.

programs.[162] Ms. Ellison said that Polaris Project developed a policy proposal that was part of the original House version of the Trafficking Victims Protection Reauthorization Act, HR 2830.[163] She noted, however, that the bill has been replaced by one that does not include the Project's provision. Ms. Ellison said that Polaris Project is now moving forward to make that provision a stand-alone bill.[164] The Polaris Project's proposal creates a registry system. Although the Department of Labor is already tracking labor recruiters, Ms. Ellis feels that there needs to be more pressure requiring them to register in this system. Employers would be able to use the registry to determine if a labor broker is registered and whether or not they are abiding by the law. The proposal incorporates penalties and other protections.

Commissioner Kladney asked Professor Parrenas if she thought a broader proposal was needed. Professor Parrenas reiterated her previous statement that she does not believe that legal servitude is human trafficking; and she noted that many migrant workers knowingly agree to the contract.[165] Professor Parrenas said that many times labor brokers will add on extra contingencies that are not part of the contract, but it becomes an unspoken agreement. She contended that workers put themselves in these vulnerable positions because they think servitude is better than poverty. Professor Parrenas stated that there are a lot of local organizations that try to educate various migrant groups globally, but she said there is not much in terms of a global alliance. Professor Parrenas agreed that advocacy work on behalf of migrant workers is better than no regulation.

Commissioner Kladney asked Professor Parrenas if she thought a lot of people in the Pot Pang and Thailand are trafficked, especially the children of the Pot Pang. In response, Professor

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[162] Ibid., 188. The H-2A visa allows a foreign national entry into the United States for temporary or seasonal agricultural work. The H-2B working visa is a nonimmigrant visa which allows foreign nationals to enter into the United States temporarily and to engage in nonagricultural employment which is seasonal, intermittent, a peak load need, or a one-time occurrence. The A-3 nonimmigrant visa allows the personal attendants, employees or servants of the principal A-1 or A-2 visa holders and the immediate family members of principal A-3 visa holders to enter into the United States. The G-5 visa is a nonimmigrant visa which allows attendants, servants or personal employees of principal G-1, G-2, G-3 and G-4 visa holders to enter into United States to render services to the principal G visa holder. The immediate family members of principal G-5 visa holders also qualify for G-5 visa.

The J-1 visa is a non-immigrant visa issued by the United States to exchange visitors participating in programs that promote cultural exchange, especially to obtain medical or business training within the United States. All applicants must meet eligibility criteria and be sponsored either by a private sector or government program.

[163] Ibid., 188.

[164] Ibid.

[165] Ibid., 189.

Parrenas responded that those people comprise two or three different groups of workers.[166] Professor Parrenas noted, again, that the women who end up in Japan are not prostitutes and Commissioner Kladney agreed with her. Professor Parrenas said the women in Japan provide commercial flirtation and are quite different from the people who engage in prostitution in the Philippines that cater to foreigners.[167] Professor Parrenas asserted that the prostitutes are both above and below 18 years of age. She said that child prostitution in the Philippines is a problem caused by severe poverty.[168]

Chairman Castro asked Ms. Ellison to elaborate on the challenges that the transgender community faces when it comes to the issue of sex trafficking. Ms. Ellison said that an additional layer of vulnerability exists for gay, lesbian, and transgender children and it is more difficult to make sure that they are identified and provided assistance.[169] In conclusion, Ms. Ellison noted that individuals working within the system who come in contact with gay, lesbian and transgender individuals need to understand what their situation is and to treat them with respect, regardless of their gender identity or sexual orientation.[170]

[166] Ibid., 191.

[167] Ibid.

[168] Ibid., 192.

[169] Ibid., 194.

[170] Ibid.

FINDINGS AND RECOMMENDATIONS

Findings

1. The Federal Bureau of Investigation (hereafter "the FBI") does not list trafficking as a major crime category.[1]

2. Definitions of what is "sex trafficking" differ among United States executive agencies and state and local law enforcement authorities.

3. The U.S. Department of Health and Human Services (hereafter "HHS") does not collect statistics on the scope of trafficking or a percentage of victims.[2]

4. State and federal definitions of a victim's age differ, making it difficult to collect and track accurate data on the prevalence of sex trafficking of minors versus adults.[3]

5. The United States fails to identify and protect victims of sex trafficking and treats them as criminals rather than as victims.[4]

6. Detaining and jailing victims of sex trafficking is unacceptable and is happening throughout the nation.[5]

7. The goals of a prosecution are often in conflict with those of the needs of addressing the issues faced by a trafficking victim.[6]

8. The biggest challenge to combatting sex trafficking is the internet. It caters to escorts and escort services.[7]

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[1] Greg Zoeller, Attorney General, State of Indiana, and Member of the National Association of Attorneys General, Testimony, *Briefing Transcript*, pp. 25-26.

[2] Maggie Wynne, Director, Division of Anti-Trafficking in Persons, U.S. Department of Health and Human Services, Testimony, *Briefing Transcript*, p. 27.

[3] Zoeller Testimony, *Briefing Transcript*, pp. 48-49.

[4] Bridgette Carr, Professor and Director, Human Trafficking Clinic, University of Michigan Law School and Member, Michigan Human Trafficking Task Force, Testimony, *Briefing Transcript*, pp. 52-53.

[5] Ibid., 56-57.

[6] Ibid., 57-58.

[7] Karen Hughes, Lieutenant, Las Vegas Metropolitan Police Department, Testimony, *Briefing Transcript*, pp. 69-70, 72.

9. The buying of sex in the United States has been decriminalized in practice as evidenced by the low risk of being arrested when you are a buyer of sex.[8]

10. Some jurisdictions abroad have begun efforts to decriminalize the commercial sex acts of those who are trafficked.

11. The funding for programs that combat sex trafficking is extremely low, contributing to a return by the victim to trafficking.[9]

12. Statistics on the numbers of women victimized by sex trafficking in the United States are not collected well or consistently in a centralized manner.[10]

13. Statistics show that women are overwhelmingly the victims of sexual harassment in the workplace. Like sexual harassment, the Bureau of Justice Statistics indicated that 94 percent of sex trafficking victims that they have tracked are women.[11]

14. Testimony showed that sex trafficking is clearly a violation of gender-based civil and human rights that enslaves women and girls in commercial sex and is rooted in gender-based discrimination.[12]

15. Labor trafficking is also a gender-based civil and human rights violation that enslaves women and girls in domestic servitude, hotels and restaurants, strip club, farms, and factories.[13]

16. Testimony showed that sex trafficking also enslaves men and boys, particularly gay and transgender individuals, in commercial sex and is rooted in discrimination on the basis of sexual orientation and is rooted also in social exclusion.[14]

17. Of the 541 letters certified by the U.S. Department of Health and Human Services of individuals entitled to benefits under the Trafficking Victims Protection Act, 78 percent of those

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[8] Carr Testimony, *BriefingTranscript*, p. 87.

[9] Hughes & Carr Testimony, *Briefing Transcript*, pp. 97-100.

[10] Zoeller Testimony, *Briefing Report*, pp. 12, 14; Wynne testimony, *Briefing report*, p. 12; Tina Frundt, Founder and Executive Director, Courtney's House, Testimony, *Briefing report*, p. 32; Mary Ellison, Director of Policy, Polaris Project, Testimony, *Briefing report*, p. 33.

[11] Chairman Castro's observation during the briefing, *Briefing Transcript*, p. 121

[12] Ellison Testimony, *Briefing Transcript*, p. 127.

[13] Ibid., 127-128.

[14] Ibid., 128-130.

victims were labor trafficked, both males and females; and 12 percent were sex trafficked, all whom were females.[15]

18. According to panelist testimony, the United Nations statistics showed people are reported to be trafficked from 127 countries into 137 other countries. It was noted that 40 percent of all victims are sexually exploited, others work in conditions of slavery and 98 percent of the victims are women and girls.[16]

19. The FBI estimates that the average age of entry into the commercial sexual exploitation industry is 12.[17]

20. Experts at Shared Hope International estimate that 100,000 American juveniles are victimized through prostitution each year. [18]

21. According to the National Center for Missing and Exploited Children, one in five girls and one in ten boys in America will be sexually victimized before they turn age 18. It is a known fact that sexual victimization is linked very closely with youth who have been trafficked.[19]

22. Testimony revealed two primary trends within the domestic minor trafficking population. The first trend is early sexual abuse, which is very dominant; and the second trend is exposure to either or both the juvenile justice and foster care systems, which are red flags for where you can find victims or those at greatest risk of victimization. Other predictors include runaways, high poverty rates, domestic violence and poor academic skills.

23. It was noted that traffickers are not only those individuals identified earlier, but also include parents, other family members, and sexual predators reaching out to girls on the internet.[20]

24. Although there were a great number of boys being trafficked, there were fewer services available to them.[21]

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[15] Ibid., 130-131.

[16] Amy Rassen, Senior Advisor, the SAGE Project, Inc., Testimony, *Briefing Transcript*, p. 132.

[17] Ibid., 133-134.

[18] Ibid., 134.

[19] Ibid.

[20] Ibid., 134-136.

[21] Frundt, Testimony, *Briefing Transcript*, pp. 143-144.

25. Trafficking victims are considered trauma victims.[22]
26. At the time of the briefing, based on the 50,000 calls received on the National Human Trafficking Resources Center Hotline since December 2007, housing, legal services, and comprehensive case management were identified as the top three needs. The calls originate around the country and its territories as well as international locations. Despite the volume, there are less than 100 beds available specifically earmarked for trafficked children.[23]

27. Testimony revealed that an additional layer of vulnerability exists for gay and lesbian children and it is more difficult to make certain that they are identified and assisted.[24]

28. Alternative screening and interviewing methods are being employed to more accurately identify sex trafficking victims going through the criminal justice system.[25]

29. Some jurisdictions have begun to learn how to establish cooperative, constructive relationships with sex trafficking survivors in order to: 1) aid in prosecutions of traffickers and those who purchase commercial sex services; and 2) facilitate survivors access to rehabilitative services.

30. Testimony indicated that an intensive, multifaceted approach to rehabilitative services for survivors of sex trafficking can be successful.

31. Sex trafficking is not exclusively an international issue, but a domestic issue as well.

32. Events like the Super Bowl act as a magnet for prostitution and trafficking activity.[26]

33. State and Federal governments take different approaches to counting trafficking victims and therefore there are no consistent statistics available.[27]

34. Gang affiliation is a major component of sex trafficking.[28]

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[22] Rassen Testimony, *Briefing Transcript*, p. 149.

[23] Ellison Testimony, *Briefing Transcript*, pp. 151-153.

[24] Ellison testimony in response to Chairman's Castro's request to elaborate on the challenges faced by the transgender community, *Briefing Transcript*, pp. 191-192.

[25] Carr Testimony, *Briefing Transcript*, pp. 57-58.

[26] Discussion of briefing testimony, *Briefing Report*, p. 9.

[27] Zoeller Testimony, *Briefing Report*, p. 10.

[28] Hughes Testimony, *Briefing Report*, p. 16.

35. The U.S. Citizenship and Immigration Service has the authority to issue T visas to non-U.S. citizen survivors of sex trafficking in order to help them rehabilitate their lives in this country.

Recommendations

1. The FBI should list trafficking as a major crime category.

2. HHS should collect statistics on the scope of trafficking, including a percentage of victims.

3. There should be different categories created and used to track the victims of sex trafficking, because as it stands now, the majority of the women that are moved around the country are domestic runaways but no accurate data collection mechanism exists to identify, track and assist these victims.[29]

4. Tougher laws with more restrictions on the escort business, in particular with how they are allowed to operate, need to be enacted and enforced.[30]

5. State laws on prostitution and child welfare must be updated to protect human trafficking victims; resources should be used to help, rather than harm, victims; and access to comprehensive and independent legal services to all victims of human trafficking should be provided.[31] An example of a comprehensive overhaul of sex trafficking laws was signed into law in 2010 by Illinois Governor Pat Quinn. The Illinois Safe Children's Act drastically changed the way Illinois law enforcement addresses the human trafficking of children under the age of 18.[32]

6. State and federal entities need to increase collaboration along the lines of programs like the Cook County Anti-Trafficking Task Force.[33]

7. There should be an increase in funds for programs such as after-rescue care.[34] Congress (or states) should fund comprehensive case management support services for victims of human trafficking. These services should include consideration of victim's legal, medical, and education needs.

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[29] Zoeller Testimony, *Briefing Transcript*, pp. 48-49.

[30] Hughes Testimony, *Briefing Transcript*, p. 71.

[31] Carr Testimony, *Briefing Transcript*, p. 71-72.

[32] Cicero written statement, *Briefing Report*, pp. 103-104.

[33] Cicero Testimony, *Briefing Transcript*, pp. 59-61; Cicero written statement, *Briefing Report*, pp. 102-104.

[34] Ibid., p. 103.

8. Funds that are allocated to communities[35] to fight sex trafficking should be increased so that social service and law enforcement professionals can create different "tools" such as training, safe houses to harbor sex trafficking victims, and funding to conduct long-term investigations.[36]

9. Lawyers should be made available for sex trafficking victims at the federal level in cases involving U.S. citizens, just as they are for cases involving foreign national victims, because those citizens have a variety of legal needs, such as facing criminal liability.

10. While the regulation of prostitution is left to the states, [37]state and federal governments should collaborate. One panelist pointed out that "in practice, one of the most effective tools at the state level is the cross designation with federal prosecutors. This cross-designation is an administrative decision that has allowed prosecutors to communicate much more efficiently and to charge either federally or locally, as well as to better direct the investigations." [38] Other suggestions include:

    a. Public education: teaching the public how to recognize the risk that family members may become trafficking victims, so as to encourage families of at-risk youth to minimize the likelihood of victimization.

    b. Legal reform: decriminalizing the commercial sex activities of both juvenile and adult survivors; increasing legal defenses available to survivors who are charged with trafficking-related crimes such as prostitution or solicitation; facilitating expunging of criminal convictions related to their status as trafficking victims; giving particular attention to the needs of minors who, by operation of law, are not capable of consenting to sexual acts; increasing prosecutions of perpetrators/pimps; and increasing availability of seizure and forfeiture of perpetrators' assets in order to provide assistance for the survivors of their crimes.

    c. Training for law enforcement: encouraging cooperative, rather than adversarial, relationships with those who have been trafficked, including building strong linkages with organizations which provide recovery assistance for survivors.

    d. Services for survivors: refinement of multidisciplinary services for survivors to address their safety, physical health, mental health, and needs for legal assistance, job skills training, child care, and the individual circumstances particular to each

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[35] This is especially important in middle-size cities, where trafficking occurs but law enforcement agencies do not have adequate funding to address the problem.

[36] Hughes & Carr Testimony, *Briefing Transcript*, pp. 97-100.

[37] Carr Testimony, *Briefing Transcript*, pp. 93-94.

[38] Cicero written statement, *Briefing Report*, pp. 104-105.

survivor's situation; and outreach to those in juvenile or adult detention facilities to find women in need of assistance.

11. The federal government should seek to implement the Pillars of Hope promulgated by the National Association of Attorneys General: (1) gather more data that will track state arrests and prosecutions; (2) raise awareness to reduce the demand[39]; (3) promote strong state statutes and forceful state prosecutions of traffickers[40]; and (mobilize communities to increase care for victims.[41]

12. There should be separate tracking of foreign and domestic trafficking because many underage sex trafficking victims are domestic runaways.[42]

13. Assets of traffickers should be seized as the result of prosecutions, and used to fund victims' services.[43]

14. A model state law on trafficking should be developed.

15. The federal government should develop standard definitions of "sex trafficking" and related terms with input from involved federal agencies, state and local law enforcement entities, and the advocacy and scholarly sectors. Once created, state and local law enforcement agencies should be encouraged to utilize those definitions.

16. The federal government should develop a standardized methodology for collecting statistics related to sex trafficking from state and local law enforcement agencies. This development should take place with input from involved federal agencies, state and local law enforcement entities, and the advocacy and scholarly sectors.

17. Create immigration policies that allow people to come out of the shadows or end unhealthy relationships with visa-sponsor employers. For example, the federal government should consider easing access to the T Visa program for the benefit for survivors of sex trafficking.

18. The federal government should increase funding for its Federal Unaccompanied Refugee Minors Program so that as many foreign youth who are survivors of sex trafficking in this

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[39] Congress should fund public service announcements that teach people to look "beneath the surface" to identify victims of human trafficking in their daily routines.

[40] Examine and strengthen the uniform state statute on human trafficking.

[41] Zoeller Testimony, *Briefing Report*, pp. 9-10.

[42] Ibid., 14.

[43] Hughes Testimony, *Briefing Report*, p. 20.

country as possible may be afforded a meaningful opportunity for a stable life in the United States.

19. Use the data collected from uniform crime reports, which started on January 1, 2013, to identify patterns and suggest policy responses.

20. Train prosecutors' offices to limit the use of victims as witnesses, and assure victims are comfortable to participate in the legal process when necessary.

COMMISSIONERS' STATEMENTS AND REBUTTALS

Statement of Chairman Martin R. Castro joined by Commissioner Michael Yaki

"Our fight against human trafficking is one of the great human rights causes of our time, and the United States will continue to lead it …. The change we seek will not come easy, but we can draw strength from the movements of the past. For we know that every life saved — in the words of that great Proclamation — is 'an act of justice'; worthy of 'the considerate judgment of mankind, and the gracious favor of Almighty God'." - President Barack Obama

Current-day slavery takes many forms. I requested that the U.S. Commission on Civil Rights examine the issue of sex trafficking as a form of gender discrimination because I truly believe, and the evidence we gathered bears out, that women and girls are targeted as sex workers because of their gender. Indeed, 94% of the victims of sex trafficking are women.1 I was also motivated to present this issue to the Commission after reading an article that appeared in the Michigan Quadrangle2 regarding the impressive work of The University of Michigan Law School's Human Trafficking Clinic led by Bridgette Carr. I'm proud of the work of my alma mater and pleased that Ms. Carr was able to participate in our briefing and contribute to the work we present in this Report.

However, I also want to make clear that women and girls are not the only victims of sex trafficking. As the evidence presented by our panelists indicates, sex traffickers also enslave men and boys. As authors Sheryl WuDunn and Nicholas D. Kristof have written:

> "[S]ex trafficking and mass rape should no more be seen as women's issues than slavery was a black issue or the Holocaust was a Jewish issue. These are all humanitarian concerns, transcending any one race, gender, or creed."[3]

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[1] Mary Ellison, Director of Policy, Polaris Project, Testimony, *Briefing Transcript*, p. 127, available at http://www.usccr.gov/calendar/trnscrpt/Sex-Trafficking-Briefing-Transcript_Final-8-2-13.pdf.

[2] The Face of Modern-Day Slavery by Katie Vloet, The Law Quadrangle, Spring Edition, available at http://www.law.umich.edu/quadrangle/spring2011/specialfeatures/Pages/TheFaceofModerndaySlavery.aspx.

[3] *Half the Sky: Turning Oppression into Opportunity for Women*, by Sheryl WuDunn and Nicholas D. Kristof, pp. 233- 234.

However, that fact does remain that gender is a great determinant in whether one may become a victim of sex trafficking. We have chosen to examine the practice of trapping women and girls into a life of sex slavery. And it is extremely important that the United States Commission on Civil Rights has so determined.

I am extremely pleased that this Report contains some very clear, strong and practical findings and recommendations distilled from the evidence presented to the Commission by panels of experts. We hope that not only the President and Congress act on our recommendations, but that state and local governments also find in our Report and recommendations a blueprint of best practices from other jurisdictions also fighting the good fight against human trafficking.

But, before I go further, I want to emphasize that trafficking is not merely an international issue, but a truly *domestic* one as well—likely occurring at this moment not far from where you are reading this Report. Also, it is not just an occasional issue, such as occurs during a big sporting event like the Super Bowl, rather it is also an issue that plagues our communities every single day of the year. It ensnares immigrants, legal permanent residents, and yes, U.S. citizens, too.

Most people don't really understand "trafficking", and I believe it is due in large measure to its name. "Trafficking" erroneously evokes a requirement that people are being transported from one place to another—which is not the case. We should call it what it is: Slavery, pure and simple. We must eradicate it worldwide and the United States must set the example by taking the lead in stamping out this modern day form of slavery through the creation of a new abolitionist movement for the 21st century. What would such a movement look like? Well, the building blocks are already there. We saw them represented among the panelists for this briefing: non-profits, law schools, local law enforcement, and federal agencies. They, along with faith-based organizations and international NGOs can—and do—form the structure of the modern day "underground" railroad, seeking to wrest the victims of sex trafficking from the hands of their profiteers and victimizers and taking them to safety and freedom. However, what I believe is truly lacking in turning the current network of anti- trafficking organizations and efforts into a real "abolition movement", is the attention and engagement of everyday people. As I said earlier, most people are not even aware of what "trafficking" is, let alone the levels by which it pervades our communities. We must continue to educate, elucidate and advocate on this issue if we ever hope to create a ground-swell movement to eradicate present- day slavery.

I hope that that the work of this Commission plays some role in educating Americans about this form of slavery, which feeds on many, but especially on our women and girls. This report is not the first time under my Chairmanship that the Commission has touched on the issue of current-day slavery—and it won't be the last. In January of 2013 we celebrated the 150th Anniversary of the Emancipation Proclamation in collaboration with President Lincoln's Cottage. We

commissioned papers from experts and created an anthology issued around a symposium at the Cottage.[4] One of our contributors and panelists was U.S. Ambassador-at-Large for Human Trafficking, Luis C. De Baca, who has been a true leader nationally and internationally on this issue.

As Ambassador de Baca stated:

> "Viewing the movement to eradicate slavery through a long lens, from the origins of abolitionism, to the worst moments of the Civil War, to where we have arrived today, it's clear that we've come a very long way.
>
> And yet, not everything has changed. We know this from the voices of those who lived and died to see the moment when the vision of Emancipation became a reality — whether they lived and died as slaves, as abolitionists, or as soldiers fighting to preserve our Union.
>
> …[S]lavery — then as now — is not movements or policies. It's people. It's the exploitation of men, women, and children who are mothers and fathers, sons and daughters. In the past, slavery's victims were born into bondage. Today, traffickers prey on the vulnerabilities of those seeking a better life."[5]

Furthermore, with next year's 150th anniversary of the ratification of the 13th Amendment to the U.S. Constitution, I have every expectation that we will continue to shine this Commission's important and historic light on the issue of human trafficking as we commemorate the passage of the provision in our Constitution forever banning slavery in our Union.

Yet, this is not enough. We must continue to put a human face on this issue of modern day slavery. To share statistics, such as the fact that there are 27 million people in the world today in bondage—more than at any other time in human history—is not enough. Americans must come to realize that it could be the girl next door, or their own son or daughter who could be the next victim. People must realize that the victims of sex trafficking are not just the poor or immigrants or people of color, but victims are of all classes, colors and creeds. We must also understand that

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[4] *Emancipation at 150: The Impact of the Emancipation Proclamation*, a project jointly produced by President Lincoln's Cottage and the United States Commission on Civil Rights, available at http://lincolncottage.org/wp-content/uploads/2013/08/USCCR-Anthology-FNL_PDF.pdf.

[5] *Id.* at pp. 17-18.

the victims are not the criminals here. As has been done in some progressive jurisdictions, like my home state of Illinois and county of Cook, we must not prosecute the victims, rather we must prosecute the persecutors and those who profit from this crime of slavery. As President Abraham Lincoln so aptly put it:

> "Those who deny freedom to others deserve it not for themselves, and, under a just God, cannot long retain it."--Abraham Lincoln, letter to H.L. Pierce, April 6, 1859. From the series Great Ideas of Western Man.

Let us hope, that in the not-to-distant future, through the combined efforts of us all, human trafficking in all its forms, in every part of the world, including right here at home, is as dead an institution as is the plantation system that enslaved our fellow men, women and children, but was eradicated 150 years ago.

Statement of Commissioner Roberta Achtenberg with the concurrences of Chairman Martin R. Castro and Commissioner Michael Yaki

I. Sex trafficking in the United States is a serious and pervasive form of modern day slavery.

Sex trafficking is one of the most disturbing and insidious, yet least visible, societal crises that plagues America today. While some prefer to couch the issue in less stark terms, sex trafficking is nothing less than modern day slavery.[6] Enormous financial gain is available to the international and domestic organized criminal enterprises which lure women and girls into physical and psychological captivity and orchestrate their brutal sexual exploitation.[7] The clandestine nature of this abuse means that clear statistics on its incidence are difficult to ascertain.[8] Nevertheless, its pervasiveness is obvious.[9] Girls[10] and young women from all social

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[6] *Sex Trafficking: A Gender-Based Violation of Civil Rights,* U.S. Commission on Civil Rights, September 2014, p. 1, 22, *available at* www.usccr.gov (Report). *See also: OJP Fact Sheet: Human Trafficking,* U.S. Department of Justice Office Justice Programs, December 2011, *available at* http://ojp.gov/newsroom/factsheets/ojpfs_humantrafficking.html; *Can You Walk Away?: A Special Exhibit at President Lincoln's Cottage*, materials *available at* http://lincolncottage.org/canyouwalkaway.html; *and* President Barack Obama, *Presidential Proclamation – National Slavery and Human Trafficking Prevention Month,* January 4, 2010, *available at* http://www.whitehouse.gov/the-press-office/presidential-proclamation-national-slavery-and-human-trafficking-prevention-month.

[7] For example, "[g]ang affiliation is a major component of sex trafficking." *Finding 34, Report,* p. 38.

[8] *See, e.g., Findings 1 through 4 and 12, 20, 21, and 33, Report* pp. 35-38.

[9] The Polaris Project reports that

> [h]uman trafficking victims have been identified in cities, suburbs, and rural areas in all 50 states and in Washington, D.C. They are forced to work or provide commercial sex against their will in legal and legitimate business settings as well as underground markets. Some victims are hidden behind locked doors in brothels and factories. In other cases, victims are in plain view and may interact with community members, but the widespread lack of awareness and understanding of trafficking leads to low levels of victim identification by the people who most often encounter them. For example, women and girls in sex trafficking situations, especially U.S. citizens, are often misidentified as "willing" participants in the sex trade who make a free choice each day to be there. *Human Trafficking: The Victims,* Polaris Project, *available at* http://www.polarisproject.org/human-trafficking/overview/the-victims.

[10] The FBI estimates that the average age of entry into the commercial sexual exploitation industry is 12 to 14. *See, e.g., Finding 19, Report* p. 37, *and Recommendations 15, 16, Report* p. 41.

strata are being lured and trapped into lives of constant abuse, rape, and other forms of sexual exploitation.[11] Many of those enmeshed do not escape. Everyone's child is a potential victim.

II. Sex trafficking in the United States is a function of organized crime with both international and domestic implications.

It is painfully clear that ensnaring victims either within the U.S. or from abroad into a life of sexual slavery in this country is a low-risk, high-reward, and highly mobile enterprise for organized networks of traffickers.

The Commission found that "[g]ang affiliation is a major component of sex trafficking."[12] The depth and breadth of the issue, however, goes far beyond mere gang involvement.[13]

Transnational trafficking by organized crime of girls and women into the United States for the purpose of sexual exploitation is a serious issue with global ramifications[14] recognized by the

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[11] Harris, Kamala D., *The State of Human Trafficking in California*, California Department of Justice, 2012, p. 5 and 21, *available at* http://oag.ca.gov/sites/all/files/agweb/pdfs/ht/human-trafficking-2012.pdf, *citing The Victims,* Polaris Project, *available at*

http://polarisproject.org/human-trafficking/overview/the-victims*; and* Clayton, Ellen Wright, Krugman, Richard D., and Simon, Patti, eds., *Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States, "Chapter 3: Risk Factors for and Consequences of Commercial Sexual Exploitation and Sex Trafficking of Minors,"* Institute of Medicine and National Research Council of The National Academies, 2013, *available at* http://www.nap.edu/download.php?record_id=18358#.

[12] *Finding 34*, *Report* p. 42.

[13] *See generally* Journal of Trafficking Organized Crime and Security, *available at* http://www.brownwalker.com/ojs/index.php/JTOCS.

[14] *See, e.g., Syndicated: Organized Crime and Human Trafficking,* The Trafficking Research Project, *available at* http://thetraffickingresearchproject.wordpress.com/2013/07/26/syndicated-organized-crime-and-human-trafficking/; Oppong, Steward Harrison, *Human Trafficking Through Organized Crime,* International Journal of Humanities and Social Science, Vol. 2, No. 20, October 2012, *available at* http://www.ijhssnet.com/journals/Vol_2_No_20_Special_Issue_October_2012/4.pdf; Forster, Bruce A., *Human Trafficking: A Transnational Organized Crime Activity,* American International Journal or Contemporary Research, Vol. 3, No. 1, January 2013, *available at* http://www.aijcrnet.com/journals/Vol_3_No_1_January_2013/1.pdf; *Human Trafficking: Organized Crime and the Multibillion Dollar Sale of People,* United Nations Office on Drugs and Crime, July 19, 2012, *available at* http://www.unodc.org/unodc/en/frontpage/2012/July/human-trafficking_-organized-crime-and-the-multibillion-dollar-sale-of-people.html; *and* Gonzalez, Elsie, *The Nexus Between Human Trafficking and Terrorism/Organized Crime: Combating Human Trafficking By Creating a Cooperative Law Enforcement System,* Seton Hall Law eRepository, May 1, 2013, *available at* http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1227&context=student_scholarship&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dsex%2520trafficking%2520organized%2520crime%26source%3Dweb%26cd%3D40%26ved%3D0CGEQFjAJOB4%26url%3Dhttp%

White House's National Security Council,[15] the United States Department of Justice,[16] the Federal Bureau of Investigation,[17] the National Institute of Justice,[18] and the U.S. House of Representatives Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security.[19] Among others, the White House National Security Council[20] and the McCain Institute for International Leadership[21] also have identified implications for our national security.

On the domestic front, the federal government,[22] the states,[23] and academic researchers[24] have long comprehended the basic societal and criminal issues which facilitate exploitation of women in the sex industry. The domestic tie to organized crime now appears to be understood, and the

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253A%252F%252Fscholarship.shu.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1227%2526context%253Dstudent_scholarship%26ei%3D0UnAU4PaOcWfyATE-4D4DA%26usg%3DAFQjCNE3azf-cuVZkeya7jIpvUXENa4xqg%26sig2%3DLcz4wZ7mRoZLQfOvSt9Dlg%26bvm%3Dbv.70810081%2Cd.aWw#search=%22sex%20trafficking%20organized%20crime%22.

[15] National Security Council, *Transnational Organized Crime: A Growing Threat to National and International Security*, The White House, *available at* http://www.whitehouse.gov/administration/eop/nsc/transnational-crime/threat.

[16] *See, e.g.*, The Justice Blog, *Confronting Organized Crime and Human Trafficking in a Global Society*, U.S. Department of Justice, November 6, 2012, *available at* http://blogs.justice.gov/main/archives/2548.

[17] *See, e.g.*, Walker-Rodrieguez, Amanda, and Hill, Rodney, *FBI Law Enforcement Bulletin: Human Sex Trafficking*, Federal Bureau o f Investigation, March 2011, *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/march_2011/human_sex_trafficking.

[18] *Human Trafficking*, National Institute of Justice Office of Justice Programs, *available at* http://nij.gov/topics/crime/human-trafficking/pages/welcome.aspx.

[19] *See, e.g., Domestic Minor Sex Trafficking: Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives*, September 15, 2010, Serial No. 111-146, *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg58250/html/CHRG-111hhrg58250.htm.

[20] *Transnational Organized Crime: A Growing Threat to National and International Security*, note 10 *supra.*

[21] *Leveraging National Security Assets to Fight Human Trafficking*, The McCain Institute for International Leadership, *available at* http://mccaininstitute.org/leveraging-national-security-assets-to-fight-human-trafficking.

[22] *See, e.g., Domestic Human Trafficking: An Internal Issue*, Human Smuggling and Trafficking Center, December 2008, *available at* http://www.state.gov/documents/organization/113612.pdf; *and Domestic Minor Sex Trafficking: Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives*, note __ *supra.*

[23] *See, e.g., The State of Human Trafficking in California*, California Department of Justice, note 6 *supra.*

[24] *See, e.g.*, Raymond, Janice G., Hughes, Donna M., and Gomez, Carol J., *Sex Trafficking of Women in the United States: International and Domestic Trends*, Coalition Against Trafficking in Women, March 2001, *available at* http://bibliobase.sermais.pt:8008/BiblioNET/upload/PDF3/01913_sex_traff_us.pdf.

federal government initiated one of its first prosecutions of sex trafficking as an organized crime offense when it charged members of the Gambino Crime Family Associates with sex trafficking and also sex trafficking of a minor in 2010.[25]

Nonetheless, sex trafficking remains overall a low-risk criminal proposition for the traffickers. Even when traffickers are detected and arrested, there are a great many barriers to successful prosecution.[26] Purchasing the sexual services of trafficked people also is a low-risk criminal activity for customers.[27]

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[25] *Manhattan U.S. Attorney Charges 14 Gambino Crime Family Associates with Racketeering, Murder, Sex Trafficking, and Other Crimes*, U.S. Attorney's Office, Southern District of New York, April 20, 2010, *available at* http://www.fbi.gov/newyork/press-releases/2010/nyfo042010.htm.

[26] Shared Hope International (sharedhope.org), an NGO dedicated to combatting sex trafficking, published a nuanced enumeration of barriers to prosecution of sex traffickers in 2009. According to *The National Report on Domestic Minor Sex Trafficking: America's Prostituted Children*,

> [t]he federal human trafficking crime carries heavy penalties. If a trafficking crime results in a victim's death or if the crime includes kidnapping, an attempted kidnapping, aggravated sexual abuse, attempted aggravated sexual abuse, or an attempt to kill, the trafficker could be sentenced to life in prison.
>
> Traffickers of children under the age of 14 or of any minor through force, fraud, or coercion for the purposes of commercial sex acts can be imprisoned for not less than 15 years, up to life. If the victim was a child between the age of 14 and 18 and the sex trafficking did not involve force, fraud, or coercion, the trafficker can be sentenced to not less than 10 years, up to life in prison. These federal sentences surpass most state sentences for sexual servitude, commercial sexual exploitation, human trafficking, or other state laws under which a trafficker of children could be charged. However, the deterrence value of the TVPA's heavy sentences is not being fully utilized as state law enforcement and prosecutors continue to apply more familiar laws — commercial sexual exploitation of children (CSEC) and other sexual abuse laws — many of which carry lesser penalties.
>
> Nonetheless, the deterrence of the harsh sentencing guidelines may not be enough alone to overcome the lucrative and low-risk nature of the crime. The sex trafficking of American children is still considered by some criminals to be low risk, as first responders are not receiving the training and awareness needed to identify a situation of sex trafficking. As a result, a trafficker of domestic minors is often not identified as such or may plead to lesser charges. Interviews with prosecutors revealed that child victim-friendly trial mechanisms, such as using closed circuit television for testimony to avoid the in-court confrontation of a child and her trafficker, are not being utilized. One reason is tactical: prosecutors feel the jury will connect with the victim better if they see her in person. In addition, the constitutionality of this mechanism is an open question in light of the decision in Crawford v. Washington, a federal court decision holding that testimonial statements made outside of court proceedings are not admissible unless the person who made the

Two additional factors drive the viability of sex trafficking enterprises in this country: the high rewards of success and the ease with which the business ventures can be moved to capitalize upon shifting demand. The financial rewards for sex trafficking are large indeed for those who profit from the exploitation. The yearly global revenue from sex trafficking is estimated to be approximately $32 billion USD,[28] and the annual domestic revenue is significant. A 2014 study of eight cities by the Urban Institute, performed under the auspices of a grant from the National Institute of Justice, concluded that profits in 2007 from the underground commercial sex

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> statement is unavailable for testimony at the trial and the defense has had a prior opportunity to cross-examine the declarant. One study done on child sexual exploitation cases from 1998 to 2005 found prosecutors tended to plea bargain the CSEC cases to avoid putting the child victim through the trial. While the plea bargain tendencies may be intended to protect the child victim, some argue that this may also in fact not be beneficial for the child victim who can be empowered through the trial process if done with the proper support and counseling.
>
> Further complicating the situation, when cases of domestic minor sex trafficking are mislabeled as prostitution of minors, then traditional state pimping and pandering laws are often used. These laws can have significantly lower punishments. For example, in Salt Lake City, plea deals with traffickers/pimps of minors varied but the average length of a sentence was just six months.
>
> Lastly, a recent study of federal prosecutions of commercial sexual exploitation of children cases across the country from 1998 to 2005 disturbingly revealed nearly 60% of CSEC cases involving prostitution of a minor presented to the U.S. Attorney's Offices were declined for prosecution. Admittedly, the caseload of federal prosecutors more than doubled in the eight-year timeframe of the study; however the 60% declination rate is still high when compared to other federal offenses, such as drug trafficking (15% declined) and weapons charges (26% declined). Though this number has been reportedly cut in recent years with the increased involvement of several entities within the U.S. Department of Justice, state law enforcement in most assessed locations reported frustration with investigating the cases of domestic minor sex trafficking which were subsequently declined.
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> (original citations omitted.)

Smith, Linda A., Vardaman, Samantha Healy, and Snow, Melissa A., *The National Report on Domestic Minor Sex Trafficking: America's Prostituted Children*, Shared Hope International, May 2009, pp. 12 -13, *available at* http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf.

[27] *See, e.g., Finding 9, Report* p. 40 *and* Carr, *Report* p. 24.

[28] International Labour Office, *ILO Action Against Trafficking in Human Beings*, International Labour Organization, 2008, p. 1, *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_090356.pdf.

economy ranged from $39.9 million in Denver, CO to $290 million in Atlanta, GA.[29]

At least two types of situations highlight the portability of trafficked sex workers. First, the National Football League's annual Super Bowl has come to be regarded as a magnet for sex traffickers and their victims and customers.[30] A March 2014 study by the Arizona State University School of Social Work's Office of Sex Trafficking Intervention Research concluded that while there is nothing unique about the Super Bowl itself that causes a spike in nearby sex trafficking, the game demonstrates that large public events will attract criminal offenders, including sex traffickers, in large numbers.[31] Cindy McCain is working to have stronger anti-trafficking laws passed in her home state of Arizona before it hosts the 2015 NFL Super Bowl[32] despite a reported lack of cooperation from the National Football League.[33]

A second situation which demonstrates the portability of trafficked sex workers occurs when an area undergoes rapid increases in population and economic well-being. Currently, the surge in population and pay brought about by North Dakota's recently-booming oil fields are thought to be luring sex traffickers and their victims to the state in search of a new customer base.[34] The

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[29] The other cities studied, and the estimated profits from their underground commercial sex economies, were: 1) Dallas, TX: $98.8 million; 2) Miami, FL: $235 million; 3) San Diego, CA: $96.6 million; 4) Seattle, WA: $112 million; and 5) Washington, D.C.: $103 million.
Dank, Meredith, Khan, Bilal, Downey, Mitchell P., Kotonias, Cybele, Mayer, Deborah, Owens, Colleen, Pacifici, Laura, and Yu, Lily, *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities*, "Table 3.1," The Urban Institute, March 2014, p. 22, *available at* http://www.urban.org/UploadedPDF/413047-Underground-Commercial-Sex-Economy.pdf. (Note: Analysis of Kansas City, MO was "dropped from estimation" because available data did not fit study criteria. *See* p. 30.)

[30] *See, e.g., Finding 32, Report* p. 38.

[31] Roe-Sepowitz, Dominique, Gallagher, James, and Hickle, Kristine, *Exploring Sex Trafficking and Prostitution Demand During the Super Bowl 2014*, Arizona School of Social Work Office of Sex Trafficking Intervention Research, March 2014, *available at* http://mccaininstitute.org/applications/Super_Bowl_2014_Sex_Trafficking_Research_Full_Report_ASU_MI-1BW_%281%29.PDF.

[32] Coe, Jackee, *Cindy McCain: Adress Humann Trafficking Before 2015 Super Bowl, azcentral 12 News, The Arizona Republic*, September 12, 2013, *available at* http://www.azcentral.com/community/glendale/articles/20130912cindy-mccain-address-human-trafficking-before-super-bowl.html?nclick_check=1.

[33] McCalmont, Lucy, *Cindy McCain: NFL No Help on Sex Trafficking*, Politico, November 20, 2013, *available at* http://www.politico.com/story/2013/11/women-rule-event-100119.html.

[34] *See, e.g.*, Boyce, Dan, *Booming Oil Fields May Be Giving Sex Trafficking A Boost*, National Public Radio, February 1, 2014, *available at* http://www.npr.org/2014/02/01/265698046/booming-oil-fields-may-be-giving-sex-trafficking-a-boost; Lymm, Katherine, *North Dakota Oil Patch Sex Trafficking A Growing, "Horrific" Problem, Agent Says*, TwinCities.com, May 6, 2014, *available at* http://www.twincities.com/nation/ci_25705650/north-

U.S. Attorney for North Dakota responded with efforts including social work trainings and an August 2014 public conference on the problem.[35]

III. Gay, lesbian, bisexual and transgender youth are particularly vulnerable to being sexually trafficked.

The Commission found that "sex trafficking also enslaves men and boys, particularly gay and transgender individuals, in commercial sex and is rooted in discrimination on the basis of sexual orientation and is rooted also in social exclusion."[36] The Commission further found that "[a]n additional layer of vulnerability exists for gay and lesbian children and it is more difficult to make certain that they are identified and assisted"[37] and that "[a]lthough there were many boys being trafficked, there were fewer services available to them."[38]

Research confirms that the LGBT youth experience a disproportionate rate of homelessness and of family rejection which underlie their disproportionate risk of becoming sex-trafficked. The U.S. Department of Health and Human Services found that

> [a]lthough LGBTQ individuals only account for three to five percent of the population, they account for up to 40 percent of the runaway and homeless youth population. It is estimated that 26 percent of LGBTQ adolescents are rejected by their families and put out of their homes for no other reason than being open about who they are. Once on the streets, they face a significant chance of becoming victims of human trafficking. More people are enslaved today than at any point in human history, and LGBTQ youth are being trapped in sexual slavery at alarming levels.[39]

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dakota-oil-patch-sex-trafficking-growing-horrific; *and* Ernst, Aaron, *The Dark Side of the Oil Boom: Human Trafficking in the Heartland,* Aljazeera America, April 28, 2014, *available at* http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/4/28/the-dark-side-oftheoilboomhumantraffickingintheheartland.html.

[35] *Crime and Human Trafficking Conference Announced*, SFGate, July 8, 2014, *available at* http://www.sfgate.com/news/crime/article/Crime-and-human-trafficking-conference-announced-5605868.php.

[36] *Finding 16, Report* p. 40.

[37] *Finding 27, Report* p. 38. *See also* Institute of Medicine and National Research Council of The National Academies *Report,* pp. 88 – 90, at note 6 *supra.*

[38] *Finding 24, Report* p. 42.

[39] Bean, Lonnie James, *LGBTQ Youth at High Risk of Becoming Human Trafficking Victims*, U.S. Department of Health & Human Services Administration for Children & Families, June 26, 2013, *available at* http://www.acf.hhs.gov/blog/2013/06/lgbtq-youth-at-high-risk-of-becoming-human-trafficking-victims. *See also*

A 2012 study by The Williams Institute of the UCLA School of Law found an even more alarming statistic on family rejection rates that cause the homelessness of LGBT youth: a full 43%.[40] Regardless of exact percentages and the raw numbers of at-risk or trafficked LGBT youth which they represent, it is clear that targeted intervention is needed.

The Family Acceptance Project at San Francisco State University, under the direction of veteran researcher Caitlin Ryan, seeks to assist families with building and maintaining healthy relationships with their LGBT teens to reduce the risk of parental rejection, youth abscondence, and ultimately teen homelessness and sex trafficking victimization.[41] Creating family climates in which LGBT youth will be allowed to stay – and in which they will choose to remain – obviates immediate risk to LGBT youth. The federal government therefore should maximize funding of programs such as the Family Acceptance Project which seek to stop problems before they start.

IV. Survivors of sex trafficking are victims, rather than criminals, and must be treated as such. The development and enactment of model statutes can go far toward shifting this paradigm.

Our legal systems, overall, treat juveniles and adults who have been sexually trafficked as criminals rather than as victims. It is well past time to "create [a] new [criminal justice] model which supports victims rather than treating them as criminals."[42]

Corliss, Heather L., Goodenow, Carole S., Nichols, Lauren, and Austin, S. Bryn, *High Burden of Homelessness Among Sexual-Minority Adolescents: Findings From A Representative Massachusetts High School Sample,* American Journal of Public Health 101(9), September 2011, p. 1683, *available at* *http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3154237/?_escaped_fragment_=po=1.45631*.

[40] Durso, Laura E. and Gates, Gary J., *Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual and Transgender Youth Who Are Homeless or At Risk of Becoming Homeless,* The Palette Fund, TrueColors Fund, and The Williams Institute of the UCLA School of Law, 2012, p. 4, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf.

[41] *See, e.g.*, Ryan, Caitlin, *Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual & Transgender Children,* Family Acceptance Project, San Francisco State University, 2009, *available at* http://familyproject.sfsu.edu/files/FAP_English%20Booklet_pst.pdf.

[42] Statement of panelist Bridgette Carr, *Report* p. 11.

The Commission recommended that we engage in:

> Legal reform: decriminalizing the commercial sex activities of both juvenile and adult survivors; increasing legal defenses available to survivors who are charged with trafficking-related crimes such as prostitution or solicitation; facilitating expungement of criminal convictions related to their status as trafficking victims; giving particular attention to the needs of minors who, by operation of law, are not capable of consenting to sexual acts; increasing prosecutions of

In order to fully appreciate the need to decriminalize the behaviors of sex-trafficked people, we need to understand that they are trauma victims[43] who likely experienced sexual trauma and/or other stressful life circumstances before being sexually trafficked. In essence, they were often "set up" for an increased risk of being trafficked simply by events in their lives over which they had either no control at all, or at best, very little.

For example, juveniles who are lured into sex trafficking were often victimized sexually prior to being trafficked. Their abusers may have been family members or friends. Many juveniles who are lured into sex trafficking are particularly vulnerable due to factors such as poverty, and foster care or juvenile justice system involvement.[44] These experiences leave these children more vulnerable to being trafficked.[45]

Sadly, once juveniles who have been sex-trafficked are in a juvenile justice system, not only are they criminalized, but they also suffer due to lost opportunities for education and therapeutic services.[46]

Adult survivors of sex trafficking, whether they were first trafficked as children, youth, or adults, are also trauma survivors. Traffickers subjugate women through many forms of physical and psychological control[47] which place them in fear of being arrested or killed.

All of this, obviously, highlights the need for statutory reform for the benefit of both adult and juvenile survivors of sex trafficking. Model statutes from states and localities, as well as from the advocacy sector, may be most informative. Indiana and Illinois are among the states that have attempted to improve their statues.[48]

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perpetrators/pimps; and increasing availability of seizure and forfeiture of perpetrators' assets in order to provide assistance for the survivors of their crimes.

Recommendation 10(b), Report, p. 44.

[43] *Finding 25, Report* p. 41 and *Finding 28, Report* p. 42.

[44] *See, e.g.,* testimony of Amy Rassen, *Report,* p. 28.

[45] *See, e.g., Finding 22, Report,* p. 41. *See also* Institute of Medicine and National Research Council of The National Academies *Report,* at note 6 *supra.*

[46] *See, e.g.,* testimony of Bridgette Carr, *Report,* p. 11.

[47] *See, e.g.,* testimony of Karen Hughes, *Report,* p. 18.

[48] *See, e.g., Recommendation 5, Report,* p. 43.

V. Recovery services for sex trafficking survivors are necessary, and in need of expansion through the continued coordinated efforts of government and the advocacy sector.

The necessity of ensuring the availability of an array of professional services in sufficient quantity to meet survivors' needs for reintegration into a violence-free life of self-determination cannot be overstated. Once we understand that we must treat people who have been sex-trafficked as survivors rather than as criminals, this becomes not only obvious, but irrefutable. This is our obligation as a society.

Services must be offered not only to the trafficking survivors who find their way, either independently or with the assistance of law enforcement or social services, to the doors of those available to help. Service providers should affirmatively reach out to prospective clients in jails and juvenile detention facilities to seek out sex trafficking survivors whom they may have but a brief moment to try to engage in a recovery plan.[49]

Although the Commission found that there are identified factors which increase an individual's risk of becoming trafficked,[50] not all survivors of sex trafficking fit the same profile. Survivors' needs are multifaceted, complex, and highly individualized.[51] Therefore, as the Commission heard very clearly from its nongovernmental organization (NGO) panelists Tina Frundt of Courtney's House, Mary Ellison of the Polaris Project, and Amy Rassen of the SAGE Project, so must be the reintegration services offered to them.

Survivors may need both short-term and long-term housing, physical and mental health services,[52] income, education, child care, and more. Therefore, multidisciplinary teams must provide survivors' services. Survivors may need case managers,[53] lawyers, social workers,

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[49] *See* testimony of Amy Rassen, *Report,* p. 27, *and* statement of Amy Rassen, *Briefing Transcript,* p. 149, l. 3 – 12.

[50] *Finding 26, Report,* p. 42.

[51] *See, e.g.,* Laskowski, Emily Jane, *A Recommendation Report in Assessing the Needs of Victims of Domestic Minor Human Trafficking,* Indiana University School of Public and Environmental Affairs and Hutton Honor College, April 9, 2011, *available at* http://www.indiana.edu/~spea/pubs/undergrad-honors/volumn-6/Laskowski_Emily_Recommendation%20Report%20in%20Assessing%20the%20Needs%20of%20Victims%20of%20Domestic%20Minor%20Human%20Trafficking%20-%20Faculty%20David%20Welch.pdf.

[52] *See, e.g.,* Clawson, Heather J. and Grace, Lisa Goldblatt, *Finding a Path To Recovery: Residential Facilities for Minor Victims of Domestic Sex Trafficking,* U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *available at* http://aspe.hhs.gov/hsp/07/humantrafficking/ResFac/ib.pdf.

[53] See, e.g., Clawson, Heather J. and Dutch, Nicole, *Case Management and the Victim of Human Trafficking: A Critical Service for Client Success,* U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *available at* http://aspe.hhs.gov/hsp/07/humantrafficking/casemgmt/ib.pdf.

therapists with various types of expertise, teachers, public benefits specialists, parenting trainers, and others. Survivors' services may best be provided in a multidisciplinary milieu and must be designed very carefully so as not to risk re-traumatization.[54]

The SAGE Project of San Francisco, whose then-Senior Advisor Amy Rassen testified before the Commission in this matter,[55] stands out in the NGO advocacy sector as a premier provider of services to survivors of sex trafficking. The SAGE Project offers a particularly comprehensive array of services designed to facilitate trauma and addiction recovery. Services of particular note include in-custody counseling for survivors in juvenile detention facilities, an Integrative Medical Clinic which provides both care and education, an Early Intervention Prostitution Program, and a First Offender Prostitution Program. The SAGE Project also participates in the Cross Bay Collaborative to Combat Human Trafficking and provides training and technical support to other NGOs.[56]

VI. Congress should pass, and the President should sign, the federal Stop Exploitation Through Trafficking Act of 2014.

Congress is currently considering the bipartisan Stop Exploitation Through Trafficking Act of 2014 (SETTA), which is based upon Minnesota's Safe Harbor for Sexually Exploited Youth Act. Senator Amy Klobuchar (D-MN) introduced S. 1733 on November 19, 2013.[57] Representative Erik Paulson (R-MN) introduced H.R. 3610 on November 23, 2013.[58] The House Committee on the Judiciary, on May 13, 2014, reported favorably upon the bill and recommended passage.[59]

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[54] *See, e.g.*, testimony of Amy Rassen, *Briefing Transcript*, p. 147, l. 21 – p. 149 l. 2.

[55] *See* testimony of Amy Rassen, *Report*, p. 27 *and* written statement of Amy Rassen at *Report*, p. 125

[56] *See* The SAGE Project at http://sagesf.org/.

[57] *See, e.g., News Release: Klobuchar, Cornyn, Heitkamp, Kirk Introduce Bipartisan Legislation to Crack Down on Sex Trafficking,* November 19, 2013, *available at*

http://www.klobuchar.senate.gov/public/2013/11/klobuchar-cornyn-heitkamp-kirk-introduce-bipartisan-legislation-to-crack-down-on-sex-trafficking; *and* S. 1733 – Stop Exploitation Through Trafficking Act of 2013, *available at* https://beta.congress.gov/113/bills/s1733/BILLS-113s1733is.pdf.

[58] H.R. 3610, Stop Exploitation Through Trafficking Act, *available at* https://beta.congress.gov/113/bills/hr3610/BILLS-113hr3610eh.pdf.

[59] Report to Accompany H.R. 3610, Stop Exploitation Through Trafficking Act of 2014, U.S. House of Representatives Committee on the Judiciary, Rept. 113-447 Part 1, *available at* https://beta.congress.gov/113/crpt/hrpt447/CRPT-113hrpt447-pt1.pdf.

The House passed H.R. 3610 shortly thereafter on May 20, 2014.[60] S. 1773 remains in the Senate Committee on the Judiciary at the time of this writing.[61]

SETTA, in brief, would require each state to treat minors sold for commercial sex acts as victims of sex trafficking, to discourage prostitution prosecutions of minor trafficking victims, and to consider instead referral of such minors to child welfare services. SETTA also seeks to make juvenile survivors of sex trafficking eligible for services through Job Corps, to require the U.S. Attorney to create a National Strategy for Combating Human Trafficking, and to increase the Attorney General's reporting obligations. The Congressional Budget Office "estimates that enacting the legislation … would not effect spending or revenues."[62]

Experts in the advocacy sector support enactment of SETTA. NGOs in favor of SETTA's passage include the McCain Institute's Humanitarian Action Program,[63] Freedom Network USA,[64] Shared Hope International,[65] the Polaris Project,[66] and the National Conference of State Legislators.[67]

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[60] *See, e.g.*, H.R. 3610: Stop Exploitation Through Trafficking Act of 2014, Status, *available at* https://www.govtrack.us/congress/bills/113/hr3610.

[61] *See, e.g.*, S. 1733: Stop Exploitation Through Trafficking Act of 2013, Actions, *available at* https://beta.congress.gov/bill/113th-congress/senate-bill/1733.

[62] *H.R. 3610: Stop Exploitation Through Trafficking Act of 2014 Cost Estimate*, Congressional Budget Office, May 14, 2014, *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr3610.pdf.

[63] *Sold Into Sex Slavery: Lawmakers Work to End Underground Sex Trafficking*, The McCain Institute for International Leadership, CNN, May 20, 2014, *available at* http://mccaininstitute.org/newsroom/current-news/sold-into-sex-slavery-lawmakers-work-to-end-underground-sex-trafficking.

[64] *Stop Exploitation Through Trafficking Act of 2014 To Be Introduced by Sen. Klobuchar*, Freedom Network USA, *available at* http://freedomnetworkusa.org/wp-content/uploads/2012/05/Stop-Exploitation-through-Trafficking-Act-Leave-Behind.pdf.

[65] *Take Action – Federal Legislation S. 1733*, Shared Hope International, *available at* http://sharedhope.org/what-we-do/bring-justice/legislative-action-center/take-action-federal-legislation-h-r-3610-s-1733/.

[66] The Polaris Project's support is conditional, as it believes that SETTA does not go far enough to protect children. Polaris states that the bill "begins to address the problem" but that it

> could do more to encourage states to provide immunity to children for trafficking crimes they were forced to commit, as well as recognize that prostitution is not the only offense children are forced to commit in a trafficking situation. Following these recommendations would bring the federal law closer to the standards set almost a year ago by the Uniform Law Commission and the American Bar Association. We also hope that both legal protections and specialized services would be available for all child victims of trafficking, and not only children who experience sex trafficking.

Human Trafficking Legislation Fact Sheet, Polaris Project, p. 3, *available at*

Congress should enact and the President should sign a version of SETTA which reasonably balances all interests at stake, including that of free speech.

VII. Conclusion

Federal, state, and local governments must continue to work with NGOs to ensure that adequate funding for survivors' services is available.[68] It is clear that existing service providers cannot meet the current need. The need for services only will increase as more and more jurisdictions come to view sex trafficking victims as survivors rather than demean them as criminals. Therefore, questions are becoming more pressing with the passage of time. Federal, state, and local governments and NGOs must be working together now to refine and expand upon successful service models and to put additional service capacity into place across the country. Codification of SETTA will likely speed this process. Until such time as SETTA may become

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http://www.polarisproject.org/storage/documents/05-20-14_Human_Trafficking_Legislation_Fact_Sheet-Final.pdf.

On other hand, the ACLU opposes the bill as currently drafted. It believes that the required scrutiny of advertisers could cause unintended, serious consequences for freedom of online or printed speech for sellers and buyers in legitimate commerce. The ACLU posits that

> the bill, rather than narrowly targeting websites that knowingly advertise these despicable practices [of trafficking], … would allow police to criminally pursue a website that has no idea it is hosting, and has procedures in place to prevent, ads featuring criminal activity. It does so because the "intent standard" – what a prosecutor has to prove the defendant knew – is vague.
>
> This would create two big problems.
>
> First, as noted, this would create an effective notice-and-takedown regime, where sites just remove content wholesale when notified of a potential problem. Second, and perhaps worse, websites could start making themselves "willfully blind." That is, given the lack of clarity in what the sites have to know to be prosecuted, they would stop prescreening ads to look for criminal activity. In other words, the bill would unintentionally discourage good corporate citizenship and potentially make the problem worse. …
>
> Lawmaking is messy stuff, and mistakes like this happen. Working to combat coerced or underage prostitution is incredibly important; however, legislation must be carefully drafted to be sure to protect our free speech rights online.
>
> Hopefully, the bill can be fixed. If not, you'll be hearing a lot more from us.

https://www.aclu.org/blog/free-speech/anti-backpagecom-bill-will-shut-down-free-speech.

[67] *Anti-Backpage.com Bill Will Shut Down Free Speech,* American Civil Liberties Union, May 20, 2014, *available at* http://www.ncsl.org/documents/standcomm/sclaw/Klobuchar_Letter_July2014.pdf.

[68] *See, e.g., Recommendation 7, Report,* p. 43 and *Recommendation 8, Report,* p. 44.

law, states which have not yet done so should improve their statutes in the manner in which Minnesota, Illinois and Indiana have done. The pain faced by current victims and future survivors of sex trafficking must be ameliorated through all available means. Our nation's victimized children and adults deserve no less.

Statement and Rebuttal of Commissioner Gail Heriot

Organized efforts to prevent human trafficking are not new. Beginning in 1807, pursuant to the Abolition of the Slave Trade Act, the British Navy undertook a blockade of the Atlantic slave trade.[69] Over the years, its West Africa Squadron was able to capture over 1500 slave ships destined for the Americas, freeing approximately 150,000 and rendering this horrific commerce essentially unprofitable. We all owe a debt to the courage and resolve of these officers and sailors, some of whom lost their lives carrying out their mission.[70] Their efforts were crucial in the war against slavery.

That particular variety of trafficking in human flesh has been wiped out. But you can still find other examples of the trade if you are willing to keep your eyes open. Indeed, in some corners of the globe, it is all too common. Just this past April, Boko Haram kidnapped 276 Nigerian schoolgirls for the supposed crime of having become too educated. Shortly thereafter, its leader announced they would be sold. As of this writing, there has been no word on their fate. Similarly, information has begun to trickle in suggesting that ISIS (the Islamic State of Iraq and Syria) is selling Yazidi and Christian women as slaves in Mosul.[71]

I believe we as Americans have a special duty to ensure that human beings are not bought and sold in the marketplace. This is not simply because we once tolerated slavery; almost all parts of the world did at one time or another. Nor is it because the United States was the last nation to renounce slavery, since it was not by any means.[72] But partly because we are a freedom loving

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[69] 47 Geo. 3, Sess. 1, ch. 36 (1807). At the same time, the United States had banned the slave trade. See An Act Prohibiting Importation of Slaves, 2 Stat. 426 (1807) (taking effect January 1, 1808, the first day such a ban was permissible under the U.S Constitution).

[70] Bernard Edwards, **ROYAL NAVY VERSUS THE SLAVES TRADERS: ENFORCING ABOLITION AT SEA 1808-1898** (2007); W.E.F. Ward, **THE ROYAL NAVY AND THE SLAVERS: SUPPRESSION OF THE ATLANTIC SLAVE TRADE** (1969).

[71] Aminu Abubakar & Josh Levs, *"I Will Sell Them," Boko Haram Leader Says of Kidnapped Nigerian Girls*, CNN (May 6, 2014). Slavery was not outlawed in Northern Nigeria until 1936, and it has never been entirely eliminated. Suzanne Miers, THE END OF SLAVERY IN AFRICA (1988). See also Mariz Tadros, *Who Will Condemn the Sexual Enslavement of Iraq's Minority Women?: Slavery* and Rape Are Being Used as Weapons of War by Isis against Yazidi and Christian Women, Yet Rights Activists Are Silent, theguardian.com (August 15, 2014).

[72] According to Wikipedia, Brazil abolished slavery with a series of partial measures beginning in 1871 and ending in 1888, while Cuba acted in 1886. Other countries lagged behind even those examples. China acted in 1906, while Thailand (then Siam) joined the list of countries where slavery is prohibited in 1912. Afghanistan, Iran, Iraq,

people and partly because the United States is the most powerful nation on the planet, we are in a special situation, just as Great Britain was in the nineteenth century.[73]

The difficulty is always in the details. When dealing with slavery outside our borders, under what circumstances should we rely upon diplomacy to achieve our goals? When are targeted economic sanctions the right tool? When do we resort, as Great Britain did, to sending in the military to rescue the victims? Within our borders, how do we best deploy our resources to root out the human subjugation that hides in the shadows?[74] How do we avoid exaggerating the prevalence of the problem and thus unduly alarming our citizens?

Morocco and Nepal all abolished slavery in the 1920s. Qatar and Bhutan acted in the 1950s; Niger, Saudi Arabia, the United Arab Emirates, and Yemen in the 1960s; Oman in 1970 and Mauritania in 1981.

[73] Cf. John F. Kennedy, Inaugural Address (January 20, 1961)("Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, in order to assure the survival and the success of liberty").

[74] If we are talking about the horrific ordeal of Amanda Berry, Georgina De Jesus and Michelle Knight, calling them "sex slaves" is hardly an exaggeration (although the term "sex trafficking" does not fit their particular situation since no commercial transaction was involved). They were abducted and forced to live for approximately a decade with Ariel Castro, who repeatedly subjected them to rape. They did not leave his home during that period and were frequently chained to the wall. Greg Botelho, *Michelle Knight Recalls Being Castro's "Punching Bag," Being Thankful for Life*, CNN (May 14, 2014), available at http://www.cnn.com/2014/05/06/us/michelle-knight-interview/. Using a milder term is arguably a disservice to the cause of truth and candor. And while cases like theirs are mercifully rare, they are not the only cases from within the borders of this country for which the term "slavery" is appropriate. Most of these others cases, however, differ from the Berry-DeJesus-Knight case in that they appear to involve organized, commercial activity and tend to victimize immigrant women who are especially vulnerable to such treatment. Determining the extent of that kind of activity is tough.

At the other extreme, in the absence of special circumstances, it is a misuse of the English language to call a prostitute, who is aware she has the power to flee, but does not, a "sex slave" or any kind of "slave" at all. Lawmakers may decide that they want to deny her the choice to engage in prostitution—either by criminalizing her conduct or by denying her the legal capacity to bind herself to that choice (and thereby opening the door for her to sue her customer or her panderer for battery) or by other means. But to deny that she has actually made a choice or to argue that a choice is a choice only if it is made from among some highly desirable alternatives is incorrect. Calling her a "slave" collapses a complex issue of public policy into an emotionally-charged slogan.

This is not to say that every woman engaged in prostitution has acted voluntarily. Many have been physically coerced; others have been lured into it by false statements or promises. Lawmakers will likely wish to treat such cases differently from those cases in which force or fraud are not at issue. (Note, however, that not all coercion or fraud, however minimal, constitutes a legal defense to other crimes, and presumably not all coercion or fraud would vitiate consent in the prostitution context.) Alternatively, lawmakers may conclude that separating the cases of coercion and fraud from other cases is too difficult and that all cases of prostitution should therefore be treated as if they are the product of coercion or fraud. But if that's what we're doing we need to be upfront about it and not hide it underneath emotionally charged slavery rhetoric.

Alas, this briefing was too unfocused to be of much assistance in developing the right policies. The terms "enslavement,"[75] "slavery," "sex slaves," "human trafficking," and "sex trafficking"[76] got tossed around a lot. But at one moment we were talking about importing immigrant women to live as sex slaves; at the next we were talking about troubled teens who run away from home and wind up ensnared in prostitution; and then finally we were talking about adult prostitutes,

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[75] See, e.g., Tr. at 6 ("In my personal estimation, the term 'human trafficking' does not significantly address the inhumanity of this crime. I think when you look at this, you see that this is truly the enslavement and exploitation of persons.") (remarks of the Chairman). I agree with Chairman Castro that when talking about slavery, "slavery" should be the preferred term and not "human trafficking."

[76] I am not certain what accounts for the popularity of the terms "human trafficking" and "sex trafficking." Both are frequently misused terms. We would understand each other a lot better if we stopped using them and adopted terms whose meaning is less susceptible to misunderstanding. Unfortunately, much of their misuse is intentional, so I don't hold out much hope for greater clarity.

Merriam-Webster defines "traffic" in relevant part this way: "1 a: import and export trade b: the business of bartering or buying and selling c: illegal or disreputable usually commercial activity … 2 a: communication or dealings especially between individuals or groups b: exchange …." "Human trafficking" is thus the buying and selling of human beings, and many people understand it in exactly that sense: as a synonym for the slave trade.

Some people would like to use it as a synonym for slavery itself, too. And it's easy to see why they would be tempted to do so. From the standpoint of law enforcement, there isn't that much need to make a distinction between the slave trade and slavery today. By contrast, the British Navy did have such a need, since its control of the seas gave it a decent shot at eliminating that trade, while eliminating slavery itself would have required an armed invasion of Argentina, Brazil, Cuba, Peru, the United States and Venezuela, among many other countries. But today, focusing exclusively on trafficking rather on slavery itself seems odd. If members of Boko Haram were to enslave the kidnapped girls themselves rather than sell them to others, that would not alter the seriousness of the problem. Yet it would not literally be "human trafficking." Some try to get around this semantic difficulty by arguing that if the victim is moved from place to place, she has been "trafficked" regardless of whether there has been a purchase or a sale. But such gymnastics are wholly unnecessary. Why not just call slavery "slavery"? It shouldn't matter if the slave is nailed to the ground or on a fast-moving train.

But the problems with the terms "human trafficking" and "sex trafficking" go far beyond this. As suggested in the text above, the latter is now routinely used to describe the procurement of adults and of teenaged runaways for prostitution. This is not an illogical use of the word in that sex is being sold, but it leads to confusion. The former term—human trafficking—is now used to describe certain kinds of labor arrangements that I discuss infra at 21-29. This also leads to confusion.

Prostitution is a problem, to be sure. It is a problem whether we are discussing the prostitution of adults or the prostitution of teenaged runaways. But prostitution is not the same problem as slavery or even sexual slavery. And the prostitution of adults is a different problem from the prostitution of children. They require different solutions. Lumping them together with slavery or even sexual slavery does more harm than good.

Similarly, onerous labor arrangements can also be a problem. But they are not necessarily the same thing as the procurement of labor through coercion or fraud. See infra at _____. We need a vocabulary that allows us to make important distinctions and avoid confusion.

many (though not all) of whom have chosen their way of life. Each one of these things is a problem, but each is a different problem with a different set of solutions or lack of a solution.[77] Running them together only makes sense if one's motive is to benefit from the emotional response that terms like "modern slavery" and "human trafficking" tend to produce.[78] But if

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[77] Among those who work closely with the problem of prostitution, making further distinctions is likely necessary. For example, among adult prostitutes, there are prostitutes whose core problem is drug addiction and who would not be engaged in the trade if they were not drug dependent. There are prostitutes whose core problem is mental illness. Some prostitutes have only a very transient attachment to the trade and will give it up as soon as they find a decent place to sleep and a little help with the necessities of life. Some get lured into prostitution as teenage runaways and would give it up if they had some marketable skills that could earn them a comparable income. Then there are those who are thrill seekers who actually enjoy the job. A few even make a good living at it.

[78] Part of the problem is understandable. If one has a worthy cause—like helping women escape prostitution—that cause will need to be funded. And it's easier to get funding to "combat sex trafficking" than it is to "help prostitutes." But employing such language can make it more difficult for the ones who are combatting real sex slavery to raise funds for their activities.

In this regard I was impressed by blogger Laura Leigh Parker, who has been active in counter-human trafficking efforts in Southeast Asia. She wrote:

> The words we use when we communicate, *especially* when talking about Christian ministries when we're raising funds to support them, are extremely important. Take, for example, the overuse {and misuse} of the term "human trafficking." Honestly, two years ago, I was fairly confused about it, too. I painted most of the global sex industry with general "trafficking/slavery" terminology, especially, I'm afraid, in those first support-raising newsletters we hammered our unsuspecting friends with. But, two years and a couple months into life and work in South East Asia, I am beginning to understand a little more.
>
> …
>
> It is true that as I type this, there are young girls and women {and some boys} who are physically locked behind closed doors, who are threatened with their family's safety, and who are paying off debts by servicing men in brothels. Estimates are, in fact, that there are about 4.5 million women and children forced, by coercion or abuse, into the sex industry today.
>
> …
>
> But, here's the thing we are learning in our {*very* meager} two years working in the counter-trafficking community of NGO's here in Asia– fighting human trafficking and reaching out to prostitutes is not the same thing.
>
> And while obviously there is a fuzzy margin of gray between the two, we often see "ministry to bar girls" pegged under the "fighting human trafficking" banner– an example of unintentionally irresponsible communication, in my opinion. Because there are *40 million* prostitutes, working mostly by *choice*, compared to the {much smaller} *4.5 million trafficked victims*, trapped in the sex industry by *force.*
>
> …
>
> And, so, who really cares what we call what? Why do the semantics really matter anyway? It's all ministry helping women who are poor, undervalued and often abused, right? What does it matter what we call it in

one's desire is to set effective public policy, they need to be disentangled. Not all prostitution is slavery; indeed, it may be that only a small sliver of commercial sex can be usefully analogized to slavery. Given that large numbers of prostitutes operate independently without panderers, it would be difficult to characterize prostitution as inherently rooted in subjugation. The promiscuous use of the word "slavery" will only water down our commitment to deal with actual slavery. And terms like "sex trafficking" and "human trafficking" tend to obscure more than they enlighten, because there is little agreement on what they mean.[79]

None of this is to say that all prostitution is "just prostitution." Some is induced by force or fraud. Some involves under-aged girls, rather than adults. Sometimes force or fraud is used on under-age girls. These are deadly serious problems.

> our newsletters and ministry-pitches?
>
> Well, it does matter. *Greatly.* Because we have seen firsthand the subtle damage that can be done by Westerners who barge into red light districts assuming they are fighting modern day slavery and who raise funds under that belief, but then teach English to prostitutes who are working in the industry by choice. And while it is good that awareness is being raised for the issue of slavery, and *while it is absolutely a loving thing to reach out to those working in the sex industry {*especially by providing them with other work opportunities}, it is not the same thing as rescuing victims of trafficking or slowing down the economic machine that makes the sale of flesh so lucrative.
>
> And I wonder if the funds, efforts and organizations that do effectively fight modern day slavery become diluted by the myriad of well-intentioned people that jump on the bandwagon under its name.

Laura Leigh Parker, *Human Trafficking vs. Prostitution: Why It Matters What We Call It*, lauraleighparker.com (June 23, 2012) (boldface deleted).

[79] The confusion over the word "trafficking" has also been noted in the United Kingdom by Nick Davies of the Guardian:

> The sex trafficking story is a model of misinformation. It began to take shape in the mid 1990s, when the collapse of economies in the old Warsaw Pact countries saw the working flats of London flooded with young women from eastern Europe. Soon, there were rumours and media reports that attached a new word to these women. They had been "trafficked."
>
> And, from the outset, that word was a problem. On a strict definition, eventually expressed in international law by the 2000 Palermo protocol, sex trafficking involves the use of force, fraud or coercion to transport an unwilling victim into sexual exploitation. This image of sex slavery soon provoked real public anxiety.
>
> But a much looser definition, subsequently adopted by the UK's 2003 Sexual Offences Act, uses the word to describe the movement of all sex workers, including willing professionals who are simply travelling in search of a better income. This wider meaning has injected public debate with confusion and disproportionate anxiety.

Nick Davies, *Prostitution and Trafficking: The Anatomy of a Moral Panic*, **THE GUARDIAN** (October 19, 2009).

I have strong doubts that the U.S. Commission on Civil Rights or any other federal commission can ever contribute usefully to a solution to the problem of ordinary prostitution by consenting adults. Every possible public policy toward it seems to have been tried by some government at some point in history (and if Herodotus was correct about the Babylonians, that includes making prostitutes temple priestesses).[80] As far as I can see, none has ever produced wholly satisfactory results. I would leave it to localities to decide which among the many imperfect responses to the problem that they would like to go with.

I will therefore not comment on what I refer to as "ordinary prostitution" (i.e. prostitution by consenting adults). Neither will I treat the broad subject matter of this briefing systematically. Given the limited information I have, I can offer only a few scattered thoughts on some of the varied issues that were touched on during the briefing.

How common are sexual slavery, forced prostitution, teenage and child prostitution and adult prostitution?

That is really several questions instead of one. And the easy answer to each of them is that I don't know. Nor does it seem that anybody has a good handle on these questions.

But there is one thing that I do know: There is something in the human soul that likes to be titillated by stories of sex and particularly of illicit sex. As a result, we often overestimate how much of it is going on. Sometimes this tendency snowballs into a full-scale panic.[81]

In the late 19th century, Great Britain was swept by hysteria over "white slavery," a term then in vogue for forced prostitution. Muckraking editor W.T. Stead, head of London's leading newspaper, the Pall Mall Gazette, printed an exposé series entitled "*The Maiden Tribute of Modern Babylon,"* which included the lurid story of Eliza Armstrong, a 13-year-old girl, who had been "purchased" for five pounds from her alcoholic mother for the purpose of prostitution.

The articles were a sensation. Crowds gathered in front of the newspaper offices to fight for copies. Political leaders feared riots. The story confirmed what activists in the social purity movement (as well as Stead himself) had been claiming for years: British women and girls were being forced into a life of prostitution. Special "white slavery" legislation had already been pending in Parliament, but the Eliza Armstrong case convinced legislators that immediate action was necessary. Only after the law was passed did the facts of the Armstrong case begin to

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[80] Herodotus, **THE HISTORIES** 1.199 (Godley, trans. 1920).

[81] See Statement of Commissioner Gail Heriot, Sexual Assault in the Military, Report of the U.S. Commission on Civil Rights at 161 (2013)(discussing misuse of statistics in an effort to depict a false epidemic in the military).

unravel. The alcoholic mother who sold the girl had been told that her daughter was going to be a maid to an old gentleman (and may or may not have understood this as a euphemism). The "purchaser" had been Stead himself, who did not actually violate the girl. The case was a hoax, and added nothing to what readers already knew about the likelihood that anyone was being forced into prostitution.[82]

Nevertheless, Stead and the members of the social purity movement were sincere in their belief that forced prostitution was a problem. And I suspect they were not wholly wrong. Such things need not be widespread before they must be taken seriously. But it was not as common as they believed. Intentionally or not, they were leading the public into an unnecessary panic. Women were being made to live in fear.

The hysteria spread to the United States in the early 20th century, where again, Progressive reformers were not wholly wrong. Women had been forced into prostitution in this country too, although the fear that many women could be snatched off the streets at any moment and forced into prostitution was sensationalized and overblown. "White Slavery" was one of "the" politically correct issues of the day, much as hate crimes have been for the last decade or so.[83] Clergymen preached against it. Artists depicted it. And it sold lots and lots of newspapers. But not as many women were being forced into prostitution as one would think from reading those reports.[84]

Misplaced fear is not a good thing. My grandmother had to work hard to graduate from high school in the little farm town where she was born. And she was talented. She applied for admission and was accepted to Radcliffe College, then the sister school to Harvard College (and now part of Harvard University).[85] But in the end, her parents wouldn't let her go. They thought

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[82] Alison Plowden, **THE CASE OF ELIZA ARMSTRONG: "A CHILD OF 13 BOUGHT FOR £5"** (1974). Stead wound up being convicted of "abduction" for having taken young Eliza without her father's permission.

[83] Compare Jack Levin & Jack McDevitt, **HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED** ix (1993)("It has become nearly impossible to keep track of the shocking rise in brutal attacks directed at individuals because they are black, Latino, Asian, white, disabled, women, or gay. Almost daily, the newspapers report new and even more grotesque abominations…. As ugly as this situation is now, it is likely to worsen throughout the remainder of the decade and into the next century as the forces of bigotry continue to gain momentum.") with James B. Jacobs & Kimberly Potter, **HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS** 46 (1998)(demonstrating that the claim of a hate crime epidemic "lacks any empirical basis").

[84] In more modern times, Hollywood, realizing the fears of the early 20th century had been exaggerated, turned the "white slavery" scare into entertainment—like the 1967 madcap comedy movie, Thoroughly Modern Millie, starring Julie Andrews and Mary Tyler Moore as young flappers who escape the clutches of their abductors. Thoroughly Modern Millie was updated and made into a Broadway musical in 2000, with alterations to the story line to make it more appealing to modern audiences. In my great-grandmothers' day, however, not many people were laughing.

[85] As part of Harvard University, it is now known as the Radcliffe Institute for Advanced Study.

life in a big city—Cambridge, Massachusetts—was too dangerous for a young woman. She had to stay on the farm with them until she married. She never forgot it. For her, people who exaggerate dangers are not heroes. They are the reason she spent her adult life milking cows. And while milking cows can be a wonderful life for those who choose it, it was not the life she had wanted for herself.[86]

Congress hurriedly passed the White-Slave Traffic Act (Mann Act) in 1910. Its wording was shockingly vague. A person could be guilty of a federal crime if he transported a woman across state lines "for immoral purposes." This covered not just forced prostitution but Labor Day weekend jaunts to the beach with a woman to whom the accused was not married. Immoral? Maybe. Worthy of calling out the FBI? For most Americans, probably then and now, the answer would be "no."

In just a few years, federal prosecutors had learned to appreciate to the statute's vagueness, and began to prosecute certain individuals for driving a woman across a state line for a lovers' tryst. Among those arrested for Mann Act violations were Charlie Chaplin, Frank Lloyd Wright, University of Chicago sociologist William I. Thomas, and African American athlete Jack Johnson. Flamboyant WWII double agent Dusan Popov (the man who was said to have warned the United States about an impending attack on Pearl Harbor) was reportedly threatened by J. Edgar Hoover with a Mann Act prosecution if he did not leave the country immediately. And the Mann Act was sometimes used to prosecute fundamentalist Mormon polygamists, since federal law does not actually prohibit the practice of polygamy. This is not what members of Congress thought they were prohibiting. But it is what they wrote, so it is what we got.

Are we still over-estimating the extent of sexual slavery, forced prostitution, prostitution by runaway teens and/or adult prostitution? I am not in a position to give definitive answers to those questions. But certainly nothing in this briefing gave me any reason to believe that these problems were as widespread as some want us to believe. This is not to suggest that our witnesses were not testifying in good faith. They did not claim to have definitive answers and were likely doing the best they could in a world with limited information.[87] And it is certainly

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[86] Efforts to describe college campuses as infected with a "rape culture" similarly serve to frighten those who are unfamiliar with the imperfect but hardly criminal culture that dominates college campuses. See, e.g., Caroline Kitchens, *It's Time to End 'Rape Culture' Hysteria*, **TIME** (March 20, 2014), available at http://time.com/30545/its-time-to-end-rape-culture-hysteria/. See also Heather MacDonald, *Meretricious Meets Meddlesome*, **CITY JOURNAL** (Winter 2014); Heather MacDonald, *The Campus Rape Myth*, **CITY JOURNAL** (Winter 2008)(criticizing exaggerated claims that there is a "rape epidemic" on college campuses.).

[87] On the other hand, it is important to recognize that there are fraudsters out there. The case of Somaly Mam, the internationally acclaimed Cambodian advocate for victims of forced prostitution, is almost mesmerizing in this regard. Did she falsely claim in her autobiography to have been forced into prostitution as a child because she desperately wanted to put herself in a position to help real victims? Or was this just a matter of her own vanity and

not to suggest that these problems are unimportant if they happen to be less widespread than what has been claimed. That is very far from the case. But a proper response to the problems is easier when the scope of the problem can be accurately ascertained.

In the meantime, the damage that can be done to young minds by falsely suggesting that there are large numbers of women and children being held captive for sex all over the country is important too. For that reason alone, getting cool-headed estimates of the problem—*by persons whose living depends neither on funding to combat the problem nor on selling newspapers and magazines*—should be a priority. In the end, we will likely have to live with some uncertainty, but, if so, we need to recognize that erring on the side of over-estimation is not costless.

We have some experience as a result of the Trafficking Victims Protection Act of 2000,[88] which created T-visas for victims of "severe" forms of labor or sex trafficking (and for their close relatives).[89] Congress received testimony on the issue prior to the statute's passage. A Department of State staff member, Theresa Loar, the Director of the President's Interagency Council on Women, told the Subcommittee on International Operations and Human Rights of the

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desire to sell books? Did she coach young women who had never been the victims of forced prostitution to misrepresent themselves on major television broadcasts, because she thought it would help her raise funds for the real victims? If so, why not use a real victim instead? Just why would she pursue such self-destructive behavior?

> In a major exposé of the scandal, Simon Marks reported in *Newsweek*:
>
> Mam has raised millions with a hectic schedule of meetings all over the globe with the good, the great and the super-rich—from the U.N.'s Ban Ki-moon to the pope. One day she will be speaking at the White House, and the next day she'll be enthralling schoolchildren in a remote corner of Cambodia.
>
> Mam claims to have rescued thousands of girls and women from sex trafficking, a dangerous and formidable feat. Her story becomes even more inspiring when you hear her shocking tale of being sold into sexual slavery. In 2005, she published her autobiography, *The Road of Lost Innocence*, which became an international best-seller. Mam was one of *Time*'s 100 most influential people in 2009 and has over 400,000 followers on Twitter.
>
> She has done so much for so many, does it matter that key parts of her story aren't true?

Simon Marks, *Somaly Mam: The Holy Saint (and Sinner) of Sex Trafficking*, **NEWSWEEK** (May 21, 2014).

[88] Trafficking Victims Protection Act, Pub. L. 106-386, 114 Stat. 1464 (2000).

[89] Severe forms of trafficking are defined as " sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." 22 U.S.C. 1702(9).

The statute also provides for U-visas for victims of other crimes (and their close relatives). 8 U.S.C. 1101(a)(15)(U).

House Committee on International Relations that about 50,000 women and children were pouring into the country as labor or sex slaves each year.[90] Rep. Christopher H. Smith (R-N.J.), the bill's chief sponsor, vowed to do something to stem this "tidal wave" of victims. Eventually, his bipartisan effort passed the House and Senate as part of the Victims of Trafficking and Violence Protection Act of 2000, with the 50,000 figure making its way into the Act's findings. President Clinton signed it into law on October 28, 2000.

But it turned out the Department of State had gotten that 50,000 estimate from a CIA analyst, who in turn had estimated the number mainly by reviewing clippings from foreign newspapers. According to the Washington Post's anonymous source within the CIA, the 50,000 figure was "unscientific," which, given how things turned out, may have been an understatement.[91]

The figure began to melt rapidly. Congress capped the number of T-visas available in any given year to 5,000 each year, despite its finding that there are about 50,000 victims each year. But at no time has the number actually given out been more than a few hundred.[92] To be fair, these things happen in the shadows, so no one would have expected 50,000 applications a year even if the estimate had been dead on. But as Ronald Weitner, a professor of sociology at George Washington University, pointed out, "The discrepancy between the alleged number of victims per year and the number of cases they've been able to make is so huge that it's got to raise major questions." An expert in criminology and trafficking, Weitzer drew the same tentative lesson from the data that I am inclined to draw, "[The discrepancy] suggests that this problem is being blown way out of proportion."[93]

A few years after the passage of the Act, the CIA revised its figure downwards to 14,500 to 17,500 each year, and the new figures made their way into a 2004 Department of State report.[94] But Attorney General Alberto Gonzales stated in 2006 that even these figures may be

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[90] Trafficking of Women and Children in the International Sex Trade, Hearing Before the Subcommittee on International Relations and Human Rights of the Committee on International Relations, House of Representatives, 106th Cong., September 14, 1999 at 13. A Justice Department official testified that the number might have been 100,000 each year.

[91] Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence: U.S. Estimates Thousands of Victims, But Efforts to Find Them Fall Short*, **WASHINGTON POST** (September 23, 2007).

[92] U.S. Department of State, *Nonimmigrant Visa Statistics*, available at http://travel.state.gov/content/visas/english/law-and-policy/statistics/non-immigrant-visas.html (last accessed July 17, 2014).

[93] Markon, supra n.23.

[94] U.S. Department of State, Trafficking in Persons Report: June 2004 at 24, available at http://www.state.gov/documents/organization/34158.pdf.

overstated.[95]

The Trafficking Victims Protection Act provides funding for programs to root and assist the victims of trafficking. If so few are being found relative to estimates, it is not because nobody has been looking for them. It is more likely that the estimates were overstated.

Meanwhile the Trafficking Victims Protection Act has been re-authorized and refunded four times—each time expanding the law in multiple ways. For example, the Trafficking Victims Protection Reauthorization Act of 2003 created a private right of action in federal court for victims along with other changes.[96] The Trafficking Victims Protection Reauthorization Act of 2005 added, among other things, grants to state and local government for enforcement and further victim assistance.[97] The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 redefined various trafficking crimes to make prosecution easier and made further changes.[98] The Trafficking Victims Protection Reauthorization Act of 2013 (Title XII of the Violence Against Women Reauthorization Act of 2013) provides, among other things, resources to support holistic support for survivors.[99]

Since I have a hard time estimating the number of women and children brought into the country for the purpose of sexual subjugation, I will refrain from taking this a step further and trying to estimate the number of teenage runaways who get lured into prostitution or the number of any other kind of prostitute. That would only take me further outside my areas of expertise.

Are State Legislatures Responding Appropriately?

Again, my answer is the same: Since I don't have a good handle on the scope of the problem generally, it is hard to have a clear position. But, again, I do know one thing: Legislating in haste is usually a bad idea.

The Criminal Law Amendment Act of 1885 in Great Britain was not all bad.[100] But just as it contained needed reforms (like raising the age of consent from 13 to 16), it also contained a number of missteps (like criminalizing all "gross indecency" between men whether in public or in private and providing for summary proceedings of various sorts).

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[95] Markon, supra n.23.

[96] Pub. L. 108-193, 117 Stat. 2875 (2003).

[97] Pub. L. 109-164, 119 Stat. 3558 (2005).

[98] Pub. L. 110-457, 122 Stat. 5044 (2008).

[99] Pub. L. 113-4, 127 Stat. 54 (2013).

[100] 48-49 Vict. ch. 69.

Similarly, the White-Slave Traffic Act (Mann Act) was not all bad.[101] It gave federal authorities the ability to intervene to stop women who were coerced or defrauded into crossing state lines to engage in prostitution. But it also defined the prohibited conduct too broadly, thus vesting federal authorities with too much enforcement discretion—discretion they eventually abused.[102] Legislate in haste; repent at leisure.

I was struck by the testimony of Greg Zoeller, Attorney General of Indiana. In 2012, the Super Bowl was held in Indianapolis. So-called experts predicted to him that the 2012 Super Bowl would be like all previous Super Bowls with staggering levels of "sex trafficking" and prostitution of both the child and adult varieties. When you think about, it seems obvious, doesn't it? About 70,000 attendees, most of them testosterone-driven men, are descending on a city for a thrill-filled weekend. They have money in their pockets, and they're away from the civilizing influences of home and hearth. We are lucky it wasn't worse than it was. Why would any city want to host such an event?

Zoeller took them seriously (as I believe his duty required him to do). The problem is that the whole notion that hordes of prostitutes descend on the Super Bowl each year appears to be something of a myth. As NFL spokesman Brian McCarthy put it in 2011, "This is urban legend that is pure pulp fiction."[103]

Said Phoenix police Sergeant Tommy Thompson after the 2008 Super Bowl: "We may have had certain precincts that were going gangbusters looking for prostitutes, but they were picking up your everyday street prostitutes. They didn't notice any sort of glitch in the number of prostitution arrests leading up to the Super Bowl."[104]

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[101] 36 Stat. 825 (1910).

[102] See supra at 10.

[103] Pete Kotz, *The Super Bowl Prostitution Hoax*, **THE VILLAGE VOICE** (February 1, 2012). See also Global Alliance Against Traffic in Women, What is the Cost of a Rumor? A Guide to Sorting Out the Myths and the Facts Sports Events and Trafficking (2011).

[104] Id. Writing for the New York Times, Kate Mogulescu, founder and supervising attorney of the Trafficking Victims Advocacy Project at the Legal Aid Society, wrote:

> No data actually support the notion that increased sex trafficking accompanies the Super Bowl. The Global Alliance Against Traffic in Women, a network of nongovernmental organizations, published a report in 2011 examining the record on sex trafficking related to World Cup soccer games, the Olympics and the Super Bowl. It found that, "despite massive media attention, law enforcement measures and efforts by prostitution abolitionist groups, there is no empirical evidence that trafficking for prostitution increases around large sporting events."

Tampa police spokeswoman Andrea Davis after the 2009 Super Bowl: "We didn't see a huge influx in prostitutes coming into Tampa. The arrests were not a lot higher. They were almost the same."[105]

Zoeller described how it was recommended to him at an August 2011 meeting of the National Association of Attorneys General (of which he was a member) that he look into the adequacy of Indiana's human trafficking laws. Upon his return to Indiana, he quickly began that process and ultimately concluded that changes were in order.[106] Because the Super Bowl was coming up in just a few months and the legislature's meeting was set for January, things had to be done fast. He testified:

So within three weeks -- and if you have ever dealt with legislation, you will know it is a Herculean task -- but within three weeks they passed the bill that we had recommended, well in time for the Super Bowl.[107]

> Even with this lack of evidence, the myth has taken hold through sheer force of repetition, playing on desires to rescue trafficking victims and appear tough on crime. Whether the game is in Dallas, Indianapolis or New Orleans, the pattern is the same: Each Super Bowl host state forms a trafficking task force to "respond" to the issue; the task force issues a foreboding statement; the National Football League pledges to work with local law enforcement to address trafficking; and news conference after news conference is held. The actual number of traffickers investigated or prosecuted hovers around zero.

Kate Mogulescu, *The Super Bowl and Sex Trafficking*, **THE NEW YORK TIMES** (January 31, 2014).

[105] Kotz, supra at n.35.

[106] In addition, Zoeller arranged for extensive training sessions:

> During the Super Bowl and in preparation, I'll say the pre-game warmup, we trained over 3,400 people, 60 different human trafficking trainings, 46 community outreach awareness activities, 45 efforts in passing out brochures, hundreds of efforts throughout the network of Super Bowl participants.
>
> We distributed 2,700-plus educational materials. We worked with law enforcement and others in this effort. And, as a post-game wrap-up, we had 68 commercial sex arrests, 2 human trafficking victims that were identified and recovered, 2 other potential trafficking victims who had been identified that are working with our law enforcement.

Tr. at 18. Zoeller did not explain what he meant by "human trafficking victims" or especially what he meant by "potential trafficking victims." Enough time had passed between the Indianapolis Super Bowl and his testimony that it ordinarily would have been possible to decide whether a particular person was or was not underage or the victim of force, coercion or fraud.

[107] Tr. at 17-18 (testimony of Attorney General Greg Zoeller).

This worried me. When statutes are passed in a hurry, they are frequently ill-considered. It should be done only when really necessary.

The most significant change was the addition of the following provision:

> (b) A person who knowingly or intentionally recruits, harbors, or transports a child less than sixteen (16) years of age with the intent of:
>
> (1) engaging the child in:
>
> (A) forced labor; or
>
> (B) involuntary servitude; or
>
> (2) inducing or causing the child to:
>
> (A) engage in prostitution; or
>
> (B) Participate in sexual conduct …;

commits promotion of human trafficking of a minor, a Class B felony. It is not a defense to a prosecution under this subsection that the child consented to engage in prostitution or to participate in sexual conduct.

Sounds good, right? And most of it probably is. But read literally, it makes it a Class B felony for a mother to force a child to make his bed or wash the dishes after a family dinner.[108] It is not a good thing to have a criminal code drafted in such a sloppy way.

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[108] A recent appellate case, U.S. v. Toviave, (__ F. 3d. __, 6th Cir. 2014), suggests that some ambitious prosecutors have read a federal forced labor statute in the way that I describe. Defendant Toviave was accused of violating 18 U.S.C. 1589, the federal statute making forced labor a crime, for making four young relatives of his from Togo cook, clean, do laundry, and babysit for his girlfriend and relatives. Toviave was also accused of physically abusing these children if they did not complete their chores – deplorable conduct that makes these children's situation very different from that of children in happy, loving households where parents use more appropriate disciplinary methods to make sure that housework gets done. Nonetheless, this case illustrates the problem with sloppy drafting of forced labor statutes.

Perhaps unknown to Gen. Zoeller, there are those who argue in good faith that parental abuse of children should be equated with slavery at least under certain circumstances. Akhil Amar and Daniel Widawsky have argued, for example, that the Thirteenth Amendment, which prohibits slavery, should provide federal remedies for children who have been abused.

> The idea that the Thirteenth Amendment might apply to child abuse will no doubt strike many readers as novel, if not farfetched. We ask these readers for patience and remind them that, for example, only a generation ago, the ideas that abortion and pornography implicate equality rights for women—ideas now widely held—were seen by many as similarly novel and farfetched.

Akhil Amar & Daniel Widasky, *Child Abuse As Slavery: A Thirteenth Amendment Response to DeShaney*, 105 **HARV. L. REV.** 1359, 1360 (1992). Might an Indiana prosecutor who is sympathetic to the arguments of Amar & Widasky also be inclined to interpret the new Indiana statute to cover the owner of a chain restaurant franchise who

Should Teenage Runaways Who Become Ensnared in Prostitution Be Treated as Criminals or Victims?

Thus far, I have been unable to supply definitive answers to any of the questions I have posed. This one is no exception. But I do feel like I can offer some food for thought.

First of all, the question presents a false dichotomy. The real question should be: ***Should they be treated as criminals, victims or something else?*** The most obvious middle course is the juvenile justice system, which I briefly describe below. Second, this question does not need to be and probably shouldn't be considered in isolation. Prostitution is not the only crime that troubled teens are lured into. They get lured into drug use, drug dealing, burglary, armed robbery and worse. And sometimes they don't need to be lured. They get there all on their own. Prostitution should not be treated as sui generis.[109]

Consider the hypothetical case of George, a sixteen-year-old runaway from a dysfunctional family in Chicago. George hitchhiked his way to a truck stop outside St. Louis, but with no money for food, he was starting to wonder if he'd done the right thing. As he sat outside the truck stop diner, a seemingly kind stranger offered to buy him breakfast. One thing lead to another and George's new friend ultimately recruited him into a ring of methamphetamine manufacturers and dealers operating out of truck stops throughout the Midwest. "It's easy and

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insists that his teenage son wait tables on weekends? Even if the restaurateur's actions violate the labor code, is it clear that the Indiana legislature would have wanted to make his conduct a Class B felony?

[109] Commissioner Achtenberg takes this one step further and asks whether adults who become ensnared in prostitution should be treated as criminals or victims. Since it is unclear to me how Commissioner Achtenberg is defining "sex-trafficked people," I am not precisely sure which persons she would classify as victims rather than criminals. But my response is the same no matter what her answer: It is not clear to me why prostitution should be treated differently from other crimes with regard to force, coercion or fraud. If one recasts my hypothetical in the text above to make sixteen-year-old George into eighteen-year-old George, it will illustrate my point. How much force, coercion or fraud is necessary for us to want to regard a methamphetamine manufacturer into a victim rather than a criminal? If the answer is different from what is necessary in the case of prostitution, what is the explanation for the difference? The overall system needs to be reasonably coherent.

Commissioner Achtenberg also points out that some prostitutes began working in the profession at a very young age—sometimes astonishingly young. But this is also true of drug dealers, pickpockets, armed robbers, murderers and even pimps. Again, therefore, my response is simply that none of this should be analyzed in isolation. If a woman who decides to become a prostitute at age fifteen is a victim rather than a criminal if she is still plying her trade at age twenty-five, it is unclear why the same would not be true for a burglar. If it should not be true, we need an explanation as to why.

One can always take the position that prostitution should be legalized. But if one does, then one must be prepared to explain why procuring prostitution should not also be legal. The policy needs to be coherent.

risk free," he told George. "If you help out for three months in our lab, you'll earn $20,000 and be able to go anywhere you want in the country with money in your pocket." And it was easy at first. But after three months, George wanted to cash out and go to Hawaii, but the friend told him he must keep at it at least for another three months to get his money. Before that time was up, police raided the lab and George was arrested. Is he a criminal or a victim?

In an earlier day, the answer may have been "criminal."[110] George may have been tried in an ordinary court and housed with adult prisoners if convicted. But Progressive Era reforms in the very late 19th and early 20th centuries created the juvenile justice systems that separated adult from youthful offenders. Under this system, a youthful offender is designated neither criminal nor victim; he is adjudged a "juvenile delinquent."

While the criminal justice system might be said to have punishment as its ultimate end, the juvenile justice system is aimed primarily or perhaps even exclusively at reform. Thus, for example, while a criminal record can last forever, a juvenile record is generally confidential and is ordinarily expunged once the minor becomes an adult.

There are circumstances under which a juvenile can be tried as an adult, particularly for very serious crimes. And reasonable persons disagree as to when circumstances should permit that. But most everyone agrees these days with the basic Progressive Era insight that juvenile offenders should under ordinary circumstances be treated differently from adult offenders—that

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[110] In deciding what to do about George's conduct, a court must decide first whether he has committed any crime at all. Was he coerced into doing what he did? If a gun had been held to his head, presumably many people would take the position that he committed no crime at all. Should it be enough to get him off the hook if he committed the crime because otherwise he feared that he would go hungry? I suspect most people would say no if George were an adult , but some may have more sympathy for him in this regard the younger he is. Reasonable minds will differ on where the line should be drawn between criminally culpable and coerced conduct. My point is simply that what constitutes "coercion" as a defense to a charge of prostitution should not be unrelated to what constitutes "coercion" as a defense to other crimes. If George wasn't coerced, was he defrauded? It was not true that his conduct was risk free, and it was not true he would only have to help at the lab for only three months. He was lied to. If fraud of this sort is not be a defense to George's crime (and I assume it is not), how about this: What if his "friend" had been a beautiful woman who falsely claimed she loved him, but that she needed cash from the methamphetamine sale in order to pay surgery necessary to save her life? What if he foolishly believed her lie? What if it is true?

I don't claim to have the one and only "correct" approach to questions of coercion and fraud. Deciding what should constitute sufficient coercion or fraud to completely or partially vitiate a teenager's (or an adult's) moral or legal culpability is a question best left to those who have been mulling over the question longer than I have. But I am disturbed by the notion that prostitution is so different from other crimes that it is unnecessary to think about it in the broad context of criminal activity and moral culpability.

they have diminished moral capacity and that the emphasis should be on reform.[111] But teens are not without moral capacity at all. Treating them as if they are is likely to be counterproductive—to result in more delinquent activity like George's and hence more shattered young lives.[112]

I fear not enough effort is being undertaken to reconcile the treatment of prostitution with the treatment of other crimes. But while the law has never been a perfectly seamless web, in the real world precious little is really in a category by itself. Reforms that are undertaken in isolation are by definition ill-considered. If one hasn't thought through how the same line of thinking would be applied in similar but not identical circumstances, then one hasn't thought through the issue.

Of course, the men (or women) who induce teenagers to engage in prostitution are wrongdoers.[113] *Of course*, they should be punished—regardless of how happy the teenager was to comply. That is an easy case. But it doesn't necessarily follow from that the best way to deal

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[111] They can and do disagree as to the details. Compare Steven Drizin, *Juveniles Deserve Jury Trials*, **CHICAGO TRIBUNE**, December 22, 1999 to Steven Fry, *Jury Trials for Youths May Strain Local Court*, **KANSAS CITY STAR**, June 21, 2008.

[112] Sometimes it is indeed true that victims, particularly very young, inexperienced ones, suffer from false consciousness and thus fail to realize how they have been taken advantage of. But it is always disconcerting when it is thought necessary to persuade someone that they have been victimized. When individuals take responsibility for their own choices, they are usually at least partially right. Efforts to force a story to fit a "pure victim" narrative may be every bit as culpably misleading as the panderer's inducements they seek to punish. The Guardian reported this statement by a public defender who specializes in representing defendants charged with prostitution:

> So no one comes into criminal court or to my office or to meet with any member of my team and says, "I'm a victim of trafficking, thank goodness the NYPD arrested me, because I've just been looking for assistance, and I don't know where to look." That's not what happens.
>
> But what we learned by listening to our clients' experiences is that many of them have experienced trafficking, and many of them, even more than that, have experienced severe marginalization, exposure to violence ... and that's an area that's of real concern to us as well.

Jessica Valenti, *Inside Human Trafficking: Don't Call it "Modern Day Slavery," Fix It Already*, **THE GUARDIAN** (April 25, 2014).

[113] Everyone seems to agree that it is common for teenage runaways who are induced to engage in prostitution to view themselves as in league with the inducer rather than as his victim. Call it youthful lack of judgment. Or call it Stockholm syndrome. Either way, it is something that has to be dealt with. When it comes to prosecuting the panderer, it is not clear which approach to the teenager's criminal liability is best. If the teenager identifies with her panderer, she may not be willing to testify against him. What is more likely to persuade her to do so? The threat that she may be in trouble with the law if she does not? Or an assurance that no legal blame will fall upon her no matter what? Is the former kind of pressure appropriate? If it isn't, are we prepared to live with the consequences of not being able to prosecute the panderer? It is tempting to want to wish away this problem by insisting that there are always other ways to prove the panderer's guilt beyond a reasonable doubt. But I am unconvinced.

with the teenager's conduct is always to declare her merely a victim. A thirteen-year-old who knows she will be beaten black and blue if she doesn't do as her panderer says is at one end of the spectrum. A seventeen-year-old who is enthusiastic about her newly found "profession" and who has passed up many opportunities to escape the influence of her panderer is at the other end.

As Commissioner Achtenberg points out in her statement, Congress currently has before it proposed legislation entitled "Stop Exploitation Through Trafficking Act" or "SETTA". If passed, it would (among other things) withhold a portion of a state's federal funding under the Omnibus Crime Control and Safe Streets Act of 1968 if that state does not follow the federal government's preferred policy as to juvenile prostitution. SETTA would give states three years to pass legislation treating a juvenile who has engaged in prostitution or other commercial sex as "a victim of a severe form of trafficking in persons." The state legislation would have to discourage prosecution and instead to encourage delivering up the juvenile to child protection services.

I oppose SETTA. I see no good reason to for a "one size fits all" approach in this area. If treating all of those minors who engage in prostitution (rather than just those minors who are forced, coerced or defrauded into it) seems like a good idea, then let those states that think so take the lead and adopt the policy. If others are impressed with the results, they will follow. There is no need for enforced uniformity here.

How Should International Labor Trafficking Be Treated Under the Law?

I would also like to comment briefly on the tendency to view the complexities of so-called "international labor trafficking" as something inherently sinister. This is a tricky area. There is plenty of opportunity for fraudulent or coercive behavior in these transactions. But there is also opportunity for gain by the most vulnerable of the world's people, trapped in poverty. If we make it too difficult for labor brokers to function in various places around the world, we will have inflicted serious harm on those we are seeking to protect.

Bear in mind that almost all of us "traffic" in labor at one time or another. I get paid to be a law professor.[114] If I ever lose that job, I would be unlikely to find another in the San Diego area

[114] Note also my contract is not "at will" on my part. I sign a contract that requires me to remain with the University of San Diego for the year. The reason is clear: It is very difficult for universities to engage someone to teach a class halfway through the semester. For similar reasons, movie stars sign contracts to complete a film and sailors sign on for entire voyages. To be sure, if I were to breach my contract, I probably could not be ordered by a court to perform against my will. But at least in theory and sometimes in practice, I can be made to pay damages if, for example, I quit suddenly and the University has to pay someone to finish teaching my classes at a cost higher than what I was being paid. That is fair. Fortunately for me, if I ever need to breach my contract, I can pay appropriate damages. Those with fewer resources than I have may find employers less willing to invest in that employee's

where I live, so there is a good chance I would have to move. Fortunately for me, I have a little money in the bank to tide me over and finance my move, whether it is 1000 miles to Dallas or 8000 to Delhi. I am lucky.

My ancestors were not as lucky. They didn't have money in the bank. Indeed, I'm not sure they had ever heard of a bank. But they had heard of the New World, and they wanted to come. The problem of how to finance a long voyage from a land of poverty to a land of opportunity is an old one. The seventeenth century British isles had a lot of willing workers, but not a lot of work or even food.[115] The American colonies were crying out for them. It was a match made in heaven. But the logistics of getting from Point A to Point B only seem easy to us because we are looking at them from a distance of hundreds of years. In reality, it required smart thinking and a willingness to take a risk. Who would pay for their passage? And who would pay for their food during the long passage? Where would they sleep before their first paycheck? What would they eat? They didn't have savings. Nor did they have credit.

One of the most logical ways for aspiring immigrants to get credit was to commit themselves to labor through a written indenture, which could be sold by a labor broker to the highest bidder upon arrival in the New World. Put differently, their best option was to become indentured servants—typically for terms of three to seven years.[116] No Old World bank could take the risk

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training, because the employee may leave thus making it impossible for the employer to recoup its investment. See Christopher T. Wonnell, *The Contractual Dispowerment of Employees*, 46 **STAN. L. REV.** 87 (1993).

[115] For example, a study of Scots-Irish immigrants found that the five waves of immigration from Northern Ireland all occurred during periods of famine and disease. James G. Leyburn, **THE SCOTCH-IRISH: A SOCIAL HISTORY** 184 (1962). In England, those who chose to emigrate as indentured servants tended to be from fatherless households, which had neither the funds nor the connections to land an apprenticeship for their children. See Farley Grubb, *Fatherless and Friendless: Factors Influencing the Flow of English Emigrant Servants*, 52 **J. ECON. HIST.** 85, 95 (1992). As harsh as conditions were in the New World, they were better than what these emigrants would have faced by staying home. See also Stanley Lebergott, **THE AMERICANS: AN ECONOMIC RECORD** 27 (1984)("[T]he life prospect faced by most Europeans [was bleak]. They could not own land. Nor could they even hope that their children might. In the New World, however, it was possible to buy a small farm after working and savings for a year or two.").

All in all, these migrants were hardly irrational for choosing to come to the New World as indentured servants, despite high mortality rate and all the other risks. See, e.g., Edwin J. Perkins, **THE ECONOMY OF COLONIAL AMERICA** 91 (2d ed. 1988) ("The indenture system was, for up to 90 percent of its participants, a market-driven, unexploitative arrangement that financed the movement of thousands of willing migrants to the colonies ….").

[116] Somewhere between one-half and two-thirds of all white immigrants to the American colonies from the mid-17th century to the Revolutionary War came as indentured servants—either voluntarily or as convicts. Convicts were only about 10% of the total number of indentured servants. Abbot Emerson Smith, **COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607-1776** 336 (1947); Edwin J. Perkins, **THE ECONOMY OF COLONIAL AMERICA** 93 (2d ed. 1988).

of lending money to these would-be immigrants. There would be no way to assure its repayment once they got to America. The debtor could disappear into the interior, never to be located by the bank again.[117] But while an Old World bank couldn't take the risk, a seventeenth-century Massachusetts Bay farmer in need of assistance could. In addition to providing room, board and work, he could keep a sharp eye on his investment. His neighbors had a stake in helping him do so, since they often had indentured servants too. The system worked imperfectly, but well enough to bring a lot of people to America who otherwise could not have gotten here.[118]

No one should be under any illusion about the potential for abuse here. Stories abound of seventeenth century Englishmen being kidnapped and thrown onto a ship headed for America.[119] I suspect these stories are often true. And there were other problems too. In the seventeenth century, recruiters usually knew a good deal more about what life is going to be like in the New World than did the potential recruit. They therefore were in a position to mislead the recruit in order to persuade him to make the move. *"The streets are paved with gold in the New World"*—or so many were told. In addition, once the servant arrived at his destination, his employer had an incentive to squeeze as much work out of him as possible. Indeed, an employer who was also a slaveholder had good reason to assign an indentured servant to the more hazardous jobs, since the death of an indentured servant, particularly one whose indenture was about to expire, was less harmful financially to the employer than the death of a healthy slave.[120]

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[117] David W. Galenson, *The Rise and Fall of Indentured Servitude in the Americas: An Economic Analysis*, 44 **J. ECON. HIST.** 1, 3 (1984)("Existing English capital market institutions were patently inadequate to cope with the problem, considering difficulties that included the high transactions costs entailed in making loans to individuals and enforcing them at a distance of 3,000 miles.").

[118] Christopher T. Wonnell, *The Contractual Dispowerment of Employees*, 46 **STAN. L. REV**. 87 (1993)(discussing advantages and disadvantages for the worker of indentured servitudes compared with a free labor system).

[119] For some ugly examples, see John van der Zee, **BOUND OVER: INDENTURED SERVITUDE AND AMERICAN CONSCIENCE** 67-227 (1985).

[120] It is important to neither minimize nor exaggerate the adversity suffered by indentured servants. Dr. Russell Menard, professor of history at the University of Minnesota and a leading expert in the social and economic history of the North American colonies, has written: "Servants could not sue at common law, but they could protest ill-treatment and receive a hearing in the courts. Cases in this period are few, but the provincial court seems to have taken seriously its obligation to enforce the terms of indentures and protect servants' rights. No instances of serious mistreatment of servants appear in the records in the late 1630s and early 1640s. Servants were worked long and hard, but they were seldom abused." Russell R. Menard, *From Servant to Freeholder: Status Mobility and Property Accumulation in Seventeenth-Century Maryland*, 30 **WM. & MARY Q.** 37, 48 (1973) (citations omitted). This is not to say that disobedient servants would not be punished, sometimes cruelly. One Maryland statute prohibited employers from administering more than 10 lashes without permission from a court. Robert J. Steinfeld, **THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870** 45-46 (1991).

Seventeenth-century law and practices dealt with this as was thought best at the time—including by having indentures be specific, limited as to time and in writing. But no doubt abuses occurred.

Note that the labor recruiter was the first performer and was hence vulnerable too. He had secured passage for the indentured servant. If the indentured servant jumped ship when the ship arrived in Boston Harbor, his recruiter (or whoever financed his trip) would likely never see a return on his investment. Similarly, once the employer paid for the indenture, he became vulnerable. If the servant ran away, did a poor job, got sick or died, the employer lost his investment. Employers could not threaten indentured servants with firing, because that was what the servant wanted.

It's almost 400 years later, but some of the fundamentals of human existence don't change easily. These days, a higher proportion of the world's residents can finance their own trips.[121] Alternatively, some have relatives who have gone before them who can help. Like many modern Americans, they are lucky. But the world's population is much higher, so the number of persons from poverty-stricken parts of the world seeking to immigrate to more prosperous lands is probably larger than ever. Many face the same problems that that my destitute ancestors did: How do I connect with someone who will want to hire me? Who is going to finance the trip?

Again, sometimes the only practical alternative for an aspiring immigrant is to incur a debt to a labor broker who may then pass that debt on to an employer (or the labor broker may remain the immigrant's legal employer, who then lends out the immigrant to the individual or enterprise for whom the immigrant actually labors). In such cases, the immigrant will almost always have to promise to remain with the employer until the debt is worked off. These arrangements seldom look exactly like the indentured servitudes of the seventeenth century. But in terms of their economic structure, they are essentially modern-day variations on a theme.

There is plenty of reason to regulate closely these variations on the indentured servant theme (and to try to come up with ways to make it easier on the immigrant). Some countries may choose to forbid them entirely. But if it is U.S. policy to prevent all these variations not just here in America but also abroad, an important method by which the world's most impoverished people can lift themselves out of poverty will be lost.[122] The credit necessary to finance

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[121] David W. Galenson, *The Rise and Fall of Indentured Servitude in the Americas: An Economic Analysis*, 44 **J. ECON. HIST.** 1, 3 (1984).

[122] The Thirteenth Amendment to the U.S. Constitution states, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction" and that "Congress shall have power to enforce this article by appropriate legislation." The language was modeled roughly after the Northwest Ordinance of 1787, which had outlawed

immigration has to come from somewhere. This problem cannot be wished away by good intentions.[123]

Our briefing was specifically on "sex trafficking," so there was not much opportunity to discuss the international labor question more generally. But the testimony of Dr. Rhacel Parreñas, professor of sociology at the University of Southern California, nevertheless touched on what I am describing in discussing a diplomatic issue that arose between the United States and Japan. According to Dr. Parreñas, the designation of Filipina hostesses in Japan as sex-trafficked by the U.S. Department of State was well meaning, but ultimately heavy-handed and counter-productive:

> "Sex trafficking" became an issue that I had to address when migrant Filipina hostesses in Japan, a group of labor migrants who I had been studying, were labeled by the U.S. Department of State as sex trafficked people. As the 2005 TIP Report states, *"A significant number of the 71,084 Philippine women who entered Japan as overseas performance artists in 2004 are believed to have been women trafficked into the sex trade"* (178). Justifying claims of their trafficking, they were described in the 2004 TIP Report as *"victims... stripped of their passports and travel documents and forced into situations of sexual exploitation or bonded servitude..."* (14). I should qualify that the labeling as trafficked persons of 80,000 plus migrant Filipina hostesses in 2005 made them the largest group of trafficked people worldwide or 10 percent of the 800,000 estimated trafficked persons in the world.
>
> The label of sex trafficked persons is one that has directly affected the migration of Filipina hostesses. It has led to a drastic reduction in their numbers. Since 2006, their annual entry has hovered at around 8,000. Many would consider this drastic decline as a victory in the war on trafficking. It marks their successful rescue. But I care to differ. As

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slavery in the Northwest Territory and which had been incorporated into the law of the various states there once they entered the union. Interestingly, it was not thought to outlaw all voluntarily entered indentures of reasonable duration. See, e.g., Ohio Const. of 1802, art. VIII, § 2. At the time, such arrangements were likely thought to be necessary in order for those without funds to finance not just immigration but occupational training.

[123] In this country, plantation owners in the Jim Crow South often did their best to prevent labor agents from recruiting African Americans to the industrial North, where there was a strong need for workers. See David E. Bernstein, **ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL** (2001). It is an aspect of history that gets little attention today. Instead we tend to concentrate on the segregation of buses, trains, hotels, restaurants, and schools. To be sure, the humiliation of "separate but equal" public accommodations was serious. The clearly unequal access to public education was even more serious. But the seldom remarked-upon efforts to prevent migration may have been as great an obstacle to African American advancement at the time, perhaps even greater. There is no more effective way to "keep 'em down on the plantation" than to ban labor recruiters.

> a gender and migration scholar, I actually see this drastic decline as nothing but a threat to the empowerment of migrant women and an end to the gains they have made in migration, including their acquired role as breadwinners of the family. The curtailment of their migration signals not their rescue but instead their domination, specifically their job elimination and their forcible unemployment. We need to listen to Filipina hostesses in Japan and figure out why many of them asked me, in reaction to their labeling as sex trafficked persons by the U.S. government, "Why is your government making our lives difficult?" [124]

Dr. Parreñas described the hostesses as "women who basically engage in the sexual titillation of their clients, but not necessarily by physical contact but by flirting." Tr. at 139. She warned of the "false assumption that these women had not been willing to be there, but were somehow duped and forced to be in that situation."

She further lamented that "a lot of our knowledge on sex trafficking" is "actually not based on empirical research." Dr. Parreñas is not guilty of this herself. She spent three months working in a Tokyo nightclub among Filipina hostesses as part of her fieldwork.[125] This was her conclusion:

> Without question, the absence of due diligence on the part of the U.S. Department of State and the organizations they have funded to help Filipina hostesses and the false claim of their sex trafficking has violated their civil rights. … [I]t eliminated their jobs, forcing their return to a life of abject poverty in the Philippines.[126]

Several things may have influenced the Department of State's decision to label these women as "sex trafficked." But a major factor was that these women had to commit to work for one particular employer for the length of their work visa.[127] To be sure, this is hardly a thing to be celebrated. In a more perfect world, it would be nice for them to be free to switch employers at will. But here in the real world, things are complex. The person who finances the trip must be able to recoup the investment made in the migrant's transportation or else the funds that are

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[124] See infra at 133 (written remarks of Dr. Rhacel Parreñas).

[126] Tr. at 140.

[127] See **THE FORCE OF DOMESTICITY**, supra note 56, at 144-48 describes complex transactions used by Filipina entertainers to come to Japan. For example, the legal employer of the entertainers is the Japanese promoter, not the club at which she works. Her wages (but not her tips) are withheld until the end of her term in Japan.

being available will dry up. Commitments of this sort are not the exception in international migration. For immigrants without the means to finance their journeys, they are the rule.[128]

As Dr. Parreñas described, the designation of Filipina hostesses as victims of sex trafficking made them worse off, not better off. "Japan now requires Filipina hostesses to go through two years and not just six months of singing and dancing lessons to qualify" for a visa. Most women in these situations cannot afford that. Those who can afford it now have greater debt prior to their migrations, thus aggravating their indenture.

Those who cannot afford an extra year and a half of singing/dancing education must come up with a Plan B. Dr. Parreñas notes that there has been a spike in the number of marriage visa applications. Some of these are probably based on false marriages. Some may be based on actual marriages to men the women have never laid eyes on. Either way, these women may be undertaking greater risks than they did as hostesses.[129] Others, of course, simply remain at home in hopeless poverty. Many would likely have preferred the deal my ancestors got—the option to sign onto an indenture of limited duration. Given that transportation costs are far less today than they were in the seventeenth century, these indentures ought to be of a very short term (as they were in the case of the Filipina hostesses). But just because we may not wish to have such arrangements in this country does not mean that we should endeavor to wipe them out globally.

Conclusion

I have been unable to offer definitive answers to any of the questions I have posed. In addition, there are many questions I did not pose at all, because I did not feel I could contribute anything by doing so.

But my overall impression is that the core case of slavery, sexual or otherwise, is uncontroversial among Americans: We oppose it without reservation. A large number of human beings have selflessly dedicated themselves to eliminating slavery. They have enlisted the help of long-established organizations and formed new ones. Individuals, foundations and governments have funded these efforts. And their work has been successful in some instances.

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[128] Even here in the United States (though for different reasons), workers from abroad with H-1B visas who are temporarily employed in specialty occupations may only "accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a). Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease." 8 U.S.C. 1184(m)(1)(as amended by the American Competitiveness in the Twenty-First Century Act of 2000, which was enacted in part to help H-1B visa holders change jobs more easily.)

[129] Tr. at 141.

Our unanimity in supporting these efforts, however, is part of the problem. No organized groups see it as their role to urge us to avoid exaggerating the prevalence of slavery. There is (mercifully) no "pro-slavery lobby" in this country. Our unanimity has thus led to mission creep. We are geared up to fight the dragons of slavery. When too few dragons show up for the battle, we use our dragon slaying equipment to fight entirely different beasts. But if we are going to be successful, we need to use the right weapons for the right battle. I urge greater caution.

PANELISTS' WRITTEN STATEMENTS

Note: Statements are unedited by the Commission and are the sole work of the author.

Maggie Wynne, Director, Division of Anti-Trafficking in Persons, U.S. Department of Health and Human Services

Federal Efforts to Eliminate Sex Trafficking and Assist Trafficking Victims
Statement of Maggie Wynne
Director, Division of Anti-Trafficking in Persons
U.S. Department of Health and Human Services
before the United States Commission on Civil Rights

April 13, 2012

Chairman Castro, Vice Chairman Thernstrom, and Commissioners, my name is Maggie Wynne and I am the Director of the Division of Anti-Trafficking in Persons (ATIP) in the Office of Refugee Resettlement (ORR) within the Administration for Children and Families (HHS), an agency in the U.S. Department of Health and Human Services (HHS). I appreciate the opportunity to provide you a description of HHS' work to identify and assist victims of human trafficking, including sex trafficking.

TVPA Requirements

HHS is required by the Trafficking Victims Protection Act of 2000 (TVPA), as amended, to conduct the following activities:

- Provide certification of adult foreign victims of trafficking and determine the eligibility of child foreign victims, making them eligible for benefits and services under any Federal or State program to the same extent as an alien admitted to the United States as a refugee;
- Participate in the President's Interagency Task Force to Monitor and Combat Trafficking (PITF) and the Senior Policy Operating Group (SPOG);
- Establish and carry out programs to increase public awareness of the dangers of trafficking and the protections that are available for victims of trafficking;
- Consult and cooperate with the Department of Justice when it conducts a biennial conference addressing trafficking in persons and commercial sex acts that occur in the United States; and
- Train appropriate HHS personnel in identifying victims of severe forms of trafficking and providing for the protection of such victims, and provide training to State and local officials to improve the identification and protection of such victims.

In addition, HHS is authorized to provide services to assist potential victims of trafficking in achieving certification and to assist minor dependent children of victims of severe forms of trafficking in persons or potential victims of trafficking.

The Secretary of HHS delegated responsibility for certification, eligibility determinations, and public awareness activities to the Assistant Secretary for Children and Families who further delegated them to the Director of ORR.

Victim Assistance and Services

Certification and Eligibility

The most important role that HHS has is the first responsibility listed. Through formal and informal interagency agreements, HHS, DOJ and the Department of Homeland Security (DHS) coordinate to ensure that, when law enforcement has identified an alien in the United States who is victim of trafficking, ORR receives the necessary information to provide that victim access to benefits and services. When ORR receives a notification from the U.S. Citizenship and Immigration Services (USCIS) that it has made a bona fide T visa determination or granted T nonimmigrant status to a victim of trafficking, we have the information we need to issue a Certification Letter or an Eligibility Letter, which are the means by which we notify adult and child victims, respectively, of their eligibility to access the benefits and services they may need to recover from their experience and rebuild their lives in the United States.

Similarly, when the Law Enforcement Parole Unit within U.S. Immigration and Customs Enforcement (ICE)/Homeland Security Investigations notifies us that it has granted continued presence (CP) to a victim of trafficking who is assisting a law enforcement investigation, ORR can act to get that victim connected to needed health care and social services.

The benefits and services available to foreign victims of trafficking are the same ones available to refugees who arrive with the hope of finding employment, education, and a new life in America. And these, in turn, are largely the same ones available to U.S. citizens and most lawful permanent residents. The benefit programs, many of which are time-limited, include the following:

- Temporary Assistance for Needy Family (TANF), Supplemental Security Income (SSI), or - for those who are ineligible for these programs – Refugee Cash Assistance;
- Medicaid, the State Children's Health Insurance Program (SCHIP), or - for those who are ineligible for these programs – Refugee Medical Assistance;
- Supplemental Nutrition Assistance Program (SNAP), formerly the food stamp program;
- Refugee Social Services and Targeted Assistance;

- Matching Grant Program;
- Public Housing Program or Tenant-Based Vouchers;
- Title IV Federal Student Financial Aid; and
- One-Stop Career Center services or Job Corps.

Unaccompanied child victims may be eligible for the Unaccompanied Refugee Minors (URM) Program, which provides specialized, culturally appropriate foster care or other licensed-care settings according to children's individual needs.

There are also many Federal and State health, nutrition, and social service programs that do not consider a potential recipient's immigration status a condition for eligibility.

ORR Trafficking Victim Assistance Program

In addition, ORR funds the National Human Trafficking Victim Assistance Program, which supports comprehensive case management services to foreign victims of trafficking and potential victims seeking certification in any location in the United States. The three grantees provide case management to assist victims of trafficking to become certified, and other necessary services after certification, through a network of sub-awardees throughout the country.

These grants ensure the provision of case management, referrals, and emergency assistance (such as food, clothing, and shelter) to victims of human trafficking and certain family members. They help them gain access to housing, employability services, mental health screening and therapy, medical care, and some legal services, enabling them to live free of violence and exploitation.

Victim Identification and Public Awareness

***Rescue & Restore* Campaign**

ATIP leads the HHS *Rescue & Restore Victims of Human Trafficking* public awareness campaign, which established Rescue and Restore coalitions in 24 cities, regions and States. These community action groups, which have grown in number over the years, are comprised of nongovernmental organization (NGO) leaders, academics, students, law enforcement agents, and other key stakeholders who are committed to addressing the problem of human trafficking in their own communities.

ATIP offers free materials to Rescue and Restore coalitions and other campaign partners to assist them in their education and awareness-raising activities. With the tag line of "Look Beneath the Surface," these posters, brochures, videos, and pocket assessment cards encourage intermediaries who encounter victims of trafficking to recognize clues and ask the right questions because they may be the only outsiders with the chance to reach out and help victims.

Materials and other information are available for download or order on our website at www.acf.hhs.gov/trafficking.

Rescue and Restore Regional Program

The Rescue and Restore Regional Program serves as the focal point for regional public awareness campaign activities and intensification of local outreach to identify victims of human trafficking. Each of the 11 ATIP-funded Rescue and Restore Regional partners oversees and builds the capacity of a local anti-trafficking network, sub-awarding 60 percent of grant funds to grassroots organizations that identify and work with victims. By acting as a focal point for regional anti-trafficking efforts, *Rescue and Restore* Regional partners encourage a cohesive and collaborative approach in the fight against modern-day slavery.

National Human Trafficking Resource Center

The National Human Trafficking Resource Center (NHTRC) is a national, toll-free hotline for the human trafficking field in the United States and is reached by calling **1-888-3737-888** or emailing NHTRC@PolarisProject.org. The NHTRC operates 24 hours a day, seven days a week, every day of the year. The NHTRC works to improve the national response to protect victims of human trafficking by providing callers with a range of comprehensive services, including crisis intervention, urgent and non-urgent referrals, tip reporting, and comprehensive anti-trafficking resources and technical assistance for the anti-trafficking field and those who wish to get involved. The NHTRC maintains a national database of organizations and individuals working in the anti-trafficking field, as well as a library of available anti-trafficking resources and materials.

Training

In addition to the training provided by our grantees, HHS directly provides training to its own staff, state and local officials, and entities receiving HHS funding.

ATIP hosts several Web-based trainings each year, including the following trainings related to sex trafficking during the last two fiscal years:

- "Reducing Demand for Commercial Sex," by San Francisco-based anti-trafficking organization Standing Against Global Exploitation Project (SAGE);
- "How to Assist American Indian Sex Trafficking Victims," by the Executive Director of the Minnesota Indian Women's Resource Center;
- "Domestic Minor Sex Trafficking: How to Identify and Respond to America's Prostituted Youth," by Shared Hope International; and
- "Runaway and Homeless Youth Programs: Resources for Conducting Outreach and Providing Services to Trafficked Children and Youth," by the ACF Family and Youth

Services Bureau (FYSB) and the Runaway and Homeless Youth Training and Technical Assistance Center (RHYTTAC).

Participants included social service providers, federal and local law enforcement, academic researchers, state officials, and representatives from international entities.

In addition, each of the 10 ACF Regional Offices throughout the United States has established an Anti-Trafficking Point of Contact. The objective of this partnership with ATIP is to increase the integration of trafficking-related trainings within existing regional health and human service programs, and to build the capacity of communities to assist trafficking victims. Many of the Regional Offices have hosted internal or public human trafficking trainings or events, and are often represented on local Rescue and Restore coalitions or DOJ anti-trafficking task forces. As one example, in FY 2011, the ACF Region V office joined the Illinois Rescue and Restore Coalition to host a Chicago Alliance Against Sexual Exploitation (CAASE) "Train the Trainer" seminar on youth prevention curriculum "Empowering Young Men to End Sexual Exploitation."

The HHS Indian Health Service (IHS) provided two internal presentations on human trafficking among Native populations: the first to the staff of the IHS Office of Clinical Preventive Services (OCPS), which included clinicians and policy makers in IHS; and the second as part of the IHS Chief Medical Officer's Rounds, with availability to those medical providers within all of IHS that could join the WebEx.

In September 2010, two work groups within the Centers for Disease Control and Prevention (CDC) — the Violence against Women Workgroup (of the Division of Violence Prevention) and the CDC-wide Health and Human Rights Workgroup — sponsored a day-long symposium entitled "A Symposium on Human Trafficking: The Role of Public Health." The symposium, attended by over 100 CDC staff, provided a foundational overview of the issue of human trafficking in the U.S. — particularly sex trafficking — and served as a forum for exploring the public health implications of human trafficking; research and data collection on human trafficking; current responses to human trafficking; and the potential role of the public health sector in the prevention of human trafficking.

Through these and other opportunities, HHS is expanding the capacity of potential intermediaries throughout the country to understand better trafficking in persons and how they can assist persons who have been or may be exploited in commercial sex or forced labor.

Bridgette Carr, Professor and Director, Human Trafficking Clinic, University of Michigan law School and Member, Michigan Human Trafficking Task Force

Bridgette Carr Testimony

Good morning. My name is Bridgette Carr. I am a Clinical Assistant Professor at the University of Michigan Law School and Director of the Human Trafficking Clinic. I appreciate the opportunity to discuss this important issue.

In the Human Trafficking Clinic, my students and I provide a variety of legal services to victims of both sex and labor trafficking. Our clients are men, women, and children; foreign nationals and U.S. citizens. We see firsthand the impact of U.S. law and policy on sex trafficking victims and the view is dire. Current criminal justice practice in the United States, at all levels within the system, fails to identify and protect victims of sex trafficking. The clients we serve exemplify the need for a paradigm shift in sex trafficking cases.

The passage of the Trafficking Victims Protection Act in 2000[1] and its subsequent reauthorizations were crucial steps in the fight against human trafficking. This Act recognized that adults who are being prostituted and all children under the age of 18 who are being induced to perform commercial sex acts are victims of human trafficking.[2] However, this designation is not enough. Simply defining new categories of victims does not overcome decades of criminalizing individuals in the commercial sex industry. Law enforcement is well versed in arresting and jailing criminals. But as a nation, we cannot improve upon our response to and our protection of victims of sex trafficking unless we create a new model which supports ***victims*** rather than treating them as ***criminals***.

The examples I will share with you today are all cases involving sex trafficking in which females are the victims; however, sex trafficking also affects men and boys. Sexual abuse is not isolated to sex trafficking since the majority of our labor trafficking cases also involve sexual abuse. In all of my examples, names and identifying information have been changed to protect the victims.

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[1] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 2151n, 2152d, 7101-7110).

[2] See 22 U.S.C.A. § 7102(8) (West 2012) ("The term "severe forms of trafficking in persons" means . . . sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age....").

Sally was a 16-year-old girl brought to Michigan and exploited by an adult male trafficker. A family member, worried about Sally's absence, found a picture of Sally in an online ad. Based on the phone number in the ad, the family member called the local police. The police went to the motel and found Sally, an 18-year-old victim named Brenda, and the trafficker. All three were forced to drop to the floor and were put in handcuffs. Sally was detained in a juvenile facility for three weeks, while Brenda, who turned 18 approximately four weeks prior, was put in the county jail. At no time while being held were Brenda or Sally ever provided services as victims of human trafficking nor were they treated as victims. Sally subsequently did not want to participate in the prosecution of her trafficker since her experience with the criminal justice system had not been kind to her. In fact, her experience confirmed what traffickers often tell their victims – "if you try to leave me or get help you will be arrested." Sally had health issues that made returning to Michigan for the trial problematic and despite our efforts to quash the subpoena and negotiate alternatives to in-person testimony with the local prosecutor, Sally was forced to travel back to Michigan and participate in the prosecution against her will.

My next example involves a 14-year-old girl who was recently apprehended after being sold for sex. In Michigan, a child under 16 years of age cannot be charged with prostitution, so this child was instead held under a possession of tobacco by a minor charge. A member of law enforcement who was outraged by her treatment told me of her case and I immediately tried to reach out to help her. I called her public defender, offering the resources of the clinic as well as information about shelters and programs to assist the young girl. Sadly, the public defender told me that the girl's case was being transferred back to the child's city of former residence and that she didn't even know where the child was physically located anymore. I was stunned. The child's former residence was a squatter house located in the city where she had first been recruited and sold by her trafficker. I have never been able to find this child to offer her our assistance.

The exploitation of children by traffickers is heartbreaking and the approach of our criminal justice system towards these same children is often tragic. However, adults must not be forgotten since ignoring a victim after his or her eighteenth birthday is both irrational and unacceptable. In particular, adults who are able to escape their traffickers are often haunted by criminal convictions that occurred during their trafficking and, in many states, there is no avenue for a victim of sex trafficking with one or more convictions of prostitution to expunge or vacate the convictions.

In the Clinic, we are currently serving a woman, I will call her Emily, who was brutalized by her trafficker and sold for sex in multiple states. In one state, Emily was arrested by law enforcement and charged with prostitution. Emily's trafficker hired a lawyer for her. The lawyer never spoke with Emily, only with her trafficker. The next day Emily's trafficker took her to another state and sold her again. After Emily finally escaped, she found our clinic and we began to help her. When she first came to us, she was not sure of the resolution of the prostitution charge; sadly, we discovered the attorney had pled guilty without her permission. Emily is now in school and has

hopes of finding a job in her chosen profession. However, she is terrified that when she applies for a job it will require a background check and her prostitution conviction will appear. Traffickers know how difficult it is to vacate or expunge prostitution convictions such as this. We have spent over a year trying to expunge or vacate this conviction, but so far we have been unsuccessful. Thankfully, Emily has a support network to help her wait out this legal process. However, I worry that without such a network, Emily would still be at great risk of being exploited again because of her inability to pass a background check.

Arresting, detaining, and jailing victims of sex trafficking is unacceptable; however it is happening all over this nation. Communities across the country are working to create an accurate picture of the prevalence of human trafficking. Significant time and effort is spent trying to identify the number of victims in any given community, but rarely do these efforts focus on the most obvious locations: jails and juvenile detention centers. For every political leader or community member who asks "where do we find the victims" or "we want to help victims of human trafficking, but don't have any in our community," I answer "go to your jails and talk to the adults and children who were apprehended for prostitution." One amazing lawyer is doing just that.

Kate Mogulescu is a Staff Attorney at the Legal Aid Society in New York. She leads the Trafficking Victims Legal Defense & Advocacy Project. This project is "the first effort by a public defender office to address the problem of systemic criminalization of victims of trafficking and exploitation."[3] Kate, along with a social worker, screens cases in which individuals have been charged with prostitution to see if the individual is a victim of human trafficking.[4] The project began in March of last year and within the first six months, 139 individuals were represented of which over 40 disclosed trafficking histories and an additional 35 were identified as being at extremely high risk for trafficking.[5] While this data is unsurprising to advocates and victim service providers working on this issue, this reality is not yet acknowledged by our criminal justice system.

So, what must be done?

- We must acknowledge that a federal human trafficking law is insufficient to combat the problem and protect victims, especially in areas of law reserved to the states. For

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[3] Kate Mogulescu, Legal Aid Society Criminal Defense Practice, Testimony Before the Council of the City of New York Committee on Women's Issues and the Committee on Public Safety: Oversight: Combating Sex Trafficking in NYC: Examining Law Enforcement Efforts—Prevention and Prosecution 4 (Oct. 19, 2004).

[4] In addition to the screening clients are also connected to support services when available and appropriate.

[5] Kate Mogulescu, supra note 3.

example, state laws on prostitution and child welfare must be updated to protect victims of human trafficking.

- We must use our resources to help, rather than harm, victims. Communities already pay a price for sex trafficking by incarcerating victims rather than funding comprehensive support services.
- We must recognize that human trafficking is universal, rather than foreign or exotic - it touches our daily lives in unexpected places. Many of today's laws and policies go far, but not far enough to respond to the various and unique issues victims face each day. The IRS's recent exclusion of restitution awards from taxable gross income for human trafficking victims is a perfect example of the type of victim-centered policies needed in a unique and unexpected place.
- We must provide access to comprehensive and independent legal services to all victims of human trafficking. Prosecutors do not represent victims and the goals of a prosecution are often in conflict with a victim's goals. Victims of human trafficking have a variety of legal needs and must have their own lawyer.

I thank you once again for the opportunity to come before you today, and I welcome your questions.

Salvador Cicero, Cook County Anti-Trafficking Task Force

REMARKS OF SALVADOR A. CICERO BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS

Sex Trafficking: A Gender-Based Violation of Civil Rights

I want to begin by thanking the Commissioners for organizing this event. Recognizing that trafficking human beings is a basic civil rights issue is essential to the continued success of all efforts to combat this phenomena. As we approach the topic of Trafficking in Persons ("TIP"), one finds that there is still quite a bit of misunderstanding as to what it means: both as a crime and as a human rights violation. It is precisely this type of meetings that helps dispel misinformation and creates new avenues to talk about new and inventive ways to combat the enslavement and exploitation of human beings.

Today, I hope to share with the Commission some behind the scenes type stories regarding our experience in Cook County, Illinois. I am certainly aware that you can find reports and studies on-line regarding the TIP issues (and certainly don't need to bring us to D.C. to find any of these). I have, however, included a couple of Law Review Articles, to share with you some of the lessons I have learned in these almost 14 years working with trafficked individuals in our hemisphere. I have also provided reports on the latest efforts and successes from our Task Force in Cook County.

Let me begin by telling you that I began my anti-trafficking merely by accident. By dealing with phenomena as it presented itself. Thereafter, during my tenure at the Foreign Ministry in Mexico, I was assigned the topic, because, frankly, at the time no-one wanted to deal with it and I was low man on the totem pole. I am very happy to see that much has changed since those days, almost ten years ago.

One must understand that the trafficking issue arises as a result of many dynamics. No one is likely to sit in the back of a room and say: "Hey, let's traffic some women or some kids." The Enslavement and subsequent exploitation of people is the result of a profitable criminal undertaking. It arises out of opportunity and is fueled by undervaluing human life and dignity. In fact, I think one of the most effective concepts that have been brought to this subject is to approach it as an organized crime phenomenon. That being said, the enslavement of human beings shakes people to the core. It is an unforgivable conduct that any lay person can agree is de-humanizing, striping people of their most basic rights as humans. That is why we always speak of this topic as a human rights –a civil rights- violation. As such, we find ourselves scrambling to find victims, to rescue them and to restore them –to the extent possible- to some normalcy. But restoring them to normalcy is a lot harder said than done.

If I had, at this point, one thing to ask this commission, it is to emphasize the need for after-rescue care. What people seem to focus on is the horrible exploitation that people suffer while enslaved. As such, finding and rescuing victims is the logical beginning of any effort to combat TIP. However, little is known about the post-rescue success of programs. How do these rescued women, men and children re-insert themselves into society? I will share with you some stories that illustrate my point.

I also think it is essential that we address this problem more directly in our society, in our schools. That we get it out in the open. In the same manner that we never talked about racism in our society, it was not until we began having open conversations about it that we began to deal with it. We must directly address the issues that enable traffickers to exist.

In Chicago, I have personally observed a couple of curious manifestations of the problem. The first was back in 1998, when I had opportunity to meet a man who had been enslaved for over a year in a Chinatown restaurant. Back then I worked at the Mexican Consulate, in the Citizen Services Department. At the time, when this gentleman arrived, we did not know what to do or how to help him (much less that this was a trafficking case). He did not know where exactly the restaurant was. He came to the Consulate though a reporter who had heard about his story and written a short piece in a Spanish language newspaper called "Exito," and had brought him for help.

This gentleman had arrived in the U.S. as an undocumented immigrant. He had hired a "coyote" (smuggler) to bring him to the U.S. Instead, he found himself being forced to work in the back of a restaurant, chained at the ankles. He suffered great injuries to his feet because of constant exposure to harsh chemicals and the shackles around his legs. He in fact did not know he was in Chicago. He had no clue where in the U.S. he was.

After he was able to run away (an atypical form of liberation in most trafficking cases), he turned to strangers to find help. When he finally came to the office, had nowhere to house him and we offered to send him back to his family. From the information he was able to provide, it seemed the mafias running Chinatown found it cheaper to bring unsuspecting immigrant from Mexico and enslave them, than to bring them across the Pacific. We contacted the police and nothing ever came of the case.

Another anecdote involves gay youth in Chicago. About three years ago I was invited to speak at the Center on Halsted (COH). The center is a gay-youth advocacy center near Lincoln Park, in the Northern part of the city. The Center provides assistance to transgender and gay youth and a variety of resources. I spoke to a group of about 30 young men and women about the trafficking phenomenon. After I finished my presentation, a Mexican-American young man approached me and told me that he had experienced some of what I had described. He recounted that when he told his parents about his sexual preferences, his father threw him out of the house. When his friends' parents found out about what had happened, and the reasons, no one would take him in.

At fifteen years and from a middle class background, he had nowhere to turn and no street smarts of any kind. He found himself living in the streets and sleeping in parks. After a while an older man picked him up at a park and offered him a place to stay. He soon began being forced to make pornographic films. He thereafter ran away with another one of the actors and was rescued by a COH volunteer police officer, who was out looking for gay youth living in the streets. No one was ever prosecuted in his case either.

I tell you of these stories, because they illustrate the varied dynamics that one may encounter when facing this phenomena. I purposely chose men to illustrate that TIP does not occur only in one context or social sphere. That being said, I find the sexual exploitation of young women a very prevalent issue in the hemisphere and, of course, Illinois. We certainly have observed the trafficking of women in the sexual context in Chicago and I have primarily seen many women who are poor being victimized. But I have also encountered middle-class, educated Au pairs who have been exploited. Traffickers simply look for opportunity and vulnerability in their victims. So, knowing that the trafficking phenomena arises in a variety of ways, in Chicago, our Task Force made a very early decision to focus our efforts on rescuing children found in the prostitution context.

Back in 2005, I was working for the American Bar Association (ABA) as Director of the Ecuador Anti-trafficking Project. I received a call from the Illinois State Guardian, Mrs. Ortega-Piron, whom I knew from my days at the Consulate. Apparently, child protection authorities they had encountered some trafficked teens who were being prostituted and were trying to figure out what to do with this emerging issue. There was no legal authority to hold children found being prostituted; there was no place to house them; there were being treated as criminals by police authorities; and, there was limited communication with federal authorities, who at the time were themselves formalizing systems to deal with the trafficking phenomena. So, a meeting was called at the Cook County Juvenile Justice Ctr. and the Salvation Army, the FBI, the Chicago Police, County Courts, the Department of Children and Family Services, and a couple of interested people, like myself and Frank Massolini, attended.

The group continued to meet monthly and we added many of the local trafficking experts (many that we were using at the ABA Project). Our first educational partner was Dominican University. Their faculty and students gave our task force ideas and special energy, as well as space to work and train volunteers. Soon thereafter we had volunteers form DePaul and Loyola Universities. Others followed from there and eventually, the task force adopted the "PROMISE" model (Partnership to Rescue Our Minors from Sexual Exploitation"). Seven years later, Frank Massolini runs PROMISE as a program for the Salvation Army, we have obtained federal funding, have a shelter and reinsertion program (Anne's house), and are revising a State anti-trafficking Law.

As I mentioned before, early on in our Task Force, we decided to focus on the sexual exploitation of cChildren. This is to mean that, with very limited resources, we decided, as a

group, we would focus on what we, at the time, thought would be the most pressing within a number of equally important issues. This is how PROMISE was born.

So I guess the biggest lesson is that, for local action to be successful, all you really need is that special interest and commitment to the issue. One needs to recognize that resources are limited and focus one's efforts in an area where true impact can be felt. Seven years later, there is a wide institutional support for PROMISE and many individuals continue to volunteer their time to this very worthy enterprise. Today, the mission of the PROMISE Program is to combat the sex trafficking of children through awareness, prevention, intervention, and service delivery. Our task force is now comprised of 33 member organizations representing law enforcement, social services, medical and mental health care, academia and legal professionals.

Since we began executing the model in Chicago in January 2005, the Task Force's major accomplishments include:

(1) training over 10,000 first responders in 5 major cities across the country with the use of a comprehensive CSEC (commercial sexual exploitation of children) curriculum developed under a $1M grant awarded by the Department of Justice;

(2) Implementing a prevention education curriculum to over 125 students in high risk secondary schools in Chicago;

(3) under the direction of law enforcement, piloting ACT (Active Communities Against Trafficking) which is designed to train community leaders in the Pullman and Roseland communities to report specific patterns of human trafficking; and

(4) Opening Anne's House, the first home in Illinois designed to provide comprehensive services for girls who have experienced commercial sexual exploitation/sex trafficking. Services such as individual and group therapy, life skills training, medical care assistance, educational and vocational planning and tutoring, recreational activities and spiritual guidance and support are provided in a safe, nurturing environment to girls and young women between the ages of 12 to 21.

Many volunteer members of our Task Force have also spun out and created their own organizations. One of them -Rachel Durschlag- began as a student volunteer. She was working on her masters at the University of Chicago when she began working as a PROMISE volunteer and has since graduation created the Chicago Alliance Against Sexual Exploitation (CAASE). CAASE is certainly played a central role in the creation of local initiatives against trafficking, but more importantly they have been instrumental in pushing anti-trafficking legislation in Illinois.

In terms of legislation, as you are aware, on August 20th, 2010, Governor Pat Quinn signed the Illinois Safe Children's Act, a bill that drastically changed the way Illinois law enforcement

addresses the human trafficking of children under the age of 18. The Law was originally drafted by the Cook County State's Attorney's Office, House Bill 6462 provided new protections to children caught up in the sex trade and will also give law enforcement new tools to investigate and prosecute the criminal rings that prostitute juveniles.

The Illinois Safe Children's Act made the following changes in the criminal code:

Provided for the transfer of jurisdiction over children who are arrested for prostitution from the criminal system to the child protection system, with special provisions to facilitate their placement in temporary protective custody if necessary.

The Act limited the affirmative defense that pimps or traffickers "believed" that the prostituted child was at least 18 years old to only those pimps and traffickers who had no reasonable opportunity actually to see the victim (in accordance with federal law and constitutional requirements of due process).

It Made crimes that penalize the commercial sexual exploitation of children applicable to all minors under 18 as child victims, in conformity with Illinois' human trafficking law and federal law.

It removed the terms related to "juvenile prostitutes" in the criminal code, in recognition of the fact that children have no capacity to consent to their own commercial sexual exploitation and thus are not prostitutes but rather are victims of a serious sexual offense.

It increased fees and expanded the vehicle impounding provisions currently in place for the crime of "Soliciting for a Prostitute" (11-15), to other related crimes of commercial sexual exploitation, including the exploitation of minors, and uses the money for victim services and police officers.

It supported the criminal investigations of these organized crime rings by adding the related offenses of human trafficking and juvenile pimping crimes to the list of offenses subject to court-ordered interceptions as defined by existing law. In this way, under judge supervision, the same legal tools used to fight groups selling drugs can be used against groups selling children.

It allowed for officer-safety recordings to protect undercover officers during dangerous sex-trafficking investigations.

As with any working law, two years and a few prosecutions later, Illinois is now revising the Act and is making some adjustments. In preparation for this meeting, I visited the Cook County Chief of Special Prosecutions, John Robert Blakey, State's Attorney Anita Alvarez's anti-trafficking point person.

In practice, one of the most effective tools at the state level is the cross designation with federal prosecutors. This cross-designation is an administrative decision that has allowed prosecutors to

communicate much more efficiently and to charge either federally or locally, as well as to better direct the investigations.

Law Enforcement officials have also inserted NGO's (The National Immigrant Justice Center and PROMISE, of course, among others) right into the operatives, making rescue operations in real time and facilitating victim centered services from day one. The issues that need revision deal with the forfeiture of assets and how to best allocate them in order to fund services for victims.

A strategy, often used in Cook County, is to bring along other law enforcement agencies, such as health, fire or city inspectors. This strategy, replicated elsewhere in our continent, we call this the "Al Capone" strategy (I know that a Chicago reference to Al Capone may strike you as funny). What I mean by the Al Capone approach is the catch people doing many illicit activities and convicting them with the best you have got.

The victim centered approach has also acquired a live meaning in Chicago. Prosecutors were telling me that in these last years they have had to rescue the same person twice. Blakey and his team, I am happy to report, have a very positive attitude about the need to support these victims.

As we have learned, dealing with the Victim is the most challenging part of the whole rescue operation. Victims may take a long time to become mentally healthy (or, for prosecutor's purposes, viable witnesses) and often experience terrible health consequences as a result of their exploitation. So Illinois Law Enforcement has looked for avenues that require less victim testimony (such as wire taps and undercover work), that are typically found in federal investigations. There is a real commitment among the group to protecting the Victim from further trauma and to work on their behalf. This, I must say, is not always the case.

Over the years, I have had an opportunity to speak with police officers about their thoughts on the subject, test the waters, so to speak. I find that much training is needed. In fact, I have heard police officers working in trafficking cases often find their fellow officers very unsupportive. With time and the growing success of rescue operations, other officers become more accepting. I once had an officer ask me: So you are telling me that these prostitutes I have been putting behind bars for 30 year are now "victims"? This is an institutional attitude that takes training and a culture change within institutions.

On the flip side, I was recently invited to do some training in Knoxville, Tennessee by Christi Wigle of the Community Coalition Against Human Trafficking (CCAHT), where I had an opportunity to speak with members of their task force. I am very happy to tell you that after the training a couple of people contacted me. In fact, Captain Nate Allen, in charge of trafficking at the Knoxville Police department called me regarding some victims and some immigration related issues. He is one of those people helping with that culture change within police departments. I have to tell you that I have remained in touch with people I have met at every training.

Also, throughout the hemisphere anti-trafficking efforts continue to grow. I have been privileged to have participated in trainings in twenty one countries for the Organization of American States. In these years traveling throughout the hemisphere I have had the opportunity to see firsthand what countries with various levels of resources can do to combat TIP cases. One thing has been common everywhere I have been: It takes an interest in the topic to make all the difference in the world.

I feel very fortunate to have had the experiences of having ran a Country project myself, having served as a trainer and having served on the task force. In each capacity I have seen incredible individuals come up with creative ways to assist victims and resolve cases. I have seen people in Chicago be open to new things and learned never be afraid of a good idea. I think it is precisely that kind of "thinking outside the box" that has been so productive for Cook County.

So, I want to share something creative and a-typical we are doing in Chicago. I want to share with you a bit of what "Buy Art Not People" (hereinafter "Buy Art"), a not-for-profit organization started in Chicago, which uses the avenue of the arts to raise awareness and resources to combat human trafficking. Volunteers at Buy Art are striving to shape the culture around us and to do away with the behaviors and mentalities that encourage exploitation of human beings. Buy Art encourages artists to be highly aware of the message they convey with their artwork and the story they would like to tell. Members of the organization are all volunteers. The only source of funding they have is from Art related events. They operate as a clearing house to spend money on the programming.

Buy Art works alongside organizations dealing w TIP to support them with visual resources, as well as putting their work in the public eye through art events. They have also sent a team of artists in to Anne's House to do art workshops with the rescued young women and girls. The theory is to use art and creativity to give the young women and girls a way to express themselves and therefore bring healing. The program has been very well received and in fact will be doing the same with clients of the Salvation Army's Stop-It Initiative in the coming months.

Although I have focused my remarks on what we are doing in Chicago, I do want to take this opportunity to tell the Commission that I firmly believe that the trafficking in persons phenomena, as evinced in the sexual exploitation of women, arises as a direct result of gender discrimination. I urge to look into what can be done to change attitudes, as the root of the problem, because it will require a true cultural change. We would need a revolution, an evolution in thinking, and in educating our society about how and why this continues to happen. The "consumers," users of sexual services of these women, are not only unaware of the consequences of their actions, but do not even stop to consider the potential enslavement of the person they are using for sexual purposes.

More men than one would care to admit do not value women as human beings and often objectify them as disposable things. I have sat at tables –in some of the finer eateries in Chicago

even- where other men, fellow attorneys, bankers, business men, talk about their trips abroad and their exploits with young women. I have had an opportunity to ask them, off to the side, if they ever stopped to think if their "weekend girlfriend" was in fact a trafficked person or how old these women were. None have (and many do not really care much for the subject). So a culture change is needed. Education is needed. And yes, enforcement is needed.

As the father of a vivacious two year old woman, I often think about the great responsibility we all have to change this world, to make it better. I believe in education and in creating practical, effective systems to deal with the trafficking phenomena. I urge you to call for more funding for education –domestic dollars for our schools- to include curricula on the subject. If Nicaragua and Ecuador have it, we should too! I also urge you to support post-rescue initiatives to assist victims re-insert themselves into society. Funding is short and agencies providing services are struggling to survive. We need to support them, if we are to truly help victims have a second chance.

Thank you again for this magnificent opportunity and for addressing the trafficking phenomena as it truly is: as a violation of our most basic right to exist.

Merrill Matthews, Resident Scholar, Institute for Policy Innovation and Chairman, Texas State Advisory Committee

Human Trafficking in Texas: A Bad Problem Getting Worse

Testimony before the U.S. Commission on Civil Rights
April 13, 2012
Prepared by
Merrill Matthews, Ph.D.
Chairman, Texas Advisory Committee

Introduction

Human trafficking is the cruel and vicious exploitation of other human beings and a violation of their civil rights. In 2010 the Texas Advisory Committee to the U.S. Commission on Civil Rights investigated human trafficking in Texas, issuing an August 2011 report, "Human Trafficking in Texas: More Resources and Resolve Needed to Stem Surge of Modern Day Slavery." This testimony is adapted from that report.

What Is Human Trafficking?

Human trafficking is the use of force or coercion to exploit a person for profit. The U.S. State Department places acts of human trafficking into two major categories:

- Sex trafficking — the procurement and use of persons by force or coercion for commercial sex.
- Involuntary servitude — the imprisonment of persons for labor services, most of whom are harbored in confining conditions or as actual slaves.[1]

Worldwide, an estimated 27 million persons are in bondage, meaning they are being forced into commercial acts or confined to involuntary servitude.[2]

Each year approximately 800,000 persons are trafficked across international borders, not including thousands of people who are trafficked within their own countries. And yet few purveyors of human trafficking are ever brought to justice.

The Social Impact of Human Trafficking

[1] U.S. Department of State, "Trafficking in Persons Report," June 2007.

[2] United Nations, "Global Report on Human Trafficking," February 2009.

The use of force or coercion in human trafficking can be direct and violent as well as psychological. Traffickers seek vulnerabilities in their intended victims and seek to operate in environments in which they can exploit victims with minimal threat of escape or law enforcement action.

Generally, victims come from impoverished circumstances, with the majority being from indigenous populations or ethnic minorities. Approximately 80 percent of all human trafficking victims are women and up to 50 percent are minors. [3]

Such persons often lack access to education and realistic employment opportunities. Victims of trafficking typically suffer from physical and mental abuse, and are often socially stigmatized. In the aftermath of human trafficking, the victims become isolated, losing ties with their former lives and families. In addition, the existence of harmful cultural and customary practices often serves to perpetuate violent practices that diminish opportunities for women and leave them vulnerable to exploitation.[4]

Human Trafficking and Border Security

Human trafficking is a high-profit and relatively low-risk business. Traffickers in the U.S. can make between $13,000 and $67,000 per victim.[5] The high-profit level is making the problem grow. Victims are reportedly brought in from all parts of the world.[6]

- 5,000-7,000 people come to the U.S. from East Asia and the Pacific;
- 3,500-5,500 are from Latin America;
- 7,000-11,000 are from Europe and Eurasia.

Human trafficking has emerged as a major civil rights issue of the 21st century. In 2001 the U.S. Commission on Civil Rights reported on this growing problem. [7] In issuing its 2011 report, the Texas Advisory Committee sought to bring attention to:

- The extent of human trafficking in Texas;
- The available resources to combat this violation of civil and human rights; and
- The social costs to the state if this problem is not urgently addressed.

Human Trafficking in Texas

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[3] Ibid.

[4] United Nations, "Human Trafficking," report on the problem, 2008.

[5] ILO, *A Global Alliance Against Forced Labor*, 2005.

[6] Ibid.

[7] "Modern Slavery," Civil Rights Issues, U.S. Commission on Civil Rights, June 2001.

As one of the largest border states in the United States, Texas is a major destination and transit state for human trafficking. The Texas Office for the Attorney General estimates that one out of every five human trafficking victims travels through Texas, and nearly 20 percent of all human trafficking victims rescued have been rescued in Texas. In addition, 38 percent of all calls to the National trafficking Resource Center hot line were dialed in Texas.[8]

The Trafficking and Violence Prevention Act of 2000 identify sharp increases in human trafficking prosecutions in four targeted Texas locations. [9] Between 2001 and 2006, the total number of persons prosecuted for human trafficking in Texas tripled. In the same period the number of persons prosecuted for sex slavery in Texas quadrupled.[10]

The U.S. Department of Justice's report on activities to combat human trafficking identified El Paso and Houston on its list of "most intense trafficking jurisdictions in the country."[11] The second largest trafficking bust in U.S. history occurred in Houston. More than 90 victims were rescued during the raid by law enforcement officials and referred to local service providers to assist them in their recovery process.

According to the Houston Rescue and Restore Coalition, three main factors contribute to the prevalence of human trafficking in Texas and in particular, Houston: proximity, demographics, and large migrant labor force. Houston's proximity to the Mexican border and I-10 corridor, along with its port, makes it a popular point of entry for international trafficking. At the 2006 Department of Justice National Conference on Human Trafficking, the I-10 corridor, the major east-west interstate highway in the southern United States, was identified as one of the main routes for human traffickers.[12]

Texas Laws Addressing Human Trafficking

Federal, state and local law enforcement agencies all have specific roles in the effort to combat human trafficking

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[8] The Texas Response to Human Trafficking, Health and Human Services Commission Report to the 81st Legislature, October 2008.

[9] P.L. 106-386.

[10] *The Texas Response to Human Trafficking*, Health and Human Services Commission Report to the 81st Legislature, October 2008.

[11] U.S. Department of Justice, *Report of Activities to Combat Human Trafficking*, 2001-2006.

[12] *Human Trafficking: The Invisible Slave Trade*, Report of the Houston Rescue and Restore Coalition, April 2007.

At the federal level, the Trafficking Victims Protection (TVPA) provides $95 million in assistance to local law enforcement agencies to enforce anti-trafficking provisions in the law, and it includes severe punishments for those convicted.

Texas introduced a state human trafficking law in 2003, making Washington State and Texas the first two states to enact laws criminalizing human trafficking. In the 78th Regular Session, Texas lawmakers enacted HB 2096, creating Penal Code §20A. Section 20A.01 established definitions for "forced labor or services" and "trafficking," and §20A.02 outlined offenses and penalties.

However, the law often served to unwittingly "victimize" the victim. Persons ensnared in human trafficking are often engaged in illegal activities such as prostitution. In many circumstances the victims of human trafficking are prosecuted for the illegal activity instead of being treated as victims of a crime. Subsequent legislation attempted to address this problem.

In 2007, during the 80th Regular Session, the Texas Legislature passed legislation that required the Office of Attorney General, in consultation with the states Health and Human Services Commission to prepare a report detailing how existing laws and rules governing victims and witnesses address—or fail to address—the needs of victims.

Legislation passed in 2009 specifically addresses human trafficking issues unique to the exploitation of children. It de-criminalizes sexual activity for children under the age of 18. Prior to this legislation, minors arrested for illegal sexual activity were required to prove they were coerced in order to be exonerated. It also requires the posting of notices of the national human trafficking hotline in overnight lodging establishments that have been targeted due to previous activities.

In addition, legislation passed that created the Texas Human Trafficking Prevention Task Force to coordinate a statewide response to human trafficking. The task force has made several important protections for victims.

Texas Law Enforcement Resources

To facilitate cooperation in sex trafficking cases, under the TVP the U.S. Department of Justice funds 42 local law enforcement agencies to combat human trafficking. Four of them—two at the county level and two municipal level—are in Texas.

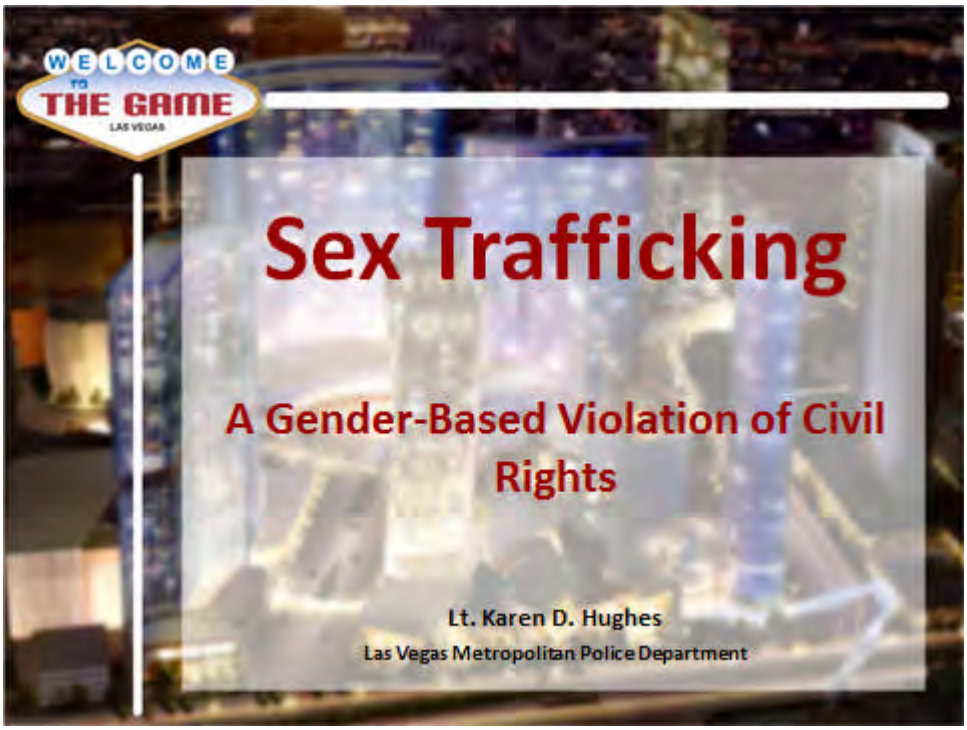
1) The Dallas Police Department and Fort Worth Police Department (a joint operation).
2) The Austin Police Department.
3) Bexar County Sheriff's Department.
4) Harris County Sheriff's Department.

These government bodies regularly collaborate with private, nonprofit organizations. While these organizations make a strong effort to address the human trafficking problem, they are severely limited in staff and funds.

Too Few Resources Fighting Human Trafficking

Tragically, the Texas Advisory Committee found that to a large extent citizens of Texas are unaware of the magnitude of human trafficking in Texas. Throughout the state there are too few resource devoted to combating human trafficking. Only four jurisdictions out of 350 local law enforcement agencies in Texas are actively engaged in fighting human trafficking. In addition, there are few social service agencies equipped to provide treatment for victims.

Karen Hughes, Lieutenant, Las Vegas Metropolitan Police Department



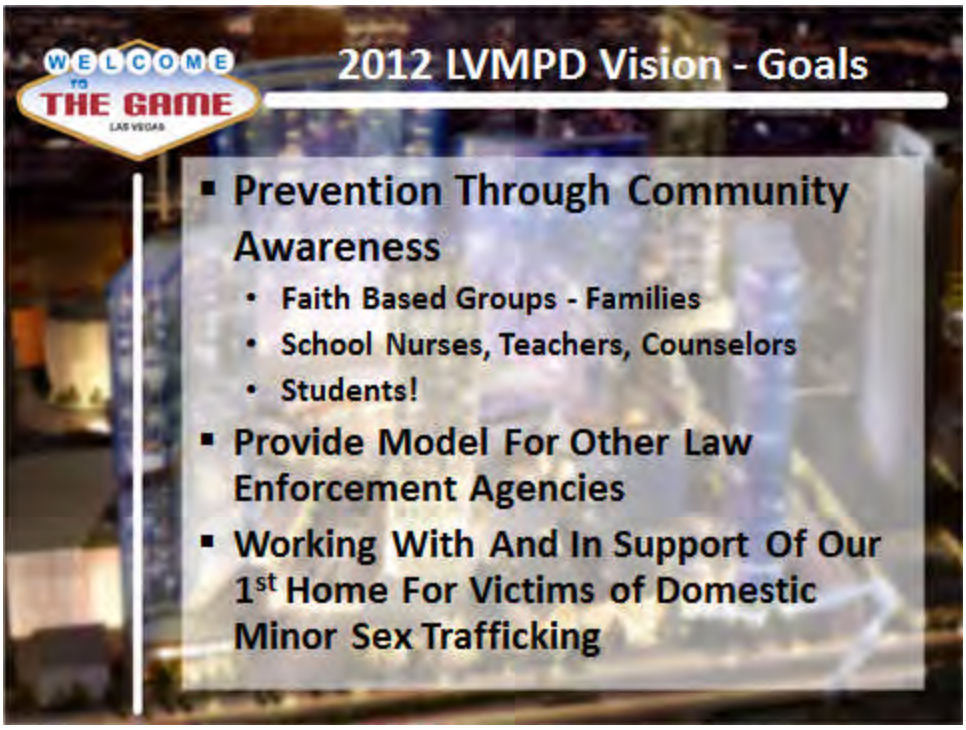

WELCOME TO THE GAME LAS VEGAS
The LVMPD Investigative Approach
Las Vegas Innocence Lost Task Force
• Focus Is On Domestic Minors < 18
Southern Nevada Human Trafficking Task Force = Pimp Investigation Team
• Focus Is On Adult Women > 18
• Huge Time Commitments With Victim Maintenance
• Detectives Are Strong Victim Advocates


WELCOME TO THE GAME LAS VEGAS
2011 Domestic Minor Sex Trafficking Stats
129 Females - 2 Males
▪ 74% Local to LV
▪ 63% African American
▪ 24% Caucasian
▪ 12% Hispanic
▪ 1% Asian or Other
Years of Age
• 53% Were 17
• 22% Were 16
• 18% Were 15
• 3% Were 14
• 4% Were 13
2122 Victims Recovered Since 1994

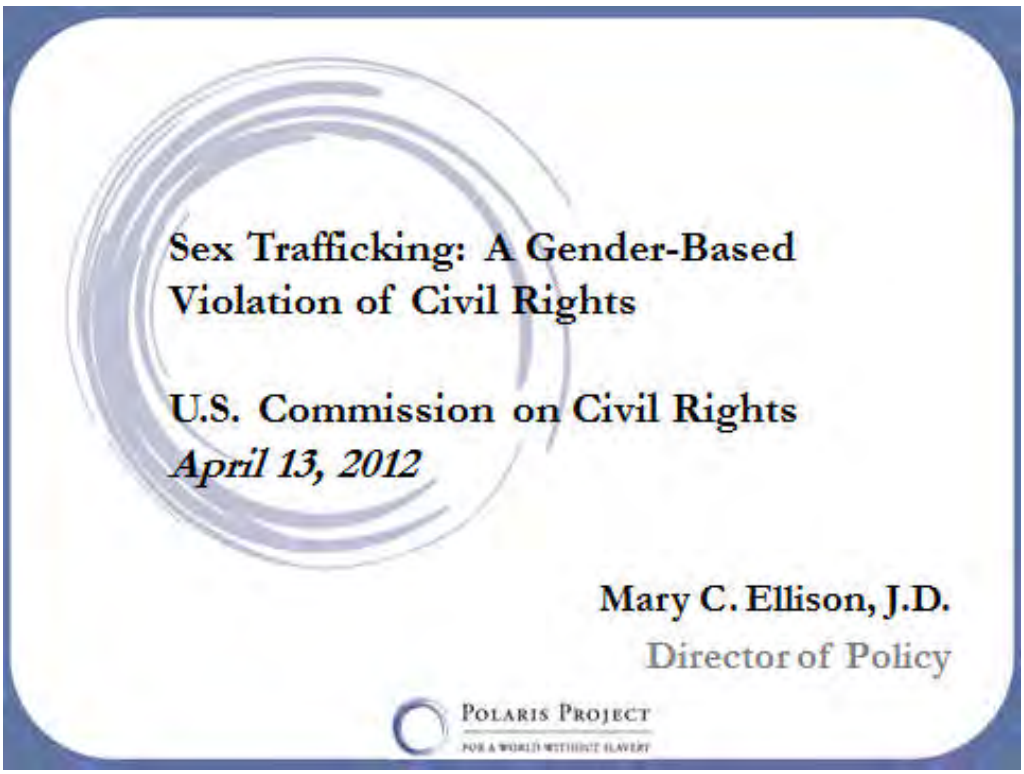

WELCOME TO THE GAME
What's Working For Us
Proactively Working Pimps
With or Without a Victim Stepping Forward
Partnered With IRS For Federal Asset Forfeitures
Working And Training With Other Task Forces To Better Identify Trends and Networks
Making The Case Personal - Ownership
Working WITH The Community
Working With The Media To Bring About Awareness

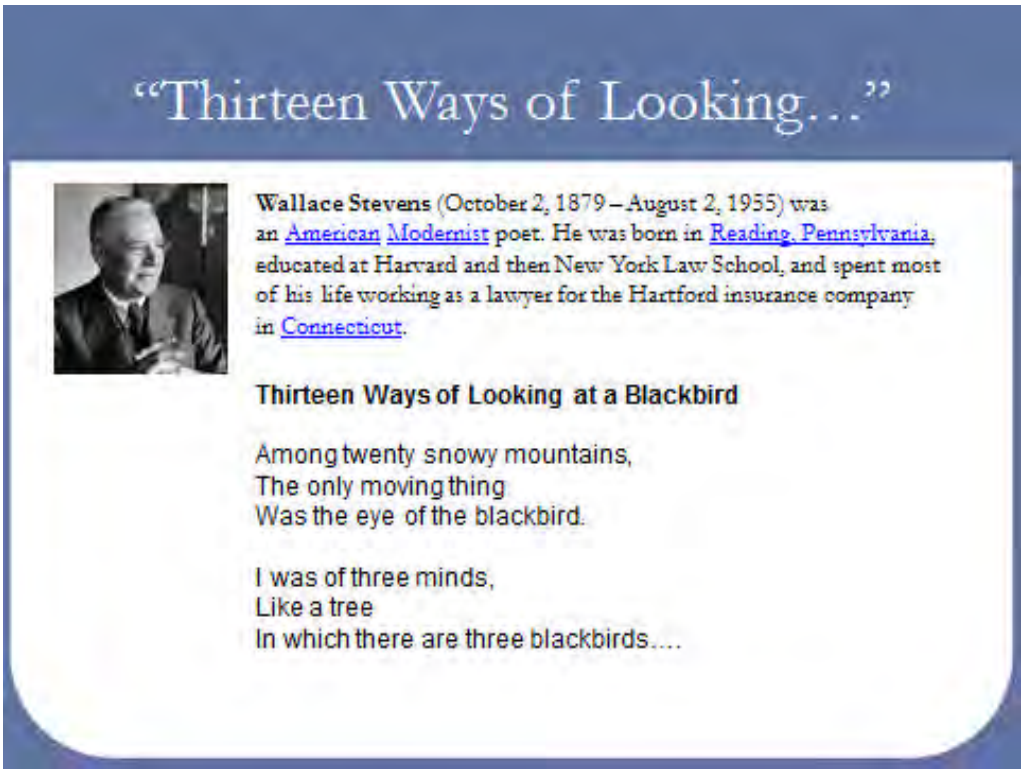

WELCOME TO THE GAME
Media = AWARENESS!
An Undercover Policing Unit Working With The Media????
Dateline "Vegas Undercover"
Katie Couric – CBS News "The Lost Girls"
CNBC - The American Tax Cheat
National Geographic – "Sex For Sale – American Escort"
Langley Productions
Las Vegas Review Journal – "Pimps, Metro Is Coming For You"
Lots Of Local Print And News


WELCOME TO THE GAME
2012 Challenges
• The Slow Economy Will Continue To Drive Up Thefts and Violence Associated To This Subculture
• Workplace Attrition for Law Enforcement Will Limit Resources
• Enacting Stronger Laws
• Identifying Hidden Assets
• Green Dot Cards


WELCOME TO THE GAME
2012 LVMPD Vision - Goals
▪ Prevention Through Community Awareness
• Faith Based Groups - Families
• School Nurses, Teachers, Counselors
• Students!
▪ Provide Model For Other Law Enforcement Agencies
▪ Working With And In Support Of Our 1st Home For Victims of Domestic Minor Sex Trafficking

Mary Ellison, Director of Policy, Polaris Project





I too am of three minds…

1. Sex Trafficking is certainly a Gender-Based Civil (& Human) Rights Violation that enslaves women and girls in commercial sex and is rooted in gender-based discrimination.

From an International Human Rights Perspective…

- Sex trafficking is a form of slavery and involuntary servitude resulting in grave human rights violations.
- Women and girls have the rights to security of person, an effective remedy, equal protection of the laws, and freedom from slavery, torture, and discrimination.
- The United States government, acting on its own or through the states, has an obligation to promote and protect these rights and to exercise due diligence to prosecute the perpetrators, protect trafficked persons, and prevent human trafficking and modern day slavery.

From a Service Provider Perspective…

– **Polaris Project is currently serving 130 individuals.**
  - **118 are female. 10 are male. 1 is transgender.**

In NJ (58 females)

72% (47) of all NJ clients are sex trafficked – not all of the women are sex trafficked

15% (10) of all NJ clients are labor trafficked – including women

In DC (60 females)

34% (22) of all DC clients are sex trafficked – not all of the women are sex trafficked

48% (31) of all DC clients are labor trafficked – including women

I too am of three minds…

2. **Labor Trafficking is also a Gender-Based Civil (& Human) Rights Violation that enslaves women and girls in domestic servitude, hotel and restaurants, strip clubs, farms, and factories. In other words, not all women or girls are sex trafficked.**

New Yorker Enslaves Woman as Domestic Servant

New Yorker Enslaves Woman as Domestic Servant

- New York woman living in a 34-room, 30,000-square-foot mansion faces a federal criminal charge related to her employment of a foreign national woman who allegedly served as a domestic servant
  - Working 17-hour days, seven days a week,
  - Being paid only $ .05/hour, and
  - Sleeping in a walk-in closet.
- Acting on a tip received by the National Human Trafficking Resource Center, federal immigration agents last year removed the servant from the 12-acre estate 20 miles north of Albany.

Gay Men from Kenya Sex Trafficked

DUBAI, United Arab Emirates, Jan. 10 (UPI)

Gay men from Kenya are being lured to Persian Gulf countries, where they are trafficked as sex slaves for wealthy men.

The men are lured by promises of high-paying jobs and then transported to the United Arab Emirates, Qatar and Saudi Arabia to work as sex slaves.

Because of high unemployment in Kenya, the victims easily fall prey to the trap.

In some countries in the Mideast, Identify says, convicted gay men can face the death penalty. It is illegal to be openly gay in the UAE.

Qatar has no laws against human trafficking, which makes crackdowns extremely difficult.

"Thirteen Ways of Looking…"

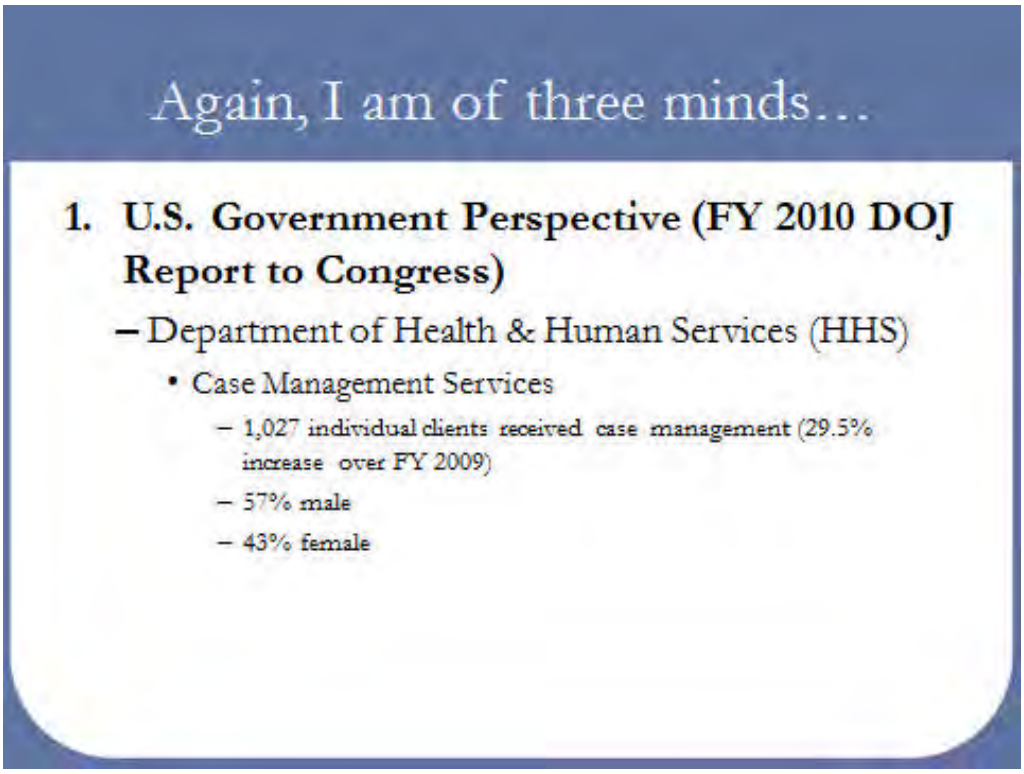
- **My point is that we need to broaden the scope of our vision –**
  - **To see women and girls who are being labor trafficked and**
  - **To see men and boys and transgendered individuals who are being sex trafficked.**
  - **And of course, to continue to see women and girls who are sex trafficked.**

Federal Efforts to Eliminate Human Trafficking

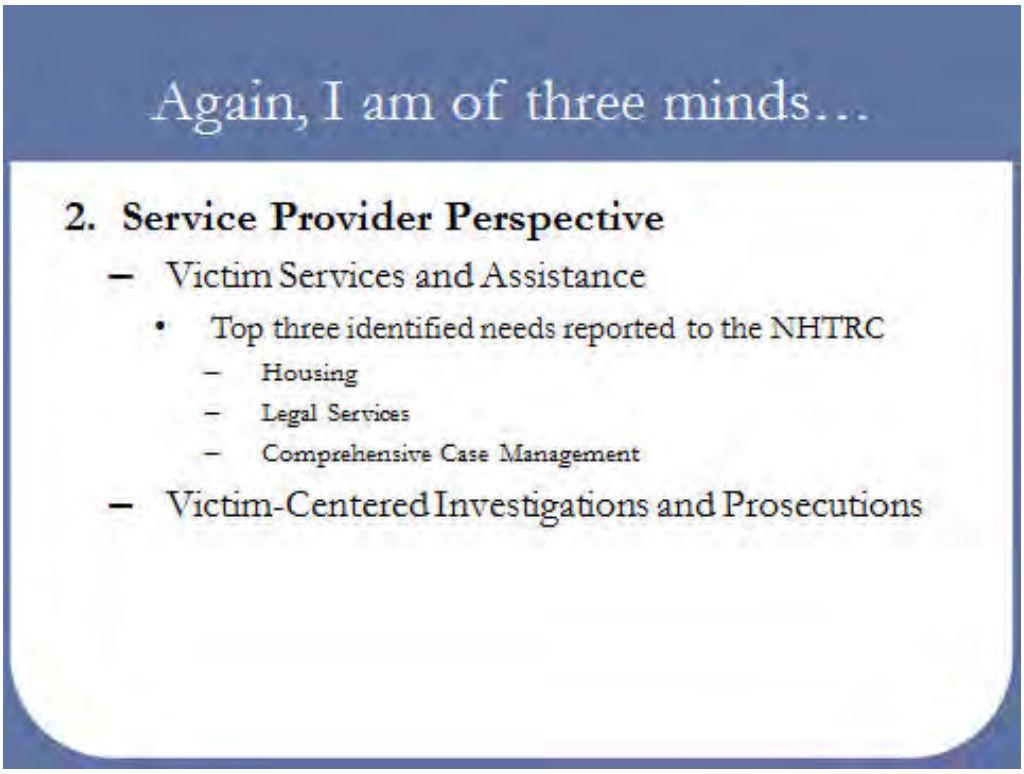
- **Again, I am of three minds…**
  1. U.S. Government Perspective
  2. Service Provider Perspective
  3. International Perspective

Again, I am of three minds…

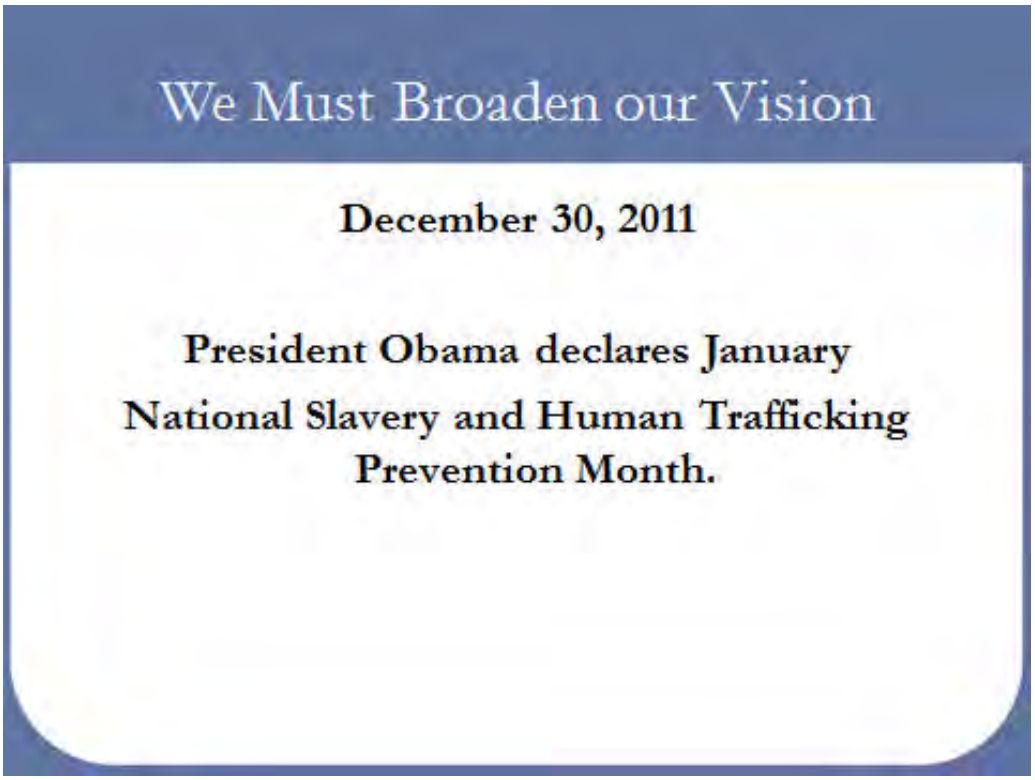
1. **U.S. Government Perspective (FY 2010 DOJ Report to Congress)**
   - Department of Health & Human Services (HHS)
     - 541 Certification Letters issued
       - 78% of all victims certified in FY 2010 were labor trafficked (both male and female)
       - 12% sex trafficked (all female)
       - 10% combined sex and labor trafficked (all female)
       - 55% issued to males (compared to 47% in '09, 45% in '08, 30% in '07, 6% in '06)

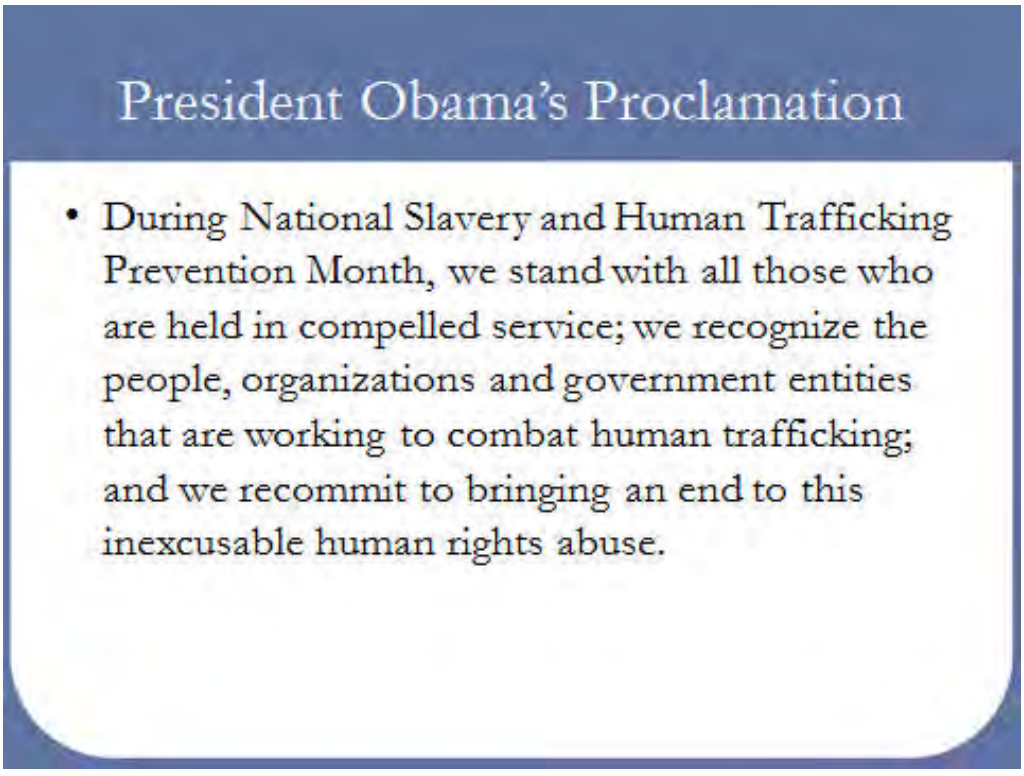

Again, I am of three minds…
1. U.S. Government Perspective (FY 2010 DOJ Report to Congress)
– Department of Health & Human Services (HHS)
• Case Management Services
– 1,027 individual clients received case management (29.5% increase over FY 2009)
– 57% male
– 43% female

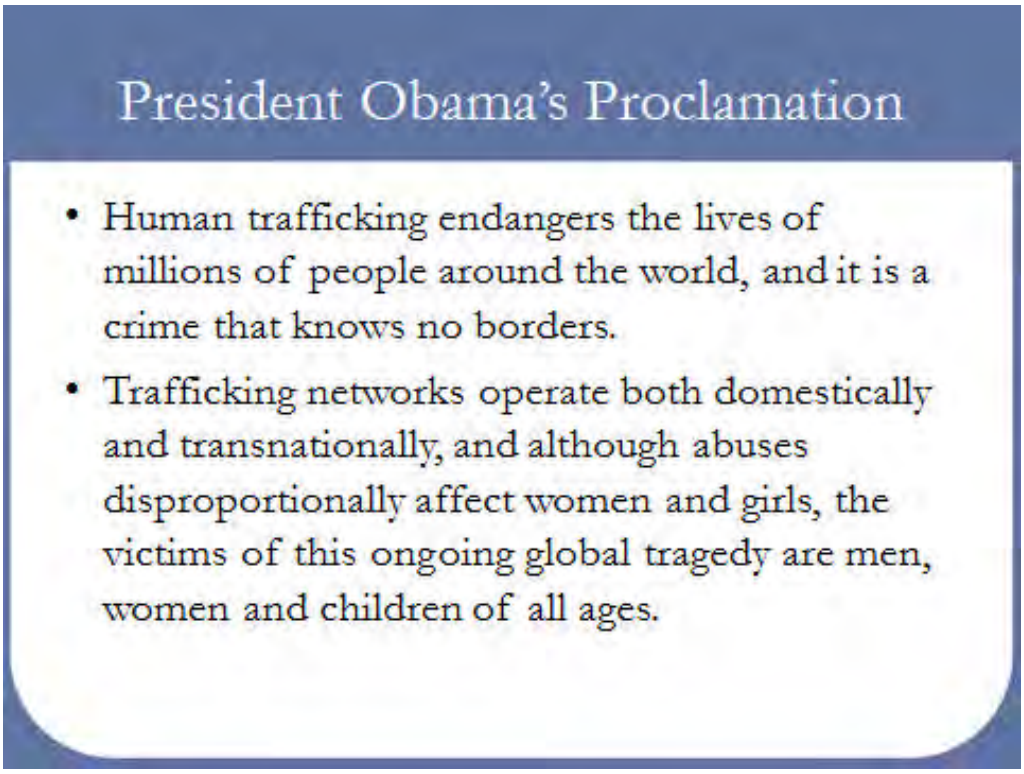

Again, I am of three minds…
1. U.S. Government Perspective (2011 U.S. TIP Report)
– Notable federal prosecutions included:
• The longest sentence returned in a single-victim forced labor case - a 20-year sentence for holding a woman in domestic servitude for eight years;
• A life sentence in a sex trafficking case;
• Convictions of 10 defendants in a multinational organized criminal conspiracy that exploited guestworkers in 14 states; and
• A bilateral enforcement initiative with Mexico resulting in indictments of sex trafficking networks under both U.S. and Mexican law.

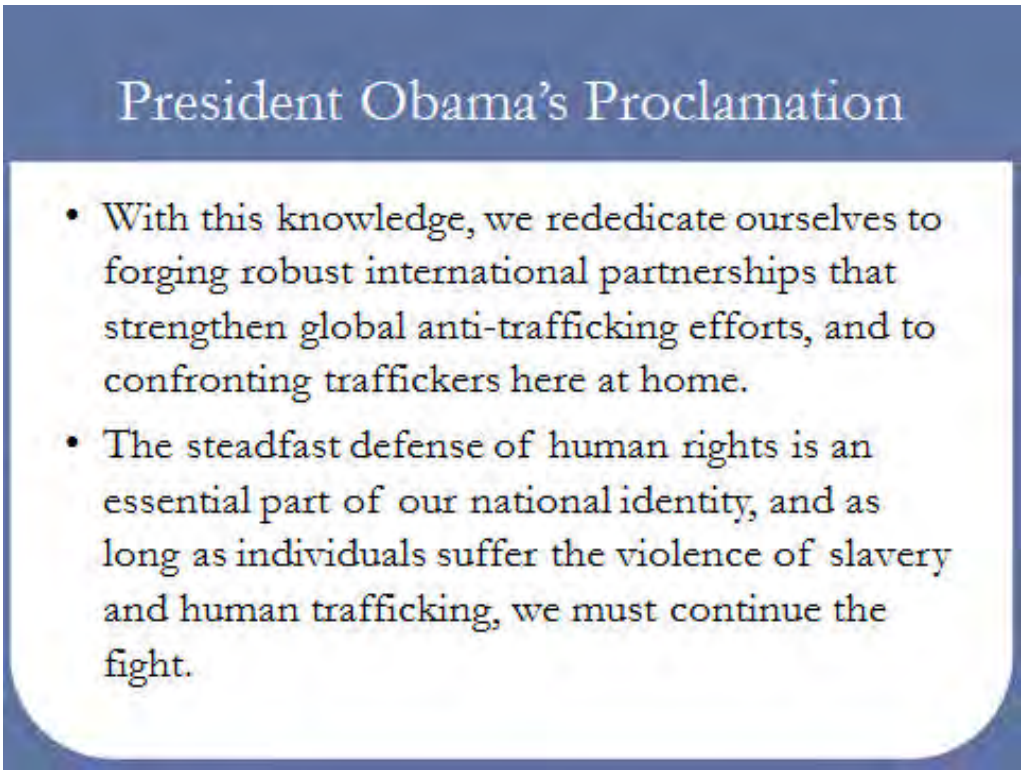

Again, I am of three minds…
2. Service Provider Perspective
– Victim Services and Assistance
• Top three identified needs reported to the NHTRC
– Housing
– Legal Services
– Comprehensive Case Management
– Victim-Centered Investigations and Prosecutions


Again, I am of three minds…
3. International Perspective
– U.S. TIP Report Rankings
– The Trafficking Victims Protection & Reauthorization Act of 2011


We Must Broaden our Vision
December 30, 2011
President Obama declares January
National Slavery and Human Trafficking
Prevention Month.


President Obama's Proclamation
• During National Slavery and Human Trafficking Prevention Month, we stand with all those who are held in compelled service; we recognize the people, organizations and government entities that are working to combat human trafficking; and we recommit to bringing an end to this inexcusable human rights abuse.


President Obama's Proclamation
• Human trafficking endangers the lives of millions of people around the world, and it is a crime that knows no borders.
• Trafficking networks operate both domestically and transnationally, and although abuses disproportionally affect women and girls, the victims of this ongoing global tragedy are men, women and children of all ages.


President Obama's Proclamation
• With this knowledge, we rededicate ourselves to forging robust international partnerships that strengthen global anti-trafficking efforts, and to confronting traffickers here at home.
• The steadfast defense of human rights is an essential part of our national identity, and as long as individuals suffer the violence of slavery and human trafficking, we must continue the fight.

For more information, resources, referrals, or to report a potential case of human trafficking please call us toll-free, 24 hours/day at **1.888.3737.888** or email us at **NHTRC@polarisproject.org.**

POLARIS PROJECT

CONTACT INFORMATION:

Mary C. Ellison, J.D.
Director of Policy
Polaris Project
mellison@polarisproject.org
202.745.1001 x131

POLARIS PROJECT

Amy Rassen, Senior Advisor, SAGE Project

Testimony of Amy Rassen

Senior Advisor

The SAGE Project, Inc.

Before the US Commission on Civil Rights

April 13, 2012

Testimony on Commercially Sexually Exploited Minors

Good afternoon. My name is Amy Rassen, Senior Advisor at the SAGE Project, Inc. located in San Francisco, California.

I have been working in the social service field since 1968. As you might imagine, over 40 years I have encountered every kind of social problem imaginable. Yet I have never seen anything so painful to witness as human trafficking, people exploiting and enslaving other people, especially children, and the human misery that results.

So, I appreciate that I can speak to today, representing SAGE, an acronym for Standing Against Global Exploitation, a nonprofit organization based in San Francisco, with one primary aim: bringing an end to human trafficking and the commercial sexual exploitation of children and adults.

While we take our freedom for granted, slavery not only exists but flourishes worldwide, in the form of human trafficking.

With partners from all over the US and around the world, SAGE works to end human trafficking, one step at a time, through education and advocacy. In the Bay Area, we give hope to children and adults who have been exploited by human traffickers by providing comprehensive services — case management, mental health counseling, educational support groups, life skills training, vocational guidance, help them escape, recover from their trauma and, ultimately, acquire the skills and strength they need to heal and start new lives. SAGE is unique in that it is one of the few organizations in the country that was created by and for commercial sexual exploitation survivors. It is staffed by people who have been trafficked, and provides all services through a "trauma-informed lens" because anyone who has been trafficked has been traumatized. The personal knowledge and experience possessed by the SAGE staff provides the passion and expertise to reach victims and influence change locally, nationally and internationally.

I have been asked to speak to you today about the following:

Sex trafficking as a form of gender discrimination

Federal efforts to eliminate sex trafficking

Ways to improve the government's efforts

To begin with, human trafficking, or modern day slavery, is a criminal industry, second only to drug trafficking, that thrives worldwide, including in the US. Around the world, it is estimated that as many as 27 million men, women and children live in bondage.1 According to the United Nations, people are reported to be trafficked from 127 countries to be exploited in 137 countries. Forty-three percent of all victims are sexually exploited; others work in conditions of slavery. Ninety-eight percent of victims are women and girls.2 The latter clearly illustrates the unique way in which human trafficking and gender intersect. As Secretary Clinton said, "modern slavery disproportionately affects women and girls. And as it does so, it disrupts family networks, and it undermines the foundation of stable economies and societies."3

Children are our future. They need us to make it possible for them to grow into healthy, educated, civic-minded citizens. So, today, I would like to focus my comments specifically on domestic minor sex trafficking, a criminal activity that desperately requires national attention. Staggering is its under-recognition. This population of victims, American children under the age of 18, is under-researched and largely overlooked.

The extent of the general lack of awareness of what is happening in our own backyards can only be described as nation-wide blindness.

1. Sex Trafficking of Minors as a Form of Gender Discrimination

The crime of domestic minor sex trafficking clearly reflects the impact of gender discrimination on young girls in our society.

Simply defined, the crime of domestic minor sex trafficking is the commercial sexual exploitation of American children within US borders. According to the Trafficking of Victims Act of 2000, it is "the recruitment, harboring, transportation, provision or obtaining a person for the purpose of a commercial sex act" where the person is a lawful US citizen or permanent resident under the age of 18. Commercial sexual exploitation of children is both hidden and highly visible. We see these children in every major US city, throughout various social service and criminal justice systems and increasingly being sold on the Internet.

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[1] http://www.state.gov/secretary/rm/2012/03/185905.htm

[2] International Labour Organization, forced Labour Statistics Factsheet (2007)

[3] http://www.state.gov/secretary/rm/2012/03/185905.htm

But we don't really see them.

The precise scale of the problem is hidden and unknown.

It is estimated by the FBI that the average age of entry into the commercial sex industry is 12 years old. Experts at Shared Hope International estimate that 100,000 American juveniles are victimized through prostitution each year. According to the National Center for Missing and Exploited Children, 1 in 5 of all girls in America and 1 in 10 boys in America will be sexually victimized before they turn 18. We know that sexual victimization is closely linked with youth who have been trafficked.

Since 2003, the FBI's Innocence Lost Initiative has recovered over 1,800 domestic minor sex trafficking victims. This number does not include the thousands of youth who are identified and served each year by agencies across the nation such as the SAGE Project. Each year, SAGE helps approximately 200 domestic minor human trafficking victims and youth identified as high-risk from being trafficked. While significant, these numbers are small compared to the actual scale of the problem.

Who are these youth who remain invisible before our eyes and where might we find them? We see two primary trends within the domestic minor human trafficking population: early sexual abuse, and exposure to either or both the juvenile justice and foster care systems. Other trends include high rates of poverty, domestic violence, poor academic skills, and runaways. These trends act as smoke signals for where one might find victims and those at greatest risk of victimization.

She is the student who sleeps at different friend's house each night because of the fighting happening at home. She is the girl who runs away when her parents physically abuse her. She is the foster child kid who, after enduring one neglectful foster parent after the next, gets in the car with a man three times her age simply because he promises her love and a fresh start. She is the sexual abuse victim who, due to immense shame and trauma, has lost all sense of appropriate boundaries and lets adults touch her for money.

You could be standing next to a girl who is being trafficked when you are in the mall or grocery store.

In the absence of supportive families and empowering mentors, young girls fall victim to negative stereotypes and messages about their self-worth, and become easy prey for those who know how to manipulate and profit from their vulnerability. Society, through vehicles such as the media, fashion and music, sends the message to our children that pimping is cool, being sexy and "hot" is in, and the ability to compete with other girls for the attention of one man is a winning quality.

They are most clearly identified as the youth that every system has failed, starting with their family, public education and health care systems and moving on to the systems that have been put in place to help them: law enforcement, social services, foster care and juvenile justice.

Who are these traffickers? They are in the business of exploitation. All are criminals. They are pimps, many posing as boyfriends, father figures or "sugar-daddies" with promises of love, affection and a fairytale, only to be followed by physical and emotional abuse. They are drug-addicted parents, members of the family or guardians, and they are peers who are themselves caught up in the web of exploitation and violence. They are also sexual predators who identify vulnerable children in the mall, schoolyard, and clubs or, as is more and more often the case, through the Internet. We love the Internet for its ability to remove geographic boundaries and make communication seamless and instantaneous. These same qualities, however, facilitate and fuel the growth of child exploitation. Approximately 1 in 7 youth online (10 to 17 years old) have received a sexual solicitation or approach over the Internet.4 And lonely, unloved children respond to solicitations. They also post information on the Internet about themselves, and then experience the painful, unintended consequences of being sexually exploited.

The current state of our child protection system makes it difficult both to protect vulnerable children from human traffickers and for a child victim to leave behind her history of exploitation when she enters adulthood. Minors picked up on prostitution charges are arrested and placed in custody for their own safety. In other words, they are criminalized and re-traumatized for their own victimization. Protective shelters are in very short supply, so there is no alternative to incarceration. Once in the criminal system, these youth are often charged and sentenced, starting not only a criminal record that will be difficult to shed when applying for a job, looking for an apartment or starting new relationships, but will add new layers of trauma that, like an onion, must be peeled back one layer at a time if they are ever to recover.

2. Federal Efforts to Eliminate Sex Trafficking of Domestic Minors

The federal government has taken a strong stance to wipe out human trafficking. Three examples follow:

Federal laws, specifically the Trafficking Victims Protection Reauthorization Act (TVPA) are among our strongest tools to combat this crime. The TVPA of 2000, including subsequent reauthorizations, has defined all minors, under the age of 18, who are "recruited, transported, harbored, provided or obtained for the purpose of a commercial sex act" as victims of trafficking, including minors who are U.S. citizens or lawful permanent residents. "Payment" for the sex act can be anything of value given to or received by any person (e.g., drugs, food, jewelry, a place to

[4] http://www.missingkids.com

stay, etc.). The framing of this law accurately portrays the complexity of domestic minor sex trafficking cases, specifically the manipulative and abusive tactics that may lead a child to believe she is selling her body out of "love" for an older man posing as a boyfriend or father figure, making it emotionally impossible for her to identify underlying force, fraud or coercion.

The President's Interagency Task Force to Monitor and Combat Trafficking in Persons coordinates the federal government's anti-human trafficking efforts. On March 15, 2012 the President directed his cabinet and senior advisors to find ways to "strengthen the federal government's current work, and to expand on partnerships with civil society and the private sector, to bring more resources to bear in fighting this horrific injustice."5 This speaks volumes about the federal government's commitment to end modern day slavery.

Leadership within federal agencies, such as the Department of Justice's Office for Victims of Crime and Office of Juvenile Justice and Delinquency Prevention, as well as the Department of Health and Human Services have worked hard to support and promote cutting-edge evidence-based models for identifying and serving domestic minor sex trafficked victims, and building multi-disciplinary networks that bridge community-based organizations, law enforcement and social services for identification and outreach purposes. SAGE has received support from all three of these agencies for this exact purpose.

3. Ways to Improve the Government's Efforts

Much remains to be done.

Despite the strength of our federal anti-trafficking law, domestic minor sex trafficking victims are most often not recognized or treated as such upon identification. The US has historically criminalized domestic minor sex trafficking victims as child prostitutes, instead as victims of rape or sexual assault, making their only access to resources those offered through the criminal justice system. State by state, legislators have worked to pass laws that chip away at this trend of criminalization. The federal government can ensure that youth who have been victims of commercial sexual exploitation are not considered criminals. The government can also continue to train law enforcement, health professionals and community workers to recognize the signs of youth who have been exploited.

Reauthorization of the trafficking of victims act must take place and be strengthened.

Prevention is key. If the average age of entry into commercial sex exploitation is 12 to 14, we must start educating youth as young as 9 and 10 years old on the myths and realities that sustain

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[5] http://www.whitehouse.gov/the-press-office/2012/03/15/statement-president-meeting-interagency-task-force-monitor-and -combat-tr

and glorify the sex industry. This can happen in classrooms, after-school programs and AT wellness centers.

The federal government must find some way to send a clear message to the media and fashion industries that they should rethink their advertising tactics because they are in part responsible for the frightening predicament laid before us. Pimping is not in fact cool, and being sexy and "hot" should not be "in".

A girl who has been put out on the streets by her parents, has no support in the community – at school, in church or elsewhere - someone running away from being sexually abused at home or by a foster parent is not a bad kid. She is vulnerable to her deep need to be cared for and loved. But not one child has chosen to be prostituted.

They are a marginalized, vulnerable and desperate group with special needs. They are also every day, average kids that we see in our local towns and cities, at the malls and hanging out with our children. Domestic minor sex trafficking occurs where vulnerable children fall through the cracks. Traffickers know this.

What else can the federal government do? The federal government can, for example, fund more programs to keep kids get off the streets and protect them from online perpetrators via stronger Internet safety laws. The government can also ensure access to safe, supportive housing as viable alternatives to incarceration. Continued funding of the systems that support and monitor foster parent programs in particular is needed, as is additional support for youth as they age out of the child welfare system, something that states are considering, too. And the federal government can fund more intervention and prevention services, like SAGE, to give the children a future.

In Conclusion

If human trafficking were a medical illness – a modern day smallpox or polio – it would receive wide publicity, and national and international attention, all aimed at a cure.

Human trafficking is indeed an illness, a social disease of epidemic proportions, as well as a major criminal activity. It is an old disease that only in the 21st century is emerging from a veil of obscurity and denial.

In the 20th century, despite great challenges, smallpox was eliminated; polio nearly so.

In this century the widespread epidemic of human trafficking is in great need of recognition, as well as commitment of energy and resources, interventions, treatment, and prevention. This disease must be eliminated as well.

The federal government must make sure there exists a unified approach to deal with this inhumanity.

Partnerships that reflect true collaborative efforts, education campaigns that are multi-dimensional and well funded, and intervention strategies that reflect emerging best practices, are the pillars of a comprehensive strategy.

Every system and institution working with children must be onboard to ensure that a clear message is sent: our children are not for sale, and anyone who tries to exploit them will face the consequences. It is only by taking these actions can we show our own humanity, but also ensure a safe and healthy future for all children.

I truly appreciate the opportunity to speak to this Commission and thank you for your attention.

Testimony before the US Civil Rights Commission on April 13, 2012

Recommendations from SAGE to Improve the Government's Efforts

1. Despite the strength of our federal anti-trafficking law, domestic minor sex trafficking victims are most often not recognized or treated as such upon identification. The US has historically criminalized domestic minor sex trafficking victims as child prostitutes, instead as victims of rape or sexual assault, making their only access to resources those offered through the criminal justice system. State by state, legislators have worked to pass laws that chip away at this trend of criminalization. The federal government should ensure that youth who have been victims of commercial sexual exploitation are not considered criminals.

2. The government should continue to train law enforcement, health professionals and community workers to recognize the signs of youth who have been exploited.

3. Reauthorization of the trafficking of victims act must take place and be strengthened.

4. Prevention is key. If the average age of entry into commercial sex exploitation is 12 to 14, we must start educating youth as young as 9 and 10 years old on the myths and realities that sustain and glorify the sex industry. This should happen in classrooms, after-school programs and AT wellness centers.

5. The federal government must find some way to send a clear message to the media and fashion industries that they should rethink their advertising tactics because they are in part responsible for the frightening predicament laid before us. Pimping is not in fact cool, and being sexy and "hot" should not be "in".

6. The federal government should fund more programs to keep kids get off the streets.

7. The federal government should protect children them from online perpetrators via stronger Internet safety laws.

8. The government should ensure access to safe, supportive housing as viable alternatives to incarceration.

9. Continued funding of the systems that support and monitor foster parent programs in particular is needed, as is additional support for youth as they age out of the child welfare system, something that states are considering, too.

10. Fund more intervention and prevention services, like SAGE, to give the children a future.

11. Continue to support partnerships that reflect true collaborative efforts, education campaigns that are multi-dimensional and well funded, and intervention strategies that reflect emerging best practices - the pillars of a comprehensive strategy.

12. Every system and institution working with children must be onboard to ensure that a clear message is sent: our children are not for sale, and anyone who tries to exploit them will face the consequences.

Rhacel Parrenas, Chair, Sociology Department, University of Southern California

My name is Rhacel Parrenas and I am a Professor of Sociology at the University of Southern California. I am speaking here as a qualitative sociologist who has done extensive research on women's labor migration from the Philippines. I have written books and numerous essays on migrant domestic workers, the families of migrant workers as well as migrant hostesses.

"Sex trafficking" became an issue that I had to address when migrant Filipina hostesses in Japan, a group of labor migrants who I had been studying, were labeled by the U.S. Department of State as sex trafficked people. As the 2005 TIP Report states, *"A significant number of the 71,084 Philippine women who entered Japan as overseas performance artists in 2004 are believed to have been women trafficked into the sex trade"* (178). Justifying claims of their trafficking, they were described in the 2004 TIP Report as "*victims… stripped of their passports and travel documents and forced into situations of sexual exploitation or bonded servitude..."* (14). I should qualify that the labeling as trafficked persons of 80,000 plus migrant Filipina hostesses in 2005 made them the largest group of trafficked people worldwide or 10 percent of the 800,000 estimated trafficked persons in the world.

The label of sex trafficked persons is one that has directly affected the migration of Filipina hostesses. It has led to a drastic reduction in their numbers. Since 2006, their annual entry has hovered at around 8,000. Many would consider this drastic decline as a victory in the war on trafficking. It marks their successful rescue. But I care to differ. As a gender and migration scholar, I actually see this drastic decline as nothing but a threat to the empowerment of migrant women and an end to the gains they have made in migration, including their acquired role as breadwinners of the family. The curtailment of their migration signals not their rescue but instead their domination, specifically their job elimination and their forcible unemployment. We need to listen to Filipina hostesses in Japan and figure out why many of them asked me, in reaction to their labeling as sex trafficked persons by the U.S. government, "Why is your government making our lives difficult?"

To make sense of this question, we need to understand the disjuncture between the goals of the U.S. anti-trafficking campaign, including organizations they fund such as Polaris Project –Japan, and the goals of the Filipina hostesses who they wish to save. Why do Filipina hostesses, for the most part, view their rescue from "sex trafficking" and the pressures imposed on the government of Japan to more tightly monitor their migration as nothing but an act of domination, an elimination of their freedom to choose their employment?

One central cause of this disjuncture is the different view of the job of hostess work that comes from outsiders, such as the U.S. government, and insiders, specifically the hostesses. To

understand this disjuncture, we first need to know what the U.S. means by sex trafficking. In TVPA, "sex trafficking" is defined as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act." This definition notably removes the factor of coercion, basically equating "commercial sex act" with exploitation. So this would make hostesses – women who engage in the sexual titillation of their clients but I should note not necessarily via physical contact but by flirting – sex trafficked persons. This makes me wonder then if the labeling of hostesses as trafficked persons comes from the conflation of sex work and sex trafficking. This conflation leads to the misunderstanding of their job – the false assumption that these women are not willing to be where they are but had somehow been duped and forced to be there.

This false assumption is likely to happen because much of our knowledge on sex trafficking – including the claims on the trafficking of Filipina hostesses in Japan – is not based on substantive research. Notably, even the US Government Accountability Office has critiqued the TIP Report for being based on scant information. I am here giving a briefing on civil rights and sex trafficking. But I am not here to say that sex trafficking is a civil rights violation but instead I want to show you that false claims of sex trafficking is a civil rights violation. I have come to realize that the civil rights of Filipina hostesses have actually been violated not by sex trafficking but by the false claims of their trafficking. False claims of their sex trafficking in the TIP Report, and the efforts to rescue them by various well-intentioned organizations, have imposed unwarranted infringement on the liberty of migrant Filipina hostesses, placing their individual freedom at risk.

Without question, the absence of due diligence in the part of the U.S. Department of State and the organizations they have funded to help Filipina hostesses and the false claims of their sex trafficking has violated the civil rights of this group. First, it has eliminated their jobs, forcing the return of Filipina hostesses to their life of abject poverty in the Philippines. What rescuers fail to consider is that Filipina hostesses are not clueless idiots when they go to Japan; often they go to Japan knowing that they will be flirting for money and knowing that they will be working in servitude with a visa that is contingent on their employment at only one club (notably a common condition of migrant work around the world). However, we should not ignore that they knowingly choose the unfreedom of servitude in Japan over the unfreedom of poverty in the Philippines. Labeling them as sex trafficked persons basically eliminates their choice of two unfreedoms and forces them to a life of unfreedom in poverty. Second, the civil rights of Filipina hostesses have been violated by the false claims of their trafficking because it has exacerbated the conditions of servitude for the few who still manage to return to Japan. To improve their ranking in the US TIP Report, Japan now requires Filipina hostesses to go through two years and not just six months of singing and dancing lessons. What this does is it increases their debt to their brokers prior to migration, aggravating their indenture. Third, false claims of their trafficking has not just violated their civil rights but has ironically left them more vulnerable to what is labeled as severe forms of trafficking. We have seen since a spike in the number of

marriage visa applications, with some local migrant advocates suspecting many of these are based on false marriages. Ironically, the Philippine Embassy in Tokyo has long said that hostesses who enter with false visas rather than contract workers are those most vulnerable to forced labor in Japan, i.e., women in this group are those more likely than contract workers to find themselves working at a place without a network of support and without the ability to quit or end their employment. Lastly, citing the dissertation research of my PhD student at Brown University Maria Hwang, the false claim of migrant Filipina hostesses as sex trafficked persons has not only denied them their jobs but have forced many to engage in prostitution in Hong Kong, which is a job many of them would actually not do if they could still perform the meeker sexual job of commercial flirtation in Japan. This unintended consequence of the U.S. war on trafficking surely gives us reason to pause and forces us to rethink how we should address the problem of human trafficking.

To conclude, we need to do our due diligence on sex trafficking. Claims based on scant information, the conflation of sex work and sex trafficking, and the use of one person's experience to generalize about an entire group's experience only results in our misunderstanding of the problem. This misunderstanding then leads to the implementation of the wrong solutions. We see this clearly in the rescue of Filipina hostesses – supposed victims of sex trafficking – but whose labeling as such does nothing but violate their civil rights. *If we respect the people we want to rescue, we would owe it to them to do our due diligence and do grounded empirical research to understand their problems. Anyone who does that with Filipina hostesses – the largest group of supposed sex traffic victims in the world – would learn that they don't want job elimination. They wish not to be rescued. Instead they want greater control of their labor and migration, including the ability to choose employers, the elimination of migrant brokers, and the recognition of their form of sex work as viable employment.*

PANELISTS' BIOGRAPHIES

Maggie Wynne

Maggie Wynne is Director of the Division of Anti-Trafficking in Persons in the Office of Refugee Resettlement within the U.S. Department of Health and Human Services (HHS). In that capacity she leads the HHS *Rescue & Restore Victims of Human Trafficking* campaign. HHS' goal is to identify trafficking victims and help them receive the services needed to rebuild their lives. Programs funded through the *Rescue and Restore* campaign train social service, public health, and other frontline intermediaries so they can help identify and connect victims to support services offered through the HHS/ACF Office of Refugee Resettlement. Miss Wynne manages a nationwide network of funded grantees and volunteer coalitions raising awareness and providing victim assistance. She also oversees ACF's collaboration with other Federal Government agencies on policy issues related to anti-trafficking measures.

From 2005 to 2007, Miss Wynne served as a Special Assistant to the Director of the HHS Office of Global Health Affairs (OGHA), and prior to that as a Legislative Analyst in the Office of the HHS Assistant Secretary for Legislation (ASL). At OGHA, her portfolio included the development of policies with respect to the Global Fund to Fight AIDS, Tuberculosis and Malaria, and implementation of the President's Emergency Plan for AIDS Relief. In ASL, Miss Wynne's areas of responsibility included reauthorization of national welfare reform legislation, biomedical ethics, and issues and programs within the jurisdiction of the Office of Refugee Resettlement. Prior to coming to HHS, she served for over 12 years as a legislative aide for Members of Congress, primarily covering issues within the jurisdiction of the House Committees on Energy and Commerce (health), the Judiciary, and Appropriations.

Greg Zoeller

Greg Zoeller was elected Indiana's 42nd Attorney General in 2008. Prior to that, Greg Zoeller served as the chief deputy AG to his predecessor, Attorney General Steve Carter, making him the first attorney general to have served in the AG's Office prior to being elected.

A commitment to service marks the career of Attorney General Zoeller. With a focus on consumer protection, Greg has expanded the Do Not Call law to include cell phones, increased the legal protections for teachers in returning discipline to the classroom and protected homeowners facing foreclosures. By battling scam artists with proactive investigations, the Attorney General has made Indiana known as a state that consumer predators want to avoid.

An advocate for the most vulnerable in society, Attorney General Zoeller organizes an annual competition among lawyers and law firms called March Against Hunger that raises food donations to support Indiana's food banks.

Greg Zoeller for ten years worked as an executive assistant to Dan Quayle – first in Senator Quayle's U.S. Senate office, and then in the Office of the Vice President of the United States. He also served in other government capacities and was in private practice for 10 years before joining the AG Carter's office.

Having studied as an undergraduate at Purdue University and Indiana University, Greg holds "dual citizenship" as both a Boilermaker and an IU Hoosier. He earned his law degree from the Indiana University School of Law at Bloomington in 1982.

Bridgette Carr

Professor Bridgette Carr directs the Human Trafficking Clinic at the University of Michigan Law School. The clinic provides comprehensive legal services to victims of human trafficking regardless of age, gender, or national origin. Her research and teaching interests focus on human trafficking, immigration, and human rights, and she is a member of the Michigan Human Trafficking Taskforce. Professor Carr co-authored a casebook, *Human Trafficking Law &* Policy that was published in 2014. Professor Carr oversees grants to combat human trafficking in the United States and abroad. In 2011, the Human Trafficking Clinic launched the nation's only comprehensive online database of human trafficking cases. She received her BA, *cum laude*, from the University of Notre Dame and earned her JD, *cum laude*, from Michigan Law. Prior to joining the Michigan Law School faculty, she was an associate clinical professor at the University of Notre Dame Law School, where she led the Immigrant Rights Project. In 2008, she was awarded a Marshall Memorial Fellowship to study human trafficking issues in Europe.

Salvador Cicero

Salvador Cicero is the Principal of The Cicero Law Firm, P.C. He currently serves as the President of the Hispanic Lawyers Association of Illinois.

Mr. Cicero is a graduate of the Matías Romero Institute for Diplomatic Studies in Mexico City (2000) and holds a Juris Doctor and a Certificate in International Trade and Development from The Ohio State University Moritz College of Law (1998). He received a B.A. in Latin American Studies at the University of New Mexico (1994). He is admitted to practice law in Illinois and the US Federal District Courts for the Northern District of Illinois (trial bar) and Eastern District of Wisconsin.

Mr. Cicero formerly served as Research Fellow of the American Bar Foundation and Director of the American Bar Association's Project to Combat Trafficking in Persons in Ecuador. The Program was designated as an international Best Practice by the U.S. Department of State and the Organization of American States (OAS). Mr. Cicero was also a career member of the Foreign Service of Mexico.

Mr. Cicero has published various Law Review articles and other academic articles in the U.S., Colombia, Mexico and Argentina. He has lectured in programs throughout the American Hemisphere, most notably as an anti-trafficking expert for the OAS and as a trainer for United Nations' Peacekeeping Forces. He has been an invited commentator on national anti-trafficking legislation in Mexico and Ecuador.

Domestically, Mr. Cicero has been a member of the Anti-trafficking task force in Cook County, Illinois, and the Illinois Rescue and Restore Working Group. He is a well-known media commentator on legal affairs and has appeared in national media outlets such as the Univision National News, Telemundo and National Public Radio.

Among Mr. Cicero's awards and distinctions are the 2011 Martin Luther King DREAM Award for Public Service, the 2007 El Humanitario Award, the Ohio State University Alumni Association's William Oxley Thompson Award for Early Career Achievement (2004), and the American Bar Association's Silver Key (1998) and Bronze Key (1997).

Merrill Matthews

Merrill Matthews, Ph.D., is a resident scholar with the Institute for Policy Innovation. He is a public policy analyst specializing in health care issues and is the author of numerous studies in health policy and other public policy issues. Dr. Matthews is past president of the Health Economics Roundtable for the National Association for Business Economics, the largest trade association of business economists.

For nine years Dr. Matthews was executive director of the Washington, DC-based Council for Affordable Health Insurance, a trade association of health insurers. He served for 10 years as the medical ethicist for the University of Texas Southwestern Medical Center's Institutional Review Board for Human Experimentation, and has contributed chapters to several books, including *Physician Assisted Suicide: Expanding the Debate, The 21st Century Health Care Leader* and, in 2009, *Stop Paying the Crooks* (on Medicare fraud). Dr. Matthews also serves as chairman of the Texas Advisory Committee of the U.S. Commission on Civil Rights.

He is a regular columnist for Forbes.com and has been published in numerous journals and newspapers, including the Wall Street Journal, the New York Times, Investor's Business Daily, Barron's, USA Today and the Washington Times. He was an award-winning political analyst for the USA Radio Network, and for several years had a daily one-minute commentary on Sirius-XM Radio. In 2008 the BBC invited him to star in a program on welfare reform in Great Britain, and specifically Wales.
Dr. Matthews received his Ph.D. in Humanities from the University of Texas at Dallas.

Karen Hughes

Karen Hughes is a Lieutenant with the Las Vegas Metropolitan Police Department with 27 years of law enforcement experience. A supervisor for over 18 years, she is currently assigned to the Vice/Narcotics Bureau overseeing the Vice Section where she has led a dedicated and diverse group of investigators who are responsible for investigating all crimes associated to prostitution and its demand. This unit is responsible for proactive enforcement efforts in a variety of venues in the Las Vegas valley where prostitution flourishes such as escort services, adult cabarets, hotels, streets, massage parlors, in/out call through internet investigations, adult book stores, and night/pool clubs. The unit has two dedicated teams that investigate all forms of human trafficking that involve the exploitation of adult women and juveniles into the commercial sex trade. The Vice Section is actively involved with the Southern Nevada Human Trafficking Task Force and the Innocence Lost National Initiative in an effort to bring strong criminal cases against pimps and seize their assets through partnering with state and federal agencies.

Mary Ellison

Mary C. Ellison currently serves as Director of Policy for Polaris Project. In addition to her years as a human rights lawyer, Ms. Ellison brings more than ten years of experience as a manager, fundraiser, trainer, and technical consultant to her work at Polaris Project. At Polaris Project, Ms. Ellison leads the work to advance state and federal policy related to the crime of human trafficking - creating protections for victims while seeking accountability for human traffickers and others that contribute to human trafficking.

Prior to joining Polaris Project, Ms. Ellison served as a staff attorney for the Advocates for Human Rights. In that capacity, she helped build a coalition to combat sex trafficking and commercial sexual exploitation in Minnesota through participation in the statewide Human Trafficking Task Force. Together with the Task Force members, Ms. Ellison played a key role in drafting, advocating for, and testifying about critical amendments to Minnesota's human trafficking law, which was unanimously passed and signed into law on May 21, 2009.

Ms. Ellison is a co-author of the *Sex Trafficking Needs Assessment for the State of Minnesota* (September, 2008); and two components of the legislation module of a *UNIFEM Global Virtual Knowledge Centre: Advocating for New Laws or the Reforming of Existing Laws and Drafting Specific Legislation on Violence Against Women and Girls – Sex Trafficking of Women and Girls*.

Ms. Ellison has worked on domestic violence legal reform in Central and Eastern Europe where she reviewed and provided commentary on the domestic violence laws of several countries. She also brings experience as a judicial law clerk, law clerk in a state public defender's office, and intern with the Refugee and Immigrant program at the Advocates for Human Rights. Ms. Ellison

earned her law degree from William Mitchell College of Law. She is admitted to practice in Minnesota. Ms. Ellison graduated cum laude from St. Olaf College with a Bachelor of Arts in Psychology and Family Studies with a concentration in Women's Studies. She also earned a Masters of Fine Arts degree in Creative Writing from Colorado State University. Ms. Ellison is a published poet and essayist and the editor of two oral history collections.

Ms. Ellison's interest in social justice and human rights was initially ignited during an educational trip to El Salvador and Nicaragua. She has also worked with inner-city youth, developmentally disabled adults, refugees and immigrants, and indigent adults and juveniles facing criminal charges, all of which inform her current work.

Amy Rassen

Amy Rassen, LCSW is known as a pioneer in the field of family support and non-profit management and is one of a handful of leaders who have shaped the family support movement in the U.S. In her over 40 years of leadership in the non-profit sector, she has focused broadly in all areas of social and human services, ensuring that children, individuals and families lead the best lives possible. Most recently she has dedicated her passion and expertise to addressing human trafficking, a social problem that is staggering for its under-recognition.

Over the years, Ms. Rassen's experience has included creating and overseeing human services, mental health programs and integrated care delivery systems. She has managed a staff of up to 800; created national and statewide organizations; designed innovative, replicable, financially sustainable programs; implemented major service and research projects; raised millions of dollars annually; developed and implemented outcomes-based quality assurance programs. She has been instrumental in revamping national and state systems, and also enabling non-profits to implement strategies for organizational sustainability.

Ms. Rassen currently assumes leadership for organizations in the midst of challenging transitions. In addition, she coaches executive directors regarding board and organizational development as well as strategic planning.

Most recently, Ms. Rassen has devoted her talents to address human trafficking. Human trafficking is a modern day form of slavery: a national and international problem that is staggering in its pervasiveness, indescribable in its cruelty, and appalling in its under-recognition.

At the SAGE Project, Ms. Rassen revitalized the organization following the untimely death of its founder, Norma Hotaling. As a result of her efforts, SAGE continues to be uniquely effective in educating the public about human trafficking, initiating policies and directly supporting survivors of human trafficking and commercial sexual exploitation. SAGE is unique in that it is one of the few organizations in the country that was created by and for survivors. SAGE was recently

named the Organization of the Year at the 2012 San Francisco International Women's Day celebration.

To learn more about Ms. Rassen's background, work, board service, publications and awards please visit www.rassenassociates.org.

Rhacel Parrenas

Rhacel Salazar Parreñas is Professor and Chair of the Sociology Department at the University of Southern California. She is known for her work on women's labor and migration. She has received more than 100 invitations to share her work at universities, government and nongovernmental institutions, and research centers throughout the United States, Europe and Asia. An award-winning author, Parreñas has co-edited three anthologies and has written four monographs as well as numerous peer-reviewed articles. Her latest book, Illicit Flirtations: Labor, Migration and Sex Trafficking in Tokyo (Stanford University Press, 2011), describes the experience of "indentured mobility" among migrant Filipina hostesses and bridges current discussions on human trafficking and gender and labor migration. She is currently working on a cross-national research project comparing the servitude of migrant care workers in Singapore and United Arab Emirates. Parreñas has received research funding from the Ford Foundation, Rockefeller Foundation, and National Science Foundation as well as fellowship invitations from the Center for Advanced Study in the Behavioral Sciences at Stanford University and the Institute for Advanced Study at Princeton, NJ. Her work is translated into French, Spanish, Italian, German, Polish, Portuguese, Korean, and Japanese. She is currently the North America Regional Editor for Women's Studies International Forum.

Tina Frundt

Tina Frundt, executive director/founder of Courtney's House, has been actively raising awareness of the commercial sexual exploitation of children (CSEC) since 2000. A high profile national advocate on the issue of domestic sex trafficking and a survivor of CSEC, Ms. Frundt is deeply committed to helping other children and women who are living through experiences similar to her own. She has been featured on numerous national shows and publications, including Lisa Ling's Show Our America that featured a undercover look into sex trafficking "3Am Girls" on the OWN network, CNN's freedom project, and trains law enforcement and services providers around the country, she has recently won the "Frederick Douglas" award through the "Freedom Awards" that recognizes survivors of sex trafficking she is the first U.S. Citizen to win the award. She has testified before U.S. Congress about her own experiences and the need for greater protection and services for trafficked persons. She has recently started her own non-Profit, "Courtney's House" in 2008. "Courtney's House" provides services for

domestic sex trafficked youth and will open first group home for sex trafficked children ages 12yrs - 18yrs in the Washington D.C. metro area.

APPENDIX: RESOURCES AVAILABLE TO ASSIST VICTIMS OF SEX TRAFFICKING

Federal Government Efforts to Combat Human Trafficking

http://www.acf.hhs.gov/programs/orr/resource/federal-government-efforts-to-combat-human-trafficking

National Human Trafficking Victim Assistance Program

http://www.acf.hhs.gov/programs/orr/programs/anti-trafficking

National Human Trafficking Resource Center

http://www.traffickingresourcecenter.org

National Human Trafficking Hotline 1-888-373-7888

Alabama

The Well House, Inc.
http://www.the-wellhouse.org

Family Connection, Inc.
http://www.familyconnection-inc.org

Alaska

Abused Women's Aid in Crisis
http://www.awaic.org

Alaska Immigration Justice Project
http://www.akijp.org

Native American Rights Fund (NARF)
http://www.narf.org

Salvation Army Anchorage
http://www.salvationarmy.org/alaska

Arizona

Arizona League To End Regional Trafficking (ALERT)
http://www.traffickingaz.org/.

Catholic Charities DIGNITY Program
http://www.catholiccharitiesaz.org

Arkansas

Catholic Charities - Little Rock
http://www.dolr.org/offices/catholiccharities/immigration.php

California

Human Exploitation and Trafficking (H.E.A.T) Watch Program
http://www.heat-watch.org.

Narika - Asian Anti-Trafficking Collaborative
http://www.narika.org .

The SAGE Project, Inc. - Standing Against Global Exploitation
http://www.sagesf.org .

Operation Safehouse
http://operationsafehouse.org

Colorado

Colorado Network to End Human Trafficking (CoNEHT)
24 Hr. Hotline: 1-866-455-5075

Laboratory to Combat Human Trafficking
http://www.combathumantrafficking.org.

Connecticut

International Institute of CT
http://www.iiconn.org/

The Paul & Lisa Program
http://www.paulandlisa.org/

Barnaba Institute, Inc.
http://www.barnabainstitute.org

Delaware

People's Place
http://www.peoplesplace2.com/programs-services/

Survivors of Abuse in Recovery, Inc.
http://www.soarinc.com

District of Columbia

Polaris Project
http://www.polarisproject.org

Courtney's House
http://www.courtneyshouse.org

Restoration Ministries
http://www.restorationministriesdc.org

Fair Girls
http://www.fairgirls.org

D.C. Stop Modern Slavery
http://www.stopmodernslavery.org/

Shared Hope International
http://sharedhope.org/

Florida

Building Empowerment By Stopping Trafficking, Inc.
http://www.beststoptrafficking.org

Covenant House Florida
http://www.covenanthousefl.org

Broward County Sexual Assault Treatment Center
http://www.broward.org/sexualassault

Harbor House of Central Florida, Inc.
http://www.harborhousefl.com

Georgia

A Future. Not A Past. Campaign
http://www.afuturenotapast.org

Wellspring Living
http://www.wellspringliving.org

Savannah Working Against Human Trafficking (SWAHT)

Street Grace
http://www.streetgrace.org

Hawaii

Pacific Alliance to Stop Slavery
http://www.traffickjamming.org

Pacific Gateway Center
http://www.pacificgatewaycenter.org

Susannah Wesley Community Center
http://www.susannahwesley.org/

Women Helping Women
http://www.whwmaui.net/

Idaho

Idaho Coalition Against Sexual & Domestic Violence
http://www.idvsa.org

Illinois

The Salvation Army–STOP IT Program
http://www.sa-stopit.org

Anne's House
http://salarmychicago.org/promise/annes-house/

PROMISE
http://salarmychicago.org/promise/about-us/

Heartland Alliance
http://www.heartlandalliance.org

Chicago Alliance Against Sexual Exploitation
http://www.caase.org

Chicago Coalition for the Homeless
http://www.chicagohomeless.org

International Organization For Adolescents
http://www.iofa-talk.blogspot.com

National Immigrant Justice Center
http://www.immigrantjustice.org/

Indiana

The Julian Center
http://www.juliancenter.org/

Exodus Refugee Immigration Inc.
http://www.exodusrefugee.org/

Neighborhood Christian Legal Clinic
http://www.nclegalclinic.org/

National Immigrant Justice Center
http://www.immigrantjustice.org/

La Plaza
http://www.laplaza-indy.org/

Indiana Coalition Against Sexual Assault
http://www.incasa.org/

Iowa

Catholic Charities – Des Moines
http://www.dmdiocese.org/catholic-charities.cfm

Family Violence Center/Children and Families of Iowa
http://www.cfiowa.org

Latinas Unidas por un Nuevo Amanecer (LUNA)
http://www.lunaiowa.org

Lutheran Social Services
http://www.lsiowa.org

Youth Emergency Services and Shelter (YESS)
http://www.yessiowa.org

Kansas

Veronica's Voice
http://www.veronicasvoice.org

Kentucky

Bluegrass Rape Crisis Center
http://www.bluegrassrapecrisis.org

Women's Crisis Center
http://www.wccky.org/

BPSOS
http://www.bpsos.org

P.A.T.H. - Partnership Against the Trafficking of Humans
http://www.pathnky.org

Louisiana

Alliance of Guestworkers for Dignity
http://www.nowcrj.org

Covenant House - New Orleans
http://www.covenanthouseno.org

Trafficking Hope
http://www.traffickinghope.org.

Eden House
http://www.edenhousenola.org.

Maine

Maine Coalition Against Sexual Assault
http://www.mecasa.org/

Maryland

Casa de Maryland
http://www.casademaryland.org/

TurnAround Inc.
http://www.turnaroundinc.org

Massachusetts

Lutheran Social Services of New England
http://www.lssne.org/Services-New-Americans/ILAP/Services/Trafficking.aspx

Support to End Exploitation Now Coalition (SEEN)/Children's Advocacy Center of Suffolk County
http://www.suffolkcac.org

Roxbury Youthworks, Inc.
http://www.roxburyyouthworks.org

My Life My Choice
http://www.fightingexploitation.org/

Project REACH/The Trauma Center
http://www.traumacenter.org/

Germaine Lawrence
http://www.germainelawrence.org/

Michigan

Alternatives for Girls
http://www.alternativesforgirls.org

Underground Railroad, Inc
http://www.undergroundrailroadinc.org/

Bethany Christian Services
http://www.bethany.org

Jewish Family Services
http://www.jfsdetroit.org/

National Immigrant Justice Center
http://www.immigrantjustice.org/

St. Vincent Catholic Charities
http://www.stvcc.org

Freedom House
http://www.freedomhousedetroit.org/

Minnesota

The Institute for Trafficked, Exploited & Missing Persons
http://www.ITEMP.org

Breaking Free
http://www.breakingfree.net

PRIDE (Prostitution to Independence, Dignity and Equality)
http://www.thefamilypartnership.org

Minnesota Indian Women's Resource Center
http://www.miwrc.org

Minnesota Indian Women's Sexual Assault Coalition
http://www.miwsac.org.

Advocates for Human Rights
http://www.mnadvocates.org

Civil Society
http://www.civilsocietyhelps.org

Center for Victims of Torture
http://www.cvt.org

Youthlink
http://www.youthlinkmn.org

International Institute of Minnesota
http://www.iimn.org

Program for Aid to Victims to Sexual Assault (PAVSA)
http://www.pavsa.org

Mississippi

Advocates For Freedom, Six Coastal Counties
http://www.advocatesforfreedom.com

The Center for Violence Prevention
http://www.mscvp.org

Wesley House Family Justice Center
http://www.wesleyhousemeridian.org

Missouri

International Institute of St. Louis

Veronica's Voice
http://www.veronicasvoice.org/

Central Missouri Stop Human Trafficking Coalition
http://stophumantraffickingmo.com

Montana

Catholic Charities Refugee Services
http://www.cfsstl.org/

YWCA - St. Louis Regional Sexual Assault Center
http://www.ywca.org/

Nebraska

The Salvation Army - Wellspring Program
http://www.givesalvationarmy.org

Nevada

Hopelink
http://link2hope.org

Nevada Parnership for Homeless Youth
http://www.nphy.org

Salvation Army
http://www.salvationarmysouthernnevada.org/

Shade Tree
http://www.theshadetree.org

New Hampshire

New Hampshire Coalition Against Domestic and Sexual Violence
http://www.nhcadsv.org

New Jersey

Polaris Project
http://www.polarisproject.org

New Mexico

New Mexico Attorney General
http://www.nmag.gov/consumer/publications/humantrafficking

The Life Link
http://thelifelink.org/

Catholic Charities - Las Cruces
http://www.catholiccharitiesdlc.org/

Catholic Charities – Albuquerque
http://www.catholiccharitiesasf.org

New York

Girls Educational & Mentoring Services (GEMS)
http://www.gems-girls.org/

Safe Horizon
http://www.safehorizon.org

My Sisters' Place
http://www.mspny.org

New York Asian Women's Center
http://www.nyawc.org.

Restore NYC
http://www.restorenyc.org

City Bar Justice Center - Immigrant Women & Children Project
http://www2.nycbar.org/citybarjusticecenter/

International Institute of Buffalo
http://www.iibuff.org

North Carolina

North Carolina Coalition Against Human Trafficking
http://www.nccasa.net/nccaht

30th Judicial District DV & SA Alliance, Inc.
http://www.30thalliance.org.

Legal Services of Southern Piedmont
http://www.lssp.org

NCCASA
http://www.nccasa.org

North Dakota

Lutheran Social Services of North Dakota
http://www.lssnd.org/community-outreach/new-americans/nas-overview.html

Ohio

Catholic Social Services of Southwestern Ohio
http://www.catholiccharitiesswo.org

Cleveland Rape Crisis Center
http://www.clevelandrapecrisis.org

Catholic Charities of Cleveland
http://www.clevelandcatholiccharities.org

Collaborative to End Human Trafficking
http://www.clevelandcatholiccharities.org

Crime Victim Services
http://www.CrimeVictimServices.org

Salvation Army of Central Ohio
http://www.centralohiorescueandrestore.org

Community Refugee and Immigration Services (CRIS)
http://www.cris-ohio.com/

Central Ohio Rescue and Restore Coalition
http://www.centralohiorescueandrestore.org/

Gracehaven, Inc.
http://www.gracehaven.me

TraffickFree
http://www.traffickfree.com.

Asian American Community Services
http://www.aacsohio.org

Catholic Social Services
http://www.colscss.org/

Legal Aid Society Columbus
http://www.columbuslegalaid.org/

Sexual Assault Response Network of Central Ohio
http://www.ohiohealth.com

ASHA Ray of Hope
http://www.asharayofhope.org

Second Chance Toledo
http://www.secondchancetoledo.org

Northern Tier Anti-Human Trafficking Consortium (NTAC)
Hotline: 1-800-837-5345

End Slavery Cincinnati (ESC)
http://www.endslaverycincinnati.org

Salvation Army of Southwest Ohio & Northeast Kentucky
http://www.salvationarmycincinnati.org

Oklahoma

Day Spring Villa
http://www.dayspringvilla.com

Safeline - OK Office of the Attorney General
Hotline: 1-800-522-7233

Oregon

Oregonians Against Trafficking Humans (OATH)
http://www.oregonoath.org/

Lutheran Community Services Northwest
http://www.lcsnw.org

Janus Youth Programs
http://www.jyp.org

Sexual Assault Resource Center (SARC)
http://www.sarcoregon.org/

Pennsylvania

Covenant House Pennsylvania
http://www.covenanthousepa.org

Dawn's Place
http://www.ahomefordawn.org

Nationalities Service Center
http://www.nscphila.org

Freedom and Restoration for Everyone Enslaved (FREE)
http://www.freefromht.org

Project to End Human Trafficking
http://www.endhumantrafficking.org/

YWCA York - York County Task Force on Human Trafficking
http://www.ywcayork.org/

Rhode Island

Day One
http://www.dayoneri.org

South Carolina

Lutheran Family Services Refugee and Immigration Services
http://www.lfscarolinas.org/what-we-do/refugee-services/community-support.aspx

South Dakota

Lutheran Social Services – Sioux Falls
http://www.lsssd.org/

Tennessee

Doctors At War
http://www.doctorsatwar.org T

Community Coalition Against Human Trafficking
http://www.ccaht.org

YWCA of Nashville & Middle Tennessee, Weaver Domestic Violence Center
http://www.ywcanashville.com

End Slavery in Tennessee
http://www.endslaverytn.org

Second Life of Chattanooga
http://www.secondlifechattanooga.org

Free for Life International
http://www.freeforlifeintl.org

A Bridge of Hope
http://www.ABridgeofHope.org

Texas

Central Texas Coalition Against Human Trafficking
http://www.ctcaht.org

Houston Rescue and Restore Coalition
http://www.houstonrr.org

Mosaic Family Services
http://www.mosaicservices.org

Tahirih Justice Center
http://www.tahirih.org

Texas Rio Grande Legal Aid
http://www.trla.org

Utah

Asian Association Refugee and Immigrant Center
http://www.aau-slc.org

YWCA - Salt Lake City
http://www.ywca.org/site/pp.asp?c=glLUJgP9H&b=67256

International Rescue Committee (IRC) - Salt Lake City
http://www.theirc.org/us-program/us-salt-lake-city-ut

Vermont

Vermont Network Against Domestic and Sexual Violence
http://www.vtnetwork.org/

Vermont Coalition of Runaway & Homeless Youth Programs
http://www.vcrhyp.org

Virginia

Courtney's House - 24 Hour Hotline: 1-888-261-3665
http://www.courtneyshouse.org

Homestretch
http://www.homestretch-inc.org

Tahirih Justice Center
http://www.tahirth.org

International Rescue Committee
http://www.theirc.org

The Gray Haven Project
http://www.thegrayhaven.com

Virginia Beach Justice Initiative
http://www.vbji.org

Washington

Washington Anti-Trafficking Response Network (WARN)
http://warn-trafficking.org/

Lutheran Community Services Northwest
http://www.lcsnw.org

Youth Care
http://www.youthcare.org

Seattle Against Slavery
http://www.seattleagainstslavery.org

West Virginia

West Virginia Domestic Violence Coalition
http://www.wvcadv.org

Wisconsin

United Migrant Opportunities Services (UMOS)
http://www.umos.org

BASICS (Brothers and Sisters in Christ, Serving)
http://www.BASICSinMKE.org

International Institute of Wisconsin
http://www.iiwisconsin.org/

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Wisconsin Coalition Against Sexual Assault
http://www.wcasa.org/pages/Intervention_Human-Trafficking.php

Franciscan Peacemakers
http://www.franpax.com

Catholic Charities of the Archdiocese of Milwaukee, Inc.
http://www.ccmke.org

ARC Community Services
http://www.arccommserv.com

NCJFCJ
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NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES
WWW.NCJFCJ.ORG

Creating a **Human Trafficking** Strategic Plan

to Protect and Heal Native Children and Youth

OJJDP Office of Juvenile Justice and Delinquency Prevention
Office of Justice Programs ♦ U.S. Department of Justice

Human trafficking is a crime in which people profit from the exploitation of others.

Victims of human trafficking include children involved in the sex trade, adults over the age of 18 who are forced, coerced or deceived into commercial sex acts, and children and adults compelled into different forms of labor. Child and youth trafficking victims require a highly educated, loving, and carefully coordinated response by multiple individuals and agencies including parents, child welfare workers, foster care workers, law enforcement officers, medical workers, school administrators and teachers, attorneys, and the courts.

Children are particularly vulnerable to human trafficking. When dealing with trafficking cases, child safety must guide all efforts: child victims must be protected, physically and psychologically, from their traffickers and provided with placements and services specifically designed to address the trauma they have endured. Because every tribal community is different, it is not possible to create one plan that will work for everyone. Instead, each community needs to consider structures, processes, resources, size, community risk factors, and other things in order to come up with the most effective plan. This worksheet walks through several questions that prompt participants to make a plan that is in alignment with the needs and abilities of the community. Some things your community will be able to work on immediately. Others will take more time and might give ideas for potential grant applications or other funding requests for the future. Still others will require coordination with non-Native communities and agencies.

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1. Who in the community needs training on the definition and indicators of human trafficking?

Indicators that trafficking might be happening:

- Does not attend school on a regular basis and/or has unexplained absences
- Frequently runs away from home
- Makes references to frequent travel to other cities
- Exhibits bruises or other signs of physical trauma, withdrawn behavior, depression, anxiety, or fear
- Shows signs of drug addiction
- Has coached/rehearsed responses to questions
- Has a sudden change in attire, personal hygiene, relationships, or material possessions
- Makes references to sexual situations or terminology that are not age appropriate
- Sudden delinquent conduct
- Has a "boyfriend" or "girlfriend" who is noticeably older and/or refusal to disclose the identity of the boyfriend or girlfriend
- Confusion about when and where they are
- Attempts to conceal recent scars or tattoos

Factors that make it difficult to identify victims:

- They may not identify themselves as victims
- They are ashamed or embarrassed for their family and/or community to find out
- They may feel extreme distrust of the system
- They may have formed a trauma-bond with their trafficker
- Both victims and perpetrators are often skilled at concealing their situations
- It can be difficult to distinguish traffickers from victims because some victims "collaborate" to survive

2. How will you train children and youth to be aware of what trafficking is and how to protect themselves?

One source that has good materials for teaching children about abuse and exploitation in general is:

National Center for Missing & Exploited Children (http://www.missingkids.org/Safety)

3. Are there any particular risk factors connected with your community that might draw traffickers into the area or cause locals to decide to get involved with trafficking?

Examples:

- Economic Factors
- Rates of Substance Abuse
- Large Number of Kids Involved with Child Welfare
- Large Number of Runaways
- Outside Events

Vulnerability factors:

- 50-80% of trafficking victims were involved with child welfare services at some point
- Minimal social support
- Poverty
- Limited Education
- Lack of work opportunities
- Run Away/Thrown Away/Homeless
- History of Previous Sexual Abuse
- Drug or Alcohol Addiction
- PTSD
- History of Truancy
- Physical, Mental, Emotional Health Challenges

4. What agencies or individuals in your community need to create procedures to work together to protect youth and children?

5. Does your tribe have human trafficking included in the tribal code? If so, how is it written? If not, how can it be included? If you do not have a written code, how can it be incorporated into your tribal justice system, both formal and informal?

Example from a Michigan state code:	Common state standard:
If a minor has been recruited, enticed, harbored, transported, obtained, exploited, or maintained to engage in commercial sexual activity, a sexually explicit performance, or the production of pornography, then the minor is a victim of sex trafficking. MCL 750.462g.	Traffickers often use force, threats, violence, false promises, manipulation, lies, or other physical and psychological methods to control the victim. Unlike adult victims, however, any sexually exploited child under 18 is considered a victim of sex trafficking, even if there is no force, fraud or coercion.

6. **If your community has a court, does it have forms to file a trafficking petition? If no tribal court, does the court you would go to have these forms?**

7. Taking a minor into protective custody - what procedures and practices have been set up? Are they trauma-informed? What do you do when the child's family/guardian is involved?

8. How do you interview a minor?

Interviewers must be careful to use statements that do not blame the victim, and also choose terminology carefully. Not all victims will be comfortable being called a victim. Victims may not tell the truth as they could have been told by their trafficker that law enforcement will punish them, not help them. Victims may repeatedly tell lies or relate a rehearsed story.

9. What will you do if the minor is a runaway and you fear that they will run again?

10. How will you address medical and mental health needs?

In all cases, a victim should receive a comprehensive medical examination as soon as possible. The comprehensive medical examination should include a behavioral/mental health screening, which may reveal evidence of post-traumatic stress, which could include: memory impairment, anxiety, depression, addictions, panic attacks, or phobias.

11. How will you meet placement and treatment needs?

The needs of survivors of trafficking are typically very complex and need to address severe trauma, medical needs, safety concerns, shelter and other basic daily needs. All child victims of human trafficking must be placed within a safe environment and receive appropriate services. The physical and mental stability of the child must be continuously assessed throughout the child's placement and treatment. Strict confidentiality is necessary to prevent the trafficker from obtaining information on the child's whereabouts.

12. What are some alternatives to punitive law enforcement measures?

Traffickers solicit children to engage in illegal acts like prostitution, selling or transporting drugs, and committing other crimes. Even though these acts are illegal, the victims are not guilty of a crime because they are under the control of the trafficker. Only if necessary to ensure a victim's separation from the trafficker or for successful treatment should a juvenile delinquency proceeding be initiated.

UCLA LAW REVIEW

(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors

Priscilla A. Ocen

ABSTRACT

Over the last twenty years, domestic sexual trafficking of children has received increased attention from state and national policymakers and advocates. Indeed, states across the country have enacted laws establishing harsh new penalties for individuals convicted of domestic sexual trafficking. At the same time, arrest and conviction rates for Black girls within the juvenile justice system are increasing, often as a result of prostitution-related offenses. In this Article, I explore the race, gender, and class dynamics that animate these trends. In particular, I highlight the ways in which historic constructions of childhood, innocence, and sexuality shape antitrafficking law enforcement practices and how they have functioned in racialized and gendered ways to exclude Black girls from protection. Consequently, Black girls who are subject to sexual exploitation in the contemporary era are often labeled as offenders rather than victims. In sum, I contend that the intersectional identities of poor Black girls at once render them vulnerable to sexual exploitation and deny them access to protective antitrafficking regimes. To combat the discrimination that Black girls experience as a result of this exclusion, I propose decriminalization of girls who are subject to trafficking and robust investment in supportive race- and gender-conscious institutions that can prevent sexual exploitation.

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INTRODUCTION

The powerful Western image of childhood innocence does not seem to benefit Black children. Black children are born guilty.[1]

Child prostitution has increasingly come to be understood as a pervasive social problem and a contradiction of terms. In Western tradition, the period of childhood is normatively constructed as a time of innocence and insulation for the responsibilities of adulthood; a time when children can psychologically and physically mature into fully functioning human beings, assessing their identities and roles within the broader society. During this formative period, social institutions function to protect children from adults who would seek to harm or misuse them. For many children, however, childhood is fraught with exploitation and sexual abuse. These children are often targeted by pimps, who exploit their bodies for commercial gain. Commonly decried as a modern form of slavery, children across the country are caught in this tragic cycle of sexual abuse and trauma. Far too often, however, sexually exploited children are not recognized as victims, despite their inability to consent to a sexual act, instead they are subject to prosecution for juvenile prostitution. To combat this problem, federal and local agencies have enacted statutes and initiatives that classify trafficked children as victims rather than offenders and increase criminal penalties for those guilty of encouraging or inducing the sexual trafficking of children.

In 2000, the U.S. Congress enacted the Trafficking Victims Protection Act (TVPA) "[t]o combat trafficking in persons, especially into the sex trade, slavery and involuntary servitude."[2] According to the TVPA, "[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked."[3] Adults are defined as severely trafficked persons—and therefore entitled to certain forms of protection such as access to T-Visas and other resources—if law enforcement finds that the "commercial sex act [was] induced by force, fraud or coercion."[4] By contrast, anyone under the age of eighteen who is the subject of trafficking is automatically defined as a "severely trafficked" person and is subject

1. Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 877 (1994).
2. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1464 (2000).
3. 22 U.S.C. § 7101(b)(19) (2012).
4. 22 U.S.C. § 7102(9)(A) (2012).

to the TVPA's protections for victims;[5] unlike adult victims of trafficking, children need not establish that the trafficking occurred due to fraud or coercion in order to be classified as a "severely trafficked person." In other words, coercion is presumed when the victim is below the age of majority. Under the TVPA, individuals who are convicted of commercial sex trafficking of children are subject to punishment ranging from ten years to life in prison.[6] Federal jurisdiction, however, is limited and most arrests for prostitution come under the purview of state and local law enforcement agencies. As a result, several states have enacted legislation to protect child victims of sexual exploitation and punish traffickers. For example, California voters recently approved the Californians Against Sexual Exploitation Act,[7] which increased penalties for sexual traffickers and required those convicted of such crimes to register as sex offenders.[8]

The shift in federal and state policy regarding commercially sexually exploited children and the differential treatment of youth and adults accused of prostitution are normatively grounded in the concept of childhood, particularly the stage known as adolescence. Animating these policies is the view that children are categorically distinct from adults as a result of their innocence, vulnerability, and dependence.[9] Because of these distinctions, children are deemed to lack the maturity and agency necessary to consent to a sexual act. Indeed, under the TVPA and similar state statutes, any sexual act involving a child is deemed inherently nonconsensual and coercive. Under this statutory regime, commercially sexually exploited children are entitled to protection, rather than punishment by the state. Yet appeals to protect children from punishment stemming from their sexual abuse have not attracted the support of a majority of states. Only fifteen states have passed robust Safe Harbor laws, which provide children who have been trafficked with immunity from prosecution and divert them out of the juvenile justice system.[10] And across the country, children, particularly Black

5. 22 U.S.C. § 7102(8)(A) (2012).
6. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5067 (2008).
7. *See, e.g.*, Anna Almendrala, *Prop. 35 Passes: California Voters Approves Harsher Sentencing for Human Traffickers*, HUFFINGTON POST (Nov. 7, 2012, 3:16 PM), http://www.huffingtonpost.com/2012/11/07/prop-35-passes-california_n_2089305.html.
8. *See infra* Part I.B.2.
9. *See, e.g.*, Kevin Lapp, *Compulsory DNA Collection and a Juvenile's Best Interest*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 53, 77 (2014).
10. *See, e.g.*, Stella Dawson, *U.S. Jails Sex-Trafficked Kids in Human Rights Abuse, Groups Say*, REUTERS (Mar. 16, 2015), http://www.reuters.com/article/2015/03/17/us-trafficking-us-children-idUSKBN0MD0AJ20150317 (noting that only 15 states have safe harbors laws for sexually exploited children); *2014 State Ranking on Human Trafficking Laws,* POLARIS PROJECT, http://www.polarisproject.org/storage/2014SRM_pamphlet_download.pdf (last visited Jun. 28, 2015); *Sex Trafficking of Minors and "Safe Harbor"*, POLARIS PROJECT,

girls, are still arrested for prostitution, adjudicated as juvenile delinquents, and subject to confinement in juvenile detention centers.

I witnessed the disjuncture between emerging policy and the treatment of girls arrested for prostitution when I visited the Los Angeles County Central Juvenile Hall, where I was invited by the director to speak to a group of girls who were detained at the facility. The juvenile hall, located just two miles from the downtown Los Angeles campus where I teach, felt worlds away. In the midst of an industrial area, concrete walls surrounded the facility, its exterior yellowing with age. As I entered the detention center, I underwent a security screening and was escorted to a locked unit by the director. In the recreation hall where I was to speak, I encountered a group of approximately sixteen girls, neatly dressed in tan uniforms and sitting mostly in silence as probation officers stood by. The girls were between the ages of fourteen and eighteen. Roughly 70 percent were Black and the other 30 percent were Latina. None were white. As we spoke, nearly all of them described experiencing some form of homelessness, abuse, or both. Many of the girls had been arrested for prostitution or prostitution-related offenses such as running away or curfew violations. Some had sold sex for survival while others had been recruited by pimps and trafficked on the street or online. Some had engaged in other activities, such as gun or drug possession at the behest of pimps. Nearly all of them were confirmed or suspected by law enforcement of being commercially sexually exploited children. Yet the girls were likely to spend weeks or months in the facility as they awaited proceedings in delinquency court or while their placements were determined.

The treatment of the girls is emblematic of the ways in which race, gender, and other identities shape responses to sexually trafficked children. In many respects, the Black girls I encountered at the juvenile detention facility did not enjoy the presumptions of childhood that undergird antitrafficking initiatives; they have been denied the protections of childhood. Rather, the protections of childhood afforded to the Black girls in the juvenile detention center, like the concept itself, are dynamic and highly contingent on other identity categories such as race, gender, and class. As such, when applied to them the concept of childhood is often partial, or incomplete, especially within the juvenile justice system. While some children are extended significant protections and diverted out of the juvenile justice system, others are directed into a system designed to discipline delinquent youth.

http://www.polarisproject.org/what-we-do/policy-advocacy/assisting-victims/safe-harbor (last visited Jun. 28, 2015).

Indeed, like many other areas in the criminal justice system, the enforcement of policies regarding sexually exploited children is uneven and rife with racial disparities.[11] Often the protective state and federal policies regarding child sex trafficking are invoked only after a child is deemed by a member of law enforcement to be a likely victim of sexual trafficking. Such discretionary designation enables racial bias—implicit or explicit—to shape who is viewed as a perpetrator and who is viewed as a victim. Studies have found that Black girls constitute a disproportionate number of juvenile arrests for prostitution, that they are more likely than their white counterparts to be adjudicated through the juvenile system, and that they are more likely to be detained in a locked facility even if identified as a victim of sexual trafficking.[12] In sum, Black girls are often not viewed as children for purposes of protection under state and federal law.

The treatment of the girls at the juvenile detention center reflects the ways in which predominately poor, Black girls exist at a structural location that renders them vulnerable to sexual abuse on the one hand and criminalization for prostitution on the other. The poverty, joblessness, and inadequate housing that characterized their predominately Black and Latino neighborhoods undermined the stability of their families and communities. With families in distress and little in the way of community resources to provide assistance, girls were often placed in the juvenile dependency system or—worse—left to find their way on the street. In the foster care system, they were often vulnerable to sexual abuse and trauma in their foster homes, and were targeted by pimps outside the home. Living in heavily policed jurisdictions, they were highly visible to law enforcement and therefore more likely to be arrested for a prostitution-related offense. Indeed, in one Los Angeles County study of juveniles arrested for prostitution, it was found that Black girls comprised 92 percent of arrestees even though they are but 3 percent of the population.[13] This pattern is not unique to Los Angeles or its juvenile detention centers; rather, it is reflected in

11. *See* Nesheba Kittling, *God Bless the Child: The United States' Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 925 (2006); Mike Kessler, *Gone Girls: Human Trafficking on the Home Front*, L.A. MAG., (Oct. 14, 2014), http://www.lamag.com/longform/gone lo -girls/ #sthash.uGInKLyf.dpuf (noting that 90 percent of girls appearing before the court adjudicating victims of sexual exploitation are Black).

12. *See infra* Part I.A.

13. Albert Sabate, *Los Angeles Task Force Takes on Underage Prostitution*, ABC NEWS (Dec. 12, 2012), http://abcnews.go.com/ABC_Univision/News/los-angeles-task-force-takes-underage-prostitution/story?id=17844111 ("African American girls made up 92 percent of the underage arrestees—some who were as young as 10 years old.").

communities and urban centers across the United States.[14] And while the race and class identities of the girls heightened their visibility for purposes of prosecution, those same identities rendered them invisible for purposes of protection. Childhood, which serves as the normative grounding for anti–child sex trafficking initiatives is viewed as a natural, essential category of human development that includes all persons below the age of majority. An emerging body of literature, however, has contested this understanding of childhood, arguing that the category is socially constructed.[15] Like other social categories, childhood is shaped by other identity categories such as race and gender. Indeed, ideological constructs of children of color—particularly Black children—as less innocent and more adult are well documented.[16] As a result of these constructs and their attendant stereotypes, Black children often experience significant discrimination and mistreatment. For example, they are suspended from school for minor misbehavior at rates higher than their white counterparts,[17] are more likely to come into contact with the criminal justice system,[18] are more likely to be criminally prosecuted,[19] and when prosecuted are more likely to be charged as adults.[20]

14. *See, e.g.*, Albert Sabate, *Los Angeles Task Force Takes On Underage Prostitution*, ABC NEWS (Dec. 7, 2012), http://abcnews.go.com/ABC_Univision/News/los-angeles-task-force-takes-underage-prostitution/story?id=17844111; *see also* Part II, *infra*.

15. *See, e.g.*, HENRY A. GIROUX, YOUTH IN A SUSPECT SOCIETY: DEMOCRACY OR DISPOSABILITY 18–19 (2009); Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J. L. & GENDER 715, 736–38 (2013); Diana Gittins, *The Historical Construction of Childhood, in* AN INTRODUCTION TO CHILDHOOD STUDIES 35 (Mary Jane Kehily ed., 2009); Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 527 (2014); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 818 (2003); M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 380 (2010); Jonathan Todres, *Maturity,* 48 HOUS. L. REV. 1107, 1109 (2012).

16. *See generally* Goff et al., *supra* note 15 (arguing that Black children are perceived to be more mature at earlier ages than their white counterparts); *see also* ALLISON JAMES & ADRIAN JAMES, CONSTRUCTING CHILDHOOD: THEORY, POLICY AND SOCIAL PRACTICE 10–13 (2004).

17. *See, e.g.*, KIMBERLÉ WILLIAMS CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED 16 (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54d23be0e4b0bb6a8002fb97/1423064032396/BlackGirlsMatter_Report.pdf.

18. Marian Wright Edelman, *Disproportionate Minority Youth Contact: Keynote Address*, 15 J.L. & POL'Y 919, 927 (2007).

19. Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101, 104 (2015) (noting that "African American girls the fastest-growing segment of the juvenile justice system"); NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 3 (2007), http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf.

20. Tera Agyepong, *Children Left Behind Bars:* Sullivan*,* Graham*, and Juvenile Life Without Parole Sentences*, 9 NW. J. INT'L HUM. RTS. 83, 98 (2010) ("African American children, who make up 60% of all children sentenced to life without parole, are sentenced to LWOP at a rate that is ten times higher than that of white youth.").

The stereotypes that deny Black children their childhood are both racialized and gendered. Because Black boys are viewed as more mature, they are treated more harshly by the systems with which they interact.[21] Black boys are more likely to be tried as adults and are disproportionately represented among juveniles who have been sentenced to life imprisonment.[22] In the context of the commercial sexual exploitation of children, gendered and racialized biases against Black girls cast them as more mature and thus as possessing more agency over their sexuality than their white counterparts.[23] They are viewed as "street smart," less dependent on adults, and less vulnerable to adult manipulation or abuse. When detected by law enforcement, their failure to cooperate may be interpreted as consent to and complicity in prostitution. As a result, they are often confined or punished rather than provided with adequate support services. Moreover, this exclusion from the category of childhood is compounded by scholarship and policy initiatives that have failed to thoroughly interrogate the intersection of race, gender, and childhood. In much of the scholarship regarding commercially sexually exploited children, for example, scholars have argued that trafficked children should be treated as victims rather than offenders, that specific programming should be created to address the children's trauma, and that penalties for child traffickers should be increased.[24] Yet, the racial and gender biases that affect presumptions of childhood are underexamined in the broader scholarly and policy conversations regarding trafficking and therefore limit the effectiveness of such initiatives.[25]

In this Article, I interrogate this discursive gap. I examine the intersectional dynamics that lead to the simultaneous overpolicing and underprotection of sexually exploited girls of color, particularly Black girls. I argue that Black girls occupy a space I term liminal childhood. Specifically, I argue that racialized and gendered constructions of childhood innocence, maturity, and sexual agency exclude Black girls from the protection of anti–child trafficking statutes and initia-

21. *See, e.g.*, Goff et al., *supra* note 15, at 527.
22. *See, e.g.*, Agyepong, *supra* note 20, at 98.
23. *See* Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 24 (2004).
24. *See, e.g.*, Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 3–4 (2011).
25. One notable exception includes Emily Chaloner, *Anybody's Daughter? How Racial Stereotypes Prevent Domestic Child Prostitutes of Color From Being Perceived as Victims*, 30 CHILD. LEGAL RTS. J. 48, 50–51 (2010). Additionally, within this issue of the UCLA Law Review, legal scholar Cheryl N. Butler has noted the ways in which race and gender shape the experience of commercially sexually trafficked minors. *See* Cheryl N. Butler, *The Racial Roots of Human Trafficking* 62 UCLA L. REV. (forthcoming 2015). *See also* Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679 (2002).

tives. In describing this concept, I assert that Black girls exist at the margins of childhood, burdened with aspects of childhood that prevent their full participation in society—such as not being able to vote—while simultaneously being excluded from the protective constructions of childhood—such as the inability to consent to certain kinds of sexual acts or diminished culpability in the criminal setting. Stated differently, as liminal children, they are at once viewed as dependent, limited rights-bearing subjects while at the same time imbued with adult characteristics such as sexual maturity, individual agency and criminal responsibility. Thus, they are directed into rather than out of the juvenile justice system.

In advancing this argument, I note that exclusion from notions of childhood and innocence are part of a historical genealogy of sexual exploitation of Black women and girls. Stereotypes of their sexual maturity and promiscuity were used to justify the exploitation of the reproductive capacities of Black women and girls as a means of maintaining the system of chattel slavery. In the post-Reconstruction era, prostitution offenses were used as a basis to control Black female sexuality and to reassert control over their labor under the auspices of the criminal justice system. Indeed, criminalization played a significant role in reinforcing stereotypes of sexual agency and deviance among Black women and girls. In the Jim Crow era, sexuality was cited as a basis to excuse the routine rape and abuse of Black females. In the contemporary era, the image of the lascivious and fecund Black teenager was used to promote draconian social welfare reform. These images persist in denying Black girls their childhood and innocence within a juvenile justice system grappling with how to handle sexually trafficked minors. In sum, I will interrogate the ways in which racism and patriarchy dehumanize Black girls, rendering them vulnerable to sexual exploitation on the one hand, while prosecuting them for prostitution on the other.

The impact of racialized and gendered constructions of childhood and innocence are not merely theoretical or academic. The social marginalization experienced by Black girls as a result of poverty, homelessness and educational inequity places them at a higher risk of victimization. The characteristics associated with their liminal status as children, including stereotypes of sexual agency, maturity and culpability, makes it more likely that they will be suspected by law enforcement and adjudicated as delinquents rather than protected as victims. To the extent that states are moving toward a law enforcement approach to combating the sexual trafficking of children, such initiatives, and the discretion given to the police agencies that execute them, may cause Black girls to be punished more harshly than similarly situated white girls. Moreover, the investment of resources into law enforcement and imprisonment often results in a divestment

from social institutions and structural reforms that address the root causes of vulnerability to exploitation, such as economic marginality, housing instability, and various forms of trauma. The failure of antitrafficking initiatives to attend to race, gender, and the structural causes of vulnerability of Black girls to exploitation runs the significant risk of further marginalizing those who are most in need of protection.

In closing, I call for an analysis of the dynamics that contribute to the commercial sexual exploitation of children through an intersectional lens that is attentive to race, gender, class, and sexual orientation. Such an approach would require mandatory decriminalization of youth who are trafficked, which would eliminate the biased use of discretion and ensure that Black girls are not consigned to a life at the margins as a result of their ongoing contact with the criminal justice system. Such an analysis should inform policymaking and focus attention the structural vulnerabilities—such as limited housing, education, and health care—that lead to domestic child sex trafficking, particularly of poor Black girls. The use of an intersectional lens would enable the establishment of protective institutions and practices that address the liminality experienced by Black girls through race-conscious and gender responsive programs in schools and other social service agencies, including the foster care system where Black girls are most vulnerable to being trafficked. This analysis would see sexual exploitation as part of a larger ecosystem of inequality that disproportionately affects Black girls.

This Article proceeds in four Parts. In Part I, I describe the concept of liminal childhood and note the ways in which girls of color, particularly Black girls, have been underserved and underprotected by social constructions of childhood, innocence, sexual agency, and diminished criminal responsibility that undergird the contemporary approaches to the commercial sexual exploitation of children. In particular, I discuss the historical and racial genealogy of normative constructs of childhood, innocence, and agency. In Part II, I briefly survey the historical and contemporary responses to child sex trafficking at the federal and state levels and note the ways in which the liminal status of Black girls has shaped antitrafficking initiatives over time. In Part III, I argue that the liminal childhood experienced by Black girls helps to explain the exclusion of Black children from protective anti–child trafficking initiatives. In Part IV, I offer some preliminary thoughts on moving toward a more racially inclusive, structural approach to anti–child sexual trafficking and highlight how sexually exploited Black girls are failed at various stages of the juvenile justice system.

I. LIMINAL CHILDHOOD: EXCLUSION OF BLACK GIRLS FROM SOCIAL CONSTRUCTIONS OF CHILDHOOD AND INNOCENCE

Childhood is commonly understood as a biological and developmental phase in which individuals lack maturity and are therefore in need of protection. This consensus view is reflected in law and policy both locally and globally. According to the United Nations Convention on the Rights of Children,[26] a child is defined as any individual below eighteen years of age.[27] The Convention goes on to state that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[28] Such protections include "the right to protection against all forms of neglect, cruelty and exploitation."[29] The Declaration captures the ways in which law and culture function to construct and codify childhood and to give the developmental phases associated with childhood meaning. Moreover, the Convention on the Rights of the Child is a useful starting point for the discussion of childhood and anti-child sex trafficking policies given that it has served as a basis for international antitrafficking legislation and articulates the conceptions of childhood—including immaturity, innocence, and protection—that justify such legal interventions.

Indeed, in a 2010 Department of Justice Report on the subject of child sexual exploitation, protecting childhood was cited as the normative justification for federal antitrafficking efforts. In particular, the report stated that "[t]he sexual abuse and exploitation of children rob the victims of their childhood, irrevocably interfering with their emotional and psychological development. Ensuring that all children come of age without being disturbed by sexual trauma or exploitation is more than a criminal justice issue, it is a societal issue."[30] This statement reflects the ways in which the heightened protections for children who are sexually exploited are often justified by conceptions of children's innocence and the heightened vulnerabilities associated with childhood.[31] The statement also exemplifies how the characteristics of childhood, such as innocence, are assumed to be naturally or biologically occurring.

26. Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. I-27531.
27. *Id.* at 46.
28. *Id.* at 45.
29. *Id.* at 56.
30. U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 1 (2010) *available at* http://www.justice.gov/psc/docs/natstrategyreport.pdf.
31. Pantea Javidan, *Global Class and the Commercial-Sexual Exploitation of Children: Toward a Multidimensional Understanding*, 1 COLUM. J. RACE & L. 365, 380 (2012).

Despite the universal language used in these statements to describe childhood and the protections available to children who are sexually exploited, Black girls have fallen between the cracks and are disproportionately subject to arrest and detention for prostitution-related offenses. Estimates vary, but studies suggest that approximately 100,000 children are sexually trafficked each year and the Federal Bureau of Investigation reports that approximately three hundred thousand children are at risk of being sexually trafficked each year.[32] Although children of all racial backgrounds and gender identities may be subject to sexual exploitation, Black girls are far more likely than their white or Latina counterparts to be identified as victims of trafficking.[33] In a 2011 report by the Department of Justice, approximately twenty-five hundred confirmed victims of trafficking were detected in the United States.[34] The report found that African Americans constituted 40 percent of the suspected victims and 62 percent of the confirmed perpetrators of sexual trafficking.[35] In Los Angeles and New York, two cities that the FBI identified as hot spots[36] for child sex trafficking, the numbers are even more stark. In 2010, the Los Angeles County Probation Department identified 174 sexually trafficked children, 92 percent of whom were African American.[37] A study of juveniles arrested for prostitution offenses in New York City found that "seventy percent were African American, although only twenty percent of all New York City residents were African American according to the 2000 census."[38]

Earlier I noted that the Black girls who experience sexual exploitation or arrest for prostitution offenses, such as the girls I encountered at the juvenile deten-

32. Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, FBI LAW ENFORCEMENT BULLETIN (Mar. 2011), *available at* http://leb.fbi.gov/2011/march/human-sex-trafficking. *See, e.g.*, RICHARD J. ESTES & NEIL ALAN WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO 92 (2001), http://www.hawaii.edu/hivandaids/Commercial%20Sexual%20Exploitation%20of%20Children%20in%20the%20US,%20Canada%20and%20Mexico.pdf (estimating that thirteen is the average age of young women when they become victims of trafficking).

33. DUREN BANKS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, at 6 (2011), http://www.bjs.gov/content/pub/pdf/cshti0810.pdf. Studies, however, are unclear whether the disproportionate arrests and prosecution of Black girls for prostitution is as a result of increased exploitation or as a result of increased attention directed toward Black girls by law enforcement.

34. *Id.*

35. *Id.*

36. *The Federal Bureau of Investigation's Efforts to Combat Crimes Against Children* ch.4 n.122, OFFICE OF INSPECTOR GEN. (2009), http://www.justice.gov/oig/reports/FBI/a0908/chapter4.htm#122.

37. *What Is Human Trafficking?*, SAVING INNOCENCE, http://www.savinginnocence.org/about/the-problem (last visited Mar. 6, 2015).

38. Javidan, *supra* note 31, at 379.

tion center, are deprived of the opportunity to be children. This statement, however, belies the complicated nature of childhood. Indeed, childhood is not only a matter of chronological age: It is a socially constructed category that intersects with and depends upon prevailing conceptions of race and gender. Thus, if one wants to understand why Black girls are at once the disproportionate victims of sexual trafficking and prosecuted as offenders, one must first examine the normative constructs of childhood that animate anti–child sexual trafficking statutes and consider the ways in which such constructs have been racialized and gendered in a manner that excludes Black girls, constituting a unique form of discrimination.

Black girls, who exist at the intersection of this racialized and gendered construct, experience what I call liminal childhood. Here, I draw upon the term liminality as it "corresponds roughly to the terms 'marginal' and 'peripheral,' designating an individual or (and more often) a group, whose inclusion in the community is ambiguous."[39] Persons who occupy a liminal identity are, as anthropologist Victor Turner has noted, "neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremon[y]."[40] Scholars who study immigration have drawn upon the concept of liminality to interrogate the relationship between various forms of legal status and belonging.[41] In the context of childhood, the concept of liminality usefully highlights the porous boundaries of the legal and ideological category.

As a social construct, childhood is not a category that exists outside of intersections with other identities such as race, gender, or class.[42] Rather, these other identities actively shape childhood and perceptions of it. From a very early age, even before adolescence, Black girls exist at the border of childhood and adult-

39. ANNE NORTON, ALTERNATIVE AMERICAS: A READING OF ANTEBELLUM POLITICAL CULTURE 12 (1986). The concept of liminality has also been deployed by post-colonial and border theorists. *See, e.g.*, Linda Bosniak, *Multiple Nationality and the Postnational Transformation of Citizenship*, 42 VA. J. INT'L L. 979, 989 (2002) ("It is the experience of being 'neither here nor there'—or, stated more affirmatively, being located in a 'third space' beyond the parameters of any individual nation-state—that shapes the sense of postnational identity to which many commentators refer. Scholars have developed concepts that seek to capture this experience—including hybrid identity, transnational identity, deterritorialized identity, and liminality—to express this phenomenon."); Brenda Cossman, *Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private*, 71 LAW & CONTEMP. PROBS. 153, 156 (2008) ("In the process, these migrating marriages and their turn to conflicts place same-sex marriage in a kind of state of liminality, betwixt and between recognition and nonrecognition.").

40. VICTOR TURNER, THE RITUAL PROCESS 95 (1969).

41. *See, e.g.*, Cecilia Menjivar, *Liminal Legality: Salvadorian and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 1007 (2006).

42. *See* ROBIN BERNSTEIN, RACIAL INNOCENCE: PERFORMING AMERICAN CHILDHOOD FROM SLAVERY TO CIVIL RIGHTS 6 (2011).

hood, viewed as dependent for some purposes and independent for others. Black girls are included in the construct of childhood to the extent that they are deemed to be dependent and thus denied the right to full membership in the polity. They cannot, for example, vote, drink, execute contracts, serve in the military, or exercise other rights associated with adulthood. In many states, they cannot control their reproductive capacities by accessing abortion without parental approval. Yet, while Black girls are assigned a dependent status, they often do not benefit from the corresponding protections associated with childhood and dependency, as Black girls are more likely than their white counterparts to be pushed out of school,[43] represented in an increasingly punitive and inadequate foster care system,[44] regulated by the juvenile justice system,[45] and more likely to be prosecuted or detained for prostitution-related offenses than their white counterparts.[46] The liminality experienced by Black girls, the simultaneous inclusion and exclusion of Black girls from childhood, is facilitated by adult-like stereotypes that are assigned to them. These stereotypical characteristics include sexual maturity, possession of agency to make important life decisions and the ability to be criminally responsible for their conduct.

The liminal childhood experienced by Black girls also reflects the ways in which they have been subject to a process of dehumanization and othering.[47] As Patricia Hill Collins notes, Black women (and girls) have historically served "[a]s the 'Others' of society who can never really belong, strangers [who] threaten the moral and social order. But they are simultaneously essential for its survival because those individuals who stand at the margins of society clarify its boundaries."[48] Indeed, Black girls exist at the border of childhood, simultaneously included for some purposes and excluded for others. Their liminal status functions to define the conceptual boundaries of childhood and innocence, for

43. *See* MONIQUE W. MORRIS, AFRICAN AM. POLICY F., RACE, GENDER AND THE SCHOOL-TO-PRISON PIPELINE: EXPANDING OUR DISCUSSION TO INCLUDE BLACK GIRLS 6 (2014), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/5422efe3e4b040cd1f255c1a/1411575779338/Morris-Race-Gender-and-the-School-to-Prison-Pipeline+FINAL.pdf.

44. *See* Shani King, *The Family Law Canon in A (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 602 (2011).

45. *See generally* Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012) (describing the racially disparate representation of Black girls within the juvenile justice system).

46. *See supra* Part I.A.2.

47. *See* Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 707 (1989) (noting that "race presents the most serious otherness problem").

48. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT 70 (2000).

they stand as a contrast to good or deserving children that are appropriately afforded the protections of the state.

A. Race, Gender, and the Normative Constructions of Childhood

Ranging from infancy to adolescence, childhood is often described as a biological and chronological stage through which human development is measured. Under this understanding of childhood, all persons below the age of majority are included, without regard to race, class, gender, disability, or other identity markers. As such, childhood is a powerful normative grounding for legal frameworks and social institutions such as familial responsibilities owed from parent to child and the state's duty to establish child-serving institutions such as schools. Although there is certainly a biological component to childhood, a strict biological account functions to mask the social and legal processes that construct childhood as well as the racialized and gendered dynamics that exclude Black girls. Rather, histories of racial and gender subordination, including slavery and Jim Crow, have interacted with the category of childhood to create a liminal category of childhood that renders Black girls vulnerable to sexual exploitation and criminalization.

1. Traditional Biological–Developmental Theory of Childhood

Under the traditional biological view of childhood, the differential treatment of children as compared to adults is rooted in physical and cognitive developmental processes, which are viewed as concluding at the age of majority. This traditional view presumes the natural and universal existence of childhood, with certain essential characteristics. As Phil Goff has observed, "[i]ndividuals tend to understand 'children' as an essential category . . . the principal characteristics of which are age . . . and innocence."[49] The essential innocence of childhood makes children more susceptible to manipulation and abuse by adults. As a result, systems designed to protect children derive their reason for existing from such essentialized notions of innocence.

In addition to innocence, immaturity is also included as an essential, biological characteristic of childhood, particularly at the stage of adolescence. For example, studies have indicated that the parts of the brain associated with critical thinking, "long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward continue to mature over the course of adolescence,

49. Goff et al., *supra* note 15, at 527.

and perhaps well into young adulthood."[50] Consequently, law and social custom treat adolescence as a bridge between the two developmental periods of childhood and adulthood; adolescents are given increased autonomy but remain limited rightsholders, subject to pervasive regulation by their families and by the state.[51] For these reasons, as legal scholar Jonathan Todres has noted, "[m]aturity is a foundational concept in all law related to children."[52]

Indeed, the diminished capacity of adolescent children to evaluate risk[53] has been recognized by a range of legal institutions and used as a justification for the creation of specific rules that apply to juveniles in the context of the criminal justice system. For example, in *Roper v. Simmons*,[54] the U.S. Supreme Court considered the constitutionality of the application of the death penalty to juveniles. In ruling that the use of capital punishment on an individual for an offense committed as a juvenile violated the Eighth Amendment's ban on cruel and unusual punishment, the Court observed that "adolescents are overrepresented statistically in virtually every category of reckless behavior"[55] because of "[a] lack of maturity and an underdeveloped sense of responsibility."[56] According to the Court, such recklessness and lack of foresight are among "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult" and "also explain why their irresponsible conduct is not as morally reprehensible as that of an adult."[57]

Adolescence is also marked by a profound period of identity formation and exploration of individuality. Researchers have found that "[i]ndividuals do not develop a coherent sense of identity until young adulthood, and adolescence is characterized by exploration, experimentation, and fluctuations in self-image."[58] During this period of identity development, adolescents are more likely to be impacted by peer pressure and judgment, which may render them vulnerable to ex-

50. Scott & Steinberg, *supra* note 15, at 816. *See generally* JOHN H. FLAVELL ET AL., COGNITIVE DEVELOPMENT (1993) (analyzing various stages in cognitive development associated with childhood).
51. *See* Goff et al., *supra* note 15, at 528; L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations,* 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 417 (2000).
52. Todres, *supra* note 15, at 1109.
53. *See* Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time,* 11 OHIO ST. J. ON CRIM. L. 107, 116 (2013) ("Although mid-adolescents' cognitive abilities are comparable with adults, their judgment and impulse control does not emerge for several more years. Youths' immature judgment reflects differences in risk perception, appreciation of future consequences, and experience with autonomy.") (internal citations omitted).
54. 543 U.S. 551 (2005).
55. *Id.* at 569.
56. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).
57. *Id.* at 561 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1998)).
58. Scott & Steinberg, *supra* note 15, at 812.

ploitation or criminalization.[59] As the Court noted in *Eddings v. Oklahoma*,[60] another case involving a challenge to the imposition of the death penalty on a person who was a juvenile at the time of the offense, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[61]

In the account described above and embraced by legal institutions, including the Supreme Court, childhood is regulated by naturally occurring developmental processes. In the criminal justice system, such developmental processes render children less responsible for their behavior. This view of childhood certainly makes intuitive sense to those who have spent time around young children or adolescents. This account, however, is incomplete. While the various stages in human development are biological, the meaning and legal effect attached to those stages are socially constructed. Indeed, although the traditional developmental approach has been the dominant framework for understanding the boundaries of childhood, this account masks the social relations embedded within the concept of childhood. As Annette Appell notes, "[t]here is some universality in the vulnerability and dependency of young children, but the length, contours, and extent of that dependency, as well as the assignment of children to dependency, vary greatly across time, nation, and geography."[62] Moreover, the extent of childhood dependency and vulnerability is shaped by other socially constructed identity categories such as race, gender and class.

2. The Social Construction of Childhood

Over the last three decades, a robust literature describing childhood as a social construct has emerged in law, sociology, and psychology.[63] In this literature, childhood is described as part of a binary construct of human development in which childhood is contrasted with adulthood. Childhood is viewed as a chronologically based, transitory identity that projects social meanings of innocence, immaturity, and vulnerability onto various stages of intellectual, emotional, and physical development. At some point, generally established by law, children age

59. *See id.* at 814–15.
60. 455 U.S. 104 (1982).
61. *Id.* at 115.
62. Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 704 (2009).
63. *See* sources cited *supra* note 15.

into adulthood and become full and independent members of the polity.[64] The point at which childhood ends and adulthood begins, is not, however, biologically determined. Rather, this boundary is determined "in relation to our social, political, historical and moral context."[65] In sum, the social constructivist view of childhood posits that the boundaries of childhood are unstable and contingent, shifting over time depending on the historical and institutional setting.

Critical theories of childhood often compare the social construction of the category of "woman" to the category of "child." This comparison is useful for a number of reasons. Both are theorized as socially constructed identities. Both have been imbued with similar kinds of characteristics at various historical moments. Certainly, as Appell notes, the "inevitably (i.e., naturally) private, vulnerable, and dependent child is reminiscent of the naturally private, vulnerable woman of the pre-feminist past."[66] These characteristics have been used to justify regulation and subordination of both women and children. The comparison is also useful inasmuch as it demonstrates the ways in which Black female bodies have been excluded from both categories, constructed as antithetical to notions of femininity, vulnerability, innocence and dependency.

Black feminist theorists have long argued that Black women have been constructed as existing outside of the category of woman or female, which has been racialized as white and grounded in the normative experiences of white women.[67] In what Paula Giddings has called the "Cult of True Womanhood," womanhood is culturally and legally grounded in sexual purity and domesticity, particularly the realm of motherhood. Within the social constructs created during the era of chattel slavery, Black women were placed in opposition to these prevailing notions of womanhood. Black women, who were forced to labor in the fields and who possessed little control over their own bodies, including their sexuality, were denied access to the identity of woman that was predicated on domestic work and sexual purity. Instead, Black women's identities served to "clarify [the] boundaries"[68] of womanhood through construction of what Hortense Spillers

64. *See* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 558–62 (2000) (discussing the logic of legal presumptions of majority and noting that the legal age of majority was twenty-one in the early history of English common law).

65. ALLISON JAMES, CHRIS JENKS & ALAN PROUT, THEORIZING CHILDHOOD 27 (1998).

66. Appell, *supra* note 62, at 715.

67. Sharon Angella Allard, Essay, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191 (1991); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 540, 550–58; Phillip Atiba Goff et al., *"Ain't I a Woman?" Towards an Intersectional Approach to Person Perception and Group-Based Harms*, 59 SEX ROLES 392, 394 (2008).

68. *See* COLLINS, *supra* note 48, at 70.

calls an "ungendered" subject.[69] Similarly, these dynamics function to exclude Black girls not only from the category of woman or female, but also from the category of child. Like the category of woman, white children serve as the paradigmatic subject of childhood while Black children occupy a marginal or liminal status within the racialized construct of childhood. As a result, Black children are denied the "developmental reality" of childhood that undergirds protective policy and institutions.

a. Shifting Definitions of Childhood

Childhood is a fluid concept, subject to change over time and geographic space.[70] For example, in Western European societies, childhood has ranged from a category that was largely indistinguishable from adulthood to one that has acquired particular recognition and protection; from an identity associated with evil to one associated with innocence.[71] Childhood theorists have articulated the historically contingent nature of childhood beginning in the middle ages, noting that "in medieval society childhood did not exist" because children "participated in society according to their abilities just as adults did."[72] Later, under the pre-Enlightenment doctrine of infant depravity, children were recognized as a distinct category and were viewed as inherently sinful, lacking in the ability to control the basest human impulses.[73] Adults were viewed as more evolved, with a heightened capacity of self control.[74] Parents were encouraged to harshly discipline their children in order to reign in their excesses.[75] Not only were children harshly disciplined, but they engaged in labor outside of the home. During this period, children, particularly adolescents, "were viewed as the property of their parents and were mainly valued as a source of cheap labor."[76] For example, children "worked at home, were bound out as servants and apprentices, or were slaves, and they fought in military combat."[77]

69. *See* Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 DIACRITICS 65, 68 (1987).
70. *See* JAMES & JAMES, *supra* note 16, at 13 ("Childhood must be seen as a particular cultural phrasing of the early part of the life course, historically and politically contingent and subject to change.").
71. *Id.*
72. *Id.* at 12; PHILLIPE ARIES, CENTURIES OF CHILDHOOD: A HISTORY OF FAMILY LIFE 125 (1962).
73. *See* BERNSTEIN, *supra* note 42, at 4, 36–37.
74. *See id.* at 4.
75. *See id.* at 36–37.
76. Nunn, *supra* note 25, at 679.
77. Appell, *supra* note 15, at 737–51 (footnote omitted).

In the early nineteenth century, however, the view of childhood began to shift from inherent sinfulness to inherent innocence.[78] Children were viewed as innocent and in need of protection from a dangerous adult world.[79] As Henry Giroux notes, "[w]ithin the myth of innocence, children are often portrayed as inhabiting a world that is untainted, magical, and utterly protected from the harshness of adult life."[80] During this era, children were viewed as lacking in adult qualities such as maturity, sexuality, and the capacity for independence, all while being wholly unconcerned with worldly affairs.[81] Children came to be seen "as dependents in social, political, legal, and economic matters."[82] Over time, the notion that children were innocent and incomplete became socially entrenched, triggering state regulation to both deny children autonomy and to invest in them a particularized set of protections designed to facilitate their transition into the complete state of adulthood.[83]

The construct of the innocent and incomplete child prompted concerns about the protection of children from the ugliness of the adult world through the creation of policies and institutions designed to provide services to and prohibit the exploitation of children. As Owain Jones notes, "the notion of 'protected childhood' animated concerns of American reformers as early as the 1820s."[84] Reformers advocated for programs like Sunday school, free schools and other child-centered social services.[85] States began to enact child labor laws and to implement juvenile curfews to ensure the safety and security of children in their communities. In various fields, such as medicine, specialized areas of practice

78. *See id.*
79. See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1093 (1991).
80. HENRY GIROUX, STEALING INNOCENCE: YOUTH, CORPORATE POWER AND THE POLITICS OF CULTURE 39 (2000).
81. *See* SARAH HOLLOWAY & GILL VALENTINE, CHILDREN'S GEOGRAPHIES: LIVING, LEARNING, PLAYING 2 (2000) ("Children in the West are assumed to have the right to a childhood of innocence and freedom from the responsibilities of the adult world. Thus responsible adults have a duty to protect children from dangerous knowledge and people, and in normal circumstances children are not expected to contribute economically to their households or the care of others.").
82. Appell, *supra* note 62, at 708.
83. Appell, *supra* note 15, at 722 ("Childhood as it exists today is, of course, an ideological construct, arising out of Enlightenment philosophy and, most specifically, liberal political and moral theory. This ideology establishes children as subjects without wisdom, knowledge, or political, moral, or legal competence, and thus excludes them from governance and self-determination. Adults, in contrast, presumptively possess these attributes and powers.") (internal citations omitted).
84. WILLIAM S. BUSH, WHO GETS A CHILDHOOD: RACE AND JUVENILE JUSTICE IN TWENTIETH-CENTURY TEXAS 4 (2010); Owain Jones, *Melting Geography: Purity, Disorder, Childhood and Space*, *in* CHILDREN'S GEOGRAPHIES: PLAYING, LIVING, LEARNING 28, 34 (Sarah L. Holloway & Gill Vallentine eds. 2000).
85. BUSH, *supra* note 84, at 4.

were developed to serve children.[86] In sum, early 19th century reformers enacted policies based on the emergent view "that a child's life should be characterized by education, play and exploration rather than adult responsibilities such as wage labor or early marriage."[87]

This view of childhood as a developmental period of innocence and immaturity, however, was not consistent or racially universal. Rather, race and gender played a critical role in allocating the benefits and burdens of childhood. In the United States, as the notion of the innocent, developmental child emerged, white children began to enjoy greater protections while Black children's position remained relatively unchanged. This is exemplified by the ways in which state and local governments began to enact some of the first laws regulating child labor while Black children were still enslaved.[88] While local communities established public and private schools to educate white children, enslaved Black children were prohibited from learning to read or write.[89] Following Reconstruction, Black children were subject to mandatory apprenticeship requirements notwithstanding the emergent child labor laws. These examples demonstrate the ways in which, as Robin Bernstein notes in *Racial Innocence*, notions childhood innocence and dependency were "raced white" and produced "a busy cultural system linking innocence to whiteness through the body of the child."[90] In other words, constructions of childhood were deeply racialized, and Black children were largely excluded.

b. Construction of a Liminal Childhood: Negating Childhood Through Enslavement

The racialization of innocence and the liminal childhood experience is inextricably bound up with the history of chattel slavery. For example, a central component of childhood is the right to parental care. Slavery, however, was predicated on the alienation of kinship ties between children and their parents, as parents of Black children were denied any right to control decisions regarding if and how their child would engage in labor.[91] Because Black children did not be-

86. JAMES & JAMES, *supra* note 16, at 12.
87. BUSH, *supra* note 84, at 4.
88. *See* Nunn, *supra* note 25, at 680.
89. *See* MANNING MARABLE & LEITH MULLINGS, LET NOBODY TURN US AROUND: VOICES OF RESISTANCE, REFORM AND RENEWAL 41 (2003); Denise C. Morgan, *What Is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 102 (1991).
90. BERNSTEIN, *supra* note 42, at 6.
91. At the same time, however, childhood was used to justify the enslavement of African Americans more generally. Indeed, the enslavement of African Americans was justified by the childlike na-

long to their parents, they could be separated from them at the whim of the slave owner. As Hortense Spillers notes, kinship lost its meaning in this context "since it can be invaded at any given and arbitrary moment by the property relations."[92]

During this era, childhood was not only a racialized construct; it was gendered as well. The sexual and physical exploitation Black girls experienced during enslavement separated them from the characteristics associated with the gendered form of childhood known as girlhood.[93] According to one scholar, "[g]irlhood is understood in terms of gender and sex, but preadolescent girls are, in most societies, situated outside the boundaries of sanctioned sexual activity. Girlhood, in particular, continues to be linked to purity, innocence, chastity, and virginity."[94] Enslaved Black girls were constructed in opposition to the prevailing understanding of girlhood, often described as seductresses, labeled prostitutes and blamed by white mistresses for their husbands' infidelity.[95] As historian Cheryl Hicks notes, "[i]n the context of American slavery, antebellum southerners accepted the image of the sexually insatiable enslaved woman, thereby characterizing all white men as victims of sepia temptresses."[96] Consequently, Black girls were regarded in ways that were similar to Black women. Being both Black and female, like Black women, Black girls were denied access to notions of femininity and womanhood. As Cheryl Harris notes, "in contrast to the image of white womanhood formulated by nineteenth-century ideology—the 'delicate, sexually pure, [Lady] . . . [d]ependent and deferential to men'—Black women were portrayed as dominant, aggressive, and, except for the matriarchal figure, Mammy, sexually promiscuous."[97]

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ture of Blacks, such that whites needed to act as stewards of their labor. *See, e.g.*, Nunn, *supra* note 25, at 680; Barbara Bennett Woodhouse, *Dred Scott's Daughters: Nineteenth Century Urban Girls at the Intersection of Race and Patriarchy*, 48 BUFF. L. REV. 669, 698 (2000).

92. Spillers, *supra* note 69, at 74.

93. MEENAKSHI GIGI DURHAM, QUVENZHANE AND THE COMEDIANS: BLACK GIRLHOOD AND SEXUALITY AT THE "EDGE" OF MEDIATED HUMOR, COMMUNICATION, CULTURE & CRITIQUE 10 (2015) (stating that girlhood is a theoretical category, articulated to different vectors in different sites and contexts, but it is generally perceived as "a stage to be passed through on the way to something else—mostly to 'being a woman'"); Treva B. Lindsay, *"One Time for My Girls": African-American Girlhood, Empowerment and Popular Visual Culture*, 17 J. AFR. AM. ST. 22, 22–24 (2012); Marnina Gonick, *Between "Girl Power" and "Reviving Ophelia": Constituting the Neoliberal Girl Subject,* 18 NWSA J. 1 (2006) (asserting that the literature on girlhood has constructed a false dichotomy that portrays girlhood as either vulnerable or assertive).

94. DURHAM, *supra* note 93, at 10.

95. *See* Saidiya V. Hartman, *Seduction and the Ruses of Power*, 19 CALLALO 537, 544 (1996).

96. Cheryl D. Hicks, *"Bright and Good Looking Colored Girl": Black Women's Sexuality and "Harmful Intimacy" in Early Twentieth-Century New York*, 18 J. HIST. & SEXUALITY 418, 426 (2009).

97. Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 313 (1996) (internal citations omitted).

Over time, the construct of the lascivious, aggressive Black female cohered into the image of the jezebel. The jezebel image projected Black women and girls as possessing an uncontrolled and uncontrollable sexual appetite, unrestrained by morality or social convention. According to Patricia Hill Collins, the jezebel "function[ed] to relegate Black women to the category of sexually aggressive women, thus providing a powerful rationale for the widespread sexual assaults by white men typically reported by Black slave women."[98] Black females were viewed as property and therefore lacking ability to withhold consent or as inherently promiscuous and therefore incapable of withholding consent to sex. The consequences of this construct of Black femaleness came into sharp relief in a 1855 case called *Missouri v. Celia, a Slave*.[99] There, a nineteen-year-old enslaved Black girl named Celia was convicted of murdering her owner. Celia, however, alleged that she killed him in self defense, after he sexually assaulted her from age fourteen to nineteen. The court rejected Celia's self-defense claim. Instead, the trial court ruled that Celia did not constitute "a woman" as described in the state rape statute and therefore had no right to resist. The exclusion of enslaved girls and women from the protection of rape law normalized sexual violence and reinforced the construction of Black femininity as sexually deviant. Moreover, although the autonomy and agency of enslaved Black women was generally denied and used as a basis for their exploitation, Celia's treatment demonstrates the ways in which agency could be selectively invoked for the purposes of criminal prosecution.[100] This construction facilitated what Saidiya Hartman describes as "inextricable link between racial formation and sexual subjection."[101] Criminalization was foundational not only to this subjugation but to the extension of a partial form of autonomy to Black women and girls.

Like Celia, Black girls were deeply affected by such constructs and the sexual assaults such constructs justified. Indeed, the narratives of enslaved Black women and girls are replete with accounts of sexual victimization. In *Life of a Slave Girl*, one of the most significant slave narratives of its era, Harriet Jacobs re-

98. COLLINS, *supra* note 48, at 81 (internal citations omitted).

99. Hartman, *supra* note 95, at 539–40 (discussing the 1855 prosecution of a nineteen-year-old enslaved Black woman named Celia, who was accused of killing her white master after he attempted to rape her). For additional discussion of the case, see David O. Linder, *Celia, a Slave, Trial (1855): An Account*, UMKC SCH. L., http://law2.umkc.edu/faculty/projects/ftrials/celia/celia account.html (last visited July 31, 2015).

100. Hartman, *supra* note 95, at 540 ("The slave was recognized as a reasoning subject, who possessed intent and rationality, solely in the context of criminal liability; ironically the slave's will was acknowledged only as it was prohibited or punished."); see also U.S. v. Amy, 24 F. Cas. 792, 810 (Va. Cir. 1859) ("In expounding [the] law, we must not lose sight of the twofold character which belongs to the slave. He is a person, and also property.").

101. Hartman, *supra* note 95, at 543.

peatedly describes the sexual violence she experiences at the hands of her master beginning in adolescence and extending into adulthood.[102] Thus, during the era of enslavement, the liminal status occupied by Black girls was established; the stereotypes of sexual maturity and promiscuity were projected on to that status, providing cover for the kinds of sexual assaults described by Jacobs. Consequently, Black girls existed, as Salamisha Tillet notes, in a "particularly estranged and subordinate position."[103]

c. Separate and Unequal: Liminal Childhood in the Era of Jim Crow Punishment

Although slavery was abolished in 1865 with the enactment of the Thirteenth Amendment, the liminal construct of Black childhood continued to shape the perceptions and treatment of Black girls. During this post–Civil War era, states began to enact criminal laws that sought to regulate African Americans and return them to a state of servitude through the imposition of criminal punishment.[104] As I have noted elsewhere, through these laws, which became known as the Black Codes, "Southern states criminalized a range of conduct thought to be committed by former slaves. These crimes included vagrancy, absence from work, the possession of firearms, insulting gestures or acts, familial neglect, reckless spending, and disorderly conduct. Blacks were also prosecuted for the failure to perform under employment contracts."[105]

Black children, including Black girls, were not exempted from criminalization under this system of racial control. Indeed, Black children were particularly vulnerable to prosecution under apprenticeship statutes that required them to be supervised by an employer.[106] According to Jill Hasday, "more than twenty-five hundred children were so 'apprenticed' within the first month after emancipa-

102. Woodhouse, *supra* note 91, at 693.

103. SALAMISHAH TILLET, SITES OF SLAVERY: CITIZENSHIP AND RACIAL DEMOCRACY IN THE POST-CIVIL RIGHTS IMAGINATION 24 (2012).

104. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2009) (describing the use of the criminal law to regulate newly freed African Americans in southern prison camps); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997).

105. Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1262 (2012).

106. *See* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1339 (1998); Nunn, *supra* note 25, at 680 ("Although most apprenticeship statutes were repealed by the 1870s, African American children continued to work on farms and in factories in much greater numbers and at much greater risks than white children.").

tion, often to their former masters."[107] These forms of punishment, however, were predicated on the assumed agency possessed by Black children, which was denied in the context of slavery, but used to facilitate subordination through criminalization in the post–Civil War era.[108] Such constructions infused Black children with contradictory characteristics of both childhood and adulthood that at once placed them outside the protections of childhood and inside the punitive posture of the criminal law. The erasure of the border between criminal culpability and childhood was part and parcel not only to the marginalization of Blacks within the broader category of child, but to efforts to reinforce the racial marginality of Blacks more generally. As such, criminalization was embedded into the marginal forms of childhood experienced by Black children.

Indeed, such racially specific regulations were not applicable to white children; in fact, for white children, the trend was moving in the opposite direction. In the late 1800s, states began to undertake efforts to protect white children from exploitative labor conditions and to provide for specialized systems of juvenile justice. Black children, however, were not protected by such labor laws nor by notions of innocence and dependency; rather their dependency was used as a justification for criminalization. In so doing, Black children's liminal childhood status was reinforced, as they existed both inside and out of the category of child.

Additionally, Black girls experienced particular forms of both racialized and gendered punishment that reinforced their marginalization not only within the category of child, but also within the category of female.[109] Indeed, constructs of Black female promiscuity and the need to police deviant sexuality was a significant rationale for state supervision and control of Black women and girls. In 1908, the Georgia legislature amended state law in order to preclude females from being sentenced to chain gangs.[110] Nevertheless, as historian Sarah Haley notes, over two thousand Black women and girls were sentenced to the chain gang, often for prostitution or other moral offenses, while only four white women were sentenced to the chain gang during the same period.[111] Instead, white

107. Hasday, *supra* note 106, at 1354.

108. Hartman, *supra* note 95, at 540.

109. Ocen, *supra* note 105, at 1259.

110. *See* Sarah Haley, *"Like I Was a Man": Chain Gangs, Gender, and the Domestic Carceral Sphere in Jim Crow Georgia*, 39 SIGNS 53, 56 (2013); TALITHA LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH 51 (2015); Kittling, *supra* note 11, at 919.

111. *See* Talitha LeFlouria, *"The Hand That Rocks the Cradle Cuts Cordwood": Exploring Black Women's Lives and Labor in Georgia's Convict Camps, 1865–1917*, 8 LAB. 47, 54 (2011) ("African American women were arrested for a wide range of offenses including larceny, gambling, bootlegging liquor,

women and girls suspected of crimes such as prostitution were viewed as innocent victims of the immorality of men and directed out of the criminal justice system. According to Haley, "[e]ach year between 1893 and 1900 more black girls and young women between the ages of fifteen and twenty were arrested than white boys and white girls in the same age group combined."[112] In this context, "punishment signaled . . . the degraded status [of Black women], while the insulation from punishment signaled the valorization of white women."[113]

d. Jim Crow Justice and the Creation of the Juvenile Delinquency System

The racialized and gendered punishments experienced by Black girls persisted in this era despite radical reforms to penal institutions, including the development of institutions designed to serve women and children. For much of early American history, adults and children (including Blacks) were punished by and housed in unitary carceral institutions. Such practices, however, gave way to the demands of progressive reformers for the establishment of a specialized system of juvenile justice.[114] As one scholar noted, "[t]he juvenile court primarily focused on delinquency matters, leaving the needs of parentless or maltreated children to the philanthropy of orphanages and their supporters."[115] The juvenile justice system was designed to provide a separate legal regime for children adjudicated as delinquents.[116] As Kevin Lapp has observed, the juvenile justice system "protected juveniles from the criminal process and its severe punishments and stigma, replacing adversarialness and procedural formality with judicial discretion and cooperative, individualized treatment that preferred rehabilitation and training over punishment."[117] Children within the juvenile justice system were to be provided with education, guidance, supervision, and other opportunities for redemption and rehabilitation, not punishment.[118] Moreover, juvenile courts were tasked with regulating noncriminal juvenile misbehavior, known as status offenses, in an effort to address harmful conduct before it crossed the threshold into

adultery, fighting, drunkenness, vagrancy, prostitution, and 'disorderly conduct.'"); Ocen, *supra* note 105, at 1265.

112. SARAH HALEY, ENGENDERING CAPTIVITY: RACE, GENDER AND PUNISHMENT AFTER THE CIVIL WAR 35 (forthcoming 2016) (manuscript on file with author).
113. Ocen, *supra* note 105, at 1259.
114. *See* Scott, *supra* note 64, at 578.
115. Akhila L. Ananth, *The Gracious Spaces of Children's Law: Innocence and Culpability in the Construction of a Children's Court*, 63 STUD. L. POL. & SOC'Y 89, 95 (2014).
116. *See generally* GEOFF K. WARD, THE BLACK CHILD SAVERS: RACIAL DEMOCRACY & JUVENILE JUSTICE 19–46 (2012).
117. Lapp, *supra* note 9, at 77–78.
118. *See, e.g.*, Nanda, *supra* note 45, at 1513.

criminality. As a result of this reform movement, many reformatories were established during the early part of the twentieth century.[119]

It was also during this era that the juvenile justice system developed specific practices designed to respond to female delinquency,[120] as adolescent girls were seen as particularly vulnerable to being sexualized and exploited.[121] Here, "the practice of female juvenile justice reflected the quasi-utopian, ultimately repressive, pursuit of Progressive-era reformers for a more 'pure' society, as revealed in the eugenics, anti-prostitution, and sex-education campaigns."[122] Given this orientation, it is unsurprising that the lofty ideals animating the creation of the juvenile justice system soon gave way to the patriarchal and racial norms of the day. The juvenile justice system was therefore designed to protect the sexual chastity and domesticity traditionally associated with girlhood.

Indeed, the juvenile systems designed to address female conduct evolved over time as a mechanism to control the sexuality of wayward girls.[123] According to Tera Agyepong, "[i]n the first stage of reform efforts, which began in the 1880s, women reformers worked to criminalise sex with young girls by raising the age of consent. These efforts were framed as protective, as they challenged the widespread perception of 'fallen women' as depraved and dangerous by portraying girls as victims of male lust and exploitation."[124] As a result of the focus on the sexuality of girls as a means of protection, girls were most often charged with morality offenses. To be charged with such a crime, a girl did not need to engage in a sex act. Rather, "a girl had to only show 'signs' in her appearance, conversation and bearing that she had probably had intercourse in the past or might do so in the near future."[125] Girls convicted of such morality offenses were far more likely than boys to be sent to reform institutions.[126] The efforts aimed at redeeming girls, however, were inflected by race, as white girls were the primary objects

119. See Steven Schlossman & Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDU. REV. 65, 70 (1978).
120. *See id.*
121. *See* Tera Agyepong, *Aberrant Sexualities and Racialised Masculinisation: Race, Gender and the Criminalisation of African American Girls at the Illinois Training School for Girls at Geneva, 1893–1945*, 25 GENDER & HIST. 270, 273 (2013).
122. Schlossman & Wallach, *supra* note 119, at 68.
123. Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584, 1590 (2012) ("Accounts of girls' treatment in the late 1800s and early 1900s show that the juvenile justice system frequently intervened to save wayward girls from perceived futures in prostitution or criminality and redirect them toward marriage, motherhood, and home life. Girls in need of intervention were seen as both sexually vulnerable and sexually precocious; the system's role was to instill in them appropriate morality").
124. Agyepong, *supra* note 121, at 273.
125. Schlossman & Wallach, *supra* note 119, at 72.
126. *See id.* at 72.

of concern.[127] As such, "notions of childhood innocence and rehabilitation were not universal, but circumscribed by race."[128]

While white girls were viewed as innocent and therefore designated as victims, Black girls were viewed as deviant offenders. Consequently, Black girls were disproportionately represented in female reformatories while white girls were often given non-custodial sentences such as probation.[129] For example, at the Illinois Training Institute for Girls, established in 1893 as one of the early juvenile justice institutions dedicated to rehabilitating and protecting girls, Black girls were disproportionately represented, accused of engaging in delinquent behaviors related to sexual immorality and subject to punitive, rather than rehabilitative, practices.[130] In one Chicago reformatory institution in 1937, Black girls represented approximately 75 percent of the population, largely adjudicated for offenses of sexual immorality.[131] Moreover, as historian Cheryl Hicks notes, even when Black girls were arrested for offenses similar to white girls, they often served their time in state penal institutions with harsher environments, rather than on probation or in local institutions designed to provide moral guidance to wayward young women.[132] For Black girls in these systems, the stereotypes of sexual maturity, agency and criminality that accompanied their liminal status effectively negated the construct of the immature and dependent children that juvenile institutions were designed to serve.

Indeed, as Agyepong notes, "[u]nlike the image of a fixable, inherently innocent delinquent that spurred the child-saving movement and brought all persons under the age of eighteen into the protective and rehabilitative folds of the juvenile justice system, images of African American girls connoted inherently deviant, unfixable and dangerous delinquents whose negative influences resulted in

127. BUSH, *supra* note 84, at 73–75 (describing campaign to establish a juvenile detention facility in Houston, Texas, and describing how when confronted with increasing rates of sexually transmitted diseases, reformers called for clinical services for sexually active girls, while treating expressions of sexuality among Black girls as a "threat to public safety" warranting "a law and order solution").

128. Agyepong, *supra* note 121, at 271.

129. *See id.* at 274–75; BUSH, *supra* note 84, at 74 (noting that Black reform institutions for girls were either non-existent or overcrowded, which meant that Black girls were often housed in county jails, and that if Black girls could get into juvenile reform institutions, they were often segregated).

130. *See id.* at 274, 276–77.

131. *See id.* at 275.

132. Cheryl D. Hicks, *"In Danger of Becoming Morally Depraved": Single Black Women, Working-Class Black Families, and New York State's Wayward Minor Laws, 1917-1928*, 151 U. PA. L. REV. 2077, 2092 (2003) ("Black women failed to receive probation at the same rate as white women and were often rejected from mainstream social welfare efforts because of the discriminatory policies of court officials and local reformatories. . . . [T]he support mechanisms that encouraged preventative rehabilitation rather and punitive incarceration were less available to black women.").

the contamination of other children."[133] Black girls confined to juvenile institutions were often viewed as more sexually promiscuous and prone to acts of physical violence.[134] Within these institutions, Black girls were blamed for rather than protected from sexual relationships with adult staff members.[135] Because Black girls were viewed as physically aggressive and sexually promiscuous, officials feared that they would have a corrupting influence on white girls within these juvenile institutions, and so they often segregated Black girls from their white counterparts and subjected them to harsher conditions or more restrictive facilities.[136] These patterns of disproportionate representation and practices of racialized punishments within female institutions reinforced the marginal status of Black girls within the broader category of childhood.

In many ways, the denigration of Black female sexuality during slavery, the criminalization of Black women for moral offenses in the post–Civil War era and the discriminatory operation of the early juvenile reform institutions established the framework for the discriminatory treatment of Black girls. In other words, the ongoing subordination of Black girls was facilitated through these early constructs of childhood. In particular, the various forms of state violence that attended to the bodies of black girls were justified by racially and gender specific form of childhood assigned to them. Criminalization was an essential part of this liminal status, as it reinforced racial and gender stereotypes while simulatenously imposing particular forms of culpability that were generally understood to be inconsistent with childhood status occupied by Black girls.

II. LIMINAL CHILDHOOD AND TRENDS: GOVERNMENTAL EFFORTS TO COMBAT THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN

Indeed, liminal childhood—the simultaneous inclusion and exclusion of Black girls from the social category of the child as a result of stereotypes of sexual maturity, adult-like agency and criminality—continues to have resonance in antitrafficking policies that are normatively grounded in childhood immaturity, innocence and sexual purity. As will be described below, the liminal childhood status attached to Black girls is embedded in the historical and contemporary legal frameworks that define what constitutes child sex trafficking and who may be

133. Agyepong, *supra* note 121, at 272.
134. *See* Cheryl N. Butler, *Blackness As Delinquency*, 90 WASH. U.L. REV. 1335, 1386–87 (2013).
135. *See* Agyepong, *supra* note 121, at 272; Hicks, *supra* note 132, at 2094 ("While the law did not designate institutional care based on race, administrators' ideas about black people and sexuality pervaded reports that justified the exclusion or separation of black from white (both native and immigrant) women.").
136. *See* Hicks, *supra* note 132, at 2094.

regarded as its victims. As a result, Black girls are often underprotected by these statutory regimes, instead more likely to be punished for prostitution as compared to their non-Black counterparts.

A. Historical Regulation of Race and Sexuality Through Antitrafficking Initiatives

The United States has a long history of racialized perceptions of and prohibitions against sexual trafficking of women and girls. For example, in 1910, the federal government enacted the first anti–sex trafficking law, titled the White Slavery Traffic Act,[137] out of a concern about immorality and so-called white slavery involving white girls being moved across state lines for the purposes of prostitution. The White Slavery Traffic Act, which came to be known as the Mann Act, prohibited the knowing transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose" through interstate or foreign commerce.[138] According to a U.S. House of Representatives report on the legislation, the Act "does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution."[139] Thus, the report stated, "[t]he term 'white slave' includes only those women and girls who are literally slaves—those women who are owned and held as property and chattels—whose lives are lives of involuntary servitude."[140]

The proponents of the Mann Act, however, sought to do more than simply regulate the sexual trafficking of white girls; they sought to punish what they believed to be a growing trend of sexual immorality among whites and to reduce immigration.[141] Proponents cast white women and girls as unwilling participants in sex work because they were viewed as naturally chaste and virtuous. As such, white women were deemed incapable of consent to such immorality and were therefore in need of protection by the federal government.[142] Indeed, "[t]he Pro-

137. 18 U.S.C. § 2421 (2012).
138. Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J.L. & PUB. POL'Y 99, 108 n.66 (1996).
139. Jonathan Todres, *Prosecuting Sex Tour Operators in U.S. Courts in an Effort to Reduce the Sexual Exploitation of Children Globally*, 9 B.U. PUB. INT. L.J. 1, 6 (1999).
140. Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 789 (2006).
141. *See* Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3015 (2006).
142. See Marlene D. Beckman, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L.J. 1111, 1115–16 (1984).

gressive Era reformers who supported the Act had used the words 'white slavery' to promote the vision of women held in bondage against their will, of mysterious druggings and abductions of helpless young girls, and of unexplained disappearances of innocent and naïve immigrants forced into lives of prostitution and vice."[143]

From the descriptive account of trafficking that generated the legislation to the naming of the legislative act, the preservation of the "virtue" of white girls was a central objective of antitrafficking advocates. Despite the allusion to chattel slavery, Black girls were wholly absent from the discourse surrounding trafficking. The motivation for the statute and the language used to codify these intentions drew upon the liminal status of Black girls, particularly stereotypes of Black female sexual immortality and criminality, to justify their exclusion from protection. While prostitution was assumed to be contrary to the essential nature of virtuous white women and girls, prostitution was seen as an extension of the assumed immoral nature of Black women and girls. Black women and girls were not viewed as victims of trafficking but rather as inherently lascivious and willing participants in criminal sex acts.

As I note in Part I, Black women and girls were instead subject to arrest, prosecution, and incarceration for prostitution-related offenses. Rather than receiving protection under the Mann Act, Black women and girls were stereotyped as sexually deviant,[144] targeted by law enforcement and disproportionately criminalized. Through the deployment of what historian Cheryl Hicks calls "racial constructions of sexuality," Black women and girls were subject to a near constant state of surveillance, which made them vulnerable to arrest for prostitution for conduct as innocuous as merely walking down the street alone or for congregating as a group.[145] In short, their femaleness combined with their blackness to signal innate deviance and promiscuity.[146]

143. *Id.* at 1111.

144. Hicks, *supra* note 96, at 428.

145. *Id.* (describing the arrest of a twenty-three-year-old Black woman who "was walking to her apartment . . . [when] a car stopped at the curb, and four men, claiming that they were the police, pulled her in and, according to her, without any reason . . . declared that she was guilty of prostitution").

146. *Id.* at 419; Cecily Devereux, *"The Maiden Tribute" and the Rise of the White Slave in the Nineteenth Century: The Making of an Imperial Construct*, 26 VICTORIAN REV. 1, 3 (2000) (noting that the antitrafficking legislation of the early twentieth century "acted as a condenser of anxieties about shifting race, sex, and gender relations").

B. Contemporary Problems and Efforts to Combat Commercial Sexual Exploitation of Children

Contemporary anti–child trafficking initiatives have inherited much from their early 20th century forebearers. While the most recent federal and state prostitution and antitrafficking laws are not explicitly racialized, they nevertheless rely upon racialized and gendered constructs of childhood in framing the normative basis for state intervention and the scope of protection afforded to affected children.

1. Federal Law

In the face of growing concern regarding international sexual and labor trafficking of vulnerable populations, Congress passed the Trafficking Victims Protection Act of 2000 (TVPA).[147] The Act was designed to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."[148] The TVPA Congressional Reports note, based on CIA estimates, that approximately fifty thousand people were victims of trafficking each year.[149] The bill was passed with overwhelming bipartisan support, signed into law by President Bill Clinton, and later enthusiastically embraced by President George W. Bush.[150] Under the Act, those found guilty of trafficking adults by means of force, fraud, or coercion can face a minimum of 15 years in prison. Those convicted of child sex trafficking face a minimum of 10 years imprisonment if the child was over the age of 14 or a minimum of 15 years imprisonment if the child was under the age of 14.[151]

With respect to child sex traffickers, the government does not need to prove that the trafficking occurred as a result of force, fraud or coercion.[152] This defini-

147. Pub. L. No. 106-386, 114 Stat. 1464 (2000).
148. 22 U.S.C. § 7101(a) (2006).
149. *See* AMY O'NEILL RICHARDSON, CTR. FOR STUDY INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME iii (Nov. 1999), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/trafficking.pdf.
150. *See* Chacón, *supra* note 141, at 2990.
151. 18 U.S.C. § 1591(b)(1) (2012). With regard to children under the age of 14, individuals can face up to life imprisonment for recruiting a child for purposes of sexual exploitation, even if the actual sexual exploitation never occurs. *See* 18 U.S.C. § 1591(b)(2) (2012). Under this statutory framework, Congress likely enhanced penalties for trafficking of minors under the age of 14 because such children are seen as particularly vulnerable and the conduct as particularly egregious.
152. *See id.*

tional choice is rooted in concerns that children are more vulnerable than adults to abuse and cannot consent to sex due to their age. Thus, as a formal matter, any person under the age of eighteen who engages in commercial sex should be designated as a victim of a severe form of trafficking and should be extended the protections authorized by the Act.

Although the TVPA of 2000 articulates the harm of trafficking in broad terms, the primary evil the legislation sought to combat was the international trafficking and exploitation of vulnerable people, particularly women and children. Often, vulnerable women and children were described not only as foreign, but non-Black. Policy advocacy groups promoted the image of European or Asian girls unwittingly being brought from their homelands to the United States for purposes of sexual exploitation. In one child sex trafficking report issued by Soroptomist International, a global women's rights organization, the cover features a young white girl in a close up photo, looking pensively at the camera.[153] The report begins with the story of Natalya, a girl who was sexually trafficked from Moldova, a small European country.[154] By using Natalya's story to condemn what the report called "modern day slavery," Black girls were wholly invisible, reflecting a racialized construct of child victims of trafficking. The absence of Black girls suggests that only a select class of children, those that fit the racialized mold articulated by advocacy groups, are to be considered victims. Those that fall outside of the narrow construct of child and victim are to be prosecuted under traditional juvenile prostitution statutes.

The construction of the paradigmatic victim as foreign and non-Black is reflected not only in policy reports but also in the legislative debates, which referenced stories of trafficking victims who were kidnapped from their countries of origin, and in the kinds of remedies available to victims of trafficking. In particular, the TVPA directs the federal government to provide resources to foreign governments and organizations to combat trafficking and provides temporary visas or permanent resident status to qualifying victims of trafficking.[155] The temporary visas authorized by the TVPA allow confirmed victims of "severe forms of trafficking" to remain in the United States if they cooperated with every "reasonable request for assistance" by law enforcement in the investigation and prosecution of their traffickers.[156] These kinds of remedies are not applicable or not helpful to U.S.-born trafficking victims.

153. SOROPTOMIST INT'L AM., THE NEW FACE OF SLAVERY: A SOROPTOMIST WHITE PAPER (2007), http://www.soroptimist.org/whitepapers/whitepaperdocs/wpnewfaceslavery.pdf.
154. *Id.* at 1.
155. *See* 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2012).
156. *See* 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa) (2012).

Subsequent amendments to the TVPA did, however, anticipate domestic victims of trafficking, as the TVPA instructs the Secretary of State and the Attorney General to work with organizations to provide services to U.S. citizen victims of human trafficking.[157] Nevertheless the invisibility of Black girls, who constitute the majority of trafficking victims, persisted in subsequent iterations of the TVPA through the description of "the ideal victim." Indeed, the public campaigns to enhance protections for sexually trafficked children and increased penalties for traffickers were infused with descriptions of the kinds of girls who are trafficked as "Little Barbies" and "the Girl Next Door."[158] These phrases were designed to invoke outrage for the loss of childhood innocence and empathy for victims. Images of white girls were deployed as a stand in for both. For example, a Vanity Fair article on the subject, titled *Sex Trafficking of Americans: Girls Next Door*, an image of a white girl on a mattress, her face obscured, accompanies the article.[159] A *New York Times* article highlighting the plight of sexually trafficked children was similarly titled. These images and descriptors are not only used in the media and public awareness campaigns, they have been embraced by federal law enforcement.[160] For example, an FBI webpage on the subject cites each of these stories and embraces the "Girl Next Door" victim construct. The face associated with the issue of child sexual trafficking on the FBI webpage is that of a frightened white girl. Invocation of descriptors such as "the Girl Next Door" and "Little Barbie" to describe the paradigmatic victim of trafficking reinforces the ideal victim as a child who is white and exemplifies "chastity, and obedience to parental and state authority."[161]

Within this discursive and statutory framework, dependency, innocence, and sexual immaturity were gendered female and race white. The liminal childhood assigned to Black girls was incompatible with this raced and gendered framing. As a consequence, Black girls are excluded from constructs of the paradigmatic victim of child-sex trafficking despite the fact that they are disproportionately targeted by exploiters. Thus, although Black girls are disproportionately represented among detected victims of sexual trafficking, they are often not treated as such by the juvenile or criminal justice systems. Rather, Black victims of sex trafficking are more likely to be prosecuted and incarcerated for prostitution than to be protected under the TVPA or similar state laws, which are largely shaped by

157. *See* 22 U.S.C. § 7105(b) (2012).
158. Amy Fine Collins, *Sex Trafficking of Americans: The Girls Next Door*, VANITY FAIR, May 2011.
159. *Id.*
160. Peter Landseman, *The Girls Next Door*, NY TIMES (Jan. 25, 2004), http://www.nytimes.com/2004/01/25/magazine/25SEXTRAFFIC.html.
161. Cynthia Godsoe, *Punishment As Protection*, 52 HOUS. L. REV. 1313, 1367 (2015).

law enforcement discretion. For example, sexually trafficked minors may be designated as confirmed victims of a "severe form of trafficking" upon the discretion of law enforcement.[162] In many cases, however, law enforcement officers often use their discretion to categorize Black girls as juvenile delinquents (and thus subject to regulation by the juvenile justice system) instead of victims.[163]

2. State Law

Although the TVPA establishes guidelines for the treatment of sexually trafficked children, most of the detection, arrests, and adjudications of children who are commercially exploited occur at the state and local level. The states' approaches to regulating prostituted children, however, vary significantly.[164] The varying approaches to child sexual exploitation reflect a broader conflict over the construction of childhood and perceptions of adolescents who are the subject of exploitation. For example, states across the country have established an age below which a child cannot consent to sex.[165] Such statutes, which range between the ages of twelve and eighteen,[166] are, as Wendi Adelson notes, designed "'to protect minors from sexual intercourse' and to 'protect minors below a certain age from predatory, exploitative sexual relationships.'"[167] Yet in most states, minors can be arrested for prostitution[168] if they sell sex for money at the discretion

162. *See* Javidan, *supra* note 31, at 378–79.

163. *See id.* at 378; *see also* Nanda, *supra* note 45, at 1505.

164. See Wendi J. Adelson, *Child Prostitute or Victim of Trafficking*, 6 U. ST. THOMAS L.J. 96, 97 (2008); Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 437 (2009) ("Since 2003, thirty-nine states have adopted their own anti-trafficking criminal provisions. Because of the time and resources required to prove force, fraud, and coercion, however, prosecutors rarely charge defendants under these statutes"); *2014 State Ranking on Human Trafficking Laws*, *supra* note 10 (finding that twenty-two states had comprehensive safe harbor laws that provided immunity from prosecution for sexually exploited children).

165. California establishes the age of sexual consent at eighteen. *See* CAL. PENAL CODE § 261.5 (West 2014) ("Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a 'minor' is a person under the age of 18 years and an 'adult' is a person who is at least 18 years of age."). In comparison, Louisiana has set the age of consent at age seventeen. *See* LA. REV. STAT. ANN. § 14:80 (2012) ("A person who is seventeen years of age or older has sexual intercourse, with consent, with a person who is thirteen years of age or older but less than seventeen years of age, when the victim is not the spouse of the offender and when the difference between the age of the victim and the age of the offender is four years or greater.").

166. *See* Adelson, *supra* note 165, at 107.

167. *Id.*

168. Prostitution is generally defined in one of two ways: "(1) prostitution (to unlawfully engage in sexual relations for profit) and (2) assisting or promoting prostitution (to solicit customers or transport persons for prostitution purposes; to own, manage, or operate a dwelling or other establishment for the purpose of providing a place where prostitution is performed; or to otherwise as-

of law enforcement.[169] This contradictory approach means that if an adult has sex with a child, that is statutory rape and the adult is subject to criminal penalties. The child is the victim. Yet, if the adult pays for sex with a child, this is deemed to be prostitution and the minor will be subject to arrest. The child is the offender. Since the enactment of the TVPA, however, some state and local agencies have launched efforts to reclassify prostituted children as victims of sex trafficking, often as a result of the infusion of federal resources authorized by the TVPA.[170] Like the TVPA, however, such state policies are shaped by racialized and gendered constructs of childhood.

a. Criminalization of Juvenile Prostitution

In the majority of states, children may be prosecuted for prostitution at the discretion of law enforcement.[171] Courts that have considered the question have reasoned that allowing prosecutions of minors for prostitution is not barred by separate criminal age of consent statutes.[172] As a consequence of the punitive approach to juvenile prostitution, thousands of children are subject to arrest and prosecution. The Office of Juvenile Justice and Delinquency Prevention estimates that approximately 1000 juveniles are arrested for such offenses on an annual basis.[173] If a child is arrested and prosecuted for a prostitution offense, they may be sentenced to incarceration or probation.[174] As I note in Part III, studies have found that Black girls are disproportionately represented amongst children arrested for prostitution.

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sist or promote prostitution." DAVID FINKELHOR AND RICHARD ORMROD, PROSTITUTION OF JUVENILES: PATTERNS FROM NIBRS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (June 2004), https://www.ncjrs.gov/pdffiles1/ojjdp/203946.pdf.

169. *See* Todres, *supra* note 15, at 1110.

170. *See* U.S. DEP'T JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS (Aug. 2010) (describing federal coordination and funding to local and state agencies combating child sexual exploitation).

171. *See In re* Nicolette R., 779 N.Y.S.2d 487 (N.Y. App. Div. 2004).

172. *Id.* (upholding a 12 month sentence for a 12 year old girl prosecuted for a prostitution offense).

173. *Estimated of Number of Juvenile Arrests, 2012*, OFF. JUV. JUST. & DELINQ. PROTECTION, http://www.ojjdp.gov/ojstatbb/crime/qa05101.asp (last visited July 31, 2015) (estimating that 800 juveniles were arrested for prostitution); *Estimated of Number of Juvenile Arrests, 2011*, OFF. JUV. JUST. & DELINQ. PROTECTION, http://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2011&text= (last visited July 31, 2015) (1,000 juvenile prostitution arrests); *Estimated of Number of Juvenile Arrests, 2010*, OFF. JUV. JUST. & DELINQ. PROTECTION, http://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2010&text= (last visited July 31, 2015) (1,000 juvenile prostitution arrests); *Estimated of Number of Juvenile Arrests, 2009*, OFF. JUV. JUST. & DELINQ. PROTECTION, http://www.ojjdp.gov/ojstatbb/crime/ qa05101.asp?qaDate=2009&text= (1,400 juvenile prostitution arrests).

174. Godsoe, *supra* note 161, at 1329–30.

At the same time, states such as California have enacted policies to increase penalties for individuals who engage in the sexual trafficking of children.[175] For example, a 2012 ballot initiative, the Californians Against Sexual Exploitation Act, was passed by an overwhelming majority of California voters. Under its terms, penalties were increased for traffickers[176] and traffickers were required to register as sex offenders.[177] Moreover, state courts were authorized to levy significant fines on offenders, the proceeds of which would be directed to a victim's compensation fund for survivors of child sexual exploitation.[178] This law enforcement approach, however, has not been universally adopted by states across the country.

b. "Safe Harbor" Laws for Sexually Exploited Children

Some states have enacted "safe harbor" statutes that differentiate the treatment of children arrested for prostitution from that of adults.[179] According to the Polaris Project, a leading antitrafficking organization, "[s]afe harbor laws are intended to address the inconsistent treatment of children, raise awareness about children that have been commercially sexually exploited, and ensure that these victims were provided with services rather than a criminal conviction."[180] The safe harbor statutes are normatively grounded in children's innocence and lack of capacity to consent to a commercial sexual act. In Texas, for example, the state supreme court found that the inability of a minor to consent to sex precluded a prosecution for a prostitution offense.[181] In reaching this conclusion, the court noted that "minors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity."[182]

Approximately twenty-two states have amended their juvenile prostitution laws to provide either immunity or supportive services to trafficked children.[183] These statutes limit the liability that may be imposed on a prostituted minor ei-

175. CAL. PENAL CODE § 236.1(c) (West 2014).
176. *See id.* § 236.1(b).
177. *See id.* § 290(a).
178. *See id.* § 236.4.
179. See Pantea Javidan, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN'S L.J. 237, 246 (2003).
180. *Sex Trafficking of Minors and "Safe Harbor"*, *supra* note 10.
181. *See In re* B.W., 313 S.W.3d 818 (Tex. 2010); *see also* Susan Crile, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U. L. REV. 1783, 1791–94 (2012) ("[M]inors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity.").
182. *In re* B.W., 313 S.W.3d at 822.
183. *See* Adelson, *supra* note 165, at 106–07 (summarizing state approaches to commercial sexual exploitation of children).

ther through immunity or diversion to social services. Under such initiatives, minors may be provided with services such as counseling, housing and drug treatment.[184] Of the twenty-two safe harbor states, fifteen have enacted robust safe harbor protection to trafficked minors, providing full immunity to juveniles arrested for prostitution. For example, the state of Illinois has enacted legislation that provides immunity to minors under the age of eighteen and Connecticut extended immunity to minors below the age of sixteen.[185] In these states, sexually exploited children may not be subject to adjudication as delinquents, thus removing any discretion that often leads to discriminatory treatment. Instead, children must receive treatment and other services through child welfare agencies.

Seven other states, however, maintain the authority to prosecute juveniles for prostitution but allow for discretionary diversion into the juvenile dependency system instead of adjudication in the delinquency system. In New York State, children arrested for prostitution may be designated as victims of sexual trafficking and provided social services instead of punishment if they meet certain requirements and complete court mandated programs.[186] As victims of sexual trafficking, children are entitled to an advocate and specialized social services, such as housing.[187] Even if a minor qualifies for diversion, the criminal charges may be reinstated if the minor fails to adhere to the conditions of the diversionary program.[188] The statute, however, gives juvenile court judges wide discretion in determining whether to divert sexually exploited children out of the juvenile justice system. If a child has previously been arrested for prostitution, is unwilling to accept the court's ordered services, or violates a court order, a judge may choose to punish the child as a delinquent.[189] Moreover, the statute does not apply to youth over sixteen years of age. Although New York has taken an important step to protect exploited minors, the discretion inherent in this system nevertheless leaves children subject to punishment within the juvenile justice system.

184. Crile, *supra* note 181, at 1791–94.
185. Tamar R. Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1067–68 (2011).
186. N.Y. SOC. SERV. LAW §§ 447-a to -b (McKinney 2010).
187. *Id.* § 447-b.
188. Cheryl N. Butler, *Bridge over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1287 (2015).
189. N.Y. FAM. CT. ACT § 311.4 (McKinney 2008 & Supp. 2015).

c. Liminal Childhood and Discretion in Modern Anti–Child Sex Trafficking Initiatives

The aforementioned approaches reflect the ambivalence associated with juvenile prostitution. Indeed, "[j]uvenile prostitutes can be viewed primarily as victims in the control of unscrupulous adults and commercial vice, but they can also be viewed as willing participants in an illegal trade and objectionable activity."[190] On the one hand, minors may be arrested for prostitution or a related offense and adjudicated as a delinquent. On the other, children may only be detained and taken immediately to social services.[191] The resolution of this ambivalence often turns on how closely aligned a child is to the ideal child sex trafficking victim in the eyes of the official tasked with enforcement of the juvenile prostitution statute. Although, this enforcement is driven by ostensibly race- and gender-neutral concerns arising from the vulnerability and innocence of childhood, as noted above, these concepts are inherently racialized and gendered, embracing an "ideal victim" that is foreign or non-Black. As a consequence, the historical constructs of Black girls as lascivious and the contemporary biases against them shape perceptions of their sexual and emotional maturity in such a way as to render them ineligible as child victims.

Historically, concerns about racialized sexual purity were built into anti–child sex trafficking statues, which is exemplified by the naming and enforcement of the White Slavery Act of 1910. Black girls were excluded from coverage, solidifying associations between them and criminal sexual deviance. During those formative years for antitrafficking discourse and policy, the paradigmatic victim was an unsuspecting young, white girl who was trapped into a life of prostitution and whose virtue was in need of protection. Similarly, in the contemporary era, the "ideal victim" is young, white and potentially foreign. She is innocent and vulnerable; she possesses little agency and is grateful for the intervention of law enforcement.[192] Those who fit the archetype are extended protections either through non-criminal interventions or non-custodial sentences. Black girls, who are stereotyped as sexually promiscuous and independent, do not fit the ideal victim mold and are therefore classified as offenders. Thus, the characteristics of Black girls enable state actors to resolve the ambivalence associated with the classification of sexually trafficked children in favor of criminalization.

In many respects, constructs of the racialized ideal victim are reconstituted in

190. FINKELHOR & ORMROD, *supra* note 168, at 2.
191. *Id.* at 1, 2.
192. *See generally* Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).

the discretion that is invested in law enforcement. Discretion has long been understood as a driver of discriminatory outcomes in the criminal justice system.[193] In the juvenile context, as Cynthia Godsoe notes, the use of discretion "has frequently resulted . . . in more punitive, arbitrary, or racially discriminatory treatment of certain groups."[194] Often, discretionary decisions to divert or prosecute prostituted children is driven more by the characteristics of the child or the biases of a law enforcement official than the conduct of the child or the elements of the offense. Indeed, as the Office of Juvenile Justice and Delinquency Prevention has acknowledged "some of the categorization may reflect arbitrary features such as the demeanor of the juveniles, the sympathy that individual police officers may have for them, or the policies of the jurisdiction in which the incident occurred."[195] For Black girls, who are often not extended the protections of childhood, official discretion is often used to classify them as offenders.[196]

As will be discussed below, the liminal status of Black girls within the category of child profoundly affects the enforcement of antitrafficking initiatives, often leading to racial disparities in the enforcement of punitive interventions and the underenforcement of protective measures. Thus, Black girls are more likely to be diverted into rather than out of secure institutional settings, often because of insufficient investments in therapeutic residential placements.[197] Even in states such as New York, with some form of protective legislation in place, a child arrested for prostitution may still be adjudicated as a delinquent while services are provided or she may be placed in a locked juvenile detention facility to prevent her from returning to her exploiter.[198] Consequently, even if Black girls are identified as victims, they may not experience treatment that is significantly different than designated offenders. Rather, the liminal status of Black girls prevents them from accessing the protections of the state.

193. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 27 (1998).

194. Godsoe, *supra* note 161, at 1335.

195. FINKELHOR & ORMROD, *supra* note 168, at 4.

196. *See, e.g.*, Rachel Lloyd, *Shut Up and Sing: Why #BlackLivesShouldMatter and How This Impacts the Anti-Trafficking Movement*, GEMS (Dec. 4, 2004, 1:16 PM), http://www.gems-girls.org/shifting-perspective/shut-up-and-sing-why-blacklivesshouldmatter-and-how-this-impacts-the-anti-trafficking-movement.

197. *See* Marian Wright Edelman, *Child Watch Column: "What About the Girls?"*, CHILD. DEF. FUND (Oct. 10, 2014), http://www.childrensdefense.org/newsroom/child-watch-columns/child-watch-documents/Whataboutthegirls.html.

198. *See, e.g.*, MONIQUE W. MORRIS ET AL., CONFINED IN CALIFORNIA: WOMEN AND GIRLS OF COLOR IN CUSTODY 12 (2012) ("Courts have often responded to the epidemic by either charging these children with prostitution and confining them or holding them in secure confinement for their own protection, with the explanation that there are no available community-based alternatives.").

III. LIMINAL CHILDHOOD AND THE FAILURE TO PROTECT AFRICAN AMERICAN CHILDREN FROM COMMERCIAL SEX TRAFFICKING

A recent story in *The Washington Post* demonstrates the particular ways that the liminal status attached to Black girls shapes their treatment by the juvenile justice system. The report highlighted the experience of a Black girl named Tami. According to the story:

> A pimp kidnapped Tami on her way home from school in Los Angeles. He held her captive for six months, raping, beating, and starving her. At night, he sold Tami for sex with other men. Tami tried to escape by telling every john who purchased her that she was only a kid. For months, Tami pleaded with her buyers: "I'm only 15. Can you please take me to a police station?" But none did. When she finally encountered police officers, they did not rescue her; they arrested her.[199]

Tami's story is emblematic of the ways in which the liminal childhood status experienced by Black girls shapes perceptions of them within the juvenile justice system and leads to racial disparities in the detection, arrest and prosecution of sexually exploited minors.

Although there is no comprehensive estimate of the number of children arrested for prostitution, the Department of Justice has released data collected by thirteen federally funded anti–human trafficking taskforces. According to the Department of Justice, these taskforces identified 2515 suspected incidents of human trafficking, including approximately one thousand suspected cases of child sex trafficking.[200] Of the suspected incidents of child sex trafficking, only a quarter of the cases (248) were confirmed as victims of commercial sexual exploitation.[201] Black girls constituted 40 percent of the confirmed commercially sexually exploited children.[202]

Upon examining the data released by the Department of Justice and various local jurisdictions, two things become clear: Black girls are disproportionately represented among juveniles arrested for prostitution, and most of the children arrested for prostitution were not identified as commercially sexually exploited children under the federal definition, despite being under eighteen years of age at

199. Malika Saada Saar, *There Is No Such Thing as a Child Prostitute*, WASH. POST (Feb. 17, 2014), http://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b227-12a45d109e03_story.html.
200. BANKS & KYCKELHAHN, *supra* note 33, at 3.
201. *Id.* at 6.
202. *Id.*

the time of arrest.[203] This disjuncture is likely produced by the structural dynamics that render Black girls vulnerable to sexual abuse and exploitation; implicit racial biases shape perceptions of Black girls within various institutional settings;[204] the discretionary process by which victims of child trafficking are identified and later prosecuted by law enforcement, and the biases that drive the disproportionate incarceration rates for sexually exploited Black girls. As will be discussed below, at each stage of the juvenile justice system—from suspicion and arrest to adjudication and confinement—the stereotypes associated with the liminal status occupied by Black girls affect how they are treated relative to their white counterparts and make them more vulnerable to further criminalization and sexual exploitation.

A. Childhood and Implicit Bias

In a recent study, social psychologist Phil Goff and others found that "Black children enjoy fewer of the basic human protections afforded to their peers because the category 'children' is seen to be a less essential category (specifically, less distinct from adults) when it is applied to Black children."[205] The study found that race shapes perceptions of maturity such that "children may not be given the privilege of innocence equally across race."[206] The authors of the study noted the following:

> From ages 0–9, children were seen as equally innocent regardless of race. However, perceptions of innocence began to diverge at age 10. At this point, participants began to think of Black children as signifi-

203. AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES (2012) https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf (noting that most human trafficking suspects are not prosecuted under human trafficking laws); Johnny E. McGaha & Amanda Evans, *Where Are the Victims - The Credibility Gap in Human Trafficking Research*, 4 INTERCULTURAL HUM. RTS. L. REV. 239 (2009) (noting the variability and unreliability of human trafficking statistics in general and failure of antitrafficking initiatives to lead to actual prosecutions); Eileen Overbaugh, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers,* 39 SETON HALL L. REV. 635, 656-57 (2009) (highlighting the fact that two years after Florida enacted an antitrafficking law and one year after California and Texas enacted antitrafficking laws, neither the Florida nor California law had been used and the Texas law had been used once); Chacón, *supra* note 141, at 3019 (the low level of prosecution for human trafficking and the fact that many human trafficking cases are charged under other laws).

204. *Cf.* Tina L. Freiburger & Alison S. Burke, *Status Offenders in the Juvenile Court: The Effects of Gender, Race, and Ethnicity on the Adjudication Decision*, 9 YOUTH, VIOLENCE & JUV. JUST. 1, 1 (2011) (finding that Native American boys and Black girls were the populations most likely to be adjudicated).

205. Goff et al., *supra* note 15, at 528.

206. *Id.* at 529.

> cantly less innocent than other children at every age group, beginning at the age of 10. Interestingly, after the age of 10, the perceived innocence of Black children is equal to or less than the perceived innocence of non-Black children in the next oldest cohort.[207]

The findings of this study provide important evidence of the liminal status of African Americans within the broader category of childhood. As noted above, the fact that Black children are perceived as more mature, and thus more accountable for their behavior, may account for racialized and gendered outcomes across a range of social institutions, including social welfare, education, and—perhaps most significantly—within the juvenile justice system.

Indeed, gendered and racial constructs of Black girls as mature and sexually promiscuous shape social biases against them in the discourses and policy debates surrounding issues such as welfare reform. For example, rather than being seen as sympathetic adolescents in need of protection and guidance, Black girls who become pregnant are cast out of the category of child and imbued with adult sexual agency.[208] Black girls and women are blamed for social ills such as poverty and violence, and stereotypes of hyperfertility and criminality are used to reduce benefits and implement drug testing in for the push for welfare reform.[209] As a result of these biases, welfare programs associated with Black girls have been significantly curtailed and increasingly function in ways that criminalize recipients.[210] In sum, the liminal status of Black girls, and the stereotypes associated with that status, often animate punitive responses to the issue they disproportionately confront, which range from poverty to sexual trauma.

B. Structural Vulnerability to Sexual Exploitation

Views of Black girls as more mature and less innocent combine with racialized structural inequalities that place them at higher risk of being sexually exploited. For example, a recent study found that Black girls are suspended from school

207. *Id.*

208. *See generally* ELAINE BELL KAPLAN, NOT OUR KIND OF GIRL: UNRAVELING THE MYTHS OF BLACK TEENAGED MOTHERHOOD (1997) (describing the ways in which stereotypes of Black teenage motherhood and hypersexuality shape social policy).

209. *See, e.g.*, Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 282–83 (1991); Joel F. Handler, *The Transformation of Aid to Families With Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 467 (1987–88); Roger J.R. Levesque, *The Role of Unwed Fathers in Welfare Law: Failing Legislative Initiatives and Surrendering Judicial Responsibility*, 12 LAW & INEQ. 93, 126 (1993).

210. *See generally* Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) (describing the relationship between race and criminalization of welfare recipients through practices such as drug testing and increased surveillance of poor households).

six times as often as their white counterparts.[211] The authors go on to note that "[t]he available evidence, however, suggests that implicit biases, stereotyping, and other cultural factors may play a role" in creating this reality.[212] Indeed, in a separate 2007 study, researchers found that Black girls were perceived as "'loud, defiant, and precocious' and that teachers were more likely to reprimand black girls for being 'unlady'-like than were their white or Latina peers."[213] The use of school discipline to police perceived gender nonconformity and the disproportionate rates of suspension also suggest that Black girls do not benefit from assumptions of childhood innocence and immaturity that call for guidance rather than punishment. This separation also increases the likelihood that Black girls may turn to underground economies to support themselves and their families. Being forced out of school may strain social support networks and leave girls more vulnerable to being targeted by pimps.

Moreover, Black women and girls who are victims of sexual trafficking are vulnerable for a number of reasons—including race, gender, class, prior sexual victimization, and placement in the juvenile dependency system. Indeed, poverty is a significant factor in trafficking,[214] and Black girls disproportionately live in impoverished communities. According to a 2009 study of poverty rates, nearly "one in three Black children lived in poverty."[215] Additionally, studies have found that Black girls experience sexual abuse at rates significantly higher than their white counterparts.[216] Such prior victimization places them at further risk of future sexual exploitation. As one study noted, "[y]outh who experience sexual abuse are twenty-eight times more likely to be arrested for prostitution at some point in their lives than children who [did] not."[217] Black girls are also disproportionately represented within the juvenile dependency system,[218] another risk

211. *See* CRENSHAW ET AL., *supra* note 17, at 16.
212. *Id.* at 24.
213. MORRIS ET AL., *supra* note 198, at 13.
214. *See id.* at 375.
215. *Id.* at 368.
216. *See, e.g.*, JODY MILLER, GETTING PLAYED: AFRICAN AMERICAN GIRLS, URBAN INEQUALITY, AND GENDERED VIOLENCE 8 (2008); *Domestic Violence Statistics*, ABA, http://www.americanbar.org/groups/domestic_violence/resources/statistics.html (last visited June 27, 2015) ("Approximately 40% of Black women report coercive contact of a sexual nature by age 18.").
217. KATE WALKER, ENDING THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA 18 (2013), http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/Ending-CSEC-A-Call-for-Multi-System_Collaboration-in-CA.pdf.
218. *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 93–99, 202–03 (2002) (noting the racial disparities in the juvenile dependency system and interrogating the institutional dynamics that account for such disparities); WALKER, *supra* note 219, at 19.

factor for exploitation. Once placed in a foster home, many Black girls experience further neglect or abuse and run away from their foster homes. When they do so, they join the ranks of runaway and homeless children, who are especially vulnerable to sexual exploitation.[219] Failure to invest in the communities, families, schools, and other social services indicates a lack of social commitment to the development of Black girls, perhaps, because they are not seen as children who are in need of society's protection.

C. Racial Disparities and Official Discretion in Arrests

Indeed, sexually exploited children, who are disproportionately Black, are often arrested and subject to regulation by the juvenile justice system rather than protection through social welfare institutions. Adjudication through the delinquency system marks Black girls as sexually deviant and stamped by the stigmatizing identity of juvenile delinquent;[220] and the adjudication of a trafficked minor as a delinquent individualizes the systemic factors that led to the sexual exploitation. Instead, Black girls are more likely to be arrested when the trauma they have experienced manifests itself in what is perceived to be antisocial behavior. The various forms of violence they have experienced are erased and an identity as a delinquent is imposed, often leading to subsequent interactions with law enforcement. As one columnist speculated, "when the girls are black, poor and prostituted, there is either indifference or an assumption that they are consenting to the abuse."[221] Through adjudication as a delinquent, the stereotypes associated with their liminal status are reinforced, further excluding Black girls from the protections of childhood.

In what advocates have termed the "sexual abuse to prison pipeline,"[222] police are more likely to treat sexually exploited children as offenders and to fail to "ask them about the circumstances of their prostitution."[223] Children are not seen as victims of sexual abuse notwithstanding the fact that they cannot consent to sex nor are they seen as victims of prior sexual abuse.[224] Rather, drawing upon the stereotypes of sexual maturity and agency that are associated with Black girls, law

219. *See* WALKER, *supra* note 217, at 20.
220. Godsoe, *supra* note 161, at 1355.
221. Nicholas D. Kristof, *The Pimps' Slaves*, N.Y. TIMES (Mar. 16, 2008), http://www.nytimes.com/2008/03/16/opinion/16kristof.html.
222. MALIKA SAADA SAAR ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY (2015), http://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf.
223. Godsoe, *supra* note 161, at 1326 (noting that 74 percent of minor arrested for prostitution are incarcerated).
224. SAAR ET AL., *supra* note 222, at 19.

enforcement officials often view girls as complicit in their exploitation. For example, in one instance "a prosecutor argued that a prostituted twelve-year-old merited incarceration because she "lacked remorse [and] . . . need[ed] the structured situation which [would] . . . force [her] to face up to where [she was] in [her] li[fe] and what [she] ha[d] done."[225] Victims of sexual trafficking are often deemed to be more culpable than the johns that purchase them or the pimps that exploit them as indicated by one New York City study that found that sexually exploited minors were six times more likely than their exploiters to be arrested.[226] As a consequence of the blaming of sexually trafficked girls rather than their exploiters, protective antitrafficking initiatives have gone underenforced.[227]

Indeed, the blaming of Black girls for the sexual trauma they experience is highlighted by the story of Danielle Hicks-Best, an eleven-year-old Black girl who reported to the Washington, D.C., police that she had been sexually assaulted. Although her allegation was supported by physical evidence, the police dismissed her claims and instead arrested her for filing a false police report.[228] The police dismissed Hicks-Best's claim because she was viewed as hypersexual and therefore to blame for her victimization. One investigating officer wrote, "parents are unable to accept the fact that this child's promiscuous behavior caused this situation."[229] Clearly, this girl was denied access to the protective construct of childhood, including the notion that children, particularly those as young as eleven, cannot consent to sex. Instead of being protected, this eleven-year-old child was punished, spending "years in and out of detention and secure treatment centers."[230]

Moreover, even when Black girls are identified as victims, they still may not receive the benefits of that status. Although the TVPA states that, "victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked," victims are often still incarcerated or prosecuted in some manner. In

225. Godsoe, supra note 161, at 1364–64.
226. *Id.* at 1338–39.
227. KEVONNE SMALL ET AL., URBAN INST. JUST. POL'Y CTR., AN ANALYSIS OF FEDERALLY PROSECUTED CSEC CASES SINCE THE PASSAGE OF THE VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, at 22 (Feb. 2008), https://www.ncjrs.gov/pdffiles1/ojjdp/grants/222023.pdf (noting the rates between 1998 and 2005 at which prosecutors declined to move forward with child sexual exploitation cases at the federal level).
228. *See* Joanna Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up With a Conviction*, WASH. POST (Mar. 12, 2015), http://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice/2015/03/12/b1cccb30-abe9-11e4-abe8-e1ef60ca26de_story.html.
229. *Id.*
230. *Id.*

addition to arrest, Black girls face significant risks of physical violence when interacting with law enforcement agencies investigating prostitution.

The stereotypes of Black girls having adult-like qualities such as hypersexuality and maturity shape police perceptions of them and may increase their vulnerability to police abuse.[231] Indeed, in a recent lawsuit, the parents of a twelve-year-old Black girl alleged that she was assaulted by a police officer who suspected her of being a prostitute, despite the fact that she did not match the description of the two white female suspects. According to reports, "the officers thought [the plaintiff] was a hooker due to the 'tight shorts' she was wearing."[232] Three weeks after the incident, "police went to [the plaintiff's] school, where she was an honor student, and arrested her for assaulting a public servant."[233] As this and other cases make clear, liminal childhood status has profound consequences for Black girls, who occupy a borderland of the contradictory approaches to children, sexuality, and criminal law enforcement.

D. Conditions of Confinement

Once arrested, Black girls encounter an increasingly punitive juvenile justice system, where they are often subject to harsh conditions of confinement and encounter difficulty accessing services necessary to address the significant trauma they have experienced. The treatment of Black girls within the juvenile justice system reveals the precarious relationship between their status as children and their race and gender identities. On the one hand, children are viewed as lacking in judgment and maturity and thus are less culpable for criminal offenses; they are viewed as more in need of support and rehabilitation to become productive members of society. On the other hand, children who violate legal norms are treated as possessing adult-like qualities when it comes to their ability to choose to engage in criminality. Indeed, over the last thirty years, "legislatures have moved toward imposing adult-like responsibility on children who commit so-called adult crimes."[234] The push to impose adult-like responsibility has included extending sentences for juveniles, constructing juvenile facilities to resemble adult

231. *See, e.g.*, Tasha Fierce, *Black Women Are Beaten, Sexually Assaulted and Killed by Police. Why Don't We Talk About It?,* ALTERNET (Feb. 26, 2015), http://www.alternet.org/activism/black-women-are-beaten-sexually-assaulted-and-killed-police-why-dont-we-talk-about-it.

232. Chris Vogel, *Police Get the Wrong House in Galveston, Allegedly Assault 12-Year Old Girl*, HOUS. PRESS (Dec. 17, 2008, 12:37 PM), http://blogs.houstonpress.com/news/2008/12/ngalveston_false_arrest.php.

233. *Id.*

234. Todres, *supra* note 15, at 1134.

prisons, using practices such as solitary confinement in juvenile facilities, trying juveniles as adults, and imposing draconian penalties such as life without parole.[235] Such retributive policies and practices mark the "shifting [of] the boundary of childhood downward."[236]

This rise in punitiveness and the decline in the protections afforded to children have had a devastating effect on Black children. Studies have estimated that approximately sixty-seven thousand juveniles are incarcerated.[237] A study conducted by the Juvenile Justice Information Exchange found that:

> [[B]lack youth between the ages of 10 and 17 made up 17 percent of all children in that age group in 2010, but comprised 31 percent of all juvenile arrests, 40 percent of detentions, 34 percent of adjudications (guilty determinations), and 45 percent of all cases transferred to adult criminal court.[238]

The pattern of disproportionate representation, for both boys and girls, has been consistent over nearly three decades.

When the juvenile population is disaggregated by gender, studies have estimated that girls represent just over 13 percent of children detained in juvenile facilities each year.[239] The representation of girls in the juvenile justice system, however, has been growing. Between 1991 and 2003, the detention rate for girls increased by 98 percent, compared to a 29 percent increase for boys.[240] During this period, girls began to represent an increasing share of the population in the juvenile justice system, largely for noncriminal status offenses such as incorrigibility, running away, or violations of probation, as well as for criminal offenses such as prostitution.[241]

235. *See generally* NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON (2014) (highlighting the ways in which juvenile detention facilities across the country inflict harm and injury on children, including using solitary confinement); Michael Barbee, Comment, *Juveniles Are Different: Juvenile Life Without Parole After Graham v. Florida*, 81 MISS. L.J. 299, 302 (2011) (noting the practice of juvenile life without parole and arguing "that under the evolving standards of decency analysis, sentencing juveniles to life without parole—for any crime—violates the Eighth Amendment because juveniles are different").

236. Scott, *supra* note 64, at 571.

237. BERNSTEIN, *supra* note 235, at 7.

238. Lisa Chiu, *After Decades of Spending, Minority Youth Still Overrepresented in System*, JUV. JUST. INFO. EXCHANGE (Feb. 26, 2014), http://jjie.org/after-decades-of-spending-minority-youth-still-overrepresented-in-system/106398.

239. BERNSTEIN, *supra* note 235, at 7.

240. Sherman, *supra* note 123, at 1599.

241. *Id.* ("[S]tudies show that 75 percent of runaways are female, and for girls, running away is disproportionately a trigger for system involvement. In 2009, girls made up 55 percent of youth arrested for running away; prostitution was the only other crime for which girls made up the majority of arrests.").

Indeed, prostitution is one of the few offenses for which arrest rates of girls exceeds arrest rates for boys.[242] A study of the metropolitan juvenile delinquency system in New York City found that almost two-thirds of minors fifteen and younger who have been arrested for prostitution were incarcerated.[243]

Examining the juvenile population from the intersectional lens of race and gender, the disproportionate representation of Black girls within the system becomes visible. In 2008, Black girls represented 35 percent of all girls referred for adjudication in the juvenile system, despite representing only 8 percent of the ten-to seventeen-year-old population.[244] More than half of the girls in secure detention are Black.[245] Indeed, as Meda Chesney-Lind notes, Black girls are "three times as likely as their white counterparts to be held in a secure facility," despite the fact that white girls represent almost two-thirds of the at-risk juvenile population.[246] In California, for example, which contains three cities designated by the FBI as child sex trafficking hot spots, Black girls make up only 3 percent of the juvenile population, yet made up "more than 70 percent of girls held in some northern California detention centers and more than 50 percent of girls receiving institutional commitments" in 2009.[247] According to Chesney-Lind, these figures suggest the operation of a "racialized juvenile justice system, where the evidence suggests that white girls who come into the system as status offenders get labeled as child welfare cases while their African American and Latina counterparts are processed as criminals."[248]

Once detained in locked juvenile facilities, the Black girls' liminal childhood status and the racial and gender stereotypes attached to such status shape their treatment within the institution. Indeed, like their adult counterparts, Black girls experience harsh conditions of confinement, including physical and

242. *Id.*

243. AMY MUSLIM, MELISSA LABRIOLA & MICHAEL REMPEL, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY 17 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/225084.pdf.

244. Sherman, *supra* note 123, at 1617.

245. See Lisa Kanti Sangoi & Lorie Smith Goshin, *Women and Girls' Experiences Before, During, and After Incarceration: A Narrative of Gender-Based Violence, and an Analysis of the Criminal Justice Laws and Policies That Perpetuate This Narrative*, 20 UCLA WOMEN'S L.J. 137, 147 (2013) ("The use of detention for girls increased by 65% between 1988 and 1997, with Black girls comprising 50% of those in secure detention.").

246. Meda Chesney-Lind, *Jailing "Bad" Girls: Girls' Violence and Trends in Female Incarceration*, *in* FIGHTING FOR GIRLS: NEW PERSPECTIVES ON GENDER AND VIOLENCE 62–63 (Meda Chesney-Lind and Nikki Jones eds. 2010).

247. MORRIS ET AL., *supra* note 198, at 1.

248. Chesney-Lind, *supra* note 246 at 63.

sexual abuse.[249] In one particularly egregious example of abuse, a class-action lawsuit against the state of Mississippi alleged that girls in a juvenile detention center were shackled for twelve hours a day.[250] In a separate suit brought by the Department of Justice against the same Mississippi juvenile detention center, it was alleged that a girl was "forced to eat [her] own vomit."[251]

These girls, who are overwhelmingly Black and overwhelmingly victims of sexual and physical abuse, are often subject to physical violence within juvenile institutions, denied access to vital treatment, and treated with profound disregard by staff.[252] One study found that Black girls were disproportionately diagnosed with things like oppositional defiance disorder and thus subject to punishment, rather than being diagnosed with post-traumatic stress disorder and thus subject to treatment.[253] In reports lodged against them by detention facility staff, Black girls are often denied both the status of child and victim. One study found that staff described the girls at the facility as "fabricating reports of abuse, acting promiscuously, [and] whining too much."[254] One probation officer reported:

> They feel like they're the victim. They try from, 'Mom kicked me out' to 'Mom's boyfriend molested me' to 'My brother was sexually assaulting me.' They'll find all kinds of excuses to justify their actions. Because they feel if I say I was victimized at home, that justifies me being out on the streets.[255]

The comments above reflect the denial of the girls' identities as victims and a view of them as possessing adult-like agency in the choices made in response to the physical and sexual trauma they experienced. This form of liminal childhood renders abused Black girls more vulnerable to punitive responses to their behavior in lieu of therapeutic or restorative interventions by the state.

Even when young women are designated as victims of sexual trafficking, they are more likely to be held in locked facilities rather than receive treatment in community-based programs. This is because state and local agencies have not invested sufficient resources in building shelters or homes capable of serving the needs of youths who have been the victims of sexual exploitation.

249. *See* Holbrook Mohr, *AP: 13K Claims of Abuse in Juvenile Detention Since '04*, USA TODAY, (Mar. 2, 2008, 3:27 PM), http://usatoday30.usatoday.com/news/nation/2008-03-02-juveniledetention_N.htm ("In 2004, the U.S. Justice Department uncovered 2,821 allegations of sexual abuse by juvenile correction staffers.").

250. See *id.*

251. *Id.*

252. Chesney-Lind, *supra* note 246, at 64–66.

253. *Id.* at 64.

254. *Id.* at 66 (describing studies).

255. Emily Gaarder et al., *Criers, Liars, and Manipulators: Probation Officers' Views of Girls*, 21 JUST. Q. 547, 557 (2004).

Rather, resources have been directed toward policing, prosecuting and incarcerating traffickers. As the *Washington Post* article noted, "this country has more animal shelters than shelters for exploited children. Judges often detain these girls, believing that jail is the safest of many bad options."[256]

IV. SHIFTING THE DISCOURSE AND APPROACH TO ADDRESS THE NEEDS OF COMMERCIALLY SEXUALLY EXPLOITED CHILDREN

Black girls are born into a society that denies them access to central tenets of childhood, particularly during the period of adolescence. This dynamic is a product of America's history of gendered racial subordination, which began in the context of slavery and extends into the contemporary era. The liminal status associated with Black girls in turn shapes social policy regarding children in ways that disadvantage them, including initiatives targeting "modern slavery" and responses to prostitution within the juvenile justice system. In every ostensibly protective space—from home to school to their communities—Black girls who experience sexual abuse or exploitation are underprotected and marginalized. Interventions to prevent their exploitation are often non-existent and criminalization an ever-present threat. At every stage of the juvenile justice system—from detection to arrest to adjudication—Black girls are disproportionately represented as compared to their white counterparts.

Nowhere were these trends more apparent than the Los Angeles juvenile hall where I heard from so many Black girls who experienced sexual abuse and exploitation. The faces of those girls, however, represented more than the statistical and structural realities that disadvantage Black girls. Rather, the girls spoke powerfully to the psychological toll of their exploitation and criminalization as they described the blame they felt, the stigma placed upon them by the juvenile justice system, and their isolation from supportive services. Regardless of the intent of law enforcement in placing the girls in the locked facility, the harm and the trauma the girls internalized as a result of their adjudication and detention was palpable and fraught with the potential for negative outcomes that could affect the rest of their lives.

Indeed, as a result of their liminal childhood status, Black girls like those at the detention center are largely excluded from the class of victims protected by child anti-trafficking policies. Rather, they are more likely to be punished for prostitution or other related offenses such as loitering, curfew violations, or running away from home. Their liminal status is reinforced by policies that allows

256. Saar, *supra* note 198.

for criminalization of minors—often under the guise of protection—and a failure to invest in the social services necessary to support girls who are sexually exploited or who are at risk of sexual exploitation. Their vulnerabilities are compounded as a result of their adjudication as delinquents within the juvenile justice system. As a result of their incarceration, they are further separated from institutions such as schools, experience diminished prospects for employment, and continue to suffer the effects of their traumatic experiences. The experience of Black girls demonstrates that federal, state, and local governments cannot simply criminalize their way out of a complex social problem that has deep roots in racial, gender, and economic vulnerabilities. As legal scholar Francine Sherman notes, "[u]nderstanding the brutal nature of commercial sexual exploitation and the need to protect victimized youth, policymakers must still be mindful of the way the impulse to protect teenage girls has historically driven them into the justice system."[257]

Instead, governmental action to address the commercial sexual exploitation of children must address the broader ecology of structural inequality and the corresponding breakdown of the social safety net in marginalized communities. In order to disrupt the marginal status occupied by Black girls and the sexual exploitation they disproportionately experience, lawmakers and advocates at the federal and state levels must address their specific vulnerabilities. Of course, a shift in federal and state policy regarding sexually exploited minors will not undo centuries of racialized and gendered exclusion from childhood, but it can ensure that the exclusion that Black girls experience is not exacerbated or reinforced. In other words, a race- and gender-conscious shift in antitrafficking policy can contest the stereotypes that are often associated with Black girlhood.

A. Federal Reform

Since 2000, the federal government has adopted a definition of "severely trafficked persons" that treats anyone under the age of eighteen who engages in a commercial sexual act as a victim of human trafficking. Under federal policy, victims of human trafficking should not be inappropriately incarcerated or "be detained in facilities inappropriate to their status as crime victims."[258] Yet, enforcement has been uneven. Only a few hundred confirmed victims of "severe human trafficking" have been identified under the federal definition. Commercially sexually exploited children continue to be subject to detention and arrest,

257. Sherman, *supra* note 123, at 1611.

258. 22 U.S.C. § 7105(c)(1)(A) (2012).

particularly at the state level. Advocates have argued that federal funding to combat the sexual exploitation of children has been inadequate to meet the existing need.

To address these deficiencies, Congress recently enacted legislation that will push states in this direction. Under the Justice for Victims Trafficking Act of 2015, the federal government established grant programs to support the implementation or expansion of child sex trafficking deterrence programs at the state and local levels, increase coordination between social services and law enforcement to better serve victims, provide services to sexually trafficked children and to establish programs to find homeless and missing children.[259] The Act also establishes a council of survivors of child sex trafficking to advise and federal policies on the trafficking of children.[260] Most significantly, the Justice for Victims of Trafficking Act provides funding preferences and incentives for states to adopt safe harbor statutes.[261]

While these are significant steps, the federal priorities embodied by the Justice for Trafficking Victim's Act do not address the structural factors that lead to exploitation in the first place or the specific intersectional dynamics that lead to disparate outcomes for Black girls. In order to prevent the sexual exploitation of children, the federal government must support the development of programs that address the structural vulnerabilities of children including racial inequality, poverty, homelessness, educational inequity, inadequate foster care and high rates of sexual abuse. Moreover, whether or not a major shift in the treatment of sexually exploited minors will occur is dependent on state and local government.

B. State Reform

States, as the primary site for the intervention for the sexual exploitation of children, should focus on at-risk populations rather than waiting for girls to be subject to sexual exploitation. Such an approach would require the investment of resources into the communities and homes in which Black girls reside; it would require investments into the lives and health of Black girls. For example, homelessness or housing instability is a significant risk factor for sex-

259. Justice for Victims of Human Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 231-36 (2015)(to be codified at 42 U.S.C. 14044b).

260. Survivors of Human Trafficking Empowerment Act, Pub. L. No. 114-22, § 115, 129 Stat. 242-44 (2015).

261. Justice for Victims of Human Trafficking Act of 2015, § 601, 129 Stat. at 258-59 (to be codified at 42 U.S.C. § 3796dd).

ually exploited children. Yet, advocates and scholars continue to find inadequate emergency and foster care homes for children who are escaping abusive environments. Those children, in turn, wind up on the streets where they engage in survival sex or are prostituted by pimps. Similarly, sexual abuse is a significant risk factor for child sex trafficking that is often overlooked in settings such as schools. State and local jurisdictions should provide training and establish protocols within child-serving institutions such as schools on how to better recognize the signs of sexual abuse and institute trauma-informed services instead of suspension or expulsion when children act out as a result of abuse.

States should also provide training and support to law enforcement officials who are often the first to detect sexually exploited children. The decisions that law enforcement officials—whether a police officer or prosecutor—make at the detection stage are critical. Law enforcement officials can use their discretion to determine whether to detain or arrest a child for juvenile prostitution, whether to adjudicate or divert a child out of the system and they can determine placements. As noted above, these discretionary decisions are often shaped by racial and gendered biases that draw upon the stereotypes associated with their liminal status and functions to disproportionately designate Black girls as offenders rather than victims. To combat these and other biases, states should institute implicit bias trainings and mandate the collection of arrest, prosecution and disposition data on juvenile prostitution disaggregated by race and gender.

In many ways, the shift toward a structural approach to the vulnerabilities of trafficked children demands a shift away from a punitive approach to juvenile delinquency. Policymakers and advocates at the state level must eliminate discretionary victim designations that often exclude Black girls by mandating that anyone under the age of eighteen who engages in commercial sex be deemed a victim as a matter of law and require diversion out of the juvenile or criminal justice systems. This robust form of safe harbor should be applicable without regard to prior arrests or cooperation with law enforcement. Such a mandatory designation would limit the risk of bias against Black girls and could challenge contemporary perceptions that situate them at the margins of childhood. The decriminalization of juvenile prostitution would enable children to be directed out of the delinquency system and into social services that can address the root issues that led to their victimization, including psychological treatment to address trauma, housing, education, and programs designed to promote familial support of our antitrafficking efforts.

CONCLUSION

The lives of poor Black girls are profoundly shaped by exclusion and violence. Black girls exist at an intersection of race, class, and gender and are situated in a liminal space both inside and outside of the category of child. They exist at an intersection of race, class, and gender that renders them vulnerable to public and private forms of violence, including commercial sexual exploitation. Yet the institutions that are ostensibly designed to protect them fail to recognize the ways in which their race, gender, and class identities shape their experiences with sexual violence and criminalization.

In order to fully combat the commercial sexual exploitation of children, policymakers, advocates, and academics must center the concerns of Black girls and attend to their particular vulnerabilities. This approach calls for the deconstruction of the social, political, and economic institutions that marginalize Black girls and exclude them from protection. In order to address the structural vulnerabilities of Black girls, we must recognize the ways in which criminal punishment has not protected girls but instead has operated to further subordinate and entrench their liminal status, both historically and contemporarily. In sum, we must bring vulnerable Black girls from the margins to the center.

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Colonial Exploitation: The Canadian State and the Trafficking of Indigenous Women and Girls in Canada

Robyn Bourgeois

ABSTRACT

This Article argues that because of its historical and ongoing investments in settler colonialism, the Canadian state has long been complicit and continues to be complicit in the human trafficking of indigenous women and girls in Canada. In addition to providing indigenous bodies for labour and sexual exploitation, Canada's trafficking of indigenous people has been essential not only to securing the indigenous lands required for the nation's existence, but also in facilitating the speedy colonial elimination of indigenous people—whether through assimilation, forced emancipation, or death. Human trafficking, as such, has been essential to securing domination of indigenous peoples and territories throughout Canadian colonial history. This Article pays particular attention to the Canadian state's uses of law to enable the trafficking of indigenous women and girls (and indigenous peoples, generally).

AUTHOR

Robyn Bourgeois is an indigenous (Cree) activist, academic, and author. She earned her Ph.D in Social Justice Education from the University of Toronto, where her doctoral research examined indigenous women's involvement in state-sponsored anti-violence responses in Canada since the 1980s. For more than a decade, she has also been involved in political activism to end violence against indigenous women and girls across Canada. She currently teaches in the International Centre for Women's Leadership at the Coady International Institute at St. Francis Xavier University in unceded Mi'kmaq territory in Antigonish, Nova Scotia.

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INTRODUCTION[1]

For indigenous women and girls in contemporary Canadian society, exploitation and violence are disturbingly relentless and brutal social norms. For example, evidence suggests that indigenous families experience some of the highest rates of violence in the country,[2] with one study finding that 80 percent of its indigenous female participants had experienced some form of family violence.[3] Indigenous women and girls also experience extremely high rates of sexual violence, with 75 percent of indigenous females experiencing some form of sexual abuse before age eighteen, with 50 percent experiencing this violence before age fourteen, and 25 percent experiencing this violence before age seven.[4] Moreover, an operational overview conducted by the Royal Canadian Mounted Police (RCMP), Canada's national police force, also recently confirmed what indigenous women and their communities have been saying for decades:[5]

1. Throughout this Article, I use the term "indigenous" to refer to the groups commonly referred to as Aboriginal, Indian, Native, First Nation, Inuit, and Métis in Canada. Its decapitalization is intentional, signaling its use as an adjective and not a proper noun, as we as indigenous peoples and nations have our own proper nouns for ourselves, such as Nehiyawak (Cree) or Anishinaabe (Ojibwa). Moreover, I privilege the use of these indigenous names throughout this discussion while also indicating their common English language translation. When citing the work of others (whether titles or direct quotes), I have maintained the integrity of the reference by using the original terminology. Finally, Indian is intentionally used to signal those with official status under Canada's Indian Act.
2. *See, e.g.*, ANNE MCGILLIVRAY & BRENDA COMASKEY, BLACK EYES ALL OF THE TIME: INTIMATE VIOLENCE, ABORIGINAL WOMEN, AND THE JUSTICE SYSTEM 17 (1999); MICHAEL BOPP, JUDIE BOPP & PHIL LANE, JR., ABORIGINAL HEALING FOUND., DOMESTIC VIOLENCE IN CANADA 24–27 (2003), *available at* http://www.ahf.ca/downloads/domestic-violence.pdf; PUB. HEALTH AGENCY OF CAN., ABORIGINAL WOMEN AND FAMILY VIOLENCE 3 (2008), *available at* http://www.onwa.ca/upload/documents/aboriginal-women-and-family-violence.pdf.
3. *See* ONTARIO NATIVE WOMEN'S ASS'N, BREAKING FREE: A PROPOSAL FOR CHANGE TO ABORIGINAL FAMILY VIOLENCE 7 (1989), *available at* www.oaith.ca/assets/files/Publications/Breaking-Free-Report.pdf.
4. *See* JOHN H. HYLTON, ABORIGINAL SEXUAL OFFENDING IN CANADA 50 (2006), *available at* www.ahf.ca/downloads/revisedsexualoffending_reprint.pdf.
5. For examples of indigenous women's arguments about the high rates of missing and murdered indigenous women and girls, see generally, AMNESTY INT'L, STOLEN SISTERS: A HUMAN RIGHTS RESPONSE TO DISCRIMINATION AND VIOLENCE AGAINST INDIGENOUS WOMEN IN CANADA (2004), *available at* http://www.amnesty.ca/sites/default/files/amr200032004enstolensisters.pdf; BEVERLY JACOBS, NATIVE WOMEN'S ASS'N OF CANADA SUBMISSION TO THE SPECIAL RAPPORTEUR INVESTIGATING THE VIOLATIONS OF INDIGENOUS HUMAN RIGHTS (2002); NATIVE WOMEN'S ASS'N OF CAN., VOICES OF OUR SISTERS IN SPIRIT: A REPORT TO FAMILIES AND COMMUNITIES (2d ed. 2009), *available at* http://www.nwac.ca/sites/default/files/download/admin/NWAC_VoicesofOurSistersInSpiritII_March2009FINAL.pdf; NATIVE WOMEN'S ASS'N OF CAN., WHAT THEIR STORIES TELL US: RESEARCH FINDINGS

Indigenous women and girls represent a disproportionate number of female homicide victims, and represent a disproportionate number of missing females in Canada.[6] The RCMP files showed 1017 indigenous-female homicides between 1980 and 2012, and 164 currently unresolved cases of missing indigenous females.[7] These numbers are stark for two reasons. First, despite representing only 4.3 percent of the Canadian female population,[8] indigenous females made up 11.3 percent of the total number of missing females in Canada[9] and 16 percent of all female homicides.[10] Second, RCMP statistics suggest that, on average, indigenous females were 5.5 times more likely to be murdered than nonindigenous females in Canada.[11]

The exploitation and violence indigenous females experience in contemporary Canadian society extends to the heinous crime of human trafficking. Formal statistics capturing the scope of the trafficking of indigenous females are limited for several reasons, including the clandestine and underground nature of this violence, the regularity of underreporting by victims (due to fear and coercion), the movement of trafficked individuals, and the lack of focus and clear understanding of the violence of human trafficking—particularly the Canadian political pattern of highlighting international trafficking while deemphasizing domestic trafficking.[12] According to the Urban Native Youth Association, an outreach group working with indigenous youth in Vancouver, British Columbia, approximately 60 percent of both female and male sexually exploited youth in that city are indigenous—a number that "has remained constant over the past few years, and threatens to climb even higher if we do not act now to stem the tide of Aboriginal child and youth sexual exploitation."[13] Researcher Anupriya Sethi points to indigenous female representation in the survival sex trade—the ex-

FROM THE SISTERS IN SPIRIT INITIATIVE (2010), *available at* http://www.nwac.ca/files/reports/2010_NWAC_SIS_Report_EN.pdf.

6. *See* ROYAL CANADIAN MOUNTED POLICE, MISSING AND MURDERED ABORIGINAL WOMEN: A NAT'L OPERATIONAL OVERVIEW 3 (2014), available at http://www.rcmp-grc.gc.ca/pubs/mmaw-faapd-eng.pdf.
7. *See id.* at 7.
8. *Id.*
9. *Id.* at 8.
10. *Id.* at 9.
11. *Id.* at 10. This average was calculated using the figures presented in Figure 5–Female homicide victimization rate. The average homicide rate for indigenous females between 1996 and 2011 was 5.5 per 100,000, and the average homicide rate for nonindigenous females during the same period was .95 (or 1.0 if rounded to the nearest whole number) per 100,000, making indigenous females, on average, 5.5 times more likely to be victims of homicide than nonindigenous females.
12. *See* Anupriya Sethi, *Domestic Sex Trafficking of Aboriginal Girls in Canada: Issues and Implications*, 3 FIRST PEOPLES CHILD & FAM. REV. 59, 65 (2007).
13. *See* URBAN NATIVE YOUTH ASS'N, FULL CIRCLE 6 (2002).

tremely visible, low paid, and highly violent street-based trade often engaged in to provide minimally for basic subsistence and, frequently, to support an addiction—as offering some insight into the potential numbers of indigenous women and girls being targeted for human trafficking for sexual exploitation.[14] In her study of the domestic sex trafficking of indigenous girls in Canada, Sethi found that young indigenous females make up anywhere from 14 to 60 percent of the survival sex trade in various regions across Canada.[15] In their 2005 interview study of prostitution in Vancouver, researchers Melissa Farley, Jacqueline Lynne, and Ann J. Cotton noted that indigenous females represented 52 percent of the sample.[16] As in the case of missing and murdered indigenous women and girls, these statistics suggest a disturbing overrepresentation of indigenous females in the sex trade in Canada and, therefore, a likely overrepresentation amongst those targeted for human trafficking. This probability is reinforced by the numerous studies suggesting that a concurrence of social factors—including the legacies of the residential school system, racism, urban migration, extreme poverty, involvement with state child welfare agencies, high rates of addiction and mental health issues, and high rates of interpersonal and family violence—make indigenous females extremely vulnerable to being targeted for human trafficking.[17]

Since becoming a signatory on the United Nations (U.N.) Protocol to Prevent, Suppress and Punish Trafficking in Persons (also known as the Palermo Protocol) in 2000, the Canadian state[18] has taken action—albeit painfully slow[19] and primarily through law—to address the issue of human trafficking. As part of its international commitment to prevent human trafficking, protect and assist victims, and prosecute traffickers, the Canadian government added a prohibition

14. *See* Sethi, *supra* note 12, at 58–59.
15. *Id.* at 59.
16. Melissa Farley, Jacqueline Lynne & Ann J. Cotton, *Prostitution in Vancouver: Violence and the Colonization of First Nations Women*, 42 TRANSCULTURAL PSYCHIATRY 242, 242 (2005).
17. *See* NATIVE WOMEN'S ASS'N OF CAN., SEXUAL EXPLOITATION AND TRAFFICKING OF ABORIGINAL WOMEN AND GIRLS: LITERATURE REVIEW AND KEY INFORMANT INTERVIEWS 11–16 (2014); PAUKTUUTIT INUIT WOMEN OF CAN., INUIT VULNERABILITIES TO HUMAN TRAFFICKING 6–26 (2013); ANETTE SIKKA, INST. ON GOVERNANCE, TRAFFICKING OF ABORIGINAL WOMEN AND GIRLS IN CANADA 6–11 (2009); Victoria Sweet, *Rising Waters, Rising Threats: The Human Trafficking of Indigenous Women in the Circumpolar Region of the United States and Canada* 5–8 (Mich. State Univ. Sch. Of Law, Research Paper No. 12-01, 2014), *available at* http://ssrn.com/abstract=2399074.
18. For the purposes of this discussion, the Canadian state refers to the federal, provincial, and territorial governments and their institutions, including the criminal justice, health, and education systems.
19. *See generally* BENJAMIN PERRIN, INVISIBLE CHAINS: CANADA'S UNDERGROUND WORLD OF HUMAN TRAFFICKING 118 (2010) (explaining the glacial pace of Canadian state interventions on human trafficking).

against trafficking to the Immigration and Refugee Protection Act in June 2002, stating "[n]o person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion."[20] In November 2005, the federal government made "trafficking in persons" an indictable offense under the Criminal Code of Canada for the first time in the country's history.[21] Amendments to the Criminal Code in 2010 added special provisions with mandatory minimum sentencing for trafficking persons under age eighteen.[22] Another amendment in 2012 made it possible to prosecute Canadians for trafficking persons while outside of Canada. Since 2005, the RCMP has operated the Human Trafficking National Coordination Centre (HTNCC).[23] It serves as "a focal point for law enforcement in their efforts to combat and disrupt individuals and criminal organizations involved in Human Trafficking activities."[24] The HTNCC is structured around five priorities, which are to:

> (1) develop tools, protocols, and guidelines to facilitate Human Trafficking investigations; (2) coordinate national awareness/training, and anti-trafficking initiatives; (3) identify and maintain lines of communication, identify issues for integrated coordination and provide support; (4) develop and maintain international partnerships and coordinate international initiatives; and (5) coordinate intelligence and facilitate the dissemination of all sources of information/intelligence.[25]

Provincial governments in Canada have also established human trafficking responses, most notably the province of British Columbia's Office to Combat Trafficking in Persons (OCTIP) created in 2007. Both the federal and provincial/territorial governments have also partnered with and disseminated funding to nongovernmental organizations, social service providers, and community groups to implement a variety of initiatives responding to human trafficking.[26]

In 2012, the Government of Canada released its National Action Plan to Combat Human Trafficking through its Ministry of Public Safety. Presiding

20. *Id.* at 120; Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 118 (Can.).
21. *See* Perrin, *supra* 19, at xviii.
22. Bill C-268, An Act to Amend the Criminal Code (Minimum sentence for offences involving trafficking of individuals under age eighteen). Enacted by the 40th Parliament on June 29, 2010.
23. *See* Perrin, *supra* 19, at 138–139.
24. Royal Canadian Mounted Police, *Human Trafficking National Coordination Centre*, ROYAL CANADIAN MOUNTED POLICE, http://www.rcmp-grc.gc.ca/ht-tp/index-eng.htm (last modified Mar. 9, 2015).
25. *Id.*
26. *See* GOV'T OF CAN., NATIONAL ACTION PLAN TO COMBAT HUMAN TRAFFICKING 1 (2012), *available at* http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-ctn-pln-cmbt/ntnl-ctn-pln-cmbt-eng.pdf; PERRIN, *supra* note 19, 99–110.

Minister of Public Safety Vic Toews called human trafficking "one of the most heinous crimes imaginable" because it "robs its victims of their most basic human rights," and stated that "[a]s part of our Government's longstanding commitment to protect the vulnerable, tackle crime and safeguard Canadians and their families in their homes and communities, we are taking action against these terrible crimes."[27] The purpose of this action plan, he claimed, was "to consolidate all of the [existing national and international] activities into one comprehensive plan with an unwavering pledge to action" and to propose "strategies that will better support organizations providing assistance to victims and help[] to protect foreign nationals . . . from being subjected to illegitimate or unsafe work."[28] "I am confident," Toews concluded, "that as we move forward as a country, we will be able to effectively address this issue in Canada and in the international arena." By "releasing this National Action Plan, we are sending a clear message that Canada will not tolerate this crime, that victims will be given the help they need, and that perpetrators will be brought to justice."[29]

Yet as the Canadian state takes this hard stand against human trafficking, indigenous women, their organizations, and indigenous and nonindigenous researchers have begun raising significant concerns about how this stance impacts indigenous women and girls in Canada. The state's efforts, it is contended, fail to adequately or appropriately meet the complex needs of indigenous females and their communities when it comes to addressing human trafficking.[30] Indeed, "for indigenous peoples," indigenous legal scholar Victoria Sweet argues, "human trafficking is just the new name of a historical problem": colonization and ongoing exploitation by outsiders.[31] Significantly, scholars argue that because domestic trafficking has not received the same attention as international trafficking in mainstream Canadian society,[32] the trafficking of indigenous women and girls has remained largely invisible. The result is that, as legal scholar Anette Sikka points out, there is "a lack of services available to address the trafficking of Aboriginal women and girls and a general apathy from the criminal justice system towards the types of trafficking they face."[33]

27. GOV'T OF CAN., *supra* note 26, at 1.
28. *Id.*
29. *Id.* at 2.
30. *See, e.g.*, YVONNE BOYER & PEGGY KAMPOURIS, PUB. SAFETY CAN., TRAFFICKING OF ABORIGINAL WOMEN AND GIRLS 3–4, 50–56 (2014), *available at* http://www.iphrc.ca/assets/Documents/Boyer%20&%20Kampouris%20Report.pdf; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 29–30, 67; PAUKTUUTIT, *supra* note 17, at 3, 21–22; SIKKA, *supra* note 17, at 1–2; Sethi, *supra* note 12, at 65–68; Sweet, *supra* note 17, at 14–19.
31. *See* Sweet, *supra* note 17, at 2.
32. *See* Sethi, *supra* note 12, at 57; SIKKA, *supra* note 17, at 1.
33. SIKKA, *supra* note 17, at 1.

Change in the state response to domestic human trafficking, critics conclude, is critical, given the increasing numbers of indigenous women and girls being trafficked across Canada.[34]

Importantly, if we accept indigenous women's position that settler colonialism is a fundamental factor in the current vulnerability of indigenous women and girls in Canada as targets for human trafficking, then, as a settler colonial nation, it is critical to interrogate Canada's complicity in the trafficking of indigenous women and girls within its borders. As indigenous legal scholar Sarah Deer has argued, colonialism in the Americas has long relied on the trafficking of indigenous people to establish and secure settler dominance over indigenous peoples and, critically, indigenous lands.[35] While this contention has previously been raised in the Canadian context,[36] there has been limited scholarly analysis of the Canadian state's involvement in the trafficking of indigenous people. Thus, in this Article, I demonstrate that by its own legal and conceptual definitions of human trafficking, the Canadian state has been and continues to be directly complicit in the trafficking of indigenous women and girls. This Article examines not only instances of trafficking on the part of the Canadian state, but also how Canadian state actions—including through the laws it adopts—contribute to the current vulnerability of indigenous women and girls to trafficking. The goal of this Article is to not only expose the Canadian state's complicity with human trafficking, but also to demonstrate the centrality of human trafficking to the historical and ongoing settler colonial project of the Canadian nation state—both of which are essential to understanding and addressing the trafficking of indigenous women and girls in Canada.

34. *See* BOYER & KAMPOURIS, *supra* note 30, at 4; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 67; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 28; Sweet, *supra* note 17, at 7–8.

35. *See* Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621 (2010), 624–25.

36. *See* Sarah Hunt, *Colonial Roots, Contemporary Risk Factors: A Cautionary Exploration of the Domestic Trafficking of Aboriginal Women and Girls in British Columbia, Canada*, ALLIANCE NEWS, July 2010, at 27–28, *available at* http://www.gaatw.org/publications/Alliance%20News/Alliance_ News_July_2010.pdf.

I. FRAMING HUMAN TRAFFICKING

A. Canadian State Definitions and Conceptualizations of Human Trafficking

A necessary starting point for this analysis is defining its main term: human trafficking. To do so, I draw on how it has been defined by and for (in the case of international treaty obligations) the Canadian state through law. My reason for doing so is simple: This analysis hinges on demonstrating the Canadian state's complicity in human trafficking and, as such, using its own definitions and understandings of this violence validates this argument. By using the state's own standards for assessing the crime of human trafficking, I also make poignantly explicit how Canada is and has been operating in contravention of its own laws and international treaty obligations. Nevertheless, this is in no way intended to suggest that this conceptualization is the most accurate or even most desirable definition of human trafficking.

As noted in the introduction, Canada's first prominent pledge to address human trafficking was made as part of the U.N. Palermo Protocol. Article 3(a) of this protocol provides a detailed explanation of how human trafficking is to be understood by the international community:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[37]

It also provides a basic definition for "exploitation": "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[38]

To critically interrogate and map the Canadian state's involvement in the trafficking of indigenous women and girls both historically and in the contemporary, it is important to highlight some of the specific commitments for signatory nations within the Palermo Protocol. Particularly relevant is Article 6's dealing

37. United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, at 42 (Nov. 15, 2000).
38. *Id.*

with the "assistance to and protection of victims of trafficking in persons."[39] For example, Article 6, Subsection One commits signatory states to protecting the privacy and identity of the victims including "by making legal proceedings relating to such trafficking confidential."[40] Subsection Two commits each signatory to ensuring

> that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases: (a) Information on relevant court and administrative proceedings; (b) Assistance to enable their views and concerns to be presented and considered at appropriate states of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defense.[41]

Subsection Three impels nation states to "consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons" including such things as "appropriate" housing; counseling and information on "their legal rights in a language that the victims of trafficking in persons can understand"; "medical, psychological and material assistance"; and employment, educational, and training opportunities.[42] Subsection Four commits signatories to "tak[ing] into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children."[43] Finally, but perhaps most importantly, Subsection Five directs nation states to "endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory."[44] The Palermo Protocol reaffirms this goal by committing signatory states to "establish[ing] comprehensive policies, programmes, and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children from revictimization."[45]

Specific provisions within both the Criminal Code and the Immigration and Refugee Protection Act outline the state's conceptualization of this violence and its response to its commitments under these treaties. For instance, section 279.01 of the Criminal Code which deals with "trafficking in persons" states, "[e]very person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is

39. *Id.* at 43.
40. *Id.* at 43–44.
41. *Id.* at 44.
42. *See id.*
43. *Id.*
44. *See id.*
45. *Id.* at 45–46.

guilty of an indictable offence."[46] Importantly, the Criminal Code distinguishes human trafficking victims on the basis of age, requiring increased minimum sentencing terms for trafficking persons under age eighteen.[47] It also imposes the maximum sentence of life in prison if traffickers "kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence."[48] Finally, the Criminal Code invalidates claims of consent in cases of human trafficking.[49]

The Immigration and Refugee Protection Act also criminalizes human smuggling and trafficking: Article 117, subsection one states that "[n]o person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act." [50] Article 118(1) states that "no person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion."[51] Finally, article 121(1) outlines "aggravating factors" to be considered by courts in assessing human trafficking penalties, including whether

> (a) bodily harm or death occurred, or the life or safety of any person was endangered, as a result of the commission of the offence; (b) the commission of the offense was for the benefit of, at the direction of or in association with a criminal organization; (c) the commission of the offense was for profit, whether or not any profit was realized; and (d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.[52]

Another prominent Canadian state response to human trafficking was a 2012 release by Public Safety Canada—a department of the federal government addressing such issues as emergency management, national security, border security, and crime prevention—of the National Action Plan to Combat Human Trafficking.[53] "While many initiatives are underway, both at home and abroad," notes Toewes in his foreword to the plan, "the time has come to consolidate all of

46. Canada Criminal Code, R.S.C. 1985, c. C-46, s. 279.01.
47. *See id.* s. 279.011.
48. *See id.* s. 279.01(1)(a); *see also id.* s. 279.011(1)(a) (same provision for the trafficking in persons under age eighteen).
49. *See id.* s. 279.01(2), s. 279.011(2).
50. Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 117 (Can.).
51. *Id.* s. 118(1).
52. *Id.* s. 121(1).
53. See Government of Canada, Nat'l Action Plan to Combat Human Trafficking.(Ottawa: Her Majesty the Queen in Right of Canada, 2012), available at http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-ctn-pln-cmbt/ntnl-ctn-pln-cmbt-eng.pdf.

the activities into one comprehensive plan with an unwavering pledge to action."[54] In this plan, the government laid out its responses to this issue organized around four areas: (1) prevention; (2) protection and assistance for victims; (3) detection, investigation, and prosecution of traffickers; and (4) partnerships and knowledge. It also presented a state definition of human trafficking: "Human Trafficking involves the recruitment, transportation, harbouring and/or exercising control, direction or influence over the movements of a person in order to exploit that person, typically through sexual exploitation or forced labour."[55] The plan notes that is often described as a "modern-day slavery"[56] involving the absence of consent and ongoing exploitation that occurs transnationally, but also "within Canada's borders."[57]

Scholars and researchers have highlighted some key components of Canada's legal definitions and understandings of human trafficking. First, they note that between the Criminal Code and the Immigration and Refugee Protection Act, both nationals and internationals are not only guaranteed protection from human trafficking, but also subject to prosecution for engaging in human trafficking offenses.[58] Second, despite the common belief that trafficking necessarily involves transportation of trafficked persons, Criminal Code provisions do not require proof of movement in laying human trafficking charges but focus instead on the elements of coercion, exploitation, and abuse.[59] Third, in assessing exploitation, the Criminal Code requires proof that a trafficked individual feared for their safety if they failed to comply with the demands of their trafficker.[60] According to legal scholar and human trafficking expert Benjamin Perrin, this requirement not only makes Canada's laws distinct from the UN Palermo Protocol and other nations who have enacted criminal offences against human trafficking, but also creates problematic constraints:

> The *Criminal Code*'s definition of human trafficking centres on the victim's fear for safety or the safety of someone known to the victim. This is unfortunately too narrow because it fails to criminalize other means by which trafficking is routinely committed. It could be argued that "safety" should not be restricted simply to the physical harm but also should encompass psychological and emotional harm (i.e., blackmailing

54. GOV'T OF CAN., *supra* note 26, at 1.
55. *Id.* at 4; SIKKA, *supra* note 17, at 4–5.
56. GOV'T OF CAN., *supra* note 26, at 1.
57. *Id.* at 4.
58. *See* PERRIN, *supra* note 19, at 119–22.
59. *See* BOYER & KAMPOURIS, *supra* note 30, at 13; PERRIN, *supra* note 19, at 119; Sweet, *supra* note 17, 3–4.
60. *See* PERRIN, *supra* note 19, at 137–38; SIKKA, *supra* note 17, at 5.

> the victim). Yet the definition may fail to address insidious methods used by traffickers—deception, fraud, abuse of power/position of vulnerability, or payment of someone to control the victim—that should be included, as required by the *Palermo Protocol*. These methods are not clearly captured in Canada's *Criminal Code* definition unless they can be linked to the conception of "safety." As a result of this loophole, traffickers in Canada have been able to escape human trafficking charges.[61]

Furthermore, this definition places the burden of proof on victims with the result, Perrin argues, that only the most extreme cases of human trafficking—those involving severe physical violence or threats—are likely to be prosecuted in Canadian courts.[62] The police officers interviewed by Yvonne Boyer and Peggy Kampouris as part of their study on trafficking for the federal Public Safety Ministry confirmed Perrin's concerns: They "pointed out that, in many cases where indicators of human trafficking and exploitation are present, the victim often considers the trafficker to be a 'boyfriend,'" and "if a victim doesn't disclose, or isn't afraid for her safety or the safety of her family, then the threshold of the law is not met [and] [t]he police are then unable to lay human trafficking charges."[63] Finally, I would add that the Canadian state's conceptualizations of trafficking are focused on individual perpetrators and criminal organizations and not on nation states as possible perpetrators. Fortunately, Canada's commitment to the Palermo Protocol presents an international political pathway for possibly pursuing recourse against the Canadian state for its complicity in human trafficking.

In assessing Canada's complicity in the trafficking of indigenous women and girls, then, this analysis considers the following criteria culled from these conceptualizations of human trafficking in international and Canadian law: first, the use of deception, coercion, and manipulation by traffickers to exploit the bodies and labour of others for profit and personal gain;[64] second, the distinctly Canadian requirement that trafficking victims feared for their safety if they failed to comply with the requirements of the traffickers;[65] third, the criterion that the use of violence or causing death may be aggravating factors in the commission of the offense

61. PERRIN, *supra* note 19, at 137.
62. *See id.*
63. BOYER & KAMPOURIS, *supra* note 30, at 13.
64. *See* Canada Criminal Code, R.S.C. 1985, c. C-46, s. 279.01; United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, at 42 U.N. Doc. A/RES/55/25 (Nov. 15, 2000).
65. *See* PERRIN, *supra* note 19, at 137–38; SIKKA, *supra* note 17, at 5.

of human trafficking resulting in higher criminal penalties;[66] and finally, the enhanced penalty for engaging in the trafficking of those aged eighteen and under.[67]

Wherever applicable, the following analysis also draws on the other specific legal provisions outlined in the previous discussion.

B. Indigenous Women Theorize Human Trafficking

Indigenous women in Canada have developed strong theoretical understandings of the violence of human trafficking, including an understanding of the Canadian state's complicity in this violence. This privileging of the indigenous woman's perspective is intended to recognize their collective expertise and knowledge about their own lives. Indeed, this privileging also falls in line with efforts to decolonize and indigenize both Western research and academia.[68] While in no way wanting to homogenize or simplify either indigenous women or their experiences with human trafficking (not to mention the complex debates and responses indigenous women, their organizations, and communities have developed in response to this violence), this section will summarize some of the common definitions, positions, and recommendations made by indigenous women in addressing the trafficking of indigenous women and girls in Canada.

Indigenous women argue that indigenous females in Canada are highly vulnerable to being trafficked[69]—a perspective shared by nonindigenous scholars and researchers who have also examined this issue.[70] This extreme vulnerability, they contend, is the product of interlocking social factors including gender and

66. *See* Canada Criminal Code, R.S.C. 1985, c. C-46, s. 279.01(1)(a); *see also id.* s. 279.011(1)(a) (same provision for the trafficking in persons under age eighteen).

67. *See id.* s. 279.011.

68. For general discussions of both the colonizing and decolonizing/indigenizing of research and academia, see MARIE BATTISTE & JAMES (SA'KE'J) YOUNGBLOOD HENDERSON, PROTECTING INDIGENOUS KNOWLEDGE AND HERITAGE: A GLOBAL CHALLENGE, (Page Wood Publ'g Servs. Ed., 2000); INDIGENIZING THE ACADEMY: TRANSFORMING SCHOLARSHIP AND EMPOWERING COMMUNITIES (Devon Abbott Mihesuah & Angela Cavender Wilson eds., 2004); LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES (1999).

69. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 2; CHERRY KINGSLEY & MELANIE MARK, SACRED LIVES: CANADIAN ABORIGINAL CHILDREN & YOUTH SPEAK OUT ABOUT SEXUAL EXPLOITATION 4, 11–12 (2000), *available at* http://www.gov.mb.ca/fs/traciastrust/pubs/sacred_lives.pdf; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 11–14; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 8–26; Hunt, *supra* note 36, at 28–29.

70. *See, e.g.*, PERRIN, *supra* note 19, at 95–96; Sethi, *supra* note 12, at 59; SIKKA, *supra* note 17, at 13–14; Melissa Farley, *Prostitution and the Invisibility of Harm*, 26 WOMEN & THERAPY 247, 254–55 (2003), *available at* http://dx.doi.org/10.1300/J015v26n03_06.

racial discrimination,[71] youth,[72] extreme poverty,[73] undereducation,[74] unemployment and underemployment,[75] inadequate and unstable housing,[76] homelessness,[77] high rates of mental health issues,[78] drug and alcohol use and addictions,[79] poor physical health,[80] involvement in dysfunctional or violent families and institutions (such as Canadian child welfare agencies and residential schools),[81] and high rates of physical and sexual abuse (as children and as adults).[82] And while the high rates of urban migration to Canadian cities (with a resultant dissolution of support networks) are a contributing factor to the vulnerability of indigenous women and girls to trafficking,[83] so too are the isolation, absence of resources, and normalization of violence in rural communities (especially in the northern regions of Canada).[84] In addition to these issues, the political organization Pauktuutit Inuit Women of Canada has argued that the particular economics of the northern regions of Canada (with their high inflation rates, inadequate employment opportunities, high unemployment rates, and low job vacancy rates),[85] suicide,[86]

71. *See, e.g.*, KINGSLEY & MARK, *supra* note 69, at 17, 24, 28; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13.
72. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 21; KINGSLEY & MARK, *supra* note 69, at 33; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; Hunt, *supra* note 36, at 28.
73. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 2, 20; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 15–18, 22; Hunt, *supra* note 36, at 28.
74. *See, e.g.*, KINGSLEY & MARK, *supra* note 69, at 14, 33; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13–14; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 23.
75. *See, e.g.*, KINGSLEY & MARK, *supra* note 69, at 33; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 15–18.
76. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 20; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 21.
77. *See, e.g.*, KINGSLEY & MARK, *supra* note 69, at 19–20.
78. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 2, 21; KINGSLEY & MARK, *supra* note 69, at 23; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 19.
79. *See, e.g.*, PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 13; Hunt, *supra* note 36, at 28.
80. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 2; KINGSLEY & MARK, *supra* note 69, at 21–22.
81. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 19; KINGSLEY & MARK, *supra* note 69, at 20; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 25–26.
82. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 2, 18–20; KINGSLEY & MARK, *supra* note 69, at 14–16; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 8, 10–12; Hunt, *supra* note 36, at 28.
83. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 19; KINGSLEY & MARK, *supra* note 69, 19–20; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; Hunt, *supra* note 36, at 29.
84. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 3, 15; KINGSLEY & MARK, *supra* note 69, at 19; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; Hunt, *supra* note 36, at 28–29.
85. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 7; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 15–18.
86. *See* PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 19.

food insecurity,[87] limited availability of shelters and shelter spaces and services,[88] and the breakdown or absence of support systems (both familial and community)[89] contribute to Inuit vulnerabilities to trafficking. Notably, the organization also identifies the increasing use of technology, especially social media, as a particular gateway that influences Inuit vulnerability to predators.[90] Victoria Sweet's work also suggests that resource extraction and its resultant influx of predominantly male travelers to the north make Inuit and other indigenous women extremely vulnerable to human trafficking.[91]

1. Colonialism

The key factor that these indigenous female writers identify as contributing to their vulnerability to being trafficked, however, is colonialism.[92] Colonialism underlies many of the previously mentioned contributing factors. As Pauktuutit Inuit Women of Canada contends:

> There are many precursors to being victimized by human trafficking, and many situations that put Inuit in vulnerable positions. The impact of residential schools and the imposition of other assimilative government policies have negatively altered the Inuit traditional way of life and culture. This historical trauma has contributed to social issues that have resulted in increased crime, substance abuse, and the normalization of violence and sexual abuse in northern communities.[93]

Similarly, Cherry Kingsley and Melanie Mark argue in their report on the trafficking of indigenous children for the Canadian branch of the international nongovernmental organization Save the Children:

> The illicit nature of commercial sexual exploitation prevents 'hard' statistics, but there is a widespread consensus among community organizations, service providers, and front line agencies that Aboriginal youth participation in the sex trade is increasing . . . . This serious overrepresentation is directly linked to the unacceptable and continuing high level of risk factors which this population faces. The Aboriginal children and youth who participated in these consultations *are*

87. *See id.* at 19–20.
88. *See id.* at 21–22.
89. *See id.* at 25–26.
90. *See id.* at 24.
91. *See* Sweet, *supra* note 17, at 1–2, 12.
92. *See* BOYER & KAMPOURIS, *supra* note 30, at 5–7; KINGSLEY & MARK, *supra* note 69, at 8, 11–12, 15–17; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 11, 53; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 5–7, 28; Hunt, *supra* note 36, at 27–28.
93. PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 28.

> *perpetuating a vicious cycle which started hundreds of years ago. The negative impact of European colonialism on Native peoples and their cultures has been a decisive factor in creating and maintaining barriers of social, economic, and political inequality.*[94]

Indeed, they contend, "[w]e must realize that the physical and mental well being of all Canadian children and youth are profoundly political issues, and are inseparable from social and economic situations."[95]

Indigenous women have highlighted particular aspects of colonialism that contribute to making indigenous women and girls extremely vulnerable to being targeted for human trafficking. The enduring colonial racist and sexist stereotype of dirty, promiscuous, and deviant indigenous femininity (often termed the "squaw"), some claim, provides ideological confirmation that indigenous women and girls are sexually available and therefore sexually violable—which not only enables the trafficking of indigenous females, but all other forms of violence against indigenous women and girls.[96] "Stereotypes about the sexual availability and willingness of Aboriginal girls and women," writes Kwakwaka'wakw First Nation scholar and activist Sarah Hunt, "has resulted in generations of sexual violence and abuse continuing outside the law, as though it was not illegal to rape or batter an Aboriginal woman."[97] In their report on the trafficking of indigenous women and girls in Canada produced for Public Safety Canada, authors Yvonne Boyer and Peggy Kampouris claim that "[m]any women now face desperate circumstances in Canadian towns and cities, a situation many attribute to the sexist stereotypes and racist attitudes applied towards Aboriginal women and girls, as well as a general indifference to their welfare and safety."[98] Moreover, this devaluation of indigenous human lives stemming from colonial stereotypes, often compounded by their involvement in the sex trade, contributes to the failure of mainstream Canadian systems (such as health, justice, and social service) to respond adequately or appropriately to this violence.[99] For example, in interviews with service and frontline organizations, Boyer and Kampouris reported "that Aboriginal women experience racism in the health care system"[100]:

94. KINGSLEY & MARK, *supra* note 69, at 8 (emphasis added).
95. *Id.*
96. *See* Hunt, *supra* note 36, at 27–28; ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 7–14 (2005) (this position is also the focus of Andrea Smith's book).
97. Hunt, *supra* note 36, at 28.
98. BOYER & KAMPOURIS, *supra* note 30, at 7.
99. *See id.* at 17, 22; KINGSLEY & MARK, *supra* note 69, 26–27; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 48; SIKKA, *supra* note 17, at 2–3, 7–9.
100. BOYER & KAMPOURIS, *supra* note 30, at 22.

> They are asked questions such as this routinely: "How much have you had to drink?," "What drugs have you done?," and "You are a prostitute are you not?" . . . . [I]f an Aboriginal woman who has been trafficked or is in the sex trade has been raped, often they will get a cold response at the hospital and leave after many, many hours of waiting . . . .[101]

Similarly, the social service and frontline support organizations interviewed by Boyer and Kampouris pointed to this same discrimination perpetrated by Canadian police.[102] Citing one of their participants, they stated "[t]here is no trust. [The police] either rape you or arrest you. The cause is racism and discrimination."[103] Finally, in a 2014 study of human trafficking conducted by the Native Women's Association of Canada (NWAC), frontline social service providers reported the shortage of support for indigenous women and girls as a major obstacle for indigenous women and girls wanting to leave prostitution.[104] "Not only is there a lack of supports," the political organization contends, "there is also the morale impact from the women seeing their prioritization by society through this shortage."[105]

2. The Residential School System

Not only is the residential school system identified by indigenous women as contributing significantly to many of the aforementioned factors producing a high vulnerability to being trafficked,[106] but some also identify it as a form of human trafficking.[107] The high rates of interpersonal violence in indigenous communities, they argue, are the product of generations of indigenous children being educated in violent residential schools and subjected to physical, sexual, emotional, and spiritual abuse and gross neglect.[108] As Boyer and Kampouris note, "the residential school legacy has contributed to intergenerational physical and sexual abuse; family members who were abused in that regime have a higher chance of abusing their own children, than family members who did not attend

101. *Id.*
102. *See id.* at 17.
103. *Id.*
104. *See* NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 46.
105. *Id.*
106. *See* BOYER & KAMPOURIS, *supra* note 30, at 34; KINGSLEY & MARK, *supra* note 69, at 11, 13, 59; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 11; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 6–7.
107. *See* Deer, *supra* note 35, at 665–69; Hunt, *supra* note 36, 27–28.
108. *See* BOYER & KAMPOURIS, *supra* note 30, at 34; KINGSLEY & MARK, *supra* note 69, at 13, 59; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 11.

or otherwise face abuse in their own lives."[109] According to Kingsley and Mark, residential schools have contributed to the fragmentation of indigenous cultures, as well as indigenous families and communities, eroding support networks, and removing positive indigenous role models that might protect indigenous women and girls from trafficking.[110] Some, however, take a stronger stand arguing, as Sarah Hunt does, that "[f]orced migration, confinement in residential schools and facilitated sexual abuse has the characteristics of what we now call human trafficking, although it is not recognized as such."[111]

From the perspective of indigenous women, then, colonialism is a fundamental factor influencing indigenous female vulnerability to human trafficking—and naming this factor, as this discussion makes clear, necessarily involves critically acknowledging and interrogating the Canadian state's complicity in the trafficking of indigenous women and girls. While indigenous women have pointed to the residential school system and the absence of criminal justice system responses as indicative of this complicity, the next section of this Article focuses on expanding our understanding of Canada's historical and ongoing involvement in the trafficking of indigenous females.

II. THE CANADIAN STATE AND THE TRAFFICKING OF INDIGENOUS WOMEN AND GIRLS

A. Interrogating the Canadian State: Colonial Exploitation and the Trafficking of Indigenous Women and Girls in Canada

Acknowledging the fundamental role of colonialism and thus Canada's complicity in the trafficking of indigenous women and girls requires an understanding of Canada as a settler colonial nation. The Canadian nation state, alongside other major nations including the United States and Australia, are white settler colonial nations established through the domination and exploitation of indigenous peoples and their lands. As critical antiracist feminist scholar Sherene Razack explains:

109. BOYER & KAMPOURIS, *supra* note 30, at 34.

110. *See* KINGSLEY & MARK, *supra* note 69, at 13, 17–18; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 7.

111. *See* Hunt, *supra* note 36, at 27–28. Additionally, indigenous legal scholar Sarah Deer has carefully articulated this position in relation to the Indian residential school system in the United States and, given the similarities in the system, her analysis can be extended to the Canadian context. *See* Deer, *supra* note 35, at 665–69.

> A white settler society is one established by Europeans on non-European soil. Its origins lie in the dispossession and near extermination of Indigenous populations by the conquering Europeans. As it evolves, a white settler society continues to be structured by a racial hierarchy. In the national mythologies of such societies, it is believed that white people came first and that it is they who principally developed the land; Aboriginal peoples are presumed to be mostly dead or assimilated. European settlers thus *become* the original inhabitants and the group most entitled to the fruits of citizenship.[112]

As Razack points out, racial hierarchy underpins settler colonialism, both ideologically and practically, with white settler supremacy established and confirmed through the portrayal of indigenous peoples as subhuman: inferior, backwards, uncivilized, deviant, dirty, and inherently worthless to dominant society.[113] This racist ideology works in interlocking and mutually supportive synchronicity with sexist ideology to produce the dominant image of the inherently sexually available, and therefore sexually violable, indigenous female, previously identified by indigenous women in their critical responses to the trafficking of indigenous women and girls in Canada.[114] This denigration of indigeneity by dominant society is required to not only justify and excuse violence against indigenous peoples, but also to justify and excuse the theft of the indigenous lands and resources required for establishing and securing a white nation state.[115] As Razack notes, however, "[a] quintessential feature of white settler mythologies is . . . the disavowal of conquest, genocide, slavery, and the exploitation of the labour of peoples of colour," and "[i]n North America, it is still the case that European conquest and colonization are often denied, largely through the fantasy that North America was peacefully settled and not colonized."[116]

In the United States, indigenous legal scholar Sarah Deer has meticulously detailed how the colonization of the Americas has required the ongoing trafficking of indigenous women and children to secure colonial domination over indigenous peoples and territories.[117] "These tactics of traffickers," she argues, "are

112. Sherene H. Razack, *Introduction: When Place Becomes Race*, RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY 1, 1–2 (Sherene H. Razack ed., 2002).

113. *Id.* at 3. *See also* Sherene H. Razack, *Gendered Racialized Violence and Spatialized Justice: The Murder of Pamela George*, *in* RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY, at 126–128, Smith, *supra note 96,* at 9–10, 12, 22–23.

114. *See* BOYER & KAMPOURIS, *supra* note 30, at 7; Hunt, *supra* note 36, at 27–28. *See also* Razack, *supra* note 114, at 121, 126 (Sherene H. Razack ed., 2002); SMITH, *supra* note 96, at 7–33; SIKKA, *supra* note 17, at 1.

115. *See* Razack, *supra* note 114, at 129–31.

116. Razack, *supra* note 112, at 2.

117. *See* Deer, *supra* note 35.

consistent with many of the tactics used by colonial and American governments to subjugate Native women and girls" and this "behavior is so deeply ingrained in American history that it is often rendered invisible and thus becomes normalized."[118] According to Deer:

> The disproportionate amount of sexual violence perpetrated against Native women can be linked to exploitation and displacement, both of which are conditions of human trafficking in contemporary law. The commoditization and exploitation of the bodies of Native women and girls, although theoretically criminalized through contemporary prostitution laws, has not been the subject of rigorous investigation and prosecution. In fact, this ubiquitous form of predation was not only legal throughout most of history, but encouraged by the dominant (white) culture.[119]

Moreover, "the dispossession and relocation of indigenous peoples on this continent both necessitated and precipitated a highly gendered and sexualized dynamic in which Native women's bodies became commodities—bought and sold for the purposes of sexual gratification (or profit)."[120] Further, "[t]oday, the eroticized image of Indian women is so commonplace in our society that it is unremarkable—the image of the hypersexual Indian woman continues to be used to market any number of products and ideas."[121] Significantly, Deer contends that "[c]olonial legal systems historically protected (and rewarded) the exploiters of Native women and girls and therefore encouraged the institutionalization of sexual subjugation of Native women and girls."[122]

While there has been some indictment of the Canadian state's complicity in the trafficking of indigenous women and girls in Canada (as noted in the discussion of residential schools), there has yet to be a focused critical interrogation of this complicity.[123] This Subpart documents how the colonial Canadian state has, whether historically or contemporarily, engaged in or enabled the trafficking of indigenous women and girls in Canada. While this is in no way intended as a comprehensive list of these instances, this discussion will highlight key examples of Canadian state complicity with the violence of human trafficking.

I want to address from the outset the unique and unprecedented Canadian requirement that trafficking victims prove they feared for their safety if they did

118. *Id.* at 626.
119. *Id.*
120. *Id.* at 628.
121. *Id.* at 626.
122. *Id.* at 628–29.
123. *See supra* note 111 and accompanying text.

not comply with the demands of their traffickers. As critics like Benjamin Perrin have pointed out, there are many reasons that trafficking victims may not have feared for their safety: For example, many trafficking situations are framed as interpersonal familial or romantic relationships and not explicitly as exploitation or violence.[124] Furthermore, traffickers often rely on psychological and emotional coercion instead of physical violence to secure the compliance of trafficking victims.[125]

But even if fear for safety is not an unfair standard by which to measure whether trafficking has occurred, indigenous women and girls have lived and continue to live in a state of constant fear for their safety in the Canadian nation state. As scholars have noted, violence, fear, and terror are integral components of settler colonial societies, helping to establish and secure the ideological and material hierarchies of colonial domination.[126] "Whatever conclusions we draw about how [colonial] hegemony was so speedily effected," contends anthropologist Michael Taussig, "we would be unwise to overlook the role of terror."[127] Indeed, it has been well-documented that violence against indigenous women and girls has long been integral to the domination of indigenous peoples and territories by white settler nation states like the United States and Canada.[128] "[I]n order to colonize a people whose society was not hierarchical," Cherokee scholar Andrea Smith contends, "colonizers must first naturalize hierarchy through instituting patriarchy." "Patriarchal gender violence is the process by which colonizers inscribe hierarchy and domination on the bodies of the colonized."[129] As such, "[t]he project of colonial sexual violence establishes the ideology that Native bodies are inherently violable—and by extension, that Native lands are also inherently violable."[130] This ideology, Smith notes, hinges on dominant colonial beliefs in the inherent sexual deviance of indigenous peoples, and "[b]ecause Indian bodies are 'dirty,' they are considered sexually violable and 'rapable,' and the rape of bodies that are considered inherently impure or dirty simply

124. *See* PERRIN, supra note 18, at 61–62.
125. *See* BOYER & KAMPOURIS, *supra* note 30, at 3, 61; PERRIN, *supra* note 19, at 8–9.
126. *See, e.g.*, MICHAEL TAUSSIG, SHAMINISM, COLONIALISM, AND THE WILD MAN: A STUDY IN TERROR AND HEALING 5 (1987); Patrick Wolfe, *Settler Colonialism and Elimination of the Native*, 8 J. GENOCIDE RES. 387–88 (2006).
127. TAUSSIG, *supra* note 126, at 5.
128. *See generally* LESLEY ERICKSON, WESTWARD BOUND: SEX, VIOLENCE, THE LAW, AND THE MAKING OF A SETTLER SOCIETY, (2011); SMITH, *supra* note 96; Emma D. LaRocque, *Violence in Aboriginal Communities*, *in* VIOLENCE AGAINST WOMEN: NEW CANADIAN PERSPECTIVES 147, 147–62 (Katherine M.J. McKenna & June Larkin eds., 2002); Razack, *supra* note 114, at 122–56.
129. SMITH, *supra* note 96, at 23.
130. *Id.* at 12.

does not count."[131] This ideology not only helps to impose patriarchal and settler colonial order onto indigenous nations, but it also exonerates perpetrators (whether white settler or not) by erasing their violence. Furthermore, this violence, Smith suggests, is productive of the multiple social identities that underpin the colonial order of things—it establishes the dominance of white men (as mythic frontier heroes) over inferior others, including dirty and lascivious indigenous females; savage and lascivious indigenous males; and respectable but vulnerable white settler women requiring protection.[132] In other words, this violence is integral to securing the hierarchies of race and gender that structure white settler societies.

Given this fundamental requirement for violence against indigenous women and girls in Canada in establishing settler colonial domination, colonial governments, including the current Canadian government, have engaged in and enabled this violence. This includes problematic governmental legislation such as the Indian Act, which has unfairly targeted only indigenous women (and their children) for exclusion from legal status (covered in greater detail later in this Article). Significantly, sex-based discrimination under the Indian Act has been linked to indigenous female poverty and vulnerability to violence. The Government of Canada also authorized and ran the Indian residential school system (which operated predominantly from the 1830s to 1996) where a large majority of indigenous children were subjected to extreme physical, emotional, and sexual abuse at the hands of various predators (also discussed in greater detail below). The Canadian criminal justice system has been condemned for overcriminalizing indigenous women and girls while failing to protect them from violence.[133] It has also been indicted for failing to pursue perpetrators of violence against indigenous women and girls and extending tremendous leniency to those who are caught.[134] Such inaction clearly communicates to indigenous women and girls the low value of their lives within the Canadian nation state.

This devaluation of the lives of indigenous women and girls has been reaffirmed in recent years by the unwillingness of current Canadian Prime Minister Stephen Harper to officially investigate, through governmental inquiry, the disappearances and deaths of thousands of indigenous women and girls from across

131. *Id.* at 10.

132. *See* SMITH, *supra* note 96, at 21–22.

133. *See* AMNESTY INT'L, *supra* note 5, at 17–19.

134. *See generally* 1 ABORIGINAL JUSTICE IMPLEMENTATION COMM'N, *Chapter 13: Aboriginal Women*, *in* THE JUSTICE SYSTEM AND ABORIGINAL PEOPLE (1991); Nicholas Bonokoski, *Colonial Constructs and Legally Sanctioned Sexually Violent Consequences in R V Edmondson*, RECONSTRUCTION: STUDIES IN CONTEMPORARY CULTURE 7 (2007); Razack, *supra* note 114, at 126–27.

Canada since the 1980s. Despite confirmation by the Canadian national police force of the high number of missing and murdered indigenous women and girls,[135] and despite the growing political demand for an official governmental inquiry into this phenomenon, Prime Minister Harper continues to claim that this issue is not high on his political radar.[136]

Indigenous women and girls in Canada, as such, have long lived with the knowledge that their lives are frequently devalued within the Canadian nation state, that very little would be done to protect them from violence, and, in fact, that the state itself enables this violence. Settler colonial domination requires violence against indigenous women and girls, and thus it is normalized and justified in white settler societies like Canada. And where violence against indigenous women and girls is the norm, indigenous women and girls (and their families and communities) live in a constant state of fear. There is therefore no need to explicitly prove fear in each of the cases of Canadian state human trafficking of indigenous women and girls (and their communities) because this entire social and political relationship is built around colonial domination and persistent fear.

B. Land Theft, Relocation, and Containment

As a white settler colonial nation state, Canada's demand for indigenous lands and resources has long required the trafficking of indigenous women and girls (and indeed, all indigenous peoples). The contemporary Canadian nation state, as is well documented, was founded principally on the British legal principle of *terra nullius*—literally "empty land."[137] As anthropologist Dara Culhane notes, a 1722 memorandum of the Privy Council of Great Britain set out two legal options for establishing British sovereignty on new territories.[138] The first, the "doctrine of discovery" (or, as Culhane refers to it, the doctrine of occupation or settlement) "was to be applied in circumstances where the land discovered was *terra nullius*—uninhabited by human beings."[139] "In the case of *terra nullius*," she contends, "Britain simply proclaimed sovereignty by virtue of discovery and

135. *See supra* notes 6–11 and accompanying text.

136. *See* Tanya Kappo, *Stephen Harper's Comments on Missing, Murdered Aboriginal Women Show 'Lack of Respect'*, CBC NEWS, (Dec. 19, 2014, 1:13 PM), http://www.cbc.ca/news/aboriginal/stephen-harper-s-comments-on-missing-murdered-aboriginal-women-show-lack-of-respect-1.2879154.

137. *See, e.g.*, NICHOLAS BLOMELY, UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY 114–18 (Routledge, 2004); DARA CULHANE, THE PLEASURE OF THE CROWN 47-53 (1998); COLE HARRIS, MAKING NATIVE SPACE: COLONIALISM, RESISTANCE, AND RESERVES IN BRITISH COLUMBIA, at xxi (2002); Razack, *supra* note 112, at 3, 12.

138. *See* CULHANE, *supra* note 137, at 47.

139. *Id.*

British law became, automatically, the law of the land."[140] The second option was referred to as the "doctrine of conquest," and it dealt with situations in which an indigenous population was encountered. This law, Culhane explains, established that "[w]here Indigenous populations were found inhabiting the desired land, the law required that British sovereignty had to first be won by military conquest, or achieved through the negotiation of treaties, before colonial law could be superimposed."[141] She contends, however:

> Of course, Britain never had colonized and never would colonize an uninhabited land. Therefore, the doctrine of discovery/occupation/settlement based in the notion of *terra nullius* was never concretely applied "on the ground." Rather, already inhabited nations were simply legally *deemed to be uninhabited* if the people were not Christian, not agricultural, not commercial, not "sufficiently evolved" or simply in the way.[142]

As this description makes clear, colonial doctrines of indigenous inferiority were used to justify land theft by the British, with the effect, according to Culhane, of not only denying indigenous peoples' prior occupation of these lands, but also their status as human beings—both of which continue to plague indigenous nations to this day.[143] Thus, "when Aboriginal people say today that they have had to go to court to prove they exist," she writes, "they are speaking not just poetically, but also *literally*."[144]

While this manipulation of colonial law helped justify the theft of indigenous lands, the actual bodies of indigenous peoples continued to occupy this legally "empty land." As a result, British and Canadian colonial governments engaged in further manipulation and coercion to displace indigenous populations from their traditional territories and confine them to "prisons of grass"[145] (reserves) in order the secure wealth and personal gain for colonial powers and individual white settlers. In some cases, colonial governments signed treaties with indigenous nations that not only secured white settler control over resource-rich lands in Canada, but also frequently confined indigenous nations to particular tracts or plots of land known as Indian reserves or reservations.[146] These legal treaties were often established through unfair practices (including, for example, negotiations

140. *Id.*
141. *Id.* at 47–48.
142. *Id.* at 48.
143. *See id.*
144. *Id.*
145. *See* HOWARD ADAMS, PRISON OF GRASS: CANADA FROM A NATIVE POINT OF VIEW (1989) (explaining that the "prisons of grass" concept draws attention to how reserves confined previously independent and mobile indigenous nations to land-based prisons created by the Canadian state).
146. *See* Harris, *supra* note 129, xxi, 291.

and agreements conducted in English or French without interpretation for indigenous parties and misrepresentation of a treaty's contents) and outright deception (for example, colonial signatories increasing their land holdings after the signing of the treaty, as in the case of the Toronto Purchase) for the profit and personal gain of colonial governments and their white settlers.[147] In other cases, colonial governments simply created Indian reservations and forced indigenous communities to comply with relocations and spatial confinement.[148] Too often, these reserves were created and assigned with little regard for an indigenous nation's traditional land use patterns, and were composed of the least arable and most resource-poor lands.[149] In addition to land, these forced relocations and confinements of indigenous peoples to reservations provided other personal gains for colonial governments in the quest of colonial domination. For example, disrupting traditional economies and patterns of subsistence not only helped secure indigenous participation in the colonial capitalist economy,[150] but also increased indigenous economic dependence on the colonial governments.[151] In other words, this colonial land theft, forced relocation, and confinement of indigenous peoples to reservations constituted human trafficking because it not only enabled the exploitation of indigenous lands and resources for the personal gain of colonial governments and white settlers by removing indigenous peoples, but also secured indigenous labour to be exploited within the colonial capitalist economy (again, to the personal gain of the colonial government and white settlers who controlled this economy). The expense of this gain, however, has been paid by indigenous peoples, whose historical and contemporary realities of abject poverty and welfare dependence have been linked to this colonial theft of indigenous land and resources and the relocation and confinement to reserves.[152] In turn, poverty is currently an indication of vulnerability to being targeted for human trafficking, making the Canadian state, once again, complicit with the domestic trafficking of indigenous women and girls.

147. *See, e.g.*, HARRIS, *supra* note 137, at xv–xxiv; Bonita Lawrence, *Rewriting Histories of the Land: Colonization and Indigenous Resistance in Eastern Canada*, *in* RACE, SPACE, AND THE LAW 23, 40–41 (Sherene. H. Razack, ed., 2002); MISSISSAUGAS OF THE NEW CREDIT FIRST NATION, TORONTO PURCHASE SPECIFIC CLAIM: ARRIVING AT AN AGREEMENT, 5–11 (2001); ROYAL COMM'N ON ABORIGINAL PEOPLES, LOOKING FORWARD, LOOKING BACK, 145–64 (1996).

148. *See* HARRIS, *supra* note 137, at xviii, 271.

149. *Id.* at 274–80.

150. *See* ADAMS, *supra* note 145, at 13–14.

151. *See* HUGH SHEWELL, 'ENOUGH TO KEEP THEM ALIVE': INDIAN WELFARE IN CANADA, 1873–1965 at 5 (2004).

152. *See* HARRIS, *supra* note 137, at 275, 284–85; ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 147, at 130–85, 395–522.

While some might imagine that forced relocations of indigenous communities like this are safely contained to Canada's long-ago past, they have, in fact, been part of the recent past and continue to occur to this day. In the 1950s, the federal government forcibly relocated Inuit families (twenty-one families in total) from the rural northern communities of Inukjuak and Pond Inlet to the larger High Arctic communities of Grise Fiord and Resolute Bay.[153] As the Government of Canada itself notes:

> The relocatees suffered significant hardship as a result of the relocations. Having been moved from an area of lush tundra to an Arctic desert, the families had to adapt to the constant darkness of the winter months and a terrain and climate that were much more severe than they were accustomed to. The varieties and quantity of wildlife were more limited and temperatures were, on average, 20 degrees colder than in their home community. Due to poor planning and implementation of the move, the relocated families spent their first winter in the High Arctic in flimsy tents with inadequate food and supplies.[154]

Deceptively, "the Government had promised that the relocatees could return to Inukjuak if they were not happy with their new homes," but "this promise was not honoured until many years later."[155] Although the federal government issued a formal apology in 2010,[156] this incident has still never been acknowledged as an act of human trafficking.

Neither have the relocations of the Sayisi Dene of northern Manitoba in 1956, Inuit of Hebron, Labrador in 1959, Gwa'Sala and 'Nakwaxda'xw of British Columbia in 1964, nor the Mushuau Innu of Labrador in 1967—all of which, as the 1996 federal Royal Commission on Aboriginal Peoples (RCAP) found were "administrative relocations," "carried out to facilitate the operation of government or address the perceived needs of Aboriginal people."[157] As noted in the RCAP final report:

> Facilitating government operations was the rationale for many relocations in the era following the Second World War. Aboriginal people

153. *See* Gov't of Can., *Backgrounder–Apology for Inuit High Arctic Relocation*, ABORIGINAL AFF. & N. DEV. CANADA, http://web.archive.org/web/20150309025132/https://www.aadnc-aandc.gc.ca/eng/1100100015426/1100100015427 (last modified Sept. 15, 2010) (accessed by searching for specific URL in Internet Archive index).

154. *Id.*

155. *See id.*

156. *See* Gov't of Can., *Government of Canada Apologizes for Relocation of Inuit Families to the High Arctic*, ABORIGINAL AFF. & N. DEV. CANADA, http://web.archive.org/web/20150220192719/http://www.aadncaandc.gc.ca/eng/1100100015397/1100100015404 (last modified Sept. 15, 2010) (accessed by searching for specific URL in Internet Archive index).

157. *See* ROYAL COMM'N ON ABORIGINAL PEOPLES, *supra* note 147, at 397.

> were often moved to make it easier for government administrators to provide the growing number of services and programs becoming available through the burgeoning welfare state . . . . Addressing the perceived needs of Aboriginal peoples often involved moving them 'for their own good.' By removing people 'back to the land' from a more or less settled existence, administrators attempted to encourage them to resume or relearn what was considered the traditional way of life. This form of dispersal was also used when officials considered it necessary to alleviate perceived population pressures in a particular region. Dispersing populations were also an effective way to separate Aboriginal people from the corrupting influence of non-Aboriginal society.[158]

RCAP identified a second type of relocation: development relocations.[159] Development relocation, the final report explains, "is the consequence of national development policies whose stated purpose is primarily to 'benefit' the relocatees or get them out of the way of proposed industrial projects," including agricultural expansion and land reclamation, urban development, and hydroelectric projects.[160] Such relocations involved the Songhees in British Columbia in 1911, the Métis of Ste. Madeleine, Manitoba in 1935, the Cheslatta Carrier Nation in northwestern British Columbia in the 1950s, and the Chemawawin Cree of Manitoba also in the 1950s.[161] RCAP identified a number of significant consequences of these relocations, including "(1) severing Aboriginal people's relationship to the land and environment and weakening cultural bonds; (2) a loss of economic self-sufficiency, including in some cases increased dependence on government transfer payments; (3) a decline in standards of health; and (4) changes in social and political relations [including the destruction of community cohesion, a lack of community leadership, and family breakdown] in the relocated populations"[162]—all of which have been identified as contributing to the vulnerability of indigenous women and girls to human trafficking in contemporary Canadian society.

These relocations continue, only they are now more commonly referred to as "evacuations." For example, the Government of Canada has long operated (since 1892) and continues to operate an evacuation policy that removes pregnant indigenous women from reserves in rural and remote reserves in Canada and

158. *Id.* at 397–98.
159. *See id.* at 398–99.
160. *Id.* at 398.
161. *See id.* at 398–99.
162. *Id.* at 400. *See also id.* at 467–80.

forces them to give birth in urban centres.[163] While this "routine, long-standing, nation-wide practice is currently articulated as originating between the 1960s and 1980s,"[164] researchers Karen Lawford and Audrey Giles argue that this dating "ignores the evacuation policy's true beginnings"[165] in the late nineteenth century.[166] Though this practice is now billed as being an issue of safety, Lawford and Giles have uncovered its founding in goals of assimilation and "civilizing" indigenous nations by undermining indigenous healing practices and coercing indigenous communities into accepting the settler Canadian biomedical model.[167] "The federal government," they contend, "viewed birthing, whether at home or in the hospital, as an influential way to assimilate and civilize First Nations into the colonial world,"[168] and consequently manipulated federal health care policy and practice (including withholding medical services) in order to facilitate these forced movements of indigenous women and their unborn children from their communities (and their indigenous birthing practices) into the colonial medical system.[169] Moreover, such evacuations sever important familial and community supports and places indigenous women and girls alone in urban centers they may be entirely unfamiliar with[170]—both of which have been identified as contributing to the vulnerability of indigenous females to being trafficked.[171] Therefore, maternal evacuations not only constitute a direct form of human trafficking on the part of the Canadian state, but also powerfully contribute to the vulnerability of indigenous females to being targeted for further human trafficking.

As these examples make clear, the settler colonial demand for indigenous lands in Canada has long required, and indeed continues to require, the trafficking of indigenous women and girls (and indeed all indigenous peoples), with forced movements of indigenous bodies necessary to secure colonial gains (land, domination, and control). While this section introduced the complicity of Canadian law in facilitating this practice, the next section focuses on the predominant Canadian legislation governing indigenous peoples in Canada: the Indian Act.

163. Karen Lawford & Audrey Giles, *Marginalization and Coercion: Canada's Evacuation Policy for Pregnant First Nations Women Who Live on Reserves in Rural and Remote Regions*, 10 PIMATISIWIN: J. ABORIGINAL & INDIGENOUS CMTY. HEALTH 327–28, 331–32 (2012).
164. *Id.* at 327.
165. *Id.* at 328.
166. *Id.* at 331.
167. *Id.* at 328, 332–34.
168. *Id.* at 332.
169. *See id.* at 331–34.
170. *See id.* at 335.
171. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 2, 20; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; Hunt, *supra* note 36, at 28.

1. Legislated Trafficking—the Indian Act

The colonial trafficking of indigenous people in Canada has been greatly facilitated through the Government of Canada's Indian Act. In place continuously since 1876, the Indian Act legislates most aspects of life in Canada for indigenous peoples, including identity.[172] It defines in law precisely who counts as "Indian" (according to the government) and therefore who the Canadian state is accountable to in terms of treaty and status obligations, including financial commitments, health care, and education (to name just a few).[173] "Control of Native people in Canada," indigenous scholar Bonita Lawrence contends, "has . . . been maintained largely through the creation of an extremely repressive body of colonial law known as the Indian Act, upheld always by the threat of direct military violence."[174] As she explains,

> Through this legislation, the only level of Indigenous governance recognized by Canada has been the elected government imposed at the local reserve or band level. Initially implemented on populations in eastern Canada demoralized by disease and alcoholism after two centuries of fur trade and Christianization, these "governments" were forced on the western nations after the selective use of policies of deliberate starvation, premised on the destruction of the buffalo, had forced them to enter into treaties and settle on reserves. Definitions of Indianness almost from the start controlled who was recognized as an Indian band, who could get any land under the treaties, and who could live on this land. Side by side with this policy of carefully controlled segregation was another one, that of carefully controlled assimilation, which was the primary means by which Canada sought to destroy its pacified Indian populations.[175]

Legal control of indigenous identity, as such, was critical to securing the settler colonial Canadian state's domination of indigenous peoples, but perhaps more importantly, indigenous territories. For as Lawrence writes, "the only way in which Indigenous peoples can be permanently severed from their land base is when they no longer exist as peoples."[176]

172. *See, e.g.*, BONITA LAWRENCE, "REAL" INDIANS AND OTHERS: MIXED-BLOOD URBAN NATIVE PEOPLES AND INDIGENOUS NATIONHOOD 25–44 (2004); ROYAL COMM'N ON ABORIGINAL PEOPLES, *supra* note 147, at 259–81.
173. *See* LAWRENCE, *supra* note 172, at 31; Royal Comm'n on Aboriginal Peoples, *supra* note 137, at Chapter 9, Section 9.
174. *Id.* at 30.
175. *Id.* at 30–31.
176. *Id.* at 38.

Consequently, the Indian Act implements many of its own exclusions from the official category of "Indian." For example, it has not included either Inuit or Métis peoples (although this recently changed for Métis, as discussed momentarily).[177] Over the years, the Act also excluded from status any Indian who earned a university degree; became a doctor, lawyer, or clergyman; served in the military; or, as Lawrence notes, "[left] their reserves for long periods of time to maintain employment."[178] Since its inception, the Indian Act has also made explicitly sexist exclusions. Between 1876 and 1986, section 12(1)(b) ejected Indian women and their children from status for marrying a non-status Indian male.[179] Yet in the case of Indian men who did the same, not only did they retain their status, but their status was also extended to their non-Indian wives and children.[180] Furthermore, if an Indian woman married an Indian man from another community, she ceased to be a member of her home community band and was transferred to her husband's band, and her status made conditional on her husband's.[181] There was also the so-called "double mother" clause wherein an Indian child would be excluded from status at age eighteen if both their mother and grandmother acquired status through marriage, regardless of the Indian lineage of their fathers.[182] An amendment in 1951 excluded from status those Indian women whose husbands died or abandoned them, as well as excluding their children.[183] And while Bill-C31, hard fought for by indigenous women and their organizations and enacted in 1985, amended the Indian Act to remove these provisions and reinstate women, it also introduced two classes of Indians.[184] Whereas the first class can pass their Indian status to their children, the second class cannot pass their status to their children unless the other parent has status under the Act.[185]

These exclusions have not only had devastating consequences for indigenous women and their communities, but also qualify as trafficking of indigenous peoples by the Canadian state. According to Lawrence, "[t]he ongoing regula-

177. *See id.* at 25–26; Gov't of Can., *Frequently Asked Questions*, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, http://www.aadnc-aandc.gc.ca/eng/1100100013800/1100100013801 (last modified Sept. 15, 2010).

178. *See* LAWRENCE, *supra* note 172, at 31.

179. *Id.* at 50–69.

180. *Id.* at 51–52

181. *See Bill C-31*, THE UNIVERSITY OF BRITISH COLUMBIA – INDIGENOUS FOUNDATIONS, http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-indian-act/bill-c-31.html (last visited Apr. 14, 2015).

182. *Id.*

183. *See id.*

184. *See* Martin J. Cannon, *Revisiting Histories of Legal Assimilation, Racialized Injustice, and the Future of Indian Status in Canada*, *in* RACISM, COLONIALISM, AND INDIGENEITY IN CANADA 89, 89–90 (Martin J. Cannon & Lina Sunseri eds., 2011).

185. *See id.*

tion of Indigenous peoples' identities . . . is part of the way in which Canada and the United States continue to actively maintain physical control of the land base they claim, a claim which is still contested by the rightful owners of the land."[186] About the specifically sexist exclusions, Lawrence contends:

> [I]t is important to note that this "bleeding off" of Native women and their children from their communities was in place for 116 years, from 1869 until 1985. The phenomenal cultural implication hidden in this legislation is the *sheer numbers of Native people lost to their communities*. Some sources have estimated that by far the majority of the twenty-five thousand Indians who lost status and were externalized from their communities . . . did so because of ongoing gender discrimination in the *Indian Act*. *But it is not simply a matter of twenty-five thousand individuals*. If one takes into account the fact that for every individual who lost status and had to leave her community, all of her descendants . . . also lost status and for the most part were *permanently alienated* from Native culture, the numbers of individuals who ultimately were removed from Indian status and lost to their nations may, at the most conservative estimates, number between one and two million.[187]

In other words, the Canadian state used exclusions enshrined in Canadian law to effectively traffic untold millions of indigenous women and children (and grandchildren, and so on) out of indigenous nations to be subsumed within the colonial Canadian nation state. The benefits secured for the state were multiple, including reducing government expenditures on treaty and Indian Act obligations,[188] providing a massive influx of exploitable labour for the capitalist economy,[189] removing these bodies from indigenous lands to ensure access for the rapid influx of white settlers,[190] and suppressing indigenous resistance.[191] The specific targeting of indigenous women struck a serious blow to the ability of indigenous nations to regenerate themselves. Moreover, the weapon of forced enfranchisement (loss of Indian status),

> provided formidable opportunities for Indian agents to control resistance in Native communities, by pushing for the enfranchisement (and therefore the removal from their communities) of anybody empowered by education or a secure income. War veterans were also enfranchised, thereby removing many of the men who had experi-

186. LAWRENCE, *supra* note 172, at 38.
187. *Id.* at 55–56 (emphasis added).
188. *Id.* at 52–54.
189. *Id.* at 27–28.
190 *Id.* at 17.
191 *Id.* at 17, 36.

> enced relative social equality overseas, as well as men who were accustomed to fighting, from reserve communities.[192]

In this way, the Indian Act and enfranchisement enabled Canadian state trafficking of indigenous peoples through coercion and force in order to remove invaluable indigenous resources to indigenous nations and force their complicity with the goals of the colonial Canadian state.

These state-initiated exclusions have enabled, and continue to enable, the trafficking of indigenous women and girls in other ways. As Lawrence argues, "[t]he financial losses experienced by Native women due to loss of status have been considerable,"[193] including the reduction and elimination of treaty monies and

> the lack of access to postsecondary-education funding, free day-care provisions in some communities, funding for school supplies and special schooling programs, housing policies that enabled on-reserve Indians to buy houses with assistance from the Central Mortgage and Housing Corporation and Indian Affairs, loans and grants from the Indian Economic Development Fund, health benefits, exemption from taxation and from provincial sales tax, hunting, fishing, animal grazing and trapping rights, cash distribution from the sale of band assets, and the ability to be employed in the United States without a visa . . . .[194]

Moreover, "Indian women were generally denied access to personal property willed to them [and] evicted from their homes, often with small children and no money . . . ."[195] These exclusions propelled generations of indigenous women and their children toward economic marginalization and poverty,[196] both identified as contemporary risk factors for being targeted for human trafficking.[197] These exclusions also facilitated the destruction of familial and social support networks,[198] all the while facilitating the trafficking of these women and children into settler colonial Canadian society where the hypersexualization of indigeneity[199] and high rates

192. *Id.* at 32.
193. *Id.* at 54.
194. *Id.* 54–55.
195. *Id.* at 55.
196. *See* CANADIAN PANEL ON VIOLENCE AGAINST WOMEN, CHANGING THE LANDSCAPE: ENDING VIOLENCE ~ ACHIEVING EQUALITY: FINAL REPORT OF THE CANADIAN PANEL ON VIOLENCE AGAINST WOMEN 145 (Penny Williams et al., 1993).
197. *See, e.g.*, BOYER & KAMPOURIS, *supra* note 30, at 2, 20; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 15–18, 22; Hunt, *supra* note 36, at 28.
198. *See* CANADIAN PANEL ON VIOLENCE AGAINST WOMEN, *supra* note 196, at 145.
199. *See* LaRocque, *supra* note 128, at 148–49.

of all forms of violence are the norm.[200] Again, all of these have been identified as factors contributing to the extreme vulnerability of indigenous women and girls to being targeted for human trafficking.[201]

In addition to those surrounding identity, the Indian Act has other provisions that involve and enable the trafficking of indigenous peoples. For example, in 1884, the Act was amended to outlaw potlatches and other important ceremonies, which were fundamental to the redistribution of wealth that sustained precolonial indigenous societies.[202] This amendment disrupted internal indigenous economies and self-sustenance to secure not only indigenous economic dependence on the Canadian state, and therefore increased settler state control over indigenous peoples and territories, but also turned indigenous bodies into an exploitable labour force within the settler state's capitalist economy. And although this provision was repealed in 1951, the economic marginalization and poverty that this created continues to plague indigenous communities to this day—again, poverty being one of the prime risk factors for being targeted for human trafficking in contemporary Canadian society. In an explicit example of trafficking, a 1905 amendment to the Indian Act allowed the federal government to remove Indian people from reserves near towns with more than 8000 residents,[203] while a 1911 amendment allowed for the movement of an entire reserve away from a Canadian municipality without the consent of the indigenous communities.[204] Between 1876 and 1951, indigenous women were prohibited from being involved in band governance, with the result that the interests of indigenous women were often ignored by Indian band leadership and the Canadian

200. *Id.* at 147.

201. On the breakdown of familial and other supports as contributing factors to the vulnerability of indigenous females to human trafficking, see, for example, BOYER & KAMPOURIS, *supra* note 30, at 19; KINGSLEY & MARK, *supra* note 69, 19–20; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; Hunt, *supra* note 36, at 29. For hypersexualization as a contributing factor, see Hunt, *supra* note 36, at 28. Finally, for previous experiences of violence as contributing to the vulnerability of indigenous females to human trafficking, see, for example, BOYER & KAMPOURIS, *supra* note 30, at 2, 18–20; KINGSLEY & MARK, *supra* note 69, at 14–16; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 8, 10–12; Hunt, *supra* note 36, at 28.

202. *See, e.g.*, ARTHUR J. RAY, I HAVE LIVED HERE SINCE THE WORLD BEGAN: AN ILLUSTRATED HISTORY OF CANADA'S NATIVE PEOPLE 222–27 (2010); Erin Hanson, *The Indian Act*, THE UNIVERSITY OF BRITISH COLUMBIA – INDIGENOUS FOUNDATIONS, http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-indian-act.html#potlatch (last visited Apr. 14, 2015).

203. *See The Indian Act, 1876: Information Taken From the Government of Saskatchewan First Nations and Métis Relations Website*, DEPARTMENT OF INDIAN AFFAIRS – CANADA, http://www.tidridge.com/uploads/3/8/4/1/3841927/the_indian_act.pdf (last visited Apr. 14, 2015).

204. *See* ROYAL COMM'N ON ABORIGINAL PEOPLES, *supra* note 147, at 261.

state.[205] This disempowerment of indigenous women's historical primary roles in indigenous leadership has been linked to the economic marginalization of indigenous women and girls,[206] the absences of social supports appropriately and adequately addressing the needs of indigenous women and their children,[207] and the high rates of violence against indigenous women and girls in Canada[208]—all of which, once again, have been identified as contributing to indigenous women's high vulnerability to being trafficked in contemporary Canadian society.

As this discussion makes clear, the Indian Act was an important legal tool enabling the direct trafficking of indigenous peoples by the Canadian state. By legislating the exclusion of generations of indigenous people from their communities through identity provisions that unfairly targeted indigenous females and many indigenous groups (including Inuit and Métis), the Indian Act not only facilitated the removal of these indigenous bodies from indigenous territories but also eliminated any future claim to indigenous lands in Canada. In other words, this legislation arranged for the trafficking of indigenous bodies for the direct social, political, and economic gains of settler colonial Canadian society. Moreover, the Indian Act provisions in 1905 and 1911 codified the trafficking of indigenous peoples by the Canadian state and white settlers, enabling the movement of entire communities if deemed expedient by the state and, most importantly, did not require the prior consent of that community. In addition to direct trafficking, the consequences of colonialism inflicted through the Indian Act, including poverty, isolation from familial and community supports, and high rates of physical and sexual violence, have been indicated as contributing to the contemporary vulnerability of indigenous females to being targeted for human trafficking. The Indian Act also authorized another particularly heinous and flagrant example of the Canadian state's trafficking of indigenous children: residential schools. In the next Part, I examine the forced removal of generations of indigenous children through the residential school and contemporary child welfare systems in Canada and explain how these removals are complicit with human trafficking.

205. *See* Kim Anderson, *Leading by Action: Female Chiefs and the Political Landscape*, *in* RESTORING THE BALANCE: FIRST NATIONS WOMEN, COMMUNITY, AND CULTURE 99, 100 (Gail Guthrie Valaskakis et al. eds., 2009).

206. *See* KIM ANDERSON, A RECOGNITION OF BEING: RECONSTRUCTING NATIVE WOMANHOOD 65 (Beth McAuley ed., 2000).

207. *See* CANADIAN PANEL ON VIOLENCE AGAINST WOMEN, *supra* note 196, at 164.

208. *See* LaRocque, *supra* note 128, at 148–49.

2. The Trafficking of Indigenous Children

As outlined previously, indigenous women in Canada have identified the Indian residential school system as not only a contributing factor to the current vulnerabilities faced by indigenous women and girls to the violence of human trafficking, but also as, itself, a form of trafficking. Here I tease out this argument in more detail in the Canadian context. Residential schools operated in Canada from the 1830s until 1996, and estimates suggest that more than 150,000 indigenous (Indian, Inuit, and Métis) children attended these institutions operated cooperatively between the government of Canada and major Canadian Christian churches (predominantly Catholic and Protestant).[209] Children under the age of sixteen were removed (many times through force) from their families and communities and confined to residential schools for most, if not all, of a year with little to no contact.[210] Indeed, contact between children of the same family or community was often prohibited within the residential schools themselves.[211] Isolated and alone in a foreign and hostile institution, indigenous children were vulnerable to predation and targeted for sexual exploitation by residential school staff, clergy, and possibly pedophile rings.[212] Moreover, as the system progressed, emphasis on education was replaced by increasing the exploitation of indigenous children's labour to help finance the costs of operating the indigenous residential school system.[213] In this system, indigenous children had every reason to fear for their safety for failing to comply with their traffickers (state officials, staff, clergy) because, as is well documented, physical abuse and gross neglect were rampant in residential schools. In the words of the Truth and Reconciliation Commission, established by the Government of Canada in 2008 to investigate the experiences of indigenous children in the residential school system: "In some schools, a *culture of abuse permeated the entire institution*."[214] The system clearly displayed the key components of Canada's contemporary understanding of the crime of human trafficking: forced relocation and forcible confinement of indigenous children who feared for their lives within this punitive and violent system, where both child sexual exploitation and the exploitation of child labour occurred. This was

209. THE TRUTH AND RECONCILIATION COMM'N OF CAN., CANADA, ABORIGINAL PEOPLES, AND RESIDENTIAL SCHOOLS: THEY CAME FOR THE CHILDREN 5–6, 113 (2012).
210. *See* JOHN S. MILLOY, A NATIONAL CRIME: THE CANADIAN GOVERNMENT AND THE RESIDENTIAL SCHOOL SYSTEM – 1879 TO 1986 at 24–26 (1999).
211. *See* THE TRUTH AND RECONCILIATION COMM'N OF CAN., *supra* note 209, at 23.
212. *See* SMITH, *supra* note 96, at 40; THE TRUTH AND RECONCILIATION COMM'N OF CAN., *supra* note 209, at 41–44.
213. *See* THE TRUTH AND RECONCILIATION COMM'N OF CAN., *supra* note 209, at 35–37.
214. *Id.* at 44 (emphasis added).

an aggravated charge of human trafficking, of course, given the heinous physical violence (up to and including murder)[215] perpetrated against indigenous children.

Significantly, while the Indian residential school system is now part of the chronological past, its effects continue to reverberate in the present and into the foreseeable future. As indigenous women have made clear, residential schools introduced and inculcated generations of indigenous children in shame, predation, and violence, with the effect that these patterns have been passed down to the children and grandchildren (and so on) of residential school survivors. Both the trauma of residential school attendance and the intergenerational trauma passed on to the ancestors of these survivors are linked to poor physical health, mental health and addiction issues, and low self-esteem,[216] all of which are identified as contemporary risk factors of human trafficking. As such, the Canadian state and its residential school system continue to contribute to the trafficking of indigenous women and children.

The trafficking and exploitation of indigenous children by the Canadian state also, however, continue unabated through the child welfare system. With the decline of the Indian residential school system in the 1950s, the Canadian state increasingly relied on its child welfare agencies to apprehend indigenous children, remove them from their families and communities, and confine them in state care. While an intensification of such apprehensions occurred in the 1960s, commonly referred to as the "Sixties Scoop," there are currently more indigenous children in the custody of the Canadian state than there ever were at the height of the Indian residential school system.[217] As Suzanne Fournier and Ernie Crey note, "culturally inappropriate judgments" underpin the removal of indigenous children cared for by parents or grandparents.[218] In many instances, children were frequently targeted for removal for living in the impoverished conditions endemic on reserves and thus, as Fournier and Crey claim, "often the only difference between the parents whose children were stolen away and those who took in foster children for a little extra cash was the colour of their skin."[219] In addition to providing income for nonindigenous foster parents, the state facilitated the adoptions of untold thousands of indigenous children to nonindigenous families

215. *See* Canada Criminal Code, R.S.C. 1985, c. C-46, s. 279.01(1)(a).

216. *See* LAWRENCE, *supra* note 172, at 105–11; THE TRUTH AND RECONCILIATION COMM'N OF CAN., *supra* note 209, at 77–83.

217. *See* Nico Trocmé et al., *Pathways to the Overrepresentation of Aboriginal Children in Canada's Child Welfare System*, SOC. SERV. REV. 577, 579 (2004). This source uses "out-of-home care" to refer to children who have been removed from their homes by the Canadian state and placed into the protective custody of the state.

218. *See* SUZANNE FOURNIER & ERNIE CREY, STOLEN FROM OUR EMBRACE 85 (1997).

219. *Id.*

around the world—many of whom have never been returned to their nations.[220] Recent studies suggest that indigenous children in state care experience tremendously high rates of physical violence, sexual exploitation, mental health and addiction issues, and poverty—again, all factors recognized as contributing to the increased risk of indigenous women and children to being trafficked. Indeed, involvement with Canadian state child welfare agencies has been indicated as a risk for trafficking.[221]

CONCLUSION

While it is admirable that Canada has stepped up to address human trafficking, ending the trafficking of indigenous women and girls will require the Canadian state to take a hard look at itself and examine its complicity in this violence. As a settler colonial nation, Canada has been built on and sustained through the trafficking of indigenous peoples, including children. In turn, the acts of trafficking by the Canadian state have carried consequences for generations of indigenous peoples that correlate with contemporary predictors of vulnerability for being targeted for human trafficking. And while there is nothing in contemporary Canadian legislation for pursuing charges of human trafficking against the Canadian state, there is the possibility of holding Canada accountable through its international treaty obligations to end human trafficking. Ending the trafficking of indigenous women and girls, however, will not only require addressing how the Canadian state is complicit in this violence, but will also require dismantling the colonial domination which makes all of it possible. The process of decolonization will not only require a drastic revisioning of the current Canadian state and the destruction of dominant systems of oppression, but also the regeneration of indigenous sovereignty and self-determination—with careful attention, of course, to not replicating dominant systems of oppression within the regeneration.

220. *See* LAWRENCE, *supra* note 178, at 113.

221. *See* BOYER & KAMPOURIS, *supra* note 30, at 19; KINGSLEY & MARK, *supra* note 69, at 20; NATIVE WOMEN'S ASS'N OF CAN., *supra* note 17, at 13; PAUKTUUTIT INUIT WOMEN OF CAN., *supra* note 17, at 25–26.

WORKING LUNCH: COLLABORATION WITH TRIBAL COMMUNITIES

JUDICIAL COUNCIL
OF CALIFORNIA
TRIBAL COURT–STATE COURT FORUM

Tribal Court-State Court Forum (Forum)

PARTICIPANT WORKBOOK

February 15, 2018

Participant's Name (optional)	

Please submit one workbook at the end of the day. After the Forum meeting, a summary of the notes will be prepared and emailed to all participants.

ACKNOWLEDGMENTS

The Judicial Council's Center for Families, Children & the Courts (CFCC) gratefully acknowledges the Tribal Court-State Court Forum (Forum) co-chairs, Judge Abby Abinanti and Justice Dennis Perluss, for co-hosting this Forum meeting, which also serves as an educational session for our Forum members and invited guests. The CFCC would also like to thank all of you who are taking the time to share your experiences, learn together, and problem-solve interjurisdictional issues.

This Forum meeting is supported by a grant from the California Department of Social Services and Subgrant No. CW 17 16 1535 awarded by the state administering office for the STOP Formula Grant Program. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or U.S. Department of Justice, Office on Violence Against Women.

USING THIS WORKBOOK

This workbook is designed to elicit your thoughts on the educational sessions today, and will be used by the Forum members as they grapple with issues of mutual concern relating to access to justice for tribal communities and the recognition and enforcement of protective and other orders. The Forum made child welfare and domestic violence its top two priorities.

After you leave today's Forum meeting, we hope that we have provided you with:

1) An opportunity to meet with tribal and state court judges;
2) More information about the Forum and its work.

Session 1: Forum Member Project Updates

Reflecting on local tribal-state-county collaborations, which gave rise to these Forum projects, please take a moment to answer the following questions:

1. Describe collaborations locally, statewide, or nationally that the Forum should explore to either build on existing Forum projects or develop new ones:

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2. How do you think these collaborations might help the Forum?

    a. Promote policies that address our common concerns in all proceedings in which the authority to exercise jurisdiction by state judicial branch and tribal justice systems overlap?

    _____

    _____

    b. Institutionalize or help sustain tribal/state/county partnerships?

    _____

    _____

    c. Improve education for judges and justice partners?

    _____

    _____

3. What resources, policy changes, materials or other actions, if any, would you recommend the Forum undertake regarding ICWA application and compliance in California?

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_____

Session 2: Jurisdiction & Safety in Tribal Communities

1. What are the most pressing issues you see in your community and/or court related to domestic violence, sexual assault, stalking, teen dating violence and human trafficking in tribal communities?

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2. What resources or action has your community and/or court implemented to address issues related to jurisdiction and safety issues?

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3. What activities do you think the Forum should prioritize to address these issues?

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Session 3: Accessing Services

1. What services and/or resources would be most useful in improving tribal – state collaborations in your community?

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2. What services and/or resources would be most useful in assisting victims of domestic violence, sexual assault, stalking, teen dating violence and human trafficking in your tribal communities?

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Session 4: Indian Child Welfare Act

1. What services and/or resources would be most useful improving compliance with ICWA and improving outcomes in ICWA cases in your county?

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2. What activities should the Forum undertake to improve ICWA compliance and outcomes for Indian children and families?

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Session 5: Forum Priorities 2018-2019

Since its inception, the Forum has made child welfare and domestic violence its top priorities. Nevertheless, as you can see from the Forum's annual agenda (work plan) and some of the work highlighted today, the Forum does undertake projects and make recommendations for improving the administration of justice in all proceedings in which the authority to exercise jurisdiction by the state judicial branch and the tribal justice systems overlap.

The Forum co-chairs would like to lead a group discussion, and ask you to write down your thoughts on the Forum's work relating to policies, education, partnerships, and resources.

1. **Rules/Forms/Legislation**
   The Forum makes policy recommendations that promote access to justice for tribal communities, and many of these recommendations take the form of court rules/forms or proposed legislation. Are there inter-jurisdictional issues relating to the recognition and enforcement of court orders that you would like the Forum to address? Please briefly describe these issues. If the Forum is already working on the issue you identify, staff will contact you to share the progress made and to explore what more the Forum can do.

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2. **Judicial Education**
   The Forum makes recommendations on statewide educational publications and programming for judges and judicial support staff. Forum members present locally, statewide, and nationally at conferences. The Forum advises on the development of judicial toolkits and other distance learning materials. What topics would you like to see addressed at in-person trainings and through distance learning?

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3. Partnerships

The Forum recommends activities needed to support local tribal court-state court collaborations. Looking at the Forum's existing activities, please identify any new ones relating to:

Sharing Resources and Communicating Information about Partnerships

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Education and Technical Assistance to Promote Partnerships and Understanding of Tribal Justice Systems

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Tribal/State Collaborations that Increase Resources for Courts

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SESSION 4 – INDIAN CHILD WELFARE ACT (ICWA) AND CHILD WELFARE

a. **Update from California Department of Social Services, Office of Tribal Affairs**
   Heather Hostler, Director, California Department of Social Services, Office of Tribal Affairs

b. **Update on ICWA Task Force Report**
   Delia Sharpe, Executive Director, California Tribal Families Coalition

Social Services



Office of Tribal Affairs (OTA)

CDSS is in process of developing a Tribal Affairs team that will serve as the hub for tribal related work at the CDSS. One of the major focus areas for the team will include the Tribal Consultation Policy.

The Office of Tribal Affairs (OTA) has the primary responsibility of building better government-to-government relationships with the CDSS and California Indian Tribes (Tribes), Counties and Tribal Governments, as well as working with Native American stakeholders. The OTA implements the CDSS Tribal Consultation Policy (TCP) in concert with Branches and Bureaus throughout the department, to carry out meaningful consultation efforts. The OTA serves as an advisor to leadership, throughout the CDSS, to use best practice strategies when working with tribal governments, in considerations of policy decisions and regulations that impact Tribes, as well as using appropriate protocols and cultural competency. The OTA coordinates the work of all divisions of the CDSS when it affects Tribes to ensure the department is in line with the Governor's Executive Order B-10-11.

Tribal Consultation

The CDSS Tribal Consultation Policy (TCP) was finalized on June 6, 2017 in accordance with Governor Edmund Brown's Executive Order B-10-11 and establishes a firm commitment to communication and consultation with California Indian Tribes.The TCP provides a framework for elected officials or other designated representatives of tribal governments to provide meaningful input into the development of regulations, rules, and policies on matters that may affect tribal communities.

Currently, the CDSS is rolling out a Tribal Consultation Strategy* that includes several phases of tribal inclusion.These phases consist of:

- Disseminating the TCP to all tribes
- Inviting tribal leaders to consult on the CDSS Tribal Engagement Strategy*
- Visiting tribes who request consultation
- Developing the Tribal Engagement Strategy based on consultation input
- Convening a Tribal Consultation Summit on CDSS issues that impact tribes
- Developing a Tribal Advisory Body and OTA Strategy for Engagement

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Heather Hostler, OTA Director

County Letters/Notices
Regulations
California Child Welfare Indicators Project
County Offices

Resources

Office of Child Abuse Prevention
Adoptions
Foster Care
ICWA at CDSS
Tribal Consultation

The California Department of Social Services (CDSS)
Tribal Consultation Policy (TCP)
Approved by CDSS Executive Leadership, Effective June 6, 2017

Sections:

1. PURPOSE:

The mission of the CDSS is to serve, aid and protect needy and vulnerable children and adults in ways that strengthen and preserve families, encourage personal responsibility and foster independence. The CDSS provides administration and oversight of programs that affect nearly three million of California's most vulnerable residents and is charged with implementation of federal legislation impacting Tribes and Indians, such as the Indian Child Welfare Act (ICWA), 25 U.S.C. §1901, et seq., codified into California law through Senate Bill (SB) 678. The purpose of this policy is to guide consultations between the CDSS and sovereign federally recognized Tribes in California on policies and procedures that affect Tribes and Indians in California, in recognition of statutory mandates and Federal and State Executive Directives to establish a formal government-to-government Tribal Consultation Policy (TCP).

2. SCOPE:

This policy applies to all Divisions of the CDSS and shall serve as a guide for Tribes to participate in Department and Division policy development to the greatest extent practicable and permitted by law.

3. PHILOSOPHY:

This Policy is based on the following foundations:

a. Values and Principles: This Policy anticipates a deliberate inclusive participatory process that aims to create effective collaboration and collective informed decision-making. All parties in the process should promote respect, shared responsibility and an open and free exchange of information. Meaningful consultation begins at the earliest possible phases of a project or program planning and continues through each phase of development and implementation. This policy is anticipated to promote positive, achievable, durable outcomes and is to be conducted in a timely, respectful, and meaningful manner using open communication.

b. Tribal Sovereignty: This Policy is not intended to waive or diminish any Tribal governmental rights, including treaty rights, sovereign immunities, or jurisdiction. Tribes exercise inherent sovereign powers over their members and territory with distinct governing systems. The CDSS recognizes that Tribal cultures are unique, with their own distinct history and traditions. The CDSS understands that Tribes are interested in CDSS policies or programs that may affect the Tribe, their members and the Native American population in California.

c. Except to the extent already established by law, this Policy is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the CDSS or any CDSS representative. The CDSS does not waive any applicable privilege that it may hold, such as the CDSS' deliberative process privilege, including but not limited to the CDSS' confidential recommendations to the Administration on proposed legislation or budget proposals. This policy is not intended to create, and does not create, any rights or benefits, whether substantive or procedural, or enforceable at law or in equity, against the State of California or its agencies, departments, entities, officers, agents, or employees.

4. POLITICAL/LEGAL FOUNDATIONS:

1. President Clinton's Executive Order 13175, November 6, 2000;
2. President Bush's Presidential Memorandum, Government-to-Government Relationship with Tribal Governments, September 23, 2004;
3. United States (U.S.) Health and Human Services Tribal Consultation Policy (established in 2005, and amended in 2010);
4. SB 678, codification of ICWA into California law; 2006;

5. President Obama's Executive Memorandum "Tribal Consultation," November 5, 2009;
6. 42 U.S.C. 622, State Plans for Child Welfare Services require Tribal Consultation, 2009; and
7. California Gubernatorial Executive Order B-10-11, September 19, 2011, and subsequent development of the California Health and Human Services (CHHS) Tribal Consultation Policy

5. DEFINITIONS:

   a. Collaboration: Working together in a meaningful effort to create a positive outcome. Collaboration occurs with authorized representatives from each party who effectuate the policy objectives determined in the consultation described under the Process and Procedure section.

   b. Consultation: A formal process of government-to-government communication which emphasizes trust, respect, and shared responsibility. It is an equitable, open and free exchange of information and opinion among parties, with the goal of leading to mutual understanding, comprehension, and informed decision-making.

   c. Federally Recognized Tribe: Native American Tribe with whom the Federal Government maintains an official government-to-government relationship usually established by a federal treaty, statute, executive order, court order, or a federal administrative action. The Bureau of Indian Affairs maintains and regularly publishes the list of federally recognized Indian Tribes in the Federal Register.

   d. Indian Organizations: A group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians who serve and advocate concerns and issues impacting tribes and Indians in California. The CDSS does not participate in government-to-government consultation with these entities. The CDSS may communicate with these groups. While this interaction and collaboration with Indian organizations is important, it does not constitute Tribal consultation except pursuant to and within the express terms of a tribal resolution or letter from the Chairperson designating an organization as a Tribal Designee to represent the tribe in its consultation with CDSS.
   e. Indians: American Indians and Alaska Natives (AI/AN), also referred to as Native Americans, refers to any descendant of a tribe indigenous to the United States.

f. Significant actions: "Significant actions" refer to policies or program activities that have Tribal implications, and (2) have substantial direct effects (a) on one or more Indian Tribe(s), or (b) on the relationship between the State Government and Indian Tribes, or (c) on the distribution of power and responsibilities between the State Government and Indian Tribes, or (3) has an effect on Indians in California.

g. To the Extent Practicable and Permitted by Law: Refers to situations where the opportunity for consultation is limited because of constraints of time, budget, legal authority, or other situations beyond the control of the parties.

h. Tribal Representative or Tribal Designee: The elected Tribal Chairperson or his/her designee by resolution or letter. The CDSS will use the contact list of Tribal Chairpersons maintained by the Governor's Tribal Advisor and available on its website.

i. Tribal Liaison: One or more staff designated by the CDSS to carry out responsibilities defined in Section 7 of this policy.

6. ESTABLISHMENT OF TRIBAL/STATE WORKGROUPS AND/OR TASKFORCES:

The need to develop or revise a policy and/or program that requires subject matter expertise may be identified by the CDSS or by a Tribe or Tribes. This provision allows for the establishment of workgroups or taskforces approved through tribal consultation that can advise, develop recommendations and/or provide expertise on particular technical, legal, regulatory or policy issues. This consultation policy is not intended to preclude collaborative relationships between the CDSS and Indian Tribes or Indian organizations outside of the processes described in this policy. The CDSS stakeholder engagement activities serve as forums to bring together state, county, tribal and American Indian community resources to help identify and address opportunities and key areas of concern that affect the wellbeing of Indians and Tribes in California. The feedback and recommendations received through such activities inform the parties on issues relevant to American Indians and Tribes and support the CDSS' formal consultation with federally recognized Tribes in California.

7. TRIBAL LIAISON:

The Director shall designate a Departmental Tribal Liaison to act as the Director's representative in matters pertaining to this Policy. The Tribal Liaison shall be at the executive level and may be the Director or a designated representative of the CDSS executive team, and shall be responsible for ensuring that the CDSS programs are engaging with Tribes consistent with this Policy. A Tribal Liaison who is a designated representative of the CDSS executive team may from time to time delegate Liaison responsibilities internal to the CDSS' functions to designated CDSS staff. The Tribal Liaison shall periodically update the Director and CHHS Secretary on tribal consultation efforts and the implementation of this Policy. Updating may include the scope of consultation efforts and their effectiveness, and the topics on which Tribes were consulted.

8. AREAS FOR CONSULTATION:

It is the CDSS policy that, to the extent practicable and permitted by law, consultation with Indian Tribes shall occur before any significant action is taken.

9. CDSS BUDGET FORMULATION:

Tribes can submit to the CDSS any concerns and requests regarding budget formulation, however, state confidentiality requirements associated with the budget development process may exclude the CDSS from consulting on budget items that will affect Tribes.

10. PROCESS AND PROCEDURE:

a. Outreach

The CDSS shall consult with Tribes and make relevant information available at the earliest possible time, and allow a reasonable opportunity for Tribes to respond and substantively engage in planning, program, regulatory, or other processes.

The CDSS shall maintain a tribal affairs webpage on its website that will include the following:

- The name and contact information of the Department's Tribal Liaison.
- The Department's current Tribal Consultation Policy.

Instructions for how to subscribe to department list servers, when available, for various programs and topics that may be of interest to Tribes and other American Indians.

b. Initiating Consultation

A significant action may be identified by CDSS and/or an Indian Tribe(s). Tribes may initiate consultation with the CDSS by contacting the Tribal Liaison, and in the absence, thereof, the Director. The Tribal Liaison may be reached via email at Tribal.Consultation@dss.ca.gov. The CDSS may initiate consultation by reaching out to tribes using the list of Tribal Chairpersons maintained by the Governor's Tribal Advisor and available on its website. To facilitate the Tribal Liaison's oversight responsibilities and reporting responsibility as specified in Section 7, a Notice of the CDSS/Tribal Consultation shall be completed when a consultation is initiated and forwarded to the Liaison within 14 days.

c. Consultations

Consultation mechanisms include but are not limited to one or more of the following:

- Mailings
- E-mail
- Teleconference
- Face-to-face meetings between the CDSS and Indian Tribes
- Roundtables
- The CDSS Tribal Consultation Summit
- Other regular or special CDSS consultation sessions
- Tribally approved and constituted workgroups or taskforces

Efforts shall be made by the parties to define and document the complexity, time constraints, and implications of the issues upon which consultation occurs.

The CDSS will communicate and collaborate with Tribes in a manner that is timely and respectful. Internal processes and timelines will be clearly identified; relevant staff will be available to explain processes and timelines, as needed.

d. Timely Notice

The CDSS recognizes that Tribes may be located in diverse or remote regions throughout California thereby necessitating the need for clear and adequate notice prior to consultation or meetings that may require travel by tribal representatives. Contact with Tribes shall be initiated as early and as promptly as possible to provide ample time for Tribes to have substantive input. Tribal requests for additional time to prepare for or attend a consultation session or in-person meeting will be honored whenever possible.

e. Tribal Consultation Summit

The CDSS will periodically consult with the Governor's Tribal Advisor to determine whether to hold a Tribal Consultation Summit meeting with Tribal leaders to provide general updates on CDSS activities even if there are no currently pending matters that are in the consultation process. The Governor's Tribal Advisor shall be consulted to secure guidance on the purpose, process for planning and running of the Summit. The CDSS will have participants at the Summit who have decision-making authority.

11. PARTIES TO CONSULTATION:

The government-to-government relationship between the state and federally recognized Indian Tribes dictates that the principle focus for CDSS consultation is Indian Tribes, individually or collectively. Tribal representatives of all federally recognized Tribes within California will be invited to the Summit. The results of these meetings are intended to help guide the CDSS on policy and program development.

12. CONFLICT RESOLUTION:

Tribes and the CDSS may not always agree. A Tribe may invoke the conflict resolution process by filing a written Notice of Conflict Impasse with the Tribal Liaison. Any Notice of Conflict Impasse shall be filed no later than 60 days after the impasse is identified. Thereafter, the Tribal Liaison shall offer mediation with the Governor's Tribal Advisor. The goal will be to accomplish the following:

1. Clarify all aspects of the issue(s) over which there is disagreement;
2. Explore the alternative position(s) available;
3. Clarify the reasons over positions taken; and

4. Attempt to reach a consensus that does not conflict with goals already established via the consultation process or that conflict with the CDSS' responsibilities and duties as dictated by federal or state laws and regulations.

Nothing in this policy is intended to prevent a Tribe from seeking otherwise available options for having alternative positions and options evaluated on issues over which there is dispute.

13. PERFORMANCE, TRANSPARENCY, EVALUATION AND REPORTING:

The CDSS Tribal Consultation Records shall be posted on the CDSS' Tribal Affairs website. Additionally, reports shall be produced following each consultation and, when a Summit has occurred, after each Summit, and will include a description of the issue(s) that were the subject of consultation, specific recommendations and any follow-up. The CDSS shall solicit Tribal Reports on satisfaction with the consultations and Summits, what Tribes felt was meaningful, and what could be improved in future meetings. A Tribe may submit a report at the consultation or Summit, or no more than 60 days of its conclusion. Tribal feedback will be included in dissemination of meeting content, with identities and all other confidential information protected upon request. The Summit reports shall be posted on the CDSS' tribal affairs website.

14. ADOPTION, AMENDMENTS AND REVISIONS

This Tribal Consultation Policy shall become effective upon approval by the CDSS executive leadership, and the date of said approval shall be noted in the Title of the document. Any parties to consultation may propose, in writing or during the Summit, amendments to this Tribal Consultation Policy. Proposed amendments shall be considered and adopted by the CDSS executive leadership after consultation and full consideration in light of the spirit and provisions of this policy. The CDSS retains the right to not agree to amendments that would impede the duties and obligations for which it is responsible under laws and regulations applicable to its work. In addition to this process, the CDSS and Tribal representatives formally shall review and, if necessary, revise the Tribal Consultation Policy a minimum of once every five years.

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Title 25: Indians

PART 23—INDIAN CHILD WELFARE ACT

Contents

A : 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901-1952.

S : 59 FR 2256, Jan. 13, 1994, unless otherwise noted.

E N : Nomenclature changes to part 23 appear at 79 FR 27190, May 13, 2014.

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Subpart A—Purpose, Definitions, and Policy

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§23.1 Purpose.

The purpose of the regulations in this part is to govern the provision of funding for, and the administration of Indian child and family service programs as authorized by the Indian Child Welfare Act of 1978 (Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 2, 9, 1901-1952).

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§23.2 Definitions.

Act means the Indian Child Welfare Act (ICWA), Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 et seq.

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

Assistant Secretary means the Assistant Secretary—Indian Affairs, the Department of the Interior.

Bureau of Indian Affairs (BIA) means the Bureau of Indian Affairs, the Department of the Interior.

Child-custody proceeding. (1) “Child-custody proceeding” means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:

(i) Foster-care placement, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) Termination of parental rights, which is any action resulting in the termination of the parent-child relationship;

(iii) Preadoptive placement, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or

(iv) Adoptive placement, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

Consortium means an association or partnership of two or more eligible applicants who enter into an agreement to administer a grant program and to provide services under the grant to Indian residents in a specific geographical area when it is administratively feasible to provide an adequate level of services within the area.

Continued custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of a child.

Custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.

Domicile means:

(1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

(2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

Emergency proceeding means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Extended family member is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

Grant means a written agreement between the BIA and the governing body of an Indian tribe or Indian organization wherein the BIA provides funds to the grantee to plan, conduct or administer specific programs, services, or activities and where the administrative and programmatic provisions are specifically delineated.

Grantee means the tribal governing body of an Indian tribe or Board of Directors of an Indian organization responsible for grant administration.

Grants officer means an officially designated officer who administers ICWA grants awarded by the Bureau of Indian Affairs, the Department of the Interior.

Hearing means a judicial session held for the purpose of deciding issues of fact, of law, or both.

Indian means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

Indian child means any unmarried person who is under age 18 and either:

(1) Is a member or citizen of an Indian Tribe; or

(2) Is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

Indian child's Tribe means:

(1) The Indian Tribe in which an Indian child is a member or eligible for membership; or

(2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in §23.109.

Indian custodian means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.

Indian foster home means a foster home where one or more of the licensed or approved foster parents is an “Indian” as defined in 25 U.S.C. 1903(3).

Indian organization, solely for purposes of eligibility for grants under subpart D of this part, means any legally established group, association, partnership, corporation, or other legal entity which is owned or controlled by Indians, or a majority (51 percent or more) of whose members are Indians.

Indian preference means preference and opportunities for employment and training provided to Indians in the administration of grants in accordance with section 7 (b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450).

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3 (c) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602 (c).

Involuntary proceeding means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

Off-reservation ICWA program means an ICWA program administered in accordance with 25 U.S.C. 1932 by an off-reservation Indian organization.

Parent or parents means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.

Secretary means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.

Service areas solely for newly recognized or restored Indian tribes without established reservations means those service areas congressionally established by Federal law to be the equivalent of a reservation for the purpose of determining the eligibility of a newly recognized or restored Indian tribe and its members for all Federal services and benefits.

State court means any agent or agency of a state, including the District of Columbia or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

Status offenses mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (e.g., truancy, incorrigibility).

Subgrant means a secondary grant that undertakes part of the obligations of the primary grant, and assumes the legal and financial responsibility for the funds awarded and for the performance of the grant-supported activity.

Technical assistance means the provision of oral, written, or other relevant information and assistance to prospective grant applicants in the development of their grant proposals. Technical assistance may include a preliminary review of an application to assist the applicant in identifying the strengths and weaknesses of the proposal, ongoing program planning, design and evaluation, and such other program-specific assistance as is necessary for ongoing grant administration and management.

Title II means title II of Public Law 95-608, the Indian Child Welfare Act of 1978, which authorizes the Secretary to make grants to Indian tribes and off-reservation Indian organizations for the establishment and operation of Indian child and family service programs.

Tribal court means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.

Tribal government means the federally recognized governing body of an Indian tribe.

Upon demand means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.

Value means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Voluntary proceeding means a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

[59 FR 2256, Jan. 13, 1994, as amended at 81 FR 38864, June 14, 2016]

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§23.3 Policy.

In enacting the Indian Child Welfare Act of 1978, Pub. L. 95-608, the Congress has declared that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and Indian families by the establishment of minimum Federal standards to prevent the arbitrary removal of Indian children from their families and tribes and to ensure that measures which prevent the breakup of Indian families are followed in child custody proceedings (25 U.S.C. 1902). Indian child and family service programs receiving title II funds and operated by federally recognized Indian tribes and off-reservation Indian organizations shall reflect the unique values of Indian culture and promote the stability and security of Indian children, Indian families and Indian communities. It is the policy of the Bureau

of Indian Affairs to emphasize and facilitate the comprehensive design, development and implementation of Indian child and family service programs in coordination with other Federal, state, local, and tribal programs which strengthen and preserve Indian families and Indian tribes.

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§23.4 Information collection.

(a) The information collection requirements contained in §23.13 of this part have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 et seq., and assigned clearance number 1076-0111.

(1) This information will be used to determine eligibility for payment of legal fees for indigent Indian parents and Indian custodians, involved in involuntary Indian child custody proceedings in state courts, who are not eligible for legal services through other mechanisms. Response to this request is required to obtain a benefit.

(2) Public reporting for this information collection is estimated to average 10 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any aspect of this information collection should be mailed or hand-delivered to the Bureau of Indian Affairs, Information Collection Clearance Officer, Room 336-SIB, 1849 C Street, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs Paperwork Reduction Project—1076-0111, Office of Management and Budget, Washington, DC 20503.

(b) The information collection requirements contained in §§23.21; 23.31; 23.46; 23.47, and 23.71 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1076-0131. The information collection requirements under §§23.21 and 23.31 are collected in the form of ICWA grant applications from Indian tribes and off-reservation Indian organizations. A response to this request is required to obtain grant funds. The information collection requirements under §23.46 are collected in compliance with applicable OMB circulars on financial management, internal and external controls and other fiscal assurances in accordance with existing Federal grant administration and reporting requirements. The grantee information collection requirements under §23.47 are collected in the form of quarterly and annual program performance narrative reports and statistical data as required by the grant award document. Pursuant to 25 U.S.C. 1951, the information collection requirement under §23.71 is collected from state courts entering final adoption decrees for any Indian child and is provided to and maintained by the Secretary.

(1) Public reporting for the information collection at §§23.21 and 23.31 is estimated to average 32 hours per response, including the time for reviewing the grant application instructions, gathering the necessary information and data, and completing the grant application. Public reporting for the information collection at §§23.46 and 23.47 is estimated to average a combined total of 16 annual hours per grantee, including the time for gathering the necessary information and data, and completing the required forms and reports. Public reporting for the information collection at §23.71 is estimated to average 4 hours per response, including the time for obtaining and preparing the final adoption decree for transmittal to the Secretary.

(2) Direct comments regarding any of these burden estimates or any aspect of these information collection requirements should be mailed or hand-delivered to the Bureau of Indian Affairs, Information Collection Clearance Officer, room 336-SIB, 1849 C Street, NW., Washington, DC, 20240; and the Office of Information and Regulatory Affairs Paperwork Reduction Project—1076-0131, Office of Management and Budget, Washington, DC 20503.

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Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel in State Courts

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§23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in §23.111, consistent with the confidentiality requirement in §23.111(d)(6)(ix). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by §23.111.

(b)(1) For child-custody proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, or any territory or possession of the United States, notices must be sent to the following address: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.

(2) For child-custody proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices must be sent to the following address: Minneapolis Regional Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241.

(3) For child-custody proceedings in Nebraska, North Dakota, or South Dakota, notices must be sent to the following address: Aberdeen Regional Director, Bureau of Indian Affairs, 115 Fourth Avenue SE., Aberdeen, South Dakota 57401.

(4) For child-custody proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), or the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods or Woodward, notices must be sent to the following address: Anadarko Regional Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6) of this section.

(5) For child-custody proceedings in Wyoming or Montana (except for notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), notices must be sent to the following address: Billings Regional Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(6) For child-custody proceedings in the Texas counties of El Paso and Hudspeth or in Colorado or New Mexico (exclusive of notices to the Navajo Nation from the New Mexico counties listed in paragraph (b)(9) of this section), notices must be sent to the following address: Albuquerque Regional Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Nation must be sent to the Navajo Regional Director at the address listed in paragraph (b)(9) of this section.

(7) For child-custody proceedings in Alaska (except for notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska), notices must be sent to the following address: Juneau Regional Director, Bureau of Indian Affairs, 709 West 9th Street, Juneau, Alaska 99802-1219. Notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(8) For child-custody proceedings in Arkansas, Missouri, or the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Stephens, Tulsa, Wagoner, or Washington, notices must be sent to the following address: Muskogee Regional Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For child-custody proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi Tribe of Arizona and the San Juan Southern Paiute Tribe of Arizona) or Navajo (except for notices to the Hopi Tribe of Arizona); the New Mexico counties of McKinley (except for notices to the Zuni Tribe of the Zuni Reservation), San Juan, or Socorro; or the Utah county of San Juan, notices must be sent to the following address: Navajo Regional Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Southern Paiute Tribes of Arizona must be sent to the Phoenix Regional Director at the address listed in paragraph (b)(10) of this section. Notices to the Zuni Tribe of the Zuni Reservation must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6 of this section).

(10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9) of this section), Nevada, or Utah (exclusive of San Juan County), notices must be sent to the following address: Phoenix Regional Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For child-custody proceedings in Idaho, Oregon, or Washington, notices must be sent to the following address: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, must also be sent to the Portland Regional Director.

(12) For child-custody proceedings in California or Hawaii, notices must be sent to the following address: Sacramento Regional Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in §23.2, or is unable to locate the parents or Indian custodians, the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

[81 FR 38866, June 14, 2016]

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§23.12 Designated tribal agent for service of notice.

Any Indian tribe entitled to notice pursuant to 25 U.S.C. 1912 may designate by resolution, or by such other form as the tribe's constitution or current practice requires, an agent for service of notice other than the tribal chairman and send a copy of the designation to the Secretary or his/her designee. The Secretary or his/her designee shall update and publish as necessary the names and addresses of the designated agents in the F R . A current listing of such agents shall be available through the area offices.

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§23.13 Payment for appointed counsel in involuntary Indian child custody proceedings in state courts.

(a) When a state court appoints counsel for an indigent Indian party in an involuntary Indian child custody proceeding for which the appointment of counsel is not authorized under state law, the court shall send written notice of the appointment to the BIA Regional Director designated for that state in §23.11. The notice shall include the following:

(1) Name, address, and telephone number of attorney who has been appointed.

(2) Name and address of client for whom counsel is appointed.

(3) Relationship of client to child.

(4) Name of Indian child's tribe.

(5) Copy of the petition or complaint.

(6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.

(7) Certification by the court that the Indian client is indigent.

(b) The Regional Director shall certify that the client is eligible to have his or her appointed counsel compensated by the BIA unless:

(1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C. 1903 (1);

(2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903 (4);

(3) The client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903 (9), nor the child's Indian custodian as defined in 25 U.S.C. 1903 (6);

(4) State law provides for appointment of counsel in such proceedings;

(5) The notice to the Regional Director of appointment of counsel is incomplete; or

(6) Funds are not available for the particular fiscal year.

(c) No later than 10 days after receipt of the notice of appointment of counsel, the Regional Director shall notify the court, the client, and the attorney in writing whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the BIA. If certification is denied, the notice shall include written reasons for that decision, together

with a statement that complies with 25 CFR 2.7 and that informs the applicant that the decision may be appealed to the Assistant Secretary. The Assistant Secretary shall consider appeals under this subsection in accordance with 25 CFR 2.20 (c) through (e). Appeal procedures shall be as set out in part 2 of this chapter.

(d) When determining attorney fees and expenses, the court shall:

(1) Determine the amount of payment due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in state juvenile delinquency proceedings; and

(2) Submit approved vouchers to the Regional Director who certified eligibility for BIA payment, together with the court's certification that the amount requested is reasonable under the state standards considering the work actually performed in light of criteria that apply in determining fees and expenses for appointed counsel in state juvenile delinquency proceedings.

(e) The Regional Director shall authorize the payment of attorney fees and expenses in the amount requested in the voucher approved by the court unless:

(1) The amount of payment due the state-appointed counsel is inconsistent with the fees and expenses specified in §23.13 (d)(1); or

(2) The client has not been certified previously as eligible under paragraph (c) of this section; or

(3) The voucher is submitted later than 90 days after completion of the legal action involving a client certified as eligible for payment of legal fees under paragraph (b) of this section.

(f) No later than 15 days after receipt of a payment voucher, the Regional Director shall send written notice to the court, the client, and the attorney stating the amount of payment, if any, that has been authorized. If the payment has been denied, or the amount authorized is less than the amount requested in the voucher approved by the court, the notice shall include a written statement of the reasons for the decision together with a statement that complies with 25 CFR 2.7 and that informs the client that the decision may be appealed to the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (e); 43 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.340.

(g) Failure of the Regional Director to meet the deadline specified in paragraphs (c) and (f) of this section may be treated as a denial for purposes of appeal under paragraph (f) of this section.

(h) Payment for appointed counsel does not extend to Indian tribes involved in state court child custody proceedings or to Indian families involved in Indian child custody proceedings in tribal courts.

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Subpart C—Grants to Indian Tribes for Title II Indian Child and Family Service Programs

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§23.21 Noncompetitive tribal government grants.

(a) Grant application information and technical assistance. Information on grant application procedures and related information may be obtained from the appropriate Agency Superintendent or Regional Director. Pre-award and ongoing technical assistance to tribal governments shall be provided in accordance with §23.42 of this part.

(b) Eligibility requirements for tribal governments. The tribal government(s) of any Indian tribe or consortium of tribes may submit a properly documented application for a grant to the appropriate Agency Superintendent or Regional Director. A tribe may neither submit more than one application for a grant nor be the beneficiary of more than one grant under this subpart.

(1) Through the publication of a F R announcement at the outset of the implementation of the noncompetitive grant award process during which tribal applications will be solicited, the Assistant Secretary will notify eligible tribal applicants under this subpart of the amount of core funds available for their ICWA program. The funding levels will be based on the service area population to be served. Upon the receipt of this notice from the Agency Superintendent or appropriate Regional Director, tribal applicants shall submit a completed ICWA application no later than 60 days after the receipt of this notice.

(2) A grant to be awarded under this subpart shall be limited to the tribal governing body(ies) of the tribe(s) to be served by the grant.

(3) For purposes of eligibility for newly recognized or restored Indian tribes without established reservations, such tribes shall be deemed eligible to apply for grants under this subpart to provide ICWA services within those service areas legislatively identified for such tribes.

(4) A grantee under this subpart may make a subgrant to another Indian tribe or an Indian organization subject to the provisions of §23.45.

(c) Revision or amendment of grants. A grantee under this subpart may submit a written request and justification for a post-award grant modification covering material changes to the terms and conditions of the grant, subject to the approval of the grants officer. The request shall include a narrative description of any significant additions, deletions, or changes to the approved program activities or budget in the form of a grant amendment proposal.

(d) Continued annual funding of an ICWA grant under this subpart shall be contingent upon the fulfillment of the requirements delineated at §23.23(c).

(e) Monitoring and program reporting requirements for grantees under this subpart are delineated at §§23.44 and 23.47.

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§23.22 Purpose of tribal government grants.

(a) Grants awarded under this subpart are for the establishment and operation of tribally designed Indian child and family service programs. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and to ensure that the permanent removal of an Indian child from the custody of his or her Indian parent or Indian custodian shall be a last resort. Such child and family service programs may include, but need not be limited to:

(1) A system for licensing or otherwise regulating Indian foster and adoptive homes, such as establishing tribal standards for approval of on-reservation foster or adoptive homes;

(2) The operation and maintenance of facilities for counseling and treatment of Indian families and for the temporary custody of Indian children with the goal of strengthening Indian families and preventing parent-child separations;

(3) Family assistance, including homemaker and home counselors, protective day care and afterschool care, recreational activities, respite care, and employment support services with the goal of strengthening Indian families and contributing to family stability;

(4) Home improvement programs with the primary emphasis on preventing the removal of children due to unsafe home environments by making homes safer, but not to make extensive structural home improvements;

(5) The employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters, but not to establish tribal court systems;

(6) Education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) A subsidy program under which Indian adoptive children not eligible for state or BIA subsidy programs may be provided support comparable to that for which they could be eligible as foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(8) Guidance, legal representation and advice to Indian families involved in tribal, state, or Federal child custody proceedings; and

(9) Other programs designed to meet the intent and purposes of the Act.

(b) Grants may be provided to tribes in the preparation and implementation of child welfare codes within their jurisdiction or pursuant to a tribal-state agreement.

(c) Grantees under this subpart may enhance their capabilities by utilizing ICWA funds as non-Federal matching shares in connection with funds provided under titles IV-B, IV-E and XX of the Social Security Act or other Federal programs which contribute to and promote the intent and purposes of the Act through the provision of comprehensive child and family services in coordination with other tribal, Federal, state, and local resources available for the same purpose.

(d) Program income resulting from the operation of programs under this subpart, such as day care operations, may be retained and used for purposes similar to those for which the grant was awarded.

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§23.23 Tribal government application contents.

(a) The appropriate Regional Director shall, subject to the tribe's fulfillment of the mandatory application requirements and the availability of appropriated funds, make a grant to the tribal governing body of a tribe or consortium of tribes eligible to apply for a grant under this subpart.

(b) The following mandatory tribal application requirements must be submitted to the appropriate Agency Superintendent or Regional Director in accordance with the timeframe established in §23.21 (b) of this subpart:

(1) A current tribal resolution requesting a grant by the Indian tribe(s) to be served by the grant. If an applicant is applying for a grant benefiting more than one tribe (consortium), an authorizing resolution from each tribal government to be served must be included. The request must be in the form of a current tribal resolution by the tribal governing body and shall include the following information:

(i) The official name of tribe(s) applying for the grant and who will directly benefit from or receive services from the grant;

(ii) The proposed beginning and ending dates of the grant;

(iii) A provision stating that the resolution will remain in effect for the duration of the program or until the resolution expires or is rescinded; and

(iv) The signature of the authorized representative of the tribal government and the date thereof.

(2) A completed Application for Federal Assistance form, SF-424.

(3) A narrative needs assessment of the social problems or issues affecting the resident Indian population to be served; the geographic area(s) to be served; and estimated number of resident Indian families and/or persons to receive benefits or services from the program.

(4) A comprehensive developmental multi-year plan in narrative form describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include:

(i) The program goals and objectives, stated in measurable terms, to be achieved through the grant;

(ii) A narrative description of how Indian families and communities will benefit from the program; and

(iii) The methodology, including culturally defined approaches, and procedures by which the tribe(s) will accomplish the identified goals and objectives.

(5) An internal monitoring system to measure progress and accomplishments, and to assure that the quality and quantity of actual performance conforms to the requirements of the grant.

(6) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services.

(i) The plan must include proposed key personnel; their qualifications, training or experience relevant to the services to be provided; responsibilities; Indian preference criteria for employment; and position descriptions.

(ii) In accordance with 25 U.S.C. 3201 et seq. (Pub. L. 101-630), title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute. Grantees must initiate character and background investigations of said personnel prior to their actual employment, and complete the investigations in a timely manner.

(7) A program budget and budget narrative justification submitted on an annual basis for the amount of the award and supported by the proposed plan, appropriate program services and activities for the applicable grant year.

(8) Identification of any consultants and/or subgrantees the applicant proposes to employ; a description of the consultant and/or subgrantee services to be rendered; the qualifications and experience in performing the identified services; and the basis for the cost and amount to be paid for such services.

(9) A certification by a licensed accountant that the bookkeeping and accounting procedures which the tribe(s) uses or intends to use meet existing Federal standards for grant management and administration specified at §23.46.

(10) A system for managing property and recordkeeping which complies with subpart D of 43 CFR part 2 implementing the Privacy Act (5 U.S.C. 552a) and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant.

(11) A listing of equipment, facilities, and buildings necessary to carry out the grant program. Liability insurance coverage for buildings and their contents is recommended for grantees under this subpart.

(12) Pursuant to the Drug-Free Workplace Act of 1988, tribal programs shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) Continued annual funding of an ICWA program under this subpart shall be contingent upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation must be submitted together with an annual budget and budget narrative justification in accordance with paragraph (b)(7) of this section. Minimum standards for receiving a satisfactory evaluation shall include:

(1) The timely submission of all fiscal and programmatic reports;

(2) A narrative program report indicating work accomplished in accordance with the applicant's approved multi-year plan and, if applicable, a description of any modification in programs or activities to be funded in the next fiscal year; and

(3) The implementation of mutually determined corrective action measures, if applicable.

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Subpart D—Grants to Off-Reservation Indian Organizations for Title II Indian Child and Family Service Programs

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§23.31 Competitive off-reservation grant process.

(a) Grant application procedures and related information may be obtained from the Regional Director designated at §23.11 for processing ICWA notices for the state in which the applicant is located. Pre-award and ongoing technical assistance of off-reservation Indian organization grantees shall be provided in accordance with §23.42.

(b) Prior to the beginning of or during the applicable year(s) in which grants for off-reservation programs will be awarded competitively, the Assistant Secretary—Indian Affairs shall publish in the F R an announcement of the grant application process for the year(s), including program priorities or special considerations (if any), applicant eligibility criteria, the required application contents, the amount of available funding and evaluation criteria for off-reservation programs.

(c) Based on the announcement described in paragraph (b) of this section, an off-reservation applicant shall prepare a multi-year developmental application in accordance with §23.33 of this subpart. To be considered in the area competitive review and scoring process, a complete application must be received by the deadline announced in the F R by the Regional Director designated at §23.11 for processing ICWA notices for the state in which the applicant is located.

(d) Eligibility requirements for off-reservation Indian organizations. The Secretary or his/her designee shall, contingent upon the availability of funds, make a multi-year grant under this subpart for an off-reservation program when officially requested by a resolution of the board of directors of the Indian organization applicant, upon the applicant's fulfillment of the mandatory application requirements and upon the applicant's successful competition pursuant to §23.33 of this subpart.

(e) A grant under this subpart for an off-reservation Indian organization shall be limited to the board of directors of the Indian organization which will administer the grant.

(f) Continued annual funding of a multi-year grant award to an off-reservation ICWA program under this subpart shall be contingent upon the grantee's fulfillment of the requirements delineated at §23.33 (e).

(g) Monitoring and program reporting requirements for grants awarded to off-reservation Indian organizations under this subpart are delineated at §§23.44 and 23.47.

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§23.32 Purpose of off-reservation grants.

The Secretary or his/her designee is authorized to make grants to off-reservation Indian organizations to establish and operate off-reservation Indian child and family service programs for the purpose of stabilizing Indian families and tribes, preventing the breakup of Indian families and, in particular, to ensure that the permanent removal of an Indian child from the custody of his/her Indian parent or Indian custodian shall be a last resort. Child and family service programs may include, but are not limited to:

(a) A system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(b) The operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children with the goal of strengthening and stabilizing Indian families;

(c) Family assistance (including homemaker and home counselors), protective day care and afterschool care, employment support services, recreational activities, and respite care with the goal of strengthening Indian families and contributing toward family stability; and

(d) Guidance, legal representation and advice to Indian families involved in state child custody proceedings.

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§23.33 Competitive off-reservation application contents and application selection criteria.

(a) An application for a competitive multi-year grant under this subpart shall be submitted to the appropriate Regional Director prior to or on the announced deadline date published in the F R . The Regional Director shall certify the application contents pursuant to §23.34 and forward the application within five working days to the area review committee, composed of members designated by the Regional Director, for competitive review and action. Modifications and/or information received after the close of the application period, as announced in the F R , shall not be reviewed or considered by the area review committee in the competitive process.

(b) Mandatory application requirements for Indian organization applicants shall include:

(1) An official request for an ICWA grant program from the organization's board of directors covering the duration of the proposed program;

(2) A completed Application for Federal Assistance form, SF 424;

(3) Written assurances that the organization meets the definition of Indian organization at §23.2;

(4) A copy of the organization's current Articles of Incorporation for the applicable grant years;

(5) Proof of the organization's nonprofit status;

(6) A copy of the organization's IRS tax exemption certificate and IRS employer identification number;

(7) Proof of liability insurance for the applicable grant years; and

(8) Current written assurances that the requirements of Circular A-128 for fiscal management, accounting, and recordkeeping are met.

(9) Pursuant to the Drug-Free Workplace Act of 1988, all grantees under this subpart shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) Competitive application selection criteria. The Regional Director or his/her designated representative shall select those proposals which will in his/her judgment best promote the proposes of the Act. Selection shall be made through the area review committee process in which each application will be scored individually and ranked according to score, taking into consideration the mandatory requirements as specified above and the following selection criteria:

(1) The degree to which the application reflects an understanding of the social problems or issues affecting the resident Indian client population which the applicant proposes to serve;

(2) Whether the applicant presents a narrative needs assessment, quantitative data and demographics of the client Indian population to be served;

(3) Estimates of the number of Indian people to receive benefits or services from the program based on available data;

(4) Program goals and objectives to be achieved through the grant;

(5) A comprehensive developmental multi-year narrative plan describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include a narrative description of the program; the program goals and objectives, stated in measurable terms, to be achieved through the grant; and the methodology, including culturally defined approaches, and procedures by which the grantee will accomplish the identified goals and objectives;

(6) An internal monitoring system the grantee will use to measure progress and accomplishments, and to ensure that the quality and quantity of actual performance conforms to the requirements of the grant;

(7) Documentation of the relative accessibility which the Indian population to be served under a specific proposal already has to existing child and family service programs emphasizing the prevention of Indian family breakups, such as mandatory state services. Factors to be considered in determining accessibility include:

(i) Cultural barriers;

(ii) Discrimination against Indians;

(iii) Inability of potential Indian clientele to pay for services;

(iv) Technical barriers created by existing public or private programs;

(v) Availability of transportation to existing programs;

(vi) Distance between the Indian community to be served under the proposal and the nearest existing programs;

(vii) Quality of services provided to Indian clientele; and

(viii) Relevance of services provided to specific needs of the Indian clientele.

(8) If the proposed program duplicates existing Federal, state, or local child and family service programs emphasizing the prevention of Indian family breakups, proper and current documented evidence that repeated attempts to obtain services have been unsuccessful;

(9) Evidence of substantial support from the Indian community or communities to be served, including but not limited to:

(i) Tribal support evidenced by a tribal resolution or cooperative service agreements between the administrative bodies of the affected tribe(s) and the applicant for the duration of the grant period, or

(ii) Letters of support from social services organizations familiar with the applicant's past work experience;

(10) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services. The plan must include proposed key personnel, their qualifications, training or experience relevant to the services to be provided, responsibilities, Indian preference criteria for employment and position descriptions. In accordance with 25 U.S.C. 3201 et seq. (Pub. L. 101-630), title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute prior to their actual employment;

(11) The reasonableness and relevance of the estimated overall costs of the proposed program or services and their overall relation to the organization's funding base, activities, and mission;

(12) The degree to which the detailed annual budget and justification for the requested funds are consistent with, and clearly supported by, the proposed plan and by appropriate program services and activities for the applicable grant year;

(13) The applicant's identification of any consultants and/or subgrantees it proposes to employ; description of the services to be rendered; the qualifications and experience of said personnel, reflecting the requirements for performing the identified services; and the basis for the cost and the amount to be paid for such services;

(14) Certification by a licensed accountant that the bookkeeping and accounting procedures that the applicant uses or intends to use meet existing Federal standards for grant administration and management specified at §23.46;

(15) The compliance of property management and recordkeeping systems with subpart D of 43 CFR part 2 (the Privacy Act, 5 U.S.C. 552a), and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant;

(16) A description of the proposed facilities, equipment, and buildings necessary to carry out the grant activities; and

(17) Proof of liability insurance coverage for the applicable grant year(s).

(d) Two or more applications receiving the same competitive score will be prioritized in accordance with announcements made in the F R pursuant to §23.31 (b) for the applicable year(s).

(e) Continued annual funding of a multi-year grant award to an off-reservation ICWA program under this subpart shall be contingent upon the availability of appropriated funds and upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation shall be submitted together with an annual budget and budget narrative justification in accordance with paragraph (c)(10) of this section. Minimum standards for receiving a satisfactory evaluation shall include the timely submission of all fiscal and programmatic reports; a narrative program report indicating work accomplished in accordance with the initial approved multi-year plan; and the implementation of mutually determined corrective action measures, if applicable.

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§23.34 Review and decision on off-reservation applications by Regional Director.

(a) Area office certification. Upon receipt of an application for a grant by an off-reservation Indian organization at the area office, the Regional Director shall:

(1) Complete and sign the area office certification form. In completing the area certification form, the Regional Director shall assess and certify whether applications contain and meet all the application requirements specified at §23.33. Regional Directors shall be responsible for the completion of the area office certification forms for all applications submitted by off-reservation Indian organizations.

(2) Acknowledge receipt of the application to the applicant and advise the applicant of the disposition of the application within 10 days of receipt; and

(3) Transmit all applications within five working days of receipt to the area review committee for competitive review and subsequent approval or disapproval of the applications.

(b) Area office competitive review and decision for off-reservation applications. Upon receipt of an application for an off-reservation grant under this part requiring the approval of the Regional Director, the Regional Director shall:

(1) Establish and convene an area review committee, chaired by a person qualified by knowledge, training and experience in the delivery of Indian child and family services.

(2) Review the area office certification form required in paragraph (a) of this section.

(3) Review the application in accordance with the competitive review procedures prescribed in §23.33. An application shall not receive approval for funding under the area competitive review and scoring process unless a review of the application determines that it:

(i) Contains all the information required in §23.33 which must be received by the close of the application period. Modifications of the grant application received after the close of the application period shall not be considered in the competitive review process.

(ii) Receives at least the established minimum score in an area competitive review, using the application selection criteria and scoring process set out in §23.33. The minimum score shall be established by the Central Office prior to each application period and announced in the F R for the applicable grants year(s).

(4) Approve or disapprove the application and promptly notify the applicant in writing of the approval or disapproval of the application. If the application is disapproved, the Regional Director shall include in the written notice the specific reasons therefore.

(c) The actual funding amounts for the initial grant year shall be subject to appropriations available nationwide and the continued funding of an approved off-reservation grant application under subpart D of this part shall be subject to available funds received by the respective area office for the applicable grant year. Initial funding decisions and subsequent

decisions with respect to funding level amounts for all approved grant applications under this part shall be made by the Regional Director.

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§23.35 Deadline for Central Office action.

Within 30 days of the receipt of grant reporting forms from the Regional Directors identifying approved and disapproved applications pursuant to subpart D of this part and recommended funding levels for approved applications, the Secretary or his/her designee shall process the Regional Directors' funding requests.

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Subpart E—General and Uniform Grant Administration Provisions and Requirements

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§23.41 Uniform grant administration provisions, requirements and applicability.

The general and uniform grant administration provisions and requirements specified at 25 CFR part 276 and under this subpart are applicable to all grants awarded to tribal governments and off-reservation Indian organizations under this part, except to the extent inconsistent with an applicable Federal statute, regulation or OMB circular.

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§23.42 Technical assistance.

(a) Pre-award and ongoing technical assistance may be requested by an Indian tribe or off-reservation Indian organization from the appropriate agency or area office to which the tribe or organization will be submitting an application for funds under subparts C and D of this part. A request for pre-award technical assistance by an off-reservation Indian organization must be received by the Regional Director designated at §23.11 for the state in which the applicant is located no later than 10 days prior to the application deadline to assure sufficient time for area response.

(b) Pre-award and ongoing technical assistance may be provided by the appropriate BIA agency or area office for purposes of program planning and design, assistance in establishing internal program monitoring and evaluation criteria for ongoing grant administration and management, and for other appropriate assistance requested.

(c) The area social services staff shall provide technical assistance to grantees upon receipt of an authorized request from the grantee or when review of the grantee's quarterly performance reports shows that:

(1) An ICWA program is yielding results that are or will be detrimental to the welfare of the intended Indian beneficiaries of the program;

(2) A program has substantially failed to implement its goals and objectives;

(3) There are serious irregularities in the fiscal management of the grant; or

(4) The grantee is otherwise deficient in its program performance.

(5) Upon receiving an authorized request from the grantee, the area social services staff and/or grants officer shall provide the necessary technical assistance to arrive at mutually determined corrective action measures and their actual implementation, if necessary, and the timeframes within which said corrective actions will be implemented.

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§23.43 Authority for grant approval and execution.

(a) Tribal government programs. The appropriate Agency Superintendent or Regional Director may approve a grant application and its subsequent execution under subpart C when the intent, purpose and scope of the application pertains solely to reservations located within the service area jurisdiction of the agency or area office.

(b) Off-reservation programs. The appropriate Regional Director may approve a grant application and its subsequent execution under subpart D when the intent, purpose and scope of the grant proposal pertains to off-reservation Indian service populations or programs.

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§23.44 Grant administration and monitoring.

All grantees under this part shall be responsible for managing day-to-day program operations to ensure that program performance goals are being achieved and to ensure compliance with the provisions of the grant award document and other applicable Federal requirements. Unless delegated to the Agency Superintendent, appropriate area office personnel designated by the Regional Director shall be responsible for all grant program and fiscal monitoring responsibilities.

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§23.45 Subgrants.

A tribal government grantee may make a subgrant under subpart C of this part, provided that such subgrants are for the purpose for which the grant was made and that the grantee retains administrative and financial responsibility over the activity and the funds.

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§23.46 Financial management, internal and external controls and other assurances.

Grantee financial management systems shall comply with the following standards for accurate, current and complete disclosure of financial activities.

(a) OMB Circular A-87 (Cost principles for state and local governments and federally recognized Indian tribal governments).

(b) OMB Circular A-102 (Common rule 43 CFR part 12).

(c) OMB Circular A-128 (Single Audit Act).

(d) OMB Circular A-110 or 122 (Cost principles for non-profit organizations and tribal organizations, where applicable).

(e) Internal control. Effective control and accountability must be maintained for all grants. Grantees must adequately safeguard any property and must ensure that it is used solely for authorized purposes.

(f) Budget control. Actual expenditures must be compared with budgeted amounts for the grant. Financial information must be related to program performance requirements.

(g) Source documentation. Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, grant documents, or other information required by the grantee's financial management system. The Secretary or his/her designee may review the adequacy of the financial management system of an Indian tribe(s) or off-reservation Indian organization applying for a grant under this part.

(h) Pursuant to 18 U.S.C. 641, whoever embezzles, steals, purloins, or knowingly converts to his or her use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or whoever receives, conceals, or retains the same with intent to convert it to his or her use or gain, knowing it to have been embezzled, stolen, purloined, or converted shall be fined not more than $10,000 or imprisoned not more than 10 years, or both; but if the value of such property does not exceed the sum of $100, he or she shall be fined not more than $1,000 or imprisoned not more than one year, or both.

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§23.47 Reports and availability of information to Indians.

(a) Any tribal government or off-reservation Indian organization receiving a grant under this part shall make general programmatic information and reports concerning that grant available to the Indian people it serves or represents. Access to this information may be requested in writing and shall be made available within 10 days of receipt of the request. Except as required by title IV of Pub. L. 101-630, the Indian Child Protection and Family Violence Prevention Act, grantees shall hold confidential all information obtained from persons receiving services from the program, and shall not release such information without the individual's written consent. Information may be disclosed in a manner which does not identify or lead to the identification of particular individuals.

(b) Grantees shall submit Standard Form 269 or 269A on a quarterly and an annual basis to report their status of funds by the dates specified in the grant award document.

(c) Grantees shall furnish and submit the following written quarterly and annual program reports by the dates specified in the award document:

(1) Quarterly and annual statistical and narrative program performance reports which shall include, but need not be limited to, the following;

(i) A summary of actual accomplishments and significant activities as related to program objectives established for the grant period;

(ii) The grantee's evaluation of program performance using the internal monitoring system submitted in their application;

(iii) Reports on all significant ICWA direct service grant activities including but not limited to the following information:

(A) Significant title II activities;

(B) Data reflecting numbers of individuals referred for out-of-home placements, number of individuals benefiting from title II services and types of services provided, and

(C) Information and referral activities.

(iv) Child abuse and neglect statistical reports and related information as required by 25 U.S.C. 2434, Pub. L. 99-570, the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986;

(v) A summary of problems encountered or reasons for not meeting established objectives;

(vi) Any deliverable or product required in the grant; and

(vii) Additional pertinent information when appropriate.

(2) The BIA may negotiate for the provision of other grant-related reports not previously identified.

(d) Events may occur between scheduled performance reporting dates which have significant impact on the grant-supported activity. In such cases, the grantee must inform the awarding agency as soon as problems, delays, adverse conditions, or serious incidents giving rise to liability become known and which will materially impair its ability to meet the objectives of the grant.

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§23.48 Matching shares and agreements.

(a) Grant funds provided to Indian tribes under subpart C of this part may be used as non-Federal matching shares in connection with funds provided under titles IV-B, IV-E and XX of the Social Security Act or such other Federal programs which contribute to and promote the purposes of the Act as specified in §§23.3 and 23.22 (25 U.S.C. 1931).

(b) Pursuant to 25 U.S.C. 1933, in furtherance of the establishment, operation, and funding of programs funded under subparts C and D of this part, the Secretary may enter into agreements with the Secretary of Health and Human Services. The latter Secretary is authorized by the Act to use funds appropriated for the Department of Health and Human Services for programs similar to those funded under subparts C and D of this part (25 U.S.C. 1931 and 1932), provided that authority to make payment pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

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§23.49 Fair and uniform provision of services.

(a) Grants awarded under this part shall include provisions assuring compliance with the Indian Civil Rights Act; prohibiting discriminatory distinctions among eligible Indian beneficiaries; and assuring the fair and uniform provision by the grantees of the services and assistance they provide to eligible Indian beneficiaries under such grants. Such procedures must include criteria by which eligible Indian beneficiaries will receive services, recordkeeping mechanisms adequate to verify the fairness and uniformity of services in cases of formal complaints, and an explanation of what rights will be afforded an individual pending the resolution of a complaint.

(b) Indian beneficiaries of the services to be rendered under a grant shall be afforded access to administrative or judicial bodies empowered to adjudicate complaints, claims, or grievances brought by such Indian beneficiaries against the grantee arising out of the performance of the grant.

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§23.50 Service eligibility.

(a) Tribal government Indian child and family service programs. Any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in §23.2 is eligible for services provided under 25 U.S.C. 1931 of the Act. Tribal membership status shall be determined by tribal law, ordinance, or custom. The tribe may, under subpart C, extend services to nontribal family members related by marriage to tribal members, provided such services promote the intent and purposes of the Act. A tribe may also, within available resources, extend services under this part to individuals who are members of, or are eligible for membership in other Indian tribes, and who reside within the tribe's designated service area.

(b) Off-reservation Indian child and family service programs and agreements with the Secretary of Health and Human Services pursuant to 25 U.S.C. 1933. For purposes of eligibility for services provided under 25 U.S.C. 1932 and 1933 of the Act, any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in §23.2, or the definition of Indian as defined in 25 U.S.C. 1603(c), shall be eligible for services. Tribal membership status shall be determined by tribal law, ordinance, or custom.

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§23.51 Grant carry-over authority.

Unless restricted by appropriation, and contingent upon satisfactory program evaluations from the appropriate area or agency office for an existing program, grantees are authorized to carry over unliquidated grant funds which remain at the end of a budget period. Such funds may be carried over for a maximum period of two years beyond the initial grant funding period and must be utilized only for the intent, purpose and scope of the original grant. These carry-over grant funds shall not be reprogrammed into other appropriation activities or subactivities. Funds carried over into another fiscal year will be added to the grantee's new fiscal year funding amount.

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§23.52 Grant suspension.

(a) When a grantee has materially failed to comply and remains out of compliance with the terms and conditions of the grant, the grants officer may, after reasonable notice to the grantee and the provision of requested technical assistance, suspend the grant. The notice preceding the suspension shall include the effective date of the suspension, the corrective measures necessary for reinstatement of the grant and, if there is no immediate threat to safety, a reasonable timeframe for corrective action prior to actual suspension.

(b) No obligation incurred by the grantee during the period of suspension shall be allowable under the suspended grant, except that the grants officer may at his/her discretion allow necessary and proper costs which the grantee could not reasonably avoid during the period of suspension if such costs would otherwise be allowable under the applicable cost principles.

(c) Appropriate adjustments to the payments under the suspended grant will be made either by withholding the payments or by not allowing the grantee credit for disbursements which the grantee may make in liquidation of unauthorized obligations the grantee incurs during the period of suspension.

(d) Suspension shall remain in effect until the grantee has taken corrective action to the satisfaction of the grants officer, or given assurances satisfactory to the grants officer that corrective action will be taken, or until the grants officer cancels the grant.

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§23.53 Cancellation.

(a) The grants officer may cancel any grant, in whole or in part, at any time before the date of completion whenever it is determined that the grantee has:

(1) Materially failed to comply with the terms and conditions of the grant;

(2) Violated the rights as specified in §23.49 or endangered the health, safety, or welfare of any person; or

(3) Been grossly negligent in, or has mismanaged the handling or use of funds provided under the grant.

(b) When it appears that cancellation of the grant will become necessary, the grants officer shall promptly notify the grantee in writing of this possibility. This written notice shall advise the grantee of the reason for the possible cancellation and the corrective action necessary to avoid cancellation. The grants officer shall also offer, and shall provide, if requested by the grantee, any technical assistance which may be required to effect the corrective action. The grantee shall have 60 days in which to effect this corrective action before the grants officer provides notice of intent to cancel the grant as provided for in paragraph (c) of this section.

(c) Upon deciding to cancel for cause, the grants officer shall promptly notify the grantee in writing of that decision, the reason for the cancellation, and the effective date. The Regional Director or his/her designated official shall also provide a hearing for the grantee before cancellation. However, the grants officer may immediately cancel the grant, upon notice to the grantee, if the grants officer determines that continuance of the grant poses an immediate threat to safety. In this event, the Regional Director or his/her designated official shall provide a hearing for the grantee within 10 days of the cancellation.

(d) The hearing referred to in paragraph (c) of this section shall be conducted as follows:

(1) The grantee affected shall be notified, in writing, at least 10 days before the hearing. The notice should give the date, time, place, and purpose of the hearing.

(2) A written record of the hearing shall be made. The record shall include written statements submitted at the hearing or within five days following the hearing.

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§23.61 Appeals from decision or action by Agency Superintendent, Regional Director or Grants Officer.

A grantee or prospective applicant may appeal any decision made or action taken by the Agency Superintendent, Regional Director, or grants officer under subpart C or E of this part. Such an appeal shall be made to the Assistant Secretary who shall consider the appeal in accordance with 25 CFR 2.20 (c) through (e). Appeal procedures shall be as set out in part 2 of this chapter.

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§23.62 Appeals from decision or action by Regional Director under subpart D.

A grantee or applicant may appeal any decision made or action taken by the Regional Director under subpart D that is alleged to be in violation of the U.S. Constitution, Federal statutes, or the regulations of this part. These appeals shall be filed with the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (e); 43 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.340. However, an applicant may not appeal a score assigned to its application or the amount of grant funds awarded.

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§23.63 Appeals from inaction of official.

A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, may make the official's inaction the subject of an appeal under part 2 of this chapter.

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§23.71 Recordkeeping and information availability.

(a) The Division of Human Services, Bureau of Indian Affairs (BIA), is authorized to receive all information and to maintain a central file on all State Indian adoptions. This file is confidential and only designated persons may have access to it.

(b) Upon the request of an adopted Indian who has reached age 18, the adoptive or foster parents of an Indian child, or an Indian Tribe, BIA will disclose such information as may be necessary for purposes of Tribal enrollment or determining any rights or benefits associated with Tribal membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, BIA must certify to the Indian child's Tribe, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment under the criteria established by such Tribe.

(c) BIA will ensure that the confidentiality of this information is maintained and that the information is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.

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Subpart H—Assistance to State Courts

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§23.81 Assistance in identifying witnesses.

Upon the request of a party in an involuntary Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying qualified expert witnesses. Such requests for assistance shall be sent to the Regional Director designated in §23.11(c). The BIA is not obligated to pay for the services of such expert witnesses.

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§23.82 Assistance in identifying language interpreters.

Upon the request of a party in an Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying language interpreters. Such requests for assistance should be sent to the Regional Director designated in §23.11(c). The BIA is not obligated to pay for the services of such language interpreters.

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§23.83 Assistance in locating biological parents of Indian child after termination of adoption.

Upon the request of a child placement agency, the court or an Indian tribe, the Secretary or his/her designee shall assist in locating the biological parents or prior Indian custodians of an adopted Indian child whose adoption has been terminated pursuant to 25 U.S.C. 1914. Such requests for assistance should be sent to the Regional Director designated in §23.11(c).

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§23.101 What is the purpose of this subpart?

The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

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§23.102 What terms do I need to know?

The following terms and their definitions apply to this subpart. All other terms have the meanings assigned in §23.2.

Agency means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and

social work necessary for foster, preadoptive, or adoptive placements.

Indian organization means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a Tribe, or a majority of whose members are Indians.

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§23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of “Indian child,” then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

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§23.104 What provisions of this subpart apply to each type of child-custody proceeding?

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in §23.103(a):

Section	Type of proceeding
23.101-23.106 (General Provisions)	Emergency, Involuntary, Voluntary.
Pretrial Requirements:	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?)	Emergency, Involuntary, Voluntary.
23.108 (Who makes the determination as to whether a child is a member whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?)	Emergency, Involuntary, Voluntary.
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?)	Emergency, Involuntary, Voluntary.
23.110 (When must a State court dismiss an action?)	Involuntary, Voluntary.
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?)	Involuntary (foster-care placement and termination of parental rights).
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and termination of parental rights).
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency.
23.114 (What are the requirements for determining improper removal?)	Involuntary.
Petitions to Transfer to Tribal Court:	
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and

	termination of parental rights).
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.118 (How is a determination of “good cause” to deny transfer made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
Adjudication of Involuntary Proceedings:	
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and termination of parental rights).
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and termination of parental rights).
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement and termination of parental rights).
23.123 Reserved	N/A.
Voluntary Proceedings:	
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary.
23.125 (How is consent obtained?)	Voluntary.
23.126 (What information must a consent document contain?)	Voluntary.
23.127 (How is withdrawal of consent to a foster-care placement achieved?)	Voluntary.
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary.
Dispositions:	
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary.
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary.
23.131 (What placement preferences apply in foster-care or preadoptive placements?)	Involuntary, Voluntary.
23.132 (How is a determination of “good cause” to depart from the placement preferences made?)	Involuntary, Voluntary.
Access:	
23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary.
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary.
23.135 Reserved.	N/A.
Post-Trial Rights & Responsibilities:	
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?)	Involuntary (if consent given under threat of removal), voluntary.
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent it involved a specified violation), involuntary, voluntary.
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary.
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary.
Recordkeeping:	
23.140 (What information must States furnish to the Bureau of Indian Affairs?)	Involuntary, Voluntary.
23.141 (What records must the State maintain?)	Involuntary, Voluntary.
23.142 (How does the Paperwork Reduction Act affect this subpart?)	Emergency, Involuntary, Voluntary.
Effective Date:	
23.143 (How does this subpart apply to pending proceedings?)	Emergency, Involuntary, Voluntary.
Severability:	
23.144 (What happens if some portion of part is held to be invalid by a court of competent jurisdiction?)	Emergency, Involuntary, Voluntary.

Note: For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

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§23.105 How do I contact a Tribe under the regulations in this subpart?

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the F R each year and makes the list available on its Web site at www.bia.gov.

(b) For a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to be directed to the appropriate office or individual.

(c) If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, DC (see www.bia.gov).

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§23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

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§23.107 How should a State court determine if there is reason to know the child is an Indian child?

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an “Indian child,” the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an “Indian child” in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an “Indian child.” A Tribe receiving information related to this inquiry must keep documents and information confidential.

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§23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?

(a) The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.

(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

(c) The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an “Indian child.” An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation.

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§23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

(a) If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe.

(b) If the Indian child meets the definition of “Indian child” through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of “Indian child” through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

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§23.110 When must a State court dismiss an action?

Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and §23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:

(a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

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§23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental-rights proceeding is an Indian child, the court must ensure that:

(1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and

(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to:

(1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (see §23.105 for information on how to contact a Tribe);

(2) The child's parents; and

(3) If applicable, the child's Indian custodian.

(c) Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

(d) Notice must be in clear and understandable language and include the following:

(1) The child's name, birthdate, and birthplace;

(2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;

(3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;

(4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);

(5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;

(6) Statements setting out:

(i) The name of the petitioner and the name and address of petitioner's attorney;

(ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.

(iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.

(iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.

(v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.

(vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and §23.115.

(vii) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.

(viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.

(ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

(e) If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in §23.112, and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

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§23.112 What time limits and extensions apply?

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and §23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows:

(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111;

(2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111;

(3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the child-custody proceeding as provided in 25 U.S.C. 1912(a) and §23.111; and

(4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and §23.111 may also be available under State law or pursuant to extensions granted by the court.

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§23.113 What are the standards for emergency proceedings involving an Indian child?

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;

(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or

(3) Restoring the child to the parent or Indian custodian.

(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child;

(2) The name and address of the child's parents and Indian custodians, if any;

(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;

(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov);

(5) The residence and the domicile of the Indian child;

(6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;

(7) The Tribal affiliation of the child and of the parents or Indian custodians;

(8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;

(9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and

(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;

(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and

(3) It has not been possible to initiate a “child-custody proceeding” as defined in §23.2.

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§23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent

or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

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§23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

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§23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

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§23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

(a) Either parent objects to such transfer;

(b) The Tribal court declines the transfer; or

(c) Good cause exists for denying the transfer.

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§23.118 How is a determination of “good cause” to deny transfer made?

(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.

(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider:

(1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;

(2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;

(3) Whether transfer could affect the placement of the child;

(4) The Indian child's cultural connections with the Tribe or its reservation; or

(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

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§23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

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§23.120 How does the State court ensure that active efforts have been made?

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail in the record.

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§23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

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§23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

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§23.124 What actions must a State court undertake in voluntary proceedings?

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in §23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in §23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

(c) State courts must ensure that the placement for the Indian child complies with §§23.129-23.132.

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§23.125 How is consent obtained?

(a) A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain to the parent or Indian custodian:

(1) The terms and consequences of the consent in detail; and

(2) The following limitations, applicable to the type of child-custody proceeding for which consent is given, on withdrawal of consent:

(i) For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned; or

(ii) For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or

(iii) For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.

(c) The court must certify that the terms and consequences of the consent were explained on the record in detail in English (or the language of the parent or Indian custodian, if English is not the primary language) and were fully understood by the parent or Indian custodian.

(d) Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(e) A consent given prior to, or within 10 days after, the birth of an Indian child is not valid.

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§23.126 What information must a consent document contain?

(a) If there are any conditions to the consent, the written consent must clearly set out the conditions.

(b) A written consent to foster-care placement should contain, in addition to the information specified in paragraph (a) of this section, the name and birthdate of the Indian child; the name of the Indian child's Tribe; the Tribal enrollment number for the parent and for the Indian child, where known, or some other indication of the child's membership in the Tribe; the name, address, and other identifying information of the consenting parent or Indian custodian; the name and address of the person or entity, if any, who arranged the placement; and the name and address of the prospective foster parents, if known at the time.

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§23.127 How is withdrawal of consent to a foster-care placement achieved?

(a) The parent or Indian custodian may withdraw consent to voluntary foster-care placement at any time.

(b) To withdraw consent, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(c) When a parent or Indian custodian withdraws consent to a voluntary foster-care placement, the court must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.

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§23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?

(a) A parent may withdraw consent to voluntary termination of parental rights at any time prior to the entry of a final decree of termination.

(b) A parent or Indian custodian may withdraw consent to voluntary adoption at any time prior to the entry of a final decree of adoption.

(c) To withdraw consent prior to the entry of a final decree of adoption, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(d) The court in which the withdrawal of consent is filed must promptly notify the person or entity who arranged any voluntary preadoptive or adoptive placement of such filing, and the Indian child must be returned to the parent or Indian custodian as soon as practicable.

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§23.129 When do the placement preferences apply?

(a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in §23.130 and §23.131 apply.

(b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.

(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under §23.132 exists to not apply those placement preferences.

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§23.130 What placement preferences apply in adoptive placements?

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) Other members of the Indian child's Tribe; or

(3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

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§23.131 What placement preferences apply in foster-care or preadoptive placements?

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that:

(1) Most approximates a family, taking into consideration sibling attachment;

(2) Allows the Indian child's special needs (if any) to be met; and

(3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;

(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

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§23.132 How is a determination of “good cause” to depart from the placement preferences made?

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is “good cause” to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

(1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) The presence of a sibling attachment that can be maintained only through a particular placement;

(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

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§23.133 Should courts allow participation by alternative methods?

If it possesses the capability, the court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

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§23.134 Who has access to reports and records during a proceeding?

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

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§23.135 [Reserved]

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§23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, the State court may invalidate the voluntary adoption upon finding that the parent's consent was obtained by fraud or duress.

(b) Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition.

(c) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the final decree of adoption, order the consent revoked, and order that the child be returned to the parent.

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§23.137 Who can petition to invalidate an action for certain ICWA violations?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster-care placement or termination of parental rights under state law where it is alleged that 25 U.S.C. 1911, 1912, or 1913 has been violated:

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's Tribe.

(b) Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.

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§23.138 What are the rights to information about adoptees' Tribal affiliations?

Upon application by an Indian who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree of adoption must inform such individual of the Tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

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§23.139 Must notice be given of a change in an adopted Indian child's status?

(a) If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe whenever:

(1) A final decree of adoption of the Indian child has been vacated or set aside; or

(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child.

(b) The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court.

(1) Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.

(2) The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained in detail in English (or the language of the parent or Indian custodian, if English is not the primary language), and were fully understood by the parent or Indian custodian.

(3) Where confidentiality is requested or indicated, execution of the waiver need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(4) The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.

(5) A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation.

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§23.140 What information must States furnish to the Bureau of Indian Affairs?

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information, in an envelope marked “Confidential”:

(1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;

(2) Names and addresses of the biological parents;

(3) Names and addresses of the adoptive parents;

(4) Name and contact information for any agency having files or information relating to the adoption;

(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and

(6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

(b) If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in paragraph (a) of this section, the State courts in that State need not fulfill those same duties.

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§23.141 What records must the State maintain?

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

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§23.142 How does the Paperwork Reduction Act affect this subpart?

The collections of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned OMB Control Number 1076-0186. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number. Send comments regarding this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer —Indian Affairs, 1849 C Street NW., Washington, DC 20240.

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§23.143 How does this subpart apply to pending proceedings?

None of the provisions of this subpart affects a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement that was initiated prior to December 12, 2016, but the provisions of this subpart apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

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§23.144 What happens if some portion of this part is held to be invalid by a court of competent jurisdiction?

If any portion of this part is determined to be invalid by a court of competent jurisdiction, the other portions of the part remain in effect. For example, the Department has considered separately whether the provisions of this part apply to involuntary and voluntary proceedings; thus, if a particular provision is held to be invalid as to one type of proceeding, it is the Department's intent that it remains valid as to the other type of proceeding.

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Guidelines for

Implementing the Indian Child Welfare Act

December 2016

U.S. Department of the Interior
Office of the Assistant Secretary – Indian Affairs
Bureau of Indian Affairs

GUIDELINES FOR
IMPLEMENTING THE
INDIAN CHILD WELFARE ACT

Purpose of These Guidelines

These guidelines are intended to assist those involved in child custody proceedings in understanding and uniformly applying the Indian Child Welfare Act (ICWA) and U.S. Department of the Interior (Department) regulations (also referred to as a "rule"). All such parties – including the courts, state child welfare agencies, private adoption agencies, Tribes, and family members – have a stake in ensuring the proper implementation of this important Federal law designed to protect Indian children, their parents, and Indian Tribes.

ICWA is a statute passed by Congress and codified in the United States Code (U.S.C.). The Department promulgated ICWA regulations to implement the statute; the regulations were published in the Federal Register and will be codified in the Code of Federal Regulations (CFR).

ICWA, the statute: Codified in the United State Code (U.S.C.) at 25 U.S.C. 1901 *et seq.*
ICWA regulations: Published at 81 FR 38864 (June 14, 2016) and codified at 25 CFR part 23.

The regulations apply to any child custody proceeding initiated on or after December 12, 2016, even if the child has already undergone child custody proceedings prior to that date to which the regulation did not apply. The statute defines a "child-custody proceeding" as a foster-care placement, a termination of parental rights (TPR), a preadoptive placement, or an adoptive placement; so, if any one of these types of proceedings is initiated on or after December 12, 2016, the rule applies to that proceeding.[1]

While not imposing binding requirements, these guidelines provide a reference and resource for all parties involved in child custody proceedings involving Indian children. These guidelines explain the statute and regulations and also provide examples of best practices for the implementation of the statute, with the goal of encouraging greater uniformity in the application of ICWA. These guidelines replace the 1979 and 2015 versions of the Department's guidelines.

Reader's Tip: Under each heading of these guidelines is a regulatory provision (if there is one) and then guidelines to provide guidance, recommended practices, and suggestions for implementation. The text of the regulation is included as part of these guidelines for ease of reference and also because it reflects the Department's guidance on ICWA's requirements.

[1] *See* 25 U.S.C. 1903(1); 25 CFR § 23.2.

Context for ICWA, the Regulations, and These Guidelines

Congress enacted ICWA in 1978 to address the Federal, State, and private agency policies and practices that resulted in the ''wholesale separation of Indian children from their families.''[2] Congress found ''that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . . . ''[3] Although the crisis flowed from multiple causes, Congress found that non-Tribal public and private agencies had played a significant role, and that State agencies and courts had often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[4] To address this failure, ICWA establishes minimum Federal standards for the removal of Indian children from their families and the placement of these children in foster or adoptive homes, and confirms Tribal jurisdiction over child-custody proceedings involving Indian children.[5]

Following ICWA's enactment, the Department issued regulations in July 1979 addressing notice procedures for involuntary child custody proceedings involving Indian children, as well as governing the provision of funding for and administration of Indian child and family service programs as authorized by ICWA.[6] Those regulations did not address the specific requirements and standards that ICWA imposes upon State court child custody proceedings, beyond the requirements for contents of the notice. Also, in 1979, the Department published guidelines for State courts to use in interpreting many of ICWA's requirements in Indian child custody proceedings.[7] In 2014, the Department invited public comments to determine whether to update its guidelines to address inconsistencies in State-level ICWA implementation that had arisen since 1979 and, if so, what changes should be made. The Department held several listening sessions, including sessions with representatives of federally recognized Indian Tribes, State-court representatives (e.g., the National Council of Juvenile and Family Court Judges (NCJFCJ) and the National Center for State Courts' Conference of Chief Justices Tribal Relations Committee), the National Indian Child Welfare Association, and the National Congress of American Indians. The Department received comments from those at the listening sessions and also received written comments, including comments from individuals and additional organizations. The Department considered these comments and subsequently published updated Guidelines (2015 Guidelines) in February 2015.[8]

Many commenters on the 2015 Guidelines requested not only that the Department update its ICWA guidelines but that the Department also issue binding regulations addressing the requirements and standards that ICWA provides for State-court child-custody proceedings. Recognizing the need for such regulations, the Department engaged in a notice-and-comment process to promulgate formal ICWA regulations. The Department issued a proposed rule on March 20, 2015.[9] After gathering and reviewing comments on the

[2] H.R. Rep. No. 95-1386, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7531.
[3] 25 U.S.C. 1901(4).
[4] 25 U.S.C. 1901(4)-(5).
[5] 25 U.S.C. 1902.
[6] See 25 CFR part 23.
[7] 44 FR 67584 (Nov. 26, 1979).
[8] See 80 FR 10146 (Feb. 25, 2015).
[9] 80 FR 14480 (Mar. 20, 2015).

proposed rule, the Department issued a final rule on June 14, 2016.[10] When it issued those regulations, the Department noted that it planned to issue updated guidelines, which it is doing with these guidelines.[11] These guidelines replace both the 2015 and the 1979 versions of the Department's guidelines.

The Department has found that, since ICWA's passage in 1978, implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State. This has led to significant variation in applying ICWA's statutory terms and protections. This variation means that an Indian child and her parents in one State can receive different rights and protections under Federal law than an Indian child and her parents in another State. This disparate application of ICWA based on where the Indian child resides creates significant gaps in ICWA protections and is contrary to the uniform minimum Federal standards intended by Congress.

The need for consistent minimum Federal standards to protect Indian children, families, and Tribes still exists today. The special relationship between the United States and the Indian Tribes and their members upon which Congress based the statute continues in full force, as does the United States' direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian Tribe.[12] Native American children, however, are still disproportionately more likely to be removed from their homes and communities than other children.[13] In addition, some State court interpretations of ICWA have essentially voided Federal protections for groups of Indian children to whom ICWA clearly applies. And commenters provided numerous anecdotal accounts where Indian children were unnecessarily removed from their parents and extended families; where the rights of Indian children, their parents, or their Tribes were not protected; or where significant delays occurred in Indian child-custody proceedings due to disputes or uncertainty about the interpretation of the Federal law.

For these reasons, and to promote the consistent application of ICWA across the United States, the Department issued the June 2016 regulations and is issuing these guidelines.

[10] 81 FR 38778 (June 14, 2016).
[11] Id. at 38780.
[12] 25 U.S.C. 1901, 1901(2).
[13] See, e.g., Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, Ending Violence So Children Can Thrive 87 (Nov. 2014); National Council of Juvenile and Family Court Judges, Disproportionality Rates for Children of Color in Foster Care, Fiscal Year 2013 (June 2015).

A. General Provisions

A.1 Federal ICWA and ICWA regulations and other Federal and State law

Regulation:

§ 23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

Guidelines:

ICWA establishes the minimum procedural and substantive standards that must be met, regardless of State law. The regulations provide a binding, consistent, nationwide interpretation of ICWA's minimum standards. ICWA displaces State laws and procedures that are less protective.[14]

Many States have their own laws applying to child welfare proceedings involving Indian children that establish protections beyond the minimum Federal standards. In those instances, the more protective State law applies. For example, the Federal ICWA does not require notice requirements in voluntary child custody proceedings (although such notice is a recommended practice). Some States have passed laws that do require notice in voluntary proceedings and that higher standard of protection would apply.

A.2 Tribal-State ICWA agreements

Regulation:

(The statute (at 25 U.S.C 1919) specifies that the Tribe and State may enter into an agreement. The regulation makes clear that the mandatory dismissal provisions in § 23.110 are "[s]ubject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes).")

Guidelines:

Some States and Tribes have entered into negotiated Tribal-State agreements that establish specific procedures to follow in Indian child custody proceedings. The Department strongly encourages both Tribes and States to enter into these cooperative agreements. The statute makes clear these agreements can address the "care and custody of Indian children and jurisdiction over child custody proceedings" and specifically can

[14] *See, e.g., In re Adoption of M.T.S., 489 N.W. 2d 285, 288 (Minn. Ct. App. 1992) (ICWA preempted Minnesota State law because State law did not provide higher standard of protection to the rights of the parent or Indian custodian of Indian child).*

include agreements that provide for the orderly transfer of jurisdiction on a case-by-case basis and agreements that provide for concurrent jurisdiction between States and Indian tribes. 25 U.S.C. 1919. The regulation provides, for example, that the mandatory dismissal provisions in § 23.110 do not apply if the State and Tribe have an agreement regarding the jurisdiction whereby the Tribes choose to refrain from asserting jurisdiction. Such agreements can also address how States notify Tribes in emergency removal and initial State hearings, financial arrangements between the Tribe and State regarding care of children, mechanisms for identifying and recruiting appropriate placements and other similar topics.

A.3 Considerations in providing access to State court ICWA proceedings

Regulation:

§ 23.133 Should courts allow participation by alternative methods?

If it possesses the capacity, the court should allow alternative methods of participation in the State-court child custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

Guidelines:

Section 23.133 encourages State courts to permit alternative means of participation in Indian child-custody proceedings, such as by phone or video. This enables the court to receive all relevant information regarding the child's circumstances, and also minimizes burdens on Tribes and other parties. Several State court systems permit the use of video-conferencing in various types of proceedings.[15] The Department notes that requesting statements under oath, even by teleconference, as to who is present may provide sufficient safeguards to maintain control over who is present on the teleconference for the purposes of confidentiality. A service such as Skype would be included in "other methods."

This issue may be particularly relevant to a Tribe's participation in a case. A Tribe's members may live far from the Tribal reservation or headquarters and the Indian child's Tribe may not necessarily be located near the State court Indian child custody proceeding. As such, it may be difficult for many Tribes to participate in State court proceedings, particularly where those actions take place outside of the Tribe's State. Allowing alternative methods of participation in a court proceeding can help alleviate that burden.

Another barrier to Tribal participation in State court proceedings is that the Tribe may not have an attorney licensed to practice law in the State in which the Indian child custody proceeding is being held. Many tribes have limited funds to hire local counsel. The Department encourages all State courts to permit Tribal representatives to present before the court in ICWA proceedings regardless of whether they are attorneys or attorneys licensed in that State, as a number of State courts have already done.[16]

[15] *See, e.g.*, National Center for State Courts Video Technologies Resource Guide (available at www.ncsc.org/Topics/Technology/Video-Technologiesw/Resource-Guide.aspx).

[16] *See, e.g., J.P.H. v. Fla. Dep't of Children & Families*, 39 So.3d 560 (Fla. Dist. Ct. App.2010)(per curiam); *State v. Jennifer M. (In re Elias L.)*, 767 N.W.2d 98, 104 (Neb. 2009); *In re N.N.E.*, 752 N.W. 2d 1, 12 (Iowa 2008); *State ex rel. Juvenile Dep't of Lane Cty. v. Shuey*, 850 P.2d 378 (Or. Ct. App. 1993).

B. Applicability & Verification

It is important to determine at the outset of any State court child custody proceeding whether ICWA applies. Doing so promotes stability for Indian children and families and conserves resources by reducing the need for delays, duplication, appeals, and attendant disruptions. There are two questions to ask in determining whether ICWA applies:

1. Does ICWA apply to this child?
2. Does ICWA apply to the proceeding?

B.1 Determining whether the child is an "Indian child" under ICWA

Regulation:

§ 23.2 *Indian child* means any unmarried person who is under age 18 and either:

(1) Is a member or citizen of an Indian Tribe; or

(2) Is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

§ 23.107 How should a State court determine if there is reason to know the child is an Indian child?

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

Guidelines:

Definition of "Indian child"

The rule reflects the statutory definition of "Indian child," which is based on the child's political ties to a federally recognized Indian Tribe, either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship. ICWA does not apply simply based on a child or parent's Indian ancestry. Instead, there must be a political relationship to the Tribe.

Most Tribes require that individuals apply for citizenship and demonstrate how they meet that Tribe's membership criteria. Congress recognized that there may not have been an opportunity for an infant or minor child to become a citizen of a Tribe prior to the child-custody proceeding, and found that Congress had the power to act for those children's protection given the political tie to the Tribe through parental citizenship and the child's own eligibility.[17]

[17] *See, e.g., H.R. Rep. No. 95-1386, at 17. This is consistent with other contexts in which the citizenship of a parent is relevant to the child's political affiliation to that sovereign. See, e.g., 8 U.S.C. 1401 (providing for U.S. citizenship for persons born outside of the United States when one or both parents are citizens and certain other conditions are met); id. 1431 (child born outside the United States automatically becomes a citizen when at least one parent of the child is a citizen of the United States and certain other conditions are met).*

Inquiry

Even if a party fails to assert that ICWA may apply, the court has a duty to inquire as to ICWA's applicability to the proceeding.

Timing of inquiry. The applicability of ICWA to a child-custody proceeding turns on the threshold question of whether the child in the case is an "Indian child." It is, therefore, critically important that there be inquiry into that threshold issue by courts, State agencies, and participants to the proceedings as soon as possible. If this inquiry is not timely, a child-custody proceeding may not comply with ICWA and thus may deny ICWA protections to Indian children and their families or, at the very least, cause inefficiencies. The failure to timely determine if ICWA applies also can generate unnecessary delays, as the court and the parties may need to redo certain processes or findings under the correct standard. This is inefficient for courts and parties, and can create delays and instability in placements for the Indian child.

Subsequent discovery of information. Recognizing that facts change during the course of a child-custody proceeding, courts must instruct the participants to inform the court if they subsequently learn information that provides "reason to know" the child is an "Indian child." Thus, if the State agency subsequently discovers that the child is an Indian child, for example, or if a parent enrolls the child in an Indian Tribe, they will need to inform the court so that the proceeding can move forward in compliance with the requirements of ICWA.

Inquiry each proceeding. The rule does not require an inquiry at each hearing within a proceeding; but, if a new child-custody proceeding (such as a proceeding to terminate parental rights or for adoption) is initiated for the same child, the court must make a finding as to whether there is "reason to know" that the child is an Indian child. In situations in which the child was not identified as an Indian child in the prior proceeding, the court has a continuing duty to inquire whether the child is an Indian child.[18]

Reason to Know

If the court has "reason to know" that a child is a member of a Tribe, then certain obligations under the statute and regulations are triggered (specifically, the court must confirm that due diligence was used to: (1) identify the Tribe; (2) work with the Tribe to verify whether the child is a citizen or a biological parent is a citizen and the child is eligible for citizenship; and (3) treat the child as an Indian child, unless and until it is determined that the child is not an Indian child).

The regulation lists factors that indicate a "reason to know" the child is an "Indian child." State courts and agencies are encouraged to interpret these factors expansively. When in doubt, it is better to conduct further investigation into a child's status early in the case; this establishes which laws will apply to the case and minimizes the potential for delays or disrupted placements in the future. States or courts may choose to require additional investigation into whether there is a reason to know the child is an Indian child.

When one or more factors is present. If there is "reason to know" the child is an "Indian child," the court needs to ensure that due diligence was used to identify and work with all of the Tribes of which there is a reason to know the child may be a member or eligible for membership, to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership). In order to provide the information that the court needs, the State agency or other party seeking placement should ask the child, parents, and potentially extended family which Tribe(s) they have an affiliation with and obtain genealogical information from the family, and contact the Tribe(s) with that information.

[18] *See, e.g., In re Isaiah W.*, 1 Cal.5th 1 (2016).

When none of the factors is present. If there is no "reason to know" the child is an "Indian child," the State agency (or other party seeking placement) should document the basis for this conclusion in the case file.

Verification or documentation of a factor. The rule provides that the court has a "reason to know" the child is an "Indian child" if it is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe. This provision reflects that there may already be sufficient documentation available to demonstrate that the Tribe has concluded that a parent or child is a citizen of the Tribe. However, for the court's determination as to whether the child is an Indian child, the best source is a contemporaneous communication from the Tribe.

Due Diligence to Work with Tribes to Verify

The determination of whether a child is an "Indian child" turns on Tribal citizenship or eligibility for citizenship. The rule recognizes that these determinations are ones that Tribes make in their sovereign capacity and requires courts to defer to those determinations. The best source for a court to use to conclude that a child or parent is a citizen of a Tribe (or that a child is eligible for citizenship)[19] is a contemporaneous communication from the Tribe documenting the determination.

See section B.7 of these guidelines for more information on verification and when a State court determination is appropriate.

Treating the Child as an Indian Child, Unless and Until Determined Otherwise

This requirement (triggered by a "reason to know" the child is an "Indian child") ensures that ICWA's requirements are followed from the early stages of a case and that harmful delays and duplication resulting from the potential late application of ICWA are avoided. For example, it makes sense to place a child that the court has reason to know is an Indian child in a placement that complies with ICWA's placement preferences from the start of a proceeding, rather than having to consider a change a placement later in the proceeding once the court confirms that the child actually is an Indian child. Notably, the early application of ICWA's requirements—which are designed to keep children, when possible, with their parents, family, or Tribal community—should benefit children regardless of whether it turns out that they are Indian children as defined by the statute. If, based on feedback from the relevant Tribe(s) or other information, the court determines that the child is not an "Indian child," then the State may proceed under its usual standards.

B.2 Determining whether ICWA applies

Regulation:

§ 23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

[19] These guidelines use the terms "member" and "citizen" interchangeably.

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of "Indian child," then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

Guidelines:

ICWA has provisions that apply to "child-custody proceedings." *See* the definition of "child-custody proceeding" and associated guidelines in section L of these guidelines. Child-custody proceedings include both involuntary proceedings and voluntary proceedings involving an "Indian child," regardless of whether individual members of the family are themselves Indian. Thus, for example, a non-Indian parent may avail himself or herself of protections provided to parents by ICWA if her child is an "Indian child."

Involuntary Proceedings

If the child may be involuntarily removed from the parents or Indian custodian or the child may be involuntarily placed, then ICWA applies to the proceeding. If the parent or Indian custodian does not agree to the removal or placement, or agrees only under threat of the child's removal, then the proceeding is involuntary.

Voluntary Proceedings

If the parents or Indian custodian voluntarily agrees to removal or placement of the Indian child, then certain provisions of ICWA still apply. Voluntary proceedings require a determination of whether the child is an

Indian child and compliance with ICWA and the regulation's provisions relating to the placement preferences. *See* section B.3 of these guidelines for a list of which regulatory provisions apply to each type of proceeding.

A proceeding is voluntary only if the parent or Indian custodian voluntarily agrees to placement, of his or her own free will, without threat of removal.

Voluntary Placements Where Custody of the Child Can Be Regained "Upon Demand"

If the parent or Indian custodian has voluntarily placed the child (upon his or her own free will without threat of removal) and can regain custody "upon demand," meaning without any formalities or contingencies, then ICWA does not apply. These excepted voluntary placements are typically done without the assistance of a child welfare agency. An example is where a parent arranges for a relative or neighbor to care for their child while they are out of town for a period of time. If a child welfare agency is involved, it is recommended that placement intended to last for an extended period of time be memorialized in written agreements that explicitly state the right of the parent or Indian custodian to regain custody of the child upon demand without any formalities or contingencies.

The distinction between a voluntary and involuntary placement can be nuanced and depends on the facts. For example:

- If parent wishes to enter a drug treatment and places the child while in treatment, but can get the child back upon demand even if treatment is not completed, then that is likely a voluntary placement.
- If parent is told they will lose the child unless they enter a drug treatment program during which child is placed elsewhere, that is not a voluntary placement.
- If a parent wishes to enter drug treatment and places the child while in treatment, and is told that they can only get child back if treatment is successfully completed, that is not a voluntary placement.

Placements Resulting from a Child's Status Offense

ICWA also applies to placements resulting from a child's status offense. Status offenses are offenses that would not be considered criminal if committed by an adult, and are prohibited only because of a person's status as a minor (such as truancy or incorrigibility). If the child is being removed because he or she committed a status offense, then ICWA applies.

Guardianships/Conservatorships

ICWA also applies to placements with a guardian or conservator, because ICWA includes guardianships in the definition of "foster care placement."

Intra-Family Custody Disputes

The statute and rule exclude custody disputes between parents, but can apply to other types of intra-family disputes—including disputes with grandparents, step-parents, or other family members—assuming that such disputes otherwise meet the statutory and regulatory definitions.

Placement with Parent

Placement with a parent is generally not an "Indian child-custody proceeding" because it is not included as a "foster-care placement." While the Act specifically exempts from ICWA's applicability awards of custody to one of the parents "in divorce proceedings," the exemption necessarily includes awards of custody to one of the parents in other types of proceedings as well. However, if a proceeding seeks to terminate the parental rights of one parent, that proceeding falls within ICWA's definition of "child-custody proceeding" even if the child will remain in the custody of the other parent or a step-parent.

Factors that May Not Be Considered

If a child-custody proceeding concerns a child who meets the statutory definition of "Indian child," then the court may not determine that ICWA does not apply based on factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum (sometimes known as the "Existing Indian Family" exception). These factors are not relevant to the inquiry of whether the statute applies. Rather, ICWA applies whenever an "Indian child" is the subject of a "child-custody proceeding," as those terms are defined in the statute. In addition, Congress expressly recognized that State courts and agencies often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. A standard that requires the evaluation of the strength of these social or cultural ties frustrates ICWA's purpose to provide more objective standards for Indian child-custody proceedings.[20]

Application Even if Child Reaches Age 18

Where State and/or Federal law provides for a child-custody proceeding to extend beyond an Indian child's 18th birthday, ICWA would not stop applying to the proceeding simply because of the child's age. This is to ensure that a set of laws apply consistently throughout a proceeding, and also to discourage strategic behavior or delays in ICWA compliance in circumstances where a child's 18th birthday is near.

B.3 Determining which requirements apply based on type of proceeding

Regulation:

§ 23.104 What [rule] provisions…apply to each type of child-custody proceeding?

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in § 23.103(a):

Regulatory Section	Type of Proceeding
23.101 - 23.106 (General Provisions)	Emergency, Involuntary, Voluntary
Pretrial Requirements	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?)	Emergency, Involuntary, Voluntary
23.108 (Who makes the determination as to whether a child is a member whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?)	Emergency, Involuntary, Voluntary
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?)	Emergency, Involuntary, Voluntary
23.110 (When must a State court dismiss an action?)	Involuntary,

[20] *See* 81 FR 38801-38802 (June 14, 2016).

	Voluntary
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?)	Involuntary (foster-care placement and TPR)
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and TPR)
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency
23.114 (What are the requirements for determining improper removal?)	Involuntary
Petitions to Transfer to Tribal Court	
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and TPR)
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and TPR)
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and TPR)
23.118 (How is a determination of "good cause" to deny transfer made?)	Involuntary, Voluntary (foster-care placement and TPR)
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and TPR)
Adjudication of Involuntary Proceedings	
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and TPR)
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and TPR)
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement and TPR)
23.123 Reserved.	N/A
Voluntary Proceedings	
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary
23.125 (How is consent obtained?)	Voluntary
23.126 (What information must a consent document contain?)	Voluntary
23.127 (How is withdrawal of consent to a foster-care placement achieved?)	Voluntary
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary
Dispositions	
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary
23.131 (What placement preferences apply in foster-care or preadoptive placements?)	Involuntary, Voluntary

23.132 (How is a determination of "good cause" to depart from the placement preferences made?)	Involuntary, Voluntary
Access	
23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary
23.135 Reserved.	N/A
Post-Trial Rights & Responsibilities	
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?)	Involuntary (if consent given under threat of removal), Voluntary
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent it involved a specified violation), Involuntary, Voluntary
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary
Recordkeeping	
23.140 (What information must States furnish to the Bureau of Indian Affairs?)	Involuntary, Voluntary
23.141 (What records must the State maintain?)	Involuntary, Voluntary
23.142 (How does the Paperwork Reduction Act affect this subpart?)	Emergency, Involuntary, Voluntary
Effective Date	
23.143 (How does this rule apply to pending proceedings?)	Emergency, Involuntary, Voluntary
Severability	
23.144 (What happens if some portion of this rule is held to be invalid by a court of competent jurisdiction?)	Emergency, Involuntary, Voluntary

Note: For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

Guidelines:

As discussed above, ICWA has provisions that apply to both involuntary proceedings and voluntary proceedings involving an "Indian child," regardless of whether individual members of the family are themselves Indian. ICWA also includes a separate category for "emergency" proceedings, which are described in section C of these guidelines, below.

This chart is intended as a quick-reference tool to provide an overview of what regulatory provisions apply to what types of proceedings. For specifics on how each regulatory provision applies, please refer directly to the regulatory provision and appropriate section of these guidelines.

B.4 Identifying the Tribe

Guidelines:

Sometimes, the child or parent may not be certain of their citizenship status in an Indian Tribe, but may indicate they are somehow affiliated with a Tribe or group of Tribes. In these circumstances, State agencies and courts should ask the parent and, potentially, extended family what Tribe or Tribal ancestral group the parent may be affiliated with.

If a specific Tribe is indicated, determine if that Tribe is listed as a federally recognized Indian Tribe on the BIA's annual list, viewable at www.bia.gov. Some Tribes are recognized by States but not recognized by the Federal Government. The Federal ICWA applies only if the Tribe is a federally recognized Indian Tribe and therefore listed on the BIA list.

If only the Tribal ancestral group (e.g., Cherokee) is indicated, then we recommend State agencies or courts contact each of the Tribes in that ancestral group (*see* section B.6 of these guidelines regarding the published list of ICWA designated agents) to identify whether the parent or child is a member of any such Tribe. If the State agency or court is unsure that it has contacted all the relevant Tribes, or needs other assistance in identifying the appropriate Tribes, it should contact the BIA Regional Office. Ideally, State agencies or courts should contact the BIA Regional Office for the region in which the Tribe is located, but if the State agency or court is not aware of the appropriate BIA Regional Office, it may contact any BIA Regional Office for direction.

B.5 Identifying the Tribe when there is more than one Tribe

Regulation:

§ 23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

(a) If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe.

(b) If the Indian child meets the definition of "Indian child" through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of "Indian child" through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

Guidelines:

If a child meets the definition of "Indian child" through more than one Tribe, it is a best practice to communicate with both (or all) of the Tribes regarding any upcoming actions regarding the child. The Tribes must be informed that the child may be a member or eligible for membership in multiple Tribes, and must be given reasonable opportunity to agree on which Tribe will be designated as the Indian child's Tribe for the purposes of the child-custody proceeding. If the Tribes are unable to reach an agreement, the State court will designate a Tribe, after considering the factors identified in the regulation. It is a best practice to conduct a hearing regarding designation of the Indian child's Tribe so that the court can gather the information about the factors identified in the regulation.

B.6 Contacting the Tribe

Regulation:

§ 23.105 How do I contact a Tribe under the regulations in this subpart?

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its website at www.bia.gov.

(b) For a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to be directed to the appropriate office or individual.

(c) If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, D.C. (see www.bia.gov).

Guidelines:

Although the regulation focuses on written contact, it is recommended that, in addition, State agencies contact, by telephone and/or email, the Tribal ICWA agent, as listed in BIA's most recent list of designated Tribal agents for service of ICWA notice (available on www.bia.gov and published annually in the Federal Register). This facilitates open communication and enables the State and Tribal social workers to coordinate on services that may be available to support the family. State agencies should document their conversations with Tribal agents. If, for some reason, the State agency cannot reach the Tribal agent listed in the most recent list on www.bia.gov or in the Federal Register, we recommend contacting the BIA.

B.7 Verifying Tribal membership

Regulation:

§ 23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?

(a) The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.

(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

(c) The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an "Indian child." An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation.

***See, also,* § 23.107(b)(1) in section B.1 of these guidelines, above.**

Guidelines:

Tribes, as sovereign governments, have the exclusive authority to determine their political citizenship and their eligibility requirements. A Tribe is, therefore, the authoritative and best source of information regarding who is a citizen (or member) of that Tribe and who is eligible for citizenship of that Tribe. Thus, the rule defers to Tribes in making such determinations and makes clear that a court may not substitute its own determination for that of a Tribe regarding a child's citizenship or eligibility for citizenship in a Tribe.

If the court has "reason to know" the child is an "Indian child" (*see* section B.1 of these guidelines, above), agencies must use due diligence to work with the relevant Tribe(s) to obtain verification regarding whether the child is a citizen or a biological parent is a citizen and the child is eligible for citizenship. The Department encourages agencies to contact Tribes informally, in addition to providing written notice, to seek such verification. The regulation requires that the agency's efforts to identify and work with those Tribes be documented in the court record. It is a best practice for these efforts to be maintained in agency files as well.

Form of Verification

While written verification from the Tribe(s) is an appropriate method for such verification, other methods may be appropriate. A Tribal representative's testimony at a hearing regarding whether the child is a citizen (or a biological parent is a citizen and the child is eligible for citizenship) is an appropriate method of verification by the Tribe.

Information in Request for Tribe's Verification

The Department encourages State courts and agencies to include enough information in the requests for verification to allow the Tribes to readily determine whether the child is a Tribal citizen (or whether the parent is a Tribal citizen and the child is eligible for citizenship). The request for verification is a meaningful request only if it provides sufficient information to the Tribe to make the determination as to whether the child is a citizen (or the parent is a citizen and the child is eligible for citizenship). Providing as much information as possible facilitates earlier identification of an Indian child and helps prevents delays and disruptions. Section 23.111(d) includes categories of information that must be provided in the notice to a Tribe in involuntary foster-care placement or TPR proceedings. Such information may be helpful to provide a Tribe to assist in verification of whether the child an Indian child. It is also important that names, birthdates, and other relevant information be reported accurately to the Tribe, as misspellings or other incorrect information can generate inaccurate or delayed responses.

A primary reason for courts mistakenly not being aware that a child is an Indian child is that the request for verification lacks the information necessary (or lacks accurate information) for the Tribe to make a determination as to membership or eligibility for membership. We therefore recommend parties include as much information as is available regarding the child in order to help the Tribe identify whether the child or the child's parent is a member. If possible, include the following information:

- ✓ Genograms or ancestry/family charts for both parents;
- ✓ All known names of both parents (maiden, married and former names or aliases), including possible alternative spellings;
- ✓ Current and former addresses of the child's parents and any extended family;
- ✓ Birthdates and places of birth (and death, if applicable) of both parents;

- ✓ All known Tribal affiliation (or Indian ancestry if Tribal affiliation not known) for individuals listed on the ancestry/family charts; and
- ✓ The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether this is on an Indian reservation or in an Alaska Native village.

Court's Determination

While a Tribe is the authoritative and best source regarding Tribal citizenship information, the court must ultimately determine whether the child is an Indian child for purposes of the child-custody proceeding. Ideally, that determination would be based on information provided by the Tribe, but may need to be based on other information if, for example, the Tribe(s) fail(s) to respond to verification requests.

The Department encourages prompt responses by Tribes, but if a Tribe fails to respond to multiple requests for verification regarding whether a child is in fact a citizen (or a biological parent is a citizen and the child is eligible for citizenship), and the agency has sought the assistance of the Bureau of Indian Affairs (BIA) in contacting the Tribe, a court may make a determination regarding whether the child is an Indian child for purposes of the child-custody proceeding based on the information it has available. A finding that a child is an "Indian child" applies only for the purposes of the application of ICWA to that proceeding, and does not establish that child's membership in a Tribe or eligibility for any Federal programs or benefits for any other purpose. If new evidence later arises, the court will need to consider it and should alter the original determination if appropriate.

It is recommended the agency document the requests to the Tribe to obtain information or verification of a child's or parent's Tribal citizenship and provide this information for the court file.

BIA Assistance

BIA does not make determinations as to Tribal citizenship or eligibility for Tribal citizenships except as otherwise provided by Federal or Tribal Law, but BIA can help route the notice to the right place.

B.8 Facilitating Tribal membership

Guidelines:

In many cases, Tribal citizenship would make more services and programs available to the child. Even where it is not clear that Tribal services and programs would assist the child, there are both immediate and long-term benefits to being a Tribal citizen. It is thus a recommended practice for the social worker (or party seeking placement in a voluntary adoption) to facilitate the child becoming a member, such as by assisting with the filing of a Tribal membership application or otherwise.

C. Emergency Proceedings

C.1 Emergency proceedings in the ICWA context

Regulation:

§ 23.2 *Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Guidelines:

The statute and regulations recognize that emergency proceedings may need to proceed differently from other proceedings under ICWA.[21] Specifically, section 1922 of ICWA was designed to "permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of" ICWA.[22] While States use different terminology (e.g., preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may be necessary to prevent imminent physical damage or harm to the child.

Both the legislative history and the decisions of multiple courts support the conclusion that ICWA's emergency proceedings provisions apply to both: (1) Indian children who are domiciled off of the reservation and (2) Indian children domiciled on the reservation, but temporarily off of the reservation.[23]

C.2 Threshold for removal on an emergency basis

Regulation:

…necessary to prevent imminent physical damage or harm to the child. *See* § 23.113(b)(1), above.

Guidelines:

ICWA allows for removal of a child from his or her parents or Indian custodian, as part of an emergency proceeding only if the child faces "imminent physical damage or harm." The Department interprets this standard as mirroring the constitutional standard for removal of *any* child from his or her parents without providing due process.

As a general rule, before any parent may be deprived of the care or custody of their child without their consent, due process—ordinarily a court proceeding resulting in an order permitting removal—must be provided.[24] A child may, however, be taken into custody by a State official without court authorization or

[21] *See* 25 U.S.C. 1922.
[22] H.R. Rep. No. 9501386; 25 U.S.C. 1922.
[23] *See* 81 FR 38794-38795 (June 14, 2016).
[24] *See, e.g., Tenenbaum v. Williams,* 193 F.3d 581 (2d Cit. 1999); *Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003).

parental consent only in emergency circumstances. Courts have defined emergency circumstances as "circumstances in which the child is immediately threatened with harm," including when there is an immediate threat to the safety of the child, when a young child is left without care or adequate supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence.[25] The same standards and protections apply when an Indian child is involved. And those standards and protections are reflected in section 1922 of ICWA, which addresses emergency proceedings involving Indian children.

C.3 Standards and processes for emergency proceedings

Regulation:

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;

(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or

(3) Restoring the child to the parent or Indian custodian.

…

[25] *Hurlman v. Ric*, 927 F.2d 74, 80-81 (2d Cir. 1991 (citing cases).

Guidelines:

Timing of hearing. If any child (including a non-Indian child) is removed from her parents by State officials without court authorization or parental consent, the State must generally provide a meaningful hearing promptly after removal.[26] States may call these proceedings by different names, such as "protective custody," "emergency custody," "shelter care," or "probable cause," among others, but they typically take place within a short time frame after the removal, such as 48 or 72 hours. These hearings should provide parents with a meaningful opportunity to be heard. If the agency determines the emergency has ended, State procedures will dictate whether the agency may return the child without the need for a hearing.

Termination of Emergency Removal. If a child was removed from the home on an emergency basis because of a temporary threat to his or her safety, but the threat has been removed and the child is no longer at risk, the State should terminate the removal, either by returning the child to the parent or transferring the case to Tribal jurisdiction. This comports with standards that apply to all child-welfare cases, and protects the "fundamental liberty interest" that parents have in the care and custody of their children.[27] If circumstances warrant, however, the State agency may instead initiate a child-custody proceeding to which the full set of ICWA protections would apply.

- **Restoring the child to the parent or Indian custodian.** If the agency determines the emergency has ended, State procedures will dictate whether the agency may return the child without the need for a hearing. A safety plan may be a solution to mitigate the situation that gave rise to the need for emergency removal and placement and allow the State to terminate the emergency proceeding. If the State court finds that the implementation of a safety plan means that emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child, the child should be returned to the parent or custodian. The State may still choose to initiate a child-custody proceeding, or may transfer the case to the jurisdiction of the Tribe.

- **Transferring the proceeding to Tribal jurisdiction.** The agency may terminate the emergency proceeding by transferring the child to the jurisdiction of the Tribe. Transfer of a proceeding is discussed below in section F of these guidelines.

- **Initiating a "child custody proceeding."** To initiate a full "child custody proceeding" (as defined in 25 CFR § 23.2), the State agency should set the hearing date and send out notice by registered or certified mail, return receipt requested, to the parent or Indian custodian and Tribe in accordance with ICWA's required timeframes (see section D.7 of these guidelines).

Termination of the emergency proceeding does not necessarily mean that the actual placement of the child must change. If an Indian child cannot be safely returned to the parents or custodian, the child must either be transferred to the jurisdiction of the appropriate Indian Tribe, or the State must initiate a child-custody proceeding to which the full set of ICWA protections would apply. Under this scenario, the child may end up staying in the same placement, but such placement will not be under the emergency proceeding provisions authorized by section 1922. Instead, that placement would need to be pursuant to Tribal law (if the child is

[26] *Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005).
[27] *See Troxel v. Granville*, 530 U.S. 57 (2000).

transferred to the jurisdiction of the Tribe) or comply with the relevant ICWA statutory and rule provisions for a child-custody proceeding (if the State retains jurisdiction)

ICWA and the rule emphasize that an emergency proceeding under ICWA section 1922 needs to be as short as possible and include provisions that are designed to achieve that result. ICWA requires that State officials "insure" that Indian children are returned home (or transferred to their Tribe's jurisdiction) as soon as the threat of imminent physical damage or harm has ended, or that State officials "expeditiously" initiate a child-custody proceeding subject to all ICWA protections.[28] The rule requires that an emergency removal or placement of an Indian child must "terminate immediately" when it is no longer necessary to prevent imminent physical damage or harm to the child.

C.4 Contents of petition for emergency removal

Regulation:

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

…(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child;

(2) The name and address of the child's parents and Indian custodians, if any;

(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;

(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov);

(5) The residence and the domicile of the Indian child;

(6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;

(7) The Tribal affiliation of the child and of the parents or Indian custodians;

(8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;

[28] 25 U.S.C. 1922.

(9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and

(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

…

Guidelines:

The contents listed in this section of the regulation are strongly recommended, but not required (as indicated by the word "should" rather than "must"). A failure to include any of the listed information should not result in denial of the petition if the child faces imminent physical damage or harm.

C.5 Outer limit on length of emergency removal

Regulation:

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

…(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;

(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and

(3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2.

Guidelines:

Emergency proceedings—which generally do not include the full suite of due process or ICWA protections for parents and children—must not extend for longer than necessary to prevent imminent physical damage or harm to the child. If there is sufficient evidence of abuse or neglect, the State should promptly initiate a proceeding that provides the full suite of due process and ICWA protections. State laws vary in their handling of emergency proceedings and the initiation of foster-care proceedings, and it may not always be easy to ascertain when the "emergency proceeding" is concluded. The intent of the presumptive outer bound on the length of an emergency proceeding (30 days) is to ensure the safeguards of the Act cannot be evaded by use of long-term emergency proceedings.

States should adapt the regulation to their own procedures, with the goal of ensuring that proceedings (beyond the emergency custody, shelter care, or otherwise named initial hearing) that include the full suite of due process and ICWA protections are commenced within 30 days of any emergency removal. While there may be State-specific types of emergency proceedings with separate timeframes, all of the State requirements may be followed, so long as a proceeding with the full suite of due process and ICWA protections is underway within 30 days, absent extenuating circumstances.

Should the court need the emergency proceeding of an Indian child to last longer than 30 days, however, it may extend the emergency proceeding if it makes all three of the specific findings listed at § 23.113(e). Allowing a court to extend an emergency proceeding if it makes those findings provides appropriate flexibility for a court that finds itself facing unusual circumstances.[29]

C.6 Emergency placements

Regulation:

See § 23.113, above.

Guidelines:

As a matter of general best practice in child welfare, State agencies should try to identify extended family or other individuals with whom the child is already familiar as possible emergency placements. If the child is an Indian child, agencies should strive to provide an initial placement for the child that meets ICWA's (or the Tribe's) placement preferences. This will help prevent subsequent disruptions if the child needs to be moved to a preferred placement once a child-custody proceeding is initiated.

State agencies should also determine if there are available emergency foster homes already licensed by the State or the child's Tribe.

If the Indian child is placed on an emergency basis in a non-preferred placement because a preferred placement is unavailable or has not yet met background check or licensing requirements, State agencies should have a concurrent plan for placement as soon as possible with a preferred placement.

C.7 Identifying Indian children in emergency situations

Regulation:

See § 23.113, above.

Guidelines:

It is recommended that the State agency ask the family and extended family whether the child is a Tribal member or whether a parent is a Tribal member and the child is eligible for membership as part of the emergency removal and placement process. If the State agency believes that the child may be an Indian child, it

[29] *See* 81 FR 38817 (June 14, 2016).

is recommended that it let the Tribe know the child has been removed on an emergency basis, and begin coordination with the Tribe regarding services and placements. If there is still uncertainty regarding who is the Indian child's Tribe, it is recommended that the State agency continue to investigate the applicability of ICWA and document findings.

C.8 Active efforts in emergency situations

Guidelines:

We recommend that State agencies work with Tribes, parents, and other parties as soon as possible, even in an emergency situation, to begin providing active efforts to reunite the family.

C.9 Notice in emergency situations

Regulation:

No regulatory requirements for notice by registered or certified apply in emergency proceedings; however, § 23.113(c) requires agencies to report to the court on their efforts to contact the parents, Indian custodian, and Tribe for the emergency proceeding.

Guidelines:

Neither the statute nor rule requires notice prior to an emergency removal because of the short timeframe in which emergency proceedings are conducted to secure the safety of the child (although there may be relevant State or due process requirements). In order to protect the parents', Indian custodians', and Tribes' due process and other rights in these situations, however, it is a recommended practice for the agency to take all practical steps to contact them. This likely includes contact by telephone or in person and may include email or other written forms of contact.

D. Notice

D.1 Requirement for notice

Regulation:

§ 23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in § 23.111, consistent with the confidentiality requirement in § 23.111(d)(6)(ix). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by § 23.111.

(b) [See Appendix 1]

(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in § 23.2, or is unable to locate the parents or Indian custodians, the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental-rights proceeding is an Indian child, the court must ensure that:

> (1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and

(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to:

(1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (see § 23.105 for information on how to contact a Tribe);

(2) The child's parents; and

(3) If applicable, the child's Indian custodian.

Guidelines:

Prompt notice of a child-custody proceeding is vitally important because it gives the parent, Indian custodian, and Tribe the opportunity to respond to any allegations in the case, to intervene, or to seek transfer jurisdiction to the Tribe. In addition, prompt notice facilitates the early identification of preferred placements as well as the provision of Tribal services to the family.

Notice by registered or certified mail, return receipt requested, to the parents, Indian custodian(s), and Indian child's Tribe is required for:

- ✓ Any involuntary foster-care proceeding; or
- ✓ Any TPR proceeding.

Notice is required for a TPR proceeding, even if notice has previously been given for the child's foster-care proceeding.

This notice is required in addition to the informal contacts made with the Tribe, such as those to verify Tribal membership and open the lines of communication.

Notice by registered or certified mail, return receipt requested is not required for voluntary proceedings, pre-adoptive proceedings, or adoptive proceedings (all of which are defined by the rule), but is a recommended practice.

While not required by the Act or rule, we recommend that State agencies and/or courts provide notice to Tribes and parents or Indian custodians of:

- Each individual hearing within a proceeding;
- Any change in placement – the statute provides rights to parents, Indian custodians and Tribes (e.g., right to intervene) and a change in circumstances resulting from a change in placement may prompt an individual or Tribe to invoke those rights, even though they did not do so before;
- Any change to the child's permanency plan or concurrent plan – a change in the ultimate goal may prompt an individual or Tribe to invoke their rights, even though they did not do so before;
- Any transfer of jurisdiction to another State or receipt of jurisdiction from another State.

D.2 Method of notice (registered or certified mail, return receipt requested)

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

…(c) Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

Guidelines:

The Act requires notice be provided by registered mail, return receipt requested. The regulation also allows for notice to be provided by certified mail, return receipt requested, as a less expensive option that better meets the underlying goal of effecting notice.[30]

If State law requires actual notice or personal service, that may be a higher standard for protection of the rights of the parent or Indian custodian of an Indian child than is provided for in ICWA. In that case, meeting that higher standard would be required.[31] Even in this case, it is a best practice to also provide notice by registered or certified mail, return receipt requested, because the return receipt provides documentation for the record that notice was received.

We encourage States to act proactively in contacting parents, custodians, and Tribes by phone, email, and through other means, in addition to sending registered or certified mail, so parties can begin gathering documents and making necessary decisions as early as practicable in the process. Tribes may agree to waive their right to challenge the adequacy of notice if the notice to the Tribe was sent by a means other than registered or certified mail (e.g., by e-mail), but may not waive or affect the statutory rights of parents or other parties to the case.

The statute and regulations require notice to the parents; a "parent" includes an unwed father that has established or acknowledged paternity. If, at any point, it is discovered that someone is a "parent," as that term is defined in the regulations, that parent would be entitled to notice.

D.3 Contents of notice

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

… (d) Notice must be in clear and understandable language and include the following:

(1) The child's name, birthdate, and birthplace;

[30] *See* 81 FR 38810-38811 (June 14, 2016).
[31] *See* 25 U.S.C. 1921.

(2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;

(3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;

(4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);

(5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;

(6) Statements setting out:

(i) The name of the petitioner and the name and address of petitioner's attorney;

(ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.

(iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.

(iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.

(v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.

(vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and § 23.115.

(vii) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.

(viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.

(ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

Guidelines:

The rule specifies the information to be contained in the notice in order for the recipients of a notice to be able to exercise their rights in a timely manner.

While notice and verification of Tribal membership are separate concepts (see section B.7 for verification), they can be accomplished through the same communication or separate communications. The BIA has a sample notice form posted at www.bia.gov as an example for States to consider if they are combining their notice and verification.

Confidentiality

While a petition may contain confidential information, providing a copy of the petition with notice to Tribes is a government-to-government exchange of information necessary for the government agencies' performance of duties. *See* 81 FR 38811. The petition is necessary to provide sufficient information to allow the parents, Indian custodian and Tribes to effectively participate in the proceeding.

D.4 Notice to the Bureau of Indian Affairs

Regulation:

§ 23.11 Notice

(a)…. Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by § 23.111.

Guidelines:

Notice to the BIA may be provided by personal delivery in lieu of registered or certified mail with return receipt requested. To determine the appropriate BIA office to send the copy to, see the list of regional offices at § 23.11(b) (available at Appendix 1). A copy of the notice must be sent to the BIA Regional Director even when the identity of the child's parents, Indian custodian, and Tribes can be ascertained. No notices, except for final adoption decrees, are required to be sent to the BIA Central Office in Washington, DC.

D.5 Documenting the notice with the court

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

(a)….

…(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

Guidelines:

If the agency or other party seeking placement voluntarily chooses to provide notice in other Indian child welfare proceedings where notice is not required by law, it is helpful to file a copy of the notice with the court so that the court record is as complete as possible.

D.6 Unascertainable identity or location of the parents, Indian custodian, or Tribes

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

…(e) If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

§ 23.11 Notice.

…(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in § 23.2, or is unable to locate the parents or Indian custodians, the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

Guidelines:

The party seeking foster-care placement or TPR has responsibility for providing notice. If that party cannot ascertain the identity or location of the parents, Indian custodian, or Tribes, it should contact the BIA Region and provide BIA with as much information as possible regarding potential Tribal affiliations. If the Region cannot assist the party, it can also contact the BIA's central office in Washington, DC. *See* Appendix 1 for a list of BIA regional offices.

D.7 Time limits for notice

Regulation:

§ 23.112 What time limits and extensions apply?

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and § 23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows:

(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the child-custody proceeding as provided in 25 U.S.C. 1912(a) and § 23.111; and

(4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and § 23.111 may also be available under State law or pursuant to extensions granted by the court.

Guidelines:

These time limitations ensure that parents, Indian custodians, and the Tribe have time to determine whether a child is an Indian child and respond to and prepare for the proceeding.

Minimum time limit. As the rule states, no foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary).

Extensions. The parent, Indian custodian, and Indian child's Tribe are entitled to one extension of up to 20 days for each proceeding. Any extension beyond the initial extension up to 20 days is subject to the State court's rules and discretion.

Informal notification. Although the rule sets out the required elements of an ICWA notice, in order to ensure that the proceeding is held promptly, we encourage agencies to contact the Tribe and the parents as soon as there is sufficient information to identify a child who may be a member of or eligible for membership in that Tribe. While the timelines set out in the rule do not begin to run until the service of formal notice as required by the rule, the initial notification may nevertheless be helpful to allow the Tribe to confirm that the child is an Indian child and begin to gather information about the case.

D.8 Translation or interpretation

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

…(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

Guidelines:

If the parent or Indian custodian requires translation or interpretation in a Native language, it is recommended that the court or party contact the Indian child's Tribe or BIA for assistance.

D.9 Right to an attorney

Regulation:

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

…(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in § 23.112, and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

Guidelines:

This provision recognizes that parents may not have appointed counsel at early hearings in the case, and helps ensure that parents are notified of their rights under Federal law.

It is a recommended practice, where possible, to appoint the same counsel for the entirety of the trial court case (throughout all proceedings), to ensure parents' rights are addressed consistently throughout the trial court case, rather than appointing different representatives at each stage.

D.10 Lack of response to notice

Regulation:

See § 23.11 and § 23.111 requiring notice of each proceeding.

Guidelines:

If the Tribe does not respond to the notice, or responds that it is not interested in participating in the proceeding, the court or agency must still send the Tribe notices of subsequent proceedings for which notice is required (i.e., a subsequent TPR proceeding). In cases where the Tribe does not confirm receipt of the required notice or otherwise does not respond, the Department recommends following up telephonically. The Tribe may decide to intervene or otherwise participate at a later point even if it has previously indicated it is not interested in participating.

E. Active Efforts

E.1 Meaning of "active efforts"

Regulation:

§ 23.2 *Active efforts* means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family…

Guidelines:

ICWA requires the use of "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.[32] The statute does not define "active efforts," but the regulation does in § 23.2. The "active efforts" requirement in ICWA reflects Congress' recognition of the particular history of the treatment of Indian children and families. Many Indian children were removed from their homes because of poverty, joblessness, substandard housing, and other situations that could be remediated through the provision of social services. The "active efforts" requirement helps ensure that parents receive the serves that they need so that they can be safely reunified with their children. The "active efforts" requirement is designed primarily to ensure that services are provided that would permit the Indian child to remain or be reunited with her parents, whenever possible, and helps protect against unwarranted removals by ensuring that parents who are, or may readily become, fit parents are provided with services necessary to retain or regain custody of their child. This is viewed by some child-welfare organizations as part of the "gold standard" of what services should be provided in all child-welfare proceedings, not just those involving an Indian child.[33]

Other Federal and State laws require that child-welfare agencies make at least "reasonable efforts" to provide services that will help families remedy the conditions that brought the child and family into the child-welfare system. And some courts and States understand "active efforts" and "reasonable efforts" as relative to each other, where "active efforts" is higher on the continuum of efforts required and "reasonable efforts" is lower on that continuum.[34] Some courts and States consider "active efforts" to be essentially the same as "reasonable efforts."[35] Instead of focusing on such a comparison, the rule defines "active efforts" by focusing on the quality of the actions necessary to constitute "active efforts" (affirmative, active, thorough, and timely) and providing examples and clarification as to what constitutes "active efforts."

ICWA requires "active efforts" prior to foster-care placement of or TPR to an Indian child, regardless of whether the agency is receiving Federal funding.

What constitutes sufficient "active efforts" will vary from case-to-case, and courts have the discretion to consider the facts and circumstances of the particular case before it when determining whether the definition of "active efforts" is met.

Active efforts should be:

- Affirmative;
- Active;

[32] 25 U.S.C. 1912(d).
[33] *See* 81 FR 38813-388-14.
[34] *See, e.g., In re Nicole B.*, 927 A.2d 1194, 1206-07 (Md. Ct. Spec. App. 2007)
[35] *See, e.g., In re C.F.*, 230 Ca. App. 4th 227 (2014); *In re Michael G.*, 63 Cal. App. 4th 700 (1998).

- Thorough; and
- Timely.

E.2 Active efforts and the case plan

Regulation:

§ 23.2 … Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.

Guidelines:

Because active efforts must involve assisting the parents or Indian custodian through the steps of the case plan, and with accessing or developing resources necessary to satisfy the case plan, the State agency may need to take an active role in connecting the parent or Indian custodian with resources. By its plain and ordinary meaning, "active" cannot be merely "passive."

E.3 Active efforts consistent with prevailing social and cultural conditions of Tribe

Regulation:

§ 23.2… To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe.

Guidelines:

The rule indicates that, to the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions of the Indian child's Tribe, and in partnership with the child, parents, extended family, and Tribe. This is consistent with congressional direction in ICWA to conduct Indian child-custody proceedings in a way that reflects the cultural and social standards prevailing in Indian communities and families. There is also evidence that services that are adapted to the client's cultural backgrounds are better.[36]

Determining the appropriate active efforts may entail discussions with Tribal leadership, elders, or religious figures or academics with expertise concerning a given Tribe as to the type of culturally appropriate services that could be provided to the family.

Culturally appropriate services in the child welfare context could include trauma-informed therapy that incorporates best practices in addressing Native American historical and intergenerational trauma, pastoral

[36] *See* 81 FR 38790-38791 (June 14, 2016).

counseling that incorporates a Native American holistic approach and focus on spirituality, and Tribal/Native faith healers or medicine/holy men or women within the Tribe who utilize prayers, ceremonies, sweat lodge and other interventions. Another example is the use of Positive Indian Parenting curriculum, which is based on Native American beliefs and customs, and provided to clients to improve their parenting skills with a strong culture-based background. These are examples only and not an exhaustive list.

E.4 Examples of active efforts

Regulation:

§ 23.2… Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

Guidelines:

The examples of active efforts provided in the ICWA regulations reflect best practices in the field of Indian child welfare, but are not meant to be an exhaustive list. Active efforts must be tailored to each child and family within each ICWA case and could include additional efforts by the agency working with the child and family. The minimum actions required to meet the "active efforts" threshold will depend on unique circumstances of the case. It is recommended that the State agency determine which active efforts will best address the specific issues facing the family and tailor those efforts to help keep the family together. This will help active efforts to respond to the unique facts and circumstances of the case. For example, if one of the child's parents has a problem with alcohol abuse, active efforts might include assisting that parent with enrollment in an alcohol treatment program and helping to coordinate transportation to and from meetings. If substance abuse is not an issue, active efforts would not need to include this kind of assistance.

As the examples illustrate, the State agency should actively connect Indian families with substantive services and not merely make the services available. Agency workers and courts should ask whether they have truly taken "active" steps (i.e., affirmative, proactive, thorough, and timely efforts) to provide services and programs to the family, recognizing that resource constraints will always exist.

E.5 Providing active efforts

Regulation:

§ 23.120 How does the State court ensure that active efforts have been made?

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.…

Guidelines:

The statute and rule provide that the State court must conclude that active efforts were provided and were unsuccessful prior to ordering an involuntary foster-care placement or TPR.[37] Thus, if a detention, jurisdiction, or disposition hearing in an involuntary child-custody proceeding includes a judicial determination that the Indian child must be placed in or remain in foster care, the court must first be satisfied that the active-efforts requirement has been met. In order to satisfy this requirement, active efforts should be provided at the earliest point possible.

[37] *See* 25 U.S.C. 1912(d); 25 CFR § 23.120.

If reunification with one parent is not possible (e.g., where the parent has severely abused a child or will be incarcerated for a long period of time), the court should still consider whether active efforts could permit reunification of the Indian child with the other parent.

Active efforts are required to prevent the breakup of the Indian child's family, regardless of whether individual members of the family are themselves Indian. The child's family is an "Indian family" because the child meets the definition of an "Indian child."

Checking on status of active efforts. The regulations reflect that the court must conclude that active efforts were made prior to ordering foster-care placement or TPR, but does not require such a finding at each hearing.[38] It is, however, a recommended practice for a court to inquire about active efforts at every court hearing and actively monitor compliance with the active efforts requirement. This will help avoid unnecessary delays in achieving reunification with the parent, or other permanency for the child. The court should not rely solely on past findings regarding the sufficiency of active efforts, but rather should routinely ask as part of a foster-care or TPR proceeding whether circumstances have changed and whether additional active efforts have been or should be provided.

How long to provide active efforts. There are no specific time limits on active efforts, and what is required will depend on the facts of each case. State agencies should keep in mind that the State court must make a finding that active efforts were provided in order to make a foster-care placement or order TPR to an Indian child. Even if a finding was made that sufficient active efforts were made to support the foster-care placement, circumstances may have changed such that the court may require additional active efforts prior to ordering TPR. For example, if a parent initially refused alcohol treatment despite an agency's active efforts to provide services, a court could find that these efforts satisfied the requirement for purposes of the foster-care placement. But, if the parent subsequently completes alcohol treatment and needs additional services to regain custody (such as parenting skills training), the court will need to consider whether active efforts were made to provide these services. The requirement to conduct active efforts necessarily ends at the TPR because, after that point, there is no service or program that would prevent the breakup of the Indian family. If a child-custody proceeding is ongoing, even after return of the child, then active efforts would be required before there may be a subsequent foster-care placement or TPR.

Applying for Tribal membership. There is no requirement to conduct active efforts to apply for Tribal citizenship for the child. In any particular case, however, it may be appropriate to assist the child or parents in obtaining Tribal citizenship for the child, as this may make more services and programs available to the child. Securing Tribal citizenship may have long-term benefits for an Indian child, including access to programs, services, benefits, cultural connections, and political rights in the Tribe. It may be appropriate, for example, to assist in obtaining Tribal citizenship where it is apparent that the child or its biological parent would become enrolled in the Tribe during the course of the proceedings, thereby aiding in ICWA's efficient administration.

E.6 Documenting active efforts

Regulation:

§ 23.120 How does the State court ensure that active efforts have been made?

…(b) Active efforts must be documented in detail in the record.

[38] *See* 25 CFR § 23.120.

Guidelines:

The active-efforts requirement is a key protection provided by ICWA, and it is important that compliance with the requirement is documented in the court record. The rule therefore requires the court to document active efforts in detail in the record.

State agencies also need to help ensure that there is sufficient documentation available for the court to use in reaching its conclusions regarding the provision of active efforts. Although the court itself determines what level of documentation it will require, the Department recommends that the State agency include the following in its documentation of active efforts, among any other relevant information:

- The issues the family is facing that the State agency is targeting with the active efforts (these should be the same issues that are threatening the breakup of the Indian family or preventing reunification);
- A list of active efforts the State agency determines would best address the issues and the reasoning for choosing those specific active efforts;
- Dates, persons contacted, and other details evidencing how the State agency provided active efforts;
- Results of the active efforts provided and, where the results were less than satisfactory, whether the State agency adjusted the active efforts to better address the issues.

While ICWA does not establish a standard of evidence for review of whether active efforts have been provided, the Department favorably views cases that apply the same standard of proof for the underlying action to the question of whether active efforts were provided (i.e., clear and convincing evidence for foster care placement and beyond a reasonable doubt for TPR).

F. Jurisdiction

F.1 Tribe's exclusive jurisdiction

Regulation:

§ 23.110 When must a State court dismiss an action?

Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and § 23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:

(a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

Guidelines:

With limited exceptions, ICWA provides for Tribal jurisdiction "exclusive as to any State" over child-custody proceedings involving an Indian child who resides or is domiciled within the reservation of such Tribe.[39] ICWA also provides for exclusive Tribal jurisdiction over an Indian child who is a ward of a Tribal court, notwithstanding the residence or domicile of the child. If the child's domicile[40] or residence is on an Indian reservation or the child is a ward of Tribal court, then the Tribe has exclusive jurisdiction over the proceeding, unless "such jurisdiction is otherwise vested in the State by existing Federal law."[41] To ensure the well-being of the child, State officials should continue to work on the case until the State court officially dismisses the case from State jurisdiction.[42]

The mandatory dismissal provisions in § 23.110 apply "subject to" § 23.113 (emergency proceedings) so that the State may take action through an emergency proceeding when necessary to prevent imminent physical damage or harm to the child. Likewise, the mandatory dismissal provisions do not apply if the State

[39] 25 U.S.C. 1911(a).
[40] *See* definition of "domicile"
[41] 25 U.S.C. 1911(a); Certain courts have interpreted the 'existing federal law' clause as granting state courts in Public Law 280 states concurrent jurisdiction over cases in which jurisdiction would otherwise remain exclusively with the tribe. *See, e.g., Doe v. Mann*, 415 F.3d 1038(9th Cir. 2005).
[42] *See* 25 CFR § 23.110 at Appendix 6.

and Tribe have an agreement regarding jurisdiction because, in some cases, Tribes choose to refrain from asserting jurisdiction. *See* section A.5 of these guidelines.

Contacting court prior to determining whether dismissal is necessary. In determining whether dismissal is necessary, the State court may need to contact the Tribal court and/or Tribal child-welfare agency to:

- Confirm the child's status as a ward of that court; and
- Determine whether jurisdiction over child-custody proceedings for that Tribe is otherwise vested in the State by existing Federal law.[43]

If the State court does not have contact information for the Tribal court, the Tribe's designated ICWA agent may provide that information. The BIA publishes, on an annual basis, a list of contacts designated by each Tribe for receipt of ICWA notices in the Federal Register and makes the list available at www.bia.gov. Each Tribe's ICWA designated contact will have information on whether the Tribe exercises exclusive jurisdiction.

Coordination of dismissal and transfer. State and Tribal courts and State and Tribal child-welfare agencies are encouraged to work cooperatively to ensure that dismissal and transfer of information proceeds expeditiously and that the welfare of the Indian child is protected. The rule requires the court to transmit all information in its possession regarding the Indian child-custody proceeding to the Tribal court. Such information would include all the information within the court's possession regarding the Indian child-custody proceeding, including the pleadings and any court record.[44] In order to best protect the welfare of the child, State agencies should also work to share information that is not contained in the State court's records but that would assist the Tribe in understanding and meeting the Indian child's needs.

Safety investigative services. The rule does not affect State authority to provide safety investigative services when a child is domiciled on reservation but located off reservation.

See also the definition of "reservation."

F.2 State's and Tribe's concurrent jurisdiction

Regulation:

§ 23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

Guidelines:

Section 1911(b) of ICWA provides for the transfer of any State court proceeding for the foster-care placement, or TPR to, an Indian child not domiciled or residing within the reservation of the Indian child's

[43] *See* 25 U.S.C. 1911(a).
[44] *See* 25 CFR § 23.110.

Tribe. This provision and § 23.115 recognize that Indian Tribes maintain concurrent jurisdiction over child-welfare matters involving Tribal children, even off of the reservation.

Applicable proceedings. Provisions addressing transfer apply to both involuntary and voluntary foster-care and TPR proceedings. This includes TPR proceedings that may be handled concurrently with adoption proceedings.

Other proceedings. Parties may request transfer of preadoptive and adoptive placement proceedings, but the standards for addressing such motions are not dictated by ICWA or the regulations. Tribes possess inherent jurisdiction over domestic relations, including the welfare of child citizens of the Tribe, even beyond that authority confirmed in ICWA. Thus, it may be appropriate to transfer preadoptive and adoptive proceedings involving children residing outside of a reservation to Tribal jurisdiction in particular circumstances.[45]

Availability at any stage. The rule provides that the right to request a transfer is available at any stage in each foster-care or TPR proceeding. Transfer to Tribal jurisdiction, even at a late stage of a proceeding, will not necessarily entail unwarranted disruption of an Indian child's placement. The Tribe or parent may have reasons for not immediately moving to transfer the case (e.g., because of geographic considerations, maintaining State-court jurisdiction appears to hold out the most promise for reunification of the family). [46]

F.3 Contact with Tribal court on potential transfer.

Regulation:

§ 23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

Guidelines:

It is important for the State court to contact the Tribal court upon receipt of the transfer petition to alert the Tribal court (usually reachable by first contacting the Tribe's designated ICWA agent) and provide it with the opportunity to determine whether it wishes to decline jurisdiction. It is recommended that, in addition to the required written notification, State court personnel contact the Tribe by phone as well.

[45] *See* 81 FR 38821 for additional information on how Congress has repeatedly sought to strengthen Tribal courts.

[46] *See* 81 FR 38823 for information on why the rule does not establish a deadline or time limit for requesting transfer.

F.4 Criteria for ruling on a transfer petition.

Regulation:

§ 23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

(a) Either parent objects to such transfer;

(b) The Tribal court declines the transfer; or

(c) Good cause exists for denying the transfer.

Guidelines:

A keystone of ICWA is its recognition of a Tribe's exclusive or concurrent jurisdiction over child-custody proceedings involving Indian children. When the State and Tribe have concurrent jurisdiction, ICWA establishes a presumption that a State must transfer jurisdiction to the Tribe upon request. The rule reflects ICWA section 1911(b)'s requirement that a child-custody proceeding be transferred to Tribal court upon petition of either parent or the Indian custodian or the Indian child's Tribe, except in three circumstances: (1) where either parent objects; (2) where the Tribal court declines the transfer; or (3) where there is good cause for denying the transfer.

Either Parent Objects

The rule mirrors the statute in respecting a parent's objection to transfer of the proceeding to Tribal court. As Congress noted, "[e]ither parent is given the right to veto such transfer."[47] However, if a parent's parental rights have been terminated and this determination is final, they would no longer be considered a "parent" with a right under these rules to object.

While, this criterion addresses the objection of either parent, nothing prohibits the State court from considering the objection of the guardian ad litem or child himself under the third criteria (good cause to deny transfer), where appropriate.

Tribe Declines

If the Tribal court explicitly states that it declines jurisdiction, the State court may deny a transfer motion. It is recommended that the State court obtain documentation of the Tribal court's declination to include in the record.

Good Cause Exists

This exception is not defined in the statute, and in the Department's experience, has in the past been used to deny transfer for reasons that frustrate the purposes of ICWA. The legislative history indicates that this provision is intended to permit a State court to apply a modified doctrine of forum non conveniens, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the

[47] H.R. Rep. No. 95-1386, at 21.

Tribe are fully protected. State courts may exercise case-by-case discretion regarding the "good cause" finding, but this discretion should be limited and animated by the Federal policy to protect the rights of the Indian child, parents, and Tribe, which can often best be accomplished in Tribal court. Exceptions cannot be construed in a manner that would swallow the rule.

F.5 Good cause to deny transfer.

Regulation:

§ 23.118 How is a determination of "good cause" to deny transfer made?

(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.

(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider:

(1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;

(2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;

(3) Whether transfer could affect the placement of the child;

(4) The Indian child's cultural connections with the Tribe or its reservation; or

(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

Guidelines:

While the statute and the rule provide State courts with the discretion to determine "good cause" based on the specific facts of a particular case, the rule does mandate certain procedural protections if a court is going to conduct a good cause analysis. It also identifies a limited number of considerations that should not be part of the good-cause analysis because there is evidence Congress did not wish them to be considered, they have been shown to frustrate the purposes of ICWA, or would otherwise work a fundamental unfairness. The regulation's limitations on what may be considered in the "good cause" determination do not limit State judges from considering some exceptional circumstance as the basis of good cause. However, the "good cause" determination whether to deny transfer to Tribal court should address which court is best positioned to adjudicate the child-custody proceeding, not predictions about the outcome of that proceeding.

Standard of Evidence

Neither the statute nor the rule establishes a Federal standard of evidence for the determination of whether there is good cause to transfer a proceeding to Tribal court. There is, however, a strong trend in State

courts to apply a clear and convincing standard of evidence.[48] The Department notes that the strong trend in State court decisions on this issue is compelling and recommends that State courts follow that trend.

Prohibited Considerations

Advanced stage if notice was not received until an advanced stage. The rule prohibits a finding of good cause based on the advanced stage of the proceeding, if the parent, Indian custodian, or Indian child's Tribe did not receive notice of the proceeding until an advanced stage. This protects the rights of the parents and Tribe to seek transfer where ICWA's notice provisions were not complied with, and thus will help to promote compliance with these provisions. It also ensures that parties are not unfairly advantaged or disadvantaged by noncompliance with the statute. Parents, custodians, and Tribes who were disadvantaged by noncompliance with ICWA's notice provisions should still have a meaningful opportunity to seek transfer.

The rule also clarifies that "advanced stage" refers to the proceeding, rather than the case as a whole. Each individual proceeding will culminate in an order, so "advanced stage" is a measurement of the stage within each proceeding. This allows Tribes to wait until the TPR proceeding to request a transfer to Tribal court, because the parents, Indian custodian, and Tribe must receive notice of each proceeding. It is often at the TPR stage that factors that may have dissuaded a Tribe from taking an active role in the case (such as the State's efforts to reunite a child with her nearby parent) change in ways that may warrant reconsidering transfer of the case.

Prior proceedings for which no petition to transfer was filed. As just discussed, the rule clarifies that "advanced stage" refers to the proceeding, rather than the case as a whole. ICWA clearly distinguishes between foster-care and TPR proceedings, and these proceedings have significantly different implications for the Indian child's parents and Tribe. There may be compelling reasons to not seek transfer for a foster-care proceeding, but those reasons may not be present for a TPR proceeding.

Effect on placement of the child. The rule provides that the State court must not consider, in its decision as to whether there is good cause to deny transfer to the Tribal court, whether the Tribal court could change the child's placement. This is not an appropriate basis for good cause because the State court cannot know or accurately predict which placement a Tribal court might consider or ultimately order. A transfer to Tribal court does not automatically mean a change in placement; the Tribal court will consider each case on and individualized basis and determine what is best for that child. Like State courts, Tribal courts and agencies seek to protect the welfare of the Indian child, and would consider whether the current placement best meets that goal.

Cultural connections to the Tribe or reservation. The regulations prohibit a finding of good cause based on the Indian child's perceived cultural connections with the Tribe or reservation. Congress enacted ICWA in express recognition of the fact that State courts and agencies were generally ill-equipped to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[49] As such, State courts must not evaluate the sufficiency of an Indian child's cultural connections with a Tribe or reservation in evaluating a motion to transfer.

Negative perceptions of Tribal or BIA social services or judicial systems. The regulations prohibit consideration of any perceived inadequacy of Tribal or BIA social services or judicial systems. This is consistent with ICWA's strong recognition of the competency of Tribal fora to address child-custody matters

[48] *See* 81 FR 38827 (June 14, 2016) for additional information on States' application of this standard of evidence.
[49] 25 U.S.C. 1901(5).

involving Tribal children. It is also consistent with section 1911(d)'s requirement that States afford full faith and credit to public acts, records, and judicial proceedings of Tribes to the same extent as any other entity.

Socioeconomic conditions within the Tribe or reservation. The regulations prohibit consideration of the perceived socioeconomic conditions within a Tribe or reservation. Congress found that misplaced concerns about low incomes, substandard housing, and similar factors on reservations resulted in the unwarranted removal of Indian children from their families and Tribes. These factors can introduce bias into decision-making and should not come into play in considering whether transfer is appropriate.

State courts retain the ability to determine "good cause" based on the specific facts of a particular case, so long as they do not base their good cause finding on one or more of these prohibited considerations. If a State court considers the distance of the parties from the Tribal court, it must also weigh any available accommodations that may address the potential hardships caused by the distance.

For additional information on the basis for the parameters for "good cause," *see* 81 FR 38821-38822 (June 14, 2016).

F.6 Transferring to Tribal court.

Regulation:

§ 23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

Guidelines:

Once the State court determines that it must transfer to Tribal court, the State court and Tribal court should communicate to agree to procedures for the transfer to ensure that the transfer of the proceeding minimizes disruptions to the child and to services provided to the family.

If the State court does not have contact information for the Tribal court, the court should contact the Tribe's ICWA officer. If this occurs, State court personnel should work with the Tribal court and agency to transfer or provide copies of all records in the Indian child's case file so that the Tribal court and agency may best meet the child's needs. State agencies should share records with Tribal agencies as they would other governmental jurisdictions, presumably at no charge.

G. Adjudication of Involuntary Proceedings

G.1 Standard of evidence for foster-care placement and TPR proceedings

Regulation:

§ 23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

Guidelines:

ICWA and the rule require that a court may not order a foster-care placement of an Indian child or a TPR unless there is a showing that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The court's determination must be supported by clear and convincing evidence, in the case of a foster-care placement, or by evidence beyond a reasonable doubt, in the case of a TPR. The evidence supporting the determination must also include the testimony of a qualified expert witness.

The rule requires there be a causal relationship between the particular conditions in the home and risk of serious emotional or physical damage to the child. Put differently, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding.

The rule prohibits relying on **any one** of the factors listed in paragraph (d), **absent the causal connection** identified in (c), **as the sole basis** for determining that clear and convincing evidence or evidence beyond a reasonable doubt support a conclusion that continued custody is likely to result in serious emotional or physical damage to the child. This provision addresses the types of situations identified in the statute's legislative history where Indian children are removed from their home based on subjective assessments of home conditions that, in fact, are not likely to cause the child serious emotional or physical damage.

"Nonconforming social behavior" may include behaviors that do not comply with society's norms, such as dressing in a manner that others perceive as strange, an unusual or disruptive manner of speech, or discomfort in or avoidance of social situations.

These provisions recognize that children can thrive when they are kept with their parents, even in homes that may not be ideal in terms of cleanliness, access to nutritious food, or personal space, or when a parent is single, impoverished, or a substance abuser. Rather, there must be a demonstrated correlation between the conditions of the home and a threat to the specific child's emotional or physical well-being.

G.2 Qualified expert witness

Regulation:

§ 23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

Guidelines:

Qualified expert witnesses must have particular expertise. The rule requires that the qualified expert witness must be qualified to testify regarding whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. This requirement flows from the language of the statute requiring a determination, supported by evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in

serious emotional or physical damage to the child.[50] Congress noted that "[t]he phrase 'qualified expert witness' is meant to apply to expertise beyond normal social worker qualifications."[51]

Qualified expert witness should have knowledge of prevailing social and cultural standards of the Tribe. In addition, the qualified expert witness should have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe. In passing ICWA, Congress wanted to make sure that Indian child-welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."[52] Congress recognized that States have failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[53] Accordingly, expert testimony presented to State courts should reflect and be informed by those cultural and social standards. This ensures that relevant cultural information is provided to the court and that the expert testimony is contextualized within the Tribe's social and cultural standards. Thus, the question of whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child is one that should be examined in the context of the prevailing cultural and social standards of the Indian child's Tribe.

The rule does not, however, strictly limit who may serve as a qualified expert witness to only those individuals who have particular Tribal social and cultural knowledge. The rule recognizes that there may be certain circumstances where a qualified expert witness need not have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe in order to meet the statutory standard. For example, a leading expert on issues regarding sexual abuse of children may not need to know about specific Tribal social and cultural standards in order to testify as a qualified expert witness regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child. Thus, while a qualified expert witness should normally be required to have knowledge of Tribal social and cultural standards, that may not be necessary if such knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding. A more stringent standard may, of course, be set by State law.

Separate expert witnesses may be used to testify regarding potential emotional or physical damage to the child and the prevailing social and cultural standards of the Tribe.

A person testifying to the prevailing social and cultural standards of the Indian child's Tribe must be knowledgeable and experienced in the Tribe's society and culture. The Indian child's Tribe may designate a person as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

Assistance in locating a qualified expert witness. The rule encourages the court or any party to request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses. The rule also allows a Tribe to designate a person as being qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.

Social worker regularly assigned to the child. The qualified expert witness should be someone who can provide a culturally informed, outside opinion to the court regarding whether the continued custody by the parent is likely to result in serious emotional or physical harm to the child. By imposing the requirement for a qualified expert witness, Congress wanted to ensure that State courts heard from experts other than State social workers seeking the action before placing an Indian child in foster care or ordering the TPR. Therefore, the

[50] 25 U.S.C. 1912(e), (f).
[51] H.R. Rep. No. 95-1386, at 22.
[52] *Holyfield,* 490 U.S. at 36 (citing H.R. Rep. No. 95-1386, at 24).
[53] *See* 25 U.S.C. 1901(5).

regulation provides that the social worker regularly assigned to the Indian child (i.e., the State agency seeking the action) may not serve as a qualified expert witness in child-custody proceedings concerning the child. If another social worker, Tribal or otherwise, serves as the qualified expert witness, that person must have expertise beyond the normal social worker qualifications. [54]

Citizen of Tribe. There is no requirement that the qualified expert witness be a citizen of the child's Tribe. The witness should be able to demonstrate knowledge of the prevailing social and cultural standards of the Indian child's Tribe or be designated by a Tribe as having such knowledge. In some instances, it may be appropriate to accept an expert with knowledge of the customs and standards of closely related Tribes. Parties may also contact the BIA for assistance.

Number of expert witnesses. ICWA and the rule do not limit the number of expert witnesses that may testify. The court may accept expert testimony from any number of witnesses, including from multiple qualified expert witnesses.

Familiarity with the child. It is also recommended that the qualified expert witness be someone familiar with that particular child. If the expert makes contact with the parents, observes interactions between the parent(s) and child, and meets with extended family members in the child's life, the expert will be able to provide a more complete picture to the court.

See 81 FR 38829-38832 (June 14, 2016) for additional information on qualified expert witnesses.

[54] *See* H.R. Rep. No. 95-1386, at 22.

H. Placement Preferences

H.1 Adoptive placement preferences

Regulation:

§ 23.130 What placement preferences apply in adoptive placements?

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) Other members of the Indian child's Tribe; or

(3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

Guidelines:

In ICWA, Congress expressed a strong Federal policy in favor of keeping Indian children with their families and Tribes whenever possible, and established preferred placements that it believed would help protect the needs and long-term welfare of Indian children and families, while providing the flexibility to ensure that the particular circumstances faced by individual Indian children can be addressed by courts.

Order. Each placement should be considered (without being skipped) in that order; the preferences are in the order of most preferred to least preferred.

Tribe's order of preference. State agencies should determine if the child's Tribe has established, by resolution, an order of preference different from that specified in ICWA. If so, then apply the Tribe's placement preferences. Otherwise, apply ICWA's placement preferences as set out in § 23.131.

The statute requires that a Tribal order of preference be established by "resolution." While different Tribes act through different types of actions and legal instruments, the Department understands that a Tribal "resolution," for this purpose, would be a legally binding statement by the competent Tribal authority that lays out an objective order of placement preferences.

If a Tribal-State agreement on ICWA establishes the order of preference, that would constitute an order of preference established by "resolution," as required by the rule. Such a document would be a legally binding statement by the competent Tribal authority that lays out an objective order of placement preferences. In addition, the statute specifically authorizes Tribal-State agreements respecting care and custody of Indian children.

Consideration of child's or parent's preference. The rule reflects the language of the statute. This language does not require a court to follow a child's or parent's preference, but rather requires that it be considered where appropriate.

H.2. Foster-care placement preferences

Regulation:

§ 23.131 What placement preferences apply in foster-care or preadoptive placements?

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that:

(1) Most approximates a family, taking into consideration sibling attachment;

(2) Allows the Indian child's special needs (if any) to be met; and

(3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;

(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

Guidelines:

The placement preferences included in ICWA and the rule codify the generally accepted best practice to favor placing the child with extended family. Congress recognized that this generally applicable preference for placing children with family is even more important for Indian children and families, given that one of the

factors leading to the passage of ICWA was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society. In many cases, the placement preferences have special force and effect for Indian children, since, as Congress recognized, there are harms to individual children and parents caused by disconnection with their Tribal communities and culture, and also harms to Tribes caused by the loss of their children.

While it may be the practice in some jurisdictions for judges to defer to State agencies to issue placement orders, the statute contemplates court review of placements of Indian children. For this reason, there must be a court determination of the placement and, if applicable, an examination of whether good cause exists to depart from the placement preferences.

Least restrictive setting. The foster-care placement includes the additional requirement that the placement be the least restrictive setting, which means the setting that most approximates a family. The placement decision must take into consideration sibling attachment and the proximity to the child's home, extended family, and/or siblings. If for some reason it is not possible to place the siblings together, then the Indian child should be placed, if possible, in a setting that is within a reasonable proximity to the sibling. In addition, if the sibling is age 18 or older, that sibling is extended family and would qualify as a preferred placement. The placement should also be one that allows the Indian child's special needs, if any, to be met.

Order. Each placement should be considered (without being skipped) in that order; the preferences are in the order of most preferred to least preferred.

Tribe's order of preference. *See* section H.1 of these guidelines on how to account for the Tribe's order of preference, but note that, for foster-care placements, the Tribe's placement preferences should be applied as long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child.

Consideration of child's or parent's preference. The rule reflects the language of the statute. This language does not require a court to follow a child or parent's preference, but rather requires that it be considered where appropriate.

See 81 FR 38838-38843 for additional information on placement preferences.

H.3 Finding preferred placements

Regulation:

[*See* §§ 23.130 and 23.131, above].

Guidelines:

The Department recommends that the State agency or other party seeking placement conduct a diligent search for placements that comply with the placement preferences. The diligent search should be thorough, on-going and in compliance with child welfare best practices. A diligent search should also involve:

- ✓ Asking the parents for information about extended family, whether members of an Indian Tribe or not;
- ✓ Contacting all known extended family, whether members of an Indian Tribe or not;
- ✓ Contacting all Tribes with which the child is affiliated for assistance in identifying placements;

- ✓ Conducting diligent follow-up with all potential placements;
- ✓ Contacting institutions for children approved or operated by Indian Tribes if other preferred placements are not available.

It is recommended that the State agency (or other party seeking placement) document the search, so that it is reflected in the record.

Guidance and assistance for families wishing to serve as placements. As a recommended practice for State agencies, the State agency should provide the preferred placements with enough information about the proceeding so they can avail themselves of the preference. As a recommended practice, State courts should treat any individual who falls into a preferred placement category and who has expressed a desire to adopt (or provide foster care to) the Indian child as a potential preferred placement. The courts should not find that no preferred placement is available simply because the individual has not timely completed the formal steps required, such as filing a petition for adoption. Agencies and courts should be aware that a family member may wish to be a foster-care or adoptive placement for an Indian child but may not know how to file a petition for adoption, may have language or education barriers, or may live far from the State court. As a best practice, States may establish that actions such as testifying in court regarding the desire to adopt, or sending a statement to that effect in writing, may substitute for a formal petition for adoption for purposes of applying the placement preferences. If a State does not have formal requirements regarding how to qualify as a preferred placement, these should be made clear to potential placements.

Availability of preferred placements. The Department encourages States and Tribes to collaborate to increase the availability of Indian foster homes. Organizations such as the National Resource Center for Diligent Recruitment at AdoptUSKids provide tools and resources for recruiting Indian homes. See, e.g., National Resource Center for Diligent Recruitment, For Tribes: Tool and Resources (last visited Apr. 27, 2016), www.nrcdr.org/for-tribes/tools-and-resources.

Preferred placements in State. The fact that a no federally recognized Tribe is located within a State where the proceeding is occurring does not mean that there are no family members or members of Tribes residing or domiciled in that State. It is also important to note that a preferred placement may not be excluded from consideration merely because the placement is not located in the State where the proceeding is occurring.

Cooperation with the Tribe. The State agency should cooperate with the Tribe in identifying placement preferences. If a child is ultimately placed in a non-preferred placement, the Tribe may request that the foster or adoptive parent take actions, such as securing membership for the child, to maintain the child's Tribal affiliation.

H.4 Good cause to depart from the placement preferences

Regulation:

§ 23.129 When do the placement preferences apply?

…(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.

§ 23.132 How is a determination of "good cause" to depart from the placement preferences made?

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

(1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) The presence of a sibling attachment that can be maintained only through a particular placement;

(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

Guidelines:

Congress determined that a placement with the Indian child's extended family or Tribal community will serve the child's best interest in most cases. A court may deviate from these preferences, however, when good cause exists.

A determination that good cause exists to deviate from the placement preferences must be made on the record by the court. It is recommended that the court state the reasons for finding good cause and incorporate agency documentation (required by § 23.141) of its search for placement preferences and other information regarding the child's needs and available placements.

This good cause standard applies to requests to deviate from both the Federal placement preferences and any applicable Tribal-specific preferences being applied in lieu of the Federal preferences.

If a party believes that good cause not to comply with the placement preferences exists because one of the factors in § 23.132(c) applies, the party must provide documentation of the basis for good cause.

Standard of evidence for "good cause" determination. While not mandatory, it is recommended that the documentation meet the "clear and convincing" standard of proof. Courts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress's intent in ICWA to maintain Indian families and Tribes intact. Widespread application of this standard will promote uniformity of the application of ICWA. It will also prevent delays in permanency that would otherwise result from protracted litigation over what the correct burden of proof should be.

A court evidentiary hearing may not be required to effect a placement that departs for good cause from the placement preferences, if such a hearing is not required under State law and if the requirements of 25 U.S.C. 1912(d)-(e) have been met. Regardless of the level of court involvement in the placement, however, the basis for an assertion of good cause must be stated in the record or in writing and a record of the placement must be maintained.

Where a party to the proceeding objects to the placement, however, the rule establishes the parameters for a court's review of whether there is good cause to deviate from the placement preferences and requires the basis for that determination to be on the record. While the agency may place a child prior to or without any determination by the court, the agency does so knowing that the court reviews the placement to ensure compliance with the statute.

Congress established preferred placements in ICWA that it believed would help protect the long-term health and welfare of Indian children, parents, families, and Tribes. ICWA must be interpreted as providing meaningful limits on the discretion of agencies and courts to remove Indian children from their families and Tribes, since this is the very problem that ICWA was intended to address. Accordingly, the rule identifies specific factors that should provide the basis for a finding of good cause to deviate from the placement preferences.

Paragraph (c) of § 23.132 provides specific factors that can support a "good cause determination. Congress intended "good cause" to be a limited exception to the placement preferences, rather than a broad category that could swallow the rule.

Factors that may form the basis for good cause. The rule's list of is not exhaustive. The State court has the ultimate authority to consider evidence provided by the parties and make its own judgment as to whether the moving party has met the statutory "good cause" standard. In this way, the rule recognizes that there may be extraordinary circumstances where there is good cause to deviate from the placement preferences based on some reason outside of the five specifically-listed factors. The rule thereby retains discretion for courts and agencies to consider any unique needs of a particular Indian child in making a good cause determination.

Flexibility to find there is no good cause even when one or more factors are present. The court retains the discretion to find that good cause does not exist (and apply the placement preferences) even where one or more of the listed factors for good cause is present. Such a finding may be appropriate if other circumstances lead the court to conclude that there is not good cause. For example, if one parent consents and one does not, the court is not mandated to deviate from the preferences – rather it should be able to listen to the arguments of both sides and then decide.

Request of parent. The statute provides that, where appropriate, preference of the parent must be considered.[55] The rule therefore reflects that the request of the parent may provide a basis for a "good cause"

[55] *See* 25 U.S.C. 1915(c).

determination, if the court agrees. The rule requires that the parent or parents making such a request must attest that they have reviewed the placement options that comply with the order of preference. The rule uses the term "placement options" to refer to the actual placements, rather than just the categories.

Request of child. The statute provides that, where appropriate, preference of the Indian child must be considered.[56] The rule adds that the child must be of "sufficient age and capacity to understand the decision that is being made" but leaves it to the fact-finder to make the determination as to age and capacity.

Sibling attachment. The rules governing placement preferences recognize the importance of maintaining biological sibling connections. The sibling placement preference makes clear that good cause can appropriately be found to depart from ICWA's placement preferences where doing so allows the "Indian child" to remain with his or her sibling. This allows biological siblings to remain together, even if only one is an "Indian child" under the Act.

Extraordinary needs. The rule retains discretion for courts and agencies to consider any extraordinary physical, mental, or emotional needs of a particular Indian child.

Unavailability of suitable placement. The rule provides that the unavailability of a suitable placement may be the basis for a good cause determination. It also requires that, in order to determine that there is good cause to deviate from the placement preferences based on unavailability of a suitable placement, the court must determine that a diligent search was conducted to find placements meeting the preference criteria. This provision is required because the Department understands ICWA to require proactive efforts to determine if there are extended family or Tribal community placements available. It is also consistent with the Federal policy for all children—not just Indian children—that States are to exercise "due diligence" to identify, locate, and notify relatives when children enter the foster care system. *See* 81 FR 38839 (June 14, 2016) for additional explanation for why the State must provide documented efforts to comply with the preferences. *See* section H.3 of these guidelines for additional guidance on what a diligent search involves.

The rule requires that, if the agency relies on unavailability of placement preferences as good cause for deviating from the placement preferences, it must be able to demonstrate to the court on the record that it conducted a diligent search. This showing would occur at the hearing in which the court determines whether a placement or change in placement is appropriate.

The determination of whether a "diligent search" has been completed is left to the fact-finder and will depend on the facts of each case. As a best practice, a diligent search will require a showing that the agency made good-faith efforts to contact all known family members to inquire about their willingness to serve as a placement, as well as whether they are aware of other family members that might be willing to serve as a placement. A diligent search will also generally require good-faith efforts to work with the child's Tribe to identify family-member and Tribal-community placements. If placements were identified but have not yet completed a necessary step for the child to be placed with them (such as filing paperwork or completing a background check), the fact-finder will need to determine whether sufficient time and assistance has been provided.

Safety of placement. While the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community, nothing in the rule eliminates other requirements under State or Federal law for ensuring that placements will protect the safety of the Indian child.

[56] *See* 25 U.S.C. 1915(c).

H.5 Limits on good cause

Regulation:

§ 23.132 How is a determination of "good cause" to depart from the placement preferences made?

…(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Guidelines:

The rule identifies certain factors that may not be the basis for a finding of good cause to depart from the preferences. These limits focus on those factors that there is evidence Congress did not wish to be considered, or that have been shown to frustrated the application of 25 U.S.C. 1911(b). State courts retain discretion to determine "good cause," so long as they do not base their good cause finding on one or more of these prohibited considerations.

Socioeconomic status. The fact that a preferred placement may be of a different socioeconomic status than a non-preferred placement may not serve as the basis for good cause to depart from the placement preferences.

Ordinary bonding with a non-preferred placement that flowed from time spent in a non-preferred placement that was made in violation of ICWA. If a child has been placed in a non-preferred placement in violation of ICWA and the rule, the court should not base a good-cause determination solely on the fact that the child has bonded with that placement.

A placement is "made in violation of ICWA" if the placement was based on a failure to comply with specific statutory or regulatory mandates. The determination of whether there was a violation of ICWA will be fact-specific and tied to the requirements of the statute and this rule. For example, failure to provide the required notice to the Indian child's Tribe for a year, despite the Tribe having been identified earlier in the proceeding, would be a violation of ICWA. By comparison, placing a child in a non-preferred placement would not be a violation of ICWA if the State agency and court followed the statute and applicable rules in making the placement, including by properly determining that there was good cause to deviate from the placement preferences.

As a best practice, in all cases, State agencies and courts should carefully consider whether the fact that an Indian child has developed a relationship with a non-preferred placement outweighs the long-term benefits to a child that can arise from maintaining connections to family and the Tribal community. Where a child is in a non-preferred placement, it is a best practice to facilitate connections between the Indian child and extended family and other potential preferred placements. For example, if a child is in a non-preferred placement due to geographic considerations and to promote reunification with the parent, the agency or court should promote connections and bonding with extended family or other preferred placements who may live further away. In this way, the child has the opportunity to develop additional bonds with these preferred placements that could ease a transition to that placement.

I. Voluntary Proceedings

I.1 Inquiry and verification in voluntary proceedings

Regulation:

§ 23.124 What actions must a State court undertake in voluntary proceedings?

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in § 23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

…

Guidelines:

The rule provides minimum requirements for State courts to determine whether a child in a voluntary proceeding is an "Indian child" as defined by statute. That determination is essential in order to assess the State court's jurisdiction and what law applies in voluntary proceedings. The determination of whether the child is an "Indian child" is a threshold inquiry; it affects the jurisdiction of the State court and what law applies to the matter before it.

In some cases, it may be undisputed that the child is an Indian child, such as where the parents attest to this fact. If, however, there is reason to believe (i.e., reason to know) that the child is an "Indian child," but this cannot be confirmed based on the evidence before the State court, it must ensure that the party seeking placement has taken all reasonable steps to confirm the child's status. This includes seeking verification of the Indian child's status with the Tribes of which the child might be a citizen. Tribes, like other governments, are equipped to keep such inquiries confidential, and the rule requires this of Tribes.

The regulation's use of the language "reason to believe" echoes, and is intended to be substantively the same as, the statutory language "reason to know."

I.2 Placement preferences in voluntary proceedings

Regulation:

§ 23.124 What actions must a State court undertake in voluntary proceedings?

…(c) State courts must ensure that the placement for the Indian child complies with §§ 23.129 - 23.132.

Guidelines:

This provision explains that the regulatory provisions addressing the application of the placement preferences apply with equal force to voluntary proceedings. The Act and rule require application of the placement preferences in both voluntary and involuntary placements.

As discussed in section H.4 of these guidelines, above, the judge may consider as a basis for good cause to depart from the placement preferences the request of one or both of the parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference. This good cause provision allows birth parents to express their preference for an adoptive family that does not fall within ICWA's placement preferences. It is important, however, for birth parents to be made aware of ICWA's preferences and whether there are available placements within the extended family or Tribal community. This balances the interest of the parent with the other interests protected by ICWA.

Situations in which a step-parent seeks to adopt the child would fall within the first placement preference because step-parents are included in the definition of "extended family member."

I.3 Notice in voluntary proceedings

Guidelines:

The Department recommends that the Indian child's Tribe be provided notice of voluntary proceedings involving that child to allow the Tribe's participation in identifying preferred placements and to promote the child's continued connections to the Tribe. As discussed above, communication with the Tribe may be required in order to verify the child's status as an Indian child. States may choose to require notice to Tribes and other parties in voluntary proceedings.

I.4 Effect of a request for anonymity on verification

Regulation:

§ 23.107 How should a State court determine if there is reason to know the child is an Indian child?

…(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

Guidelines:

In voluntary proceedings where the consenting parent requests, in writing, to remain anonymous, it is recommended that the party seeking placement notify the Tribe of the request for anonymity; the Tribe is required to keep information related to the verification inquiry confidential.

I.5 Effect of a request for anonymity on placement preferences

Regulation:

§ 23.129 When do the placement preferences apply?

…(b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.

Guidelines:

If the consenting parent requests anonymity, it is recommended that the agency work with the Tribe to identify placement preferences that protect the parent's anonymity. The rule does not mandate contacting extended family members to identify potential placements.

I.6 Parent's or Indian custodian's consent

Regulation:

§ 23.125 How is consent obtained?

(a) A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain to the parent or Indian custodian:

(1) The terms and consequences of the consent in detail; and

(2) The following limitations, applicable to the type of child-custody proceeding for which consent is given, on withdrawal of consent:

(i) For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned; or

(ii) For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or

(iii) For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.

(c) The court must certify that the terms and consequences of the consent were explained on the record in detail in English (or the language of the parent or Indian custodian, if English is not the primary language) and were fully understood by the parent or Indian custodian.

(d) Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(e) A consent given prior to, or within 10 days after, the birth of an Indian child is not valid.

Guidelines:

An individual parent's consent is valid only as to himself or herself.

The rule provides that the consent must be "recorded" before a court; this must be accomplished by providing a written document to the court.

I.7 Contents of consent document

Regulation:

§ 23.126 What information must a consent document contain?

(a) If there are any conditions to the consent, the written consent must clearly set out the conditions.

(b) A written consent to foster-care placement should contain, in addition to the information specified in paragraph (a) of this section, the name and birthdate of the Indian child; the name of the Indian child's Tribe; the Tribal enrollment number for the parent and for the Indian child, where known, or some other indication of the child's membership in the Tribe; the name, address, and other identifying information of the consenting parent or Indian custodian; the name and address of the person or entity, if any, who arranged the placement; and the name and address of the prospective foster parents, if known at the time.

Guidelines:

A State may choose to include or require the inclusion of additional information, beyond what is required in § 23.126.

The BIA has a sample form for consent posted at www.bia.gov as an example for States to consider.

I.7 Withdrawal of consent

Regulation:

§ 23.127 How is withdrawal of consent to a foster-care placement achieved?

(a) The parent or Indian custodian may withdraw consent to voluntary foster-care placement at any time.

(b) To withdraw consent, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(c) When a parent or Indian custodian withdraws consent to a voluntary foster-care placement, the court must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.

§ 23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?

(a) A parent may withdraw consent to voluntary termination of parental rights at any time prior to the entry of a final decree of termination.

(b) A parent or Indian custodian may withdraw consent to voluntary adoption at any time prior to the entry of a final decree of adoption.

(c) To withdraw consent prior to the entry of a final decree of adoption, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(d) The court in which the withdrawal of consent is filed must promptly notify the person or entity who arranged any voluntary preadoptive or adoptive placement of such filing, and the Indian child must be returned to the parent or Indian custodian as soon as practicable.

Guidelines:

A parent may withdraw consent to a TPR any time before the final decree for that TPR is entered, and a parent may withdraw consent to an adoption any time before the final decree of adoption is entered. However, note that if a parent's or Indian custodian's parental rights have already been terminated, then the parent or Indian custodian may no longer withdraw consent to the adoption, because they no longer legally qualify as a parent or Indian custodian.

The written withdrawal of consent filed with the court (or testimony before the court) is not intended to be an overly formalistic requirement. Parents involved in pending TPR or adoption proceedings can be reasonably expected to know that there are court proceedings concerning their child, and the rule balances the need for a clear indication that the parent wants to withdraw consent with the parent's interest in easily withdrawing consent. States may have additional methods for withdrawing consent that are more protective of a parent's rights that would then apply.

Under the rule, whenever consent has been withdrawn, court must contact the party by or through whom any preadoptive or adoptive placement has been arranged. In most cases this will be the agency, whether public or private. The agency is expected to have the contact information for the placement.

The BIA has a sample form for withdrawal of consent posted at www.bia.gov as an example for States to consider.

J. Recordkeeping & Reporting

J.1 Record of every placement

Regulation:

§ 23.141 What records must the State maintain?

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

Guidelines:

The statute and the rule require that the State maintain a record of each placement, under State law, of an Indian child. The files may be originals or may be true copies of the originals.

The rule ensures States have the flexibility to determine the best way to maintain their records to ensure that they can comply with the 14-day timeframe.

Paragraph (b) of § 23.141 directly addresses only court records because the court records must include all evidence justifying the placement determination. States may require that additional records be maintained.

It is recommended that the record include any documentation of preferred placements contacted and, if any were found ineligible as a placement, an explanation as to the ineligibility.

It is recommended that State agencies coordinate with State courts and private agencies to identify who is best positioned to fulfill this duty.

J.2 Transmission of every final adoption decree

Regulation:

§ 23.140 What information must States furnish to the Bureau of Indian Affairs?

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human

Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information, in an envelope marked "Confidential":

(1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;

(2) Names and addresses of the biological parents;

(3) Names and addresses of the adoptive parents;

(4) Name and contact information for any agency having files or information relating to the adoption;

(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and

(6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

(b) If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in paragraph (a) of this section, the State courts in that State need not fulfill those same duties.

Guidelines:

Providing the information to BIA for each final adoption decree and order allows BIA to serve as a resource for Indian children who, when they become adults, seek information on their adoption.

It is recommended that State agencies coordinate with State courts and private agencies to identify who is best positioned to fulfill this duty.

J.3 Adoptions that are vacated or set aside

Regulation:

§ 23.139 Must notice be given of a change in an adopted Indian child's status?

(a) If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe whenever:

(1) A final decree of adoption of the Indian child has been vacated or set aside; or

(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child.

(b) The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court.

(1) Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.

(2) The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained in detail in English (or the language of the parent or Indian custodian, if English is not the primary language), and were fully understood by the parent or Indian custodian.

(3) Where confidentiality is requested or indicated, execution of the waiver need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(4) The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.

(5) A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation.

Guidelines:

If an adoption is vacated or set aside, or the adoptive parent voluntarily consents to TPR, then the State agency should work with the State court to ensure that the notice requirements of § 23.139 are fulfilled.

This notice is required because, in the particular circumstances where an adoption is vacated or set aside, or the adoptive parent voluntarily consents to TPR, the statute provides certain rights to the biological parent or prior Indian custodian.[57] The notice enables the biological parent or prior Indian custodian to avail himself or herself of those rights.

This section of the rule addresses waiver of notice for two particular situations:

- Where an adoption of an Indian child is subsequently vacated or set aside; or
- Where the adoptive parents decide to voluntarily terminate their parental rights.

In those cases, the biological parent or prior Indian custodian may waive notice of these actions.

J.4 Adult adoptees' access to information about their Tribal affiliation

Regulation:

§ 23.138 What are the rights to information about adoptees' Tribal affiliations?

Upon application by an Indian who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree of adoption must inform such individual of the Tribal affiliations, if any, of the individual's biological parents

[57] *See* 25 U.S.C. 1916(a).

and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

Guidelines:

ICWA provides Indian adult adoptees with specific rights to information on Tribal, as reflected in the above rule provision. States may provide additional rights to adoptees.

Some States have registries that allow individuals to obtain information on siblings for purposes of reunification.

It is recommended that the State agency work with the State court to ensure that, with each adoptive placement, there is sufficient information in the record regarding the individual's Tribal relationship to allow the court to meet its requirements under § 23.138 for the protection of any rights that may result from the individual's Tribal membership.

BIA is also adding information to its website (www.bia.gov) to assist adult adoptees who are looking to reconnect with their Tribes.

J.5 Parties' access to the case documents

Regulation:

§ 23.134 Who has access to reports and records during a proceeding?

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

Guidelines:

Parties to emergency, foster-care-placement, or TPR proceedings are entitled to receipt of documents upon which a decision may be based.

States cannot refuse to provide a party to an ICWA proceeding, including a Tribe that is a party, access to information about the proceedings.

K. Improper Removal, Consent Obtained through Fraud or Duress, Other ICWA Violations

Both the State agency and the court have an independent responsibility under Federal law to follow ICWA. The following addresses regulatory provisions setting out how an Indian child, parent, Indian custodian, or the Tribe can seek redress for certain actions made in violation of ICWA.

K.1 Improper removal

Regulation:

§ 23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

Guidelines:

This regulatory provision implements section 1920 of the statute. It requires that, where a court determines that a child has been improperly removed from custody of the parent or Indian custodian or has been improperly retained in the custody of a petitioner in a child-custody proceeding, the court should return the child to his/her parent or Indian custodian unless returning the child to his/her parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

K.2 Consent obtained through fraud or duress

Regulation:

§ 23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, the State court may invalidate the voluntary adoption upon finding that the parent's consent was obtained by fraud or duress.

(b) Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition.

(c) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the final decree of adoption, order the consent revoked, and order that the child be returned to the parent.

Guidelines:

The two-year statute of limitations applies only to invalidation of adoptions based on parental consent having been obtained through fraud or duress. If a State's statute of limitations exceeds two years, then the State statute of limitations may apply; the two-year statute of limitations is a minimum timeframe.

K.3 Other ICWA violations

Regulation:

§ 23.137 Who can petition to invalidate an action for certain ICWA violations?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster-care placement or termination of parental rights under state law where it is alleged that 25 U.S.C. 1911, 1912, or 1913 has been violated:

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's Tribe.

(b) Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.

Guidelines:

The court of competent jurisdiction referenced in this rule provision may be a different court from the court where the original proceedings occurred.

A party may assert violations of ICWA requirements that may have impacted the ICWA rights of other parties (e.g., a parent can assert a violation of the requirement for a Tribe to receive notice under section

1912(a)). One party cannot waive another party's right to seek to invalidate such an action. Additionally, parties may have other appeal rights under State or other Federal law in addition to the rights established in ICWA.

A petition to invalidate an action does not necessarily affect only the action that is currently before the court. For example, an action to invalidate a TPR may affect an adoption proceeding.

The rule does not require the court to invalidate an action, but requires the court to determine whether it is appropriate to invalidate the action under the standard of review under applicable law.

L. Definitions

L.1 Active Efforts

Regulation:

§ 23.2

…*Active efforts* means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and

actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

Guidelines:

See section E of these guidelines.

L.2 Agency

Regulation:

§ 23.102

…*Agency* means a private State-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding.

Guidelines:

The rule defines "agency" as an organization that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in, the administrative and social work necessary for foster, preadoptive, or adoptive placements. The definition includes non-profit, for-profit, or governmental organizations including those who may assist in the administrative or social work aspects of seeking placement. An "agency" may also be assisting in the legal aspects of seeking placement, but the definition does not include attorneys or law firms, standing alone, because as used in the rule, "agencies" are presumed to have some capacity to provide social services. Attorneys and others involved in court proceedings are addressed separately in various provisions in the rule. This comports with the statute's broad language imposing requirements on "any party" seeking placement of a child or TPR.

L.3 Child-custody proceeding

Regulation:

§ 23.2

…*Child-custody proceeding.*

(1) "Child custody proceeding" means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:

> (i) Foster-care placement, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (ii) Termination of parental rights, which is any action resulting in the termination of the parent-child relationship;
>
> (iii) Preadoptive placement, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or
>
> (iv) Adoptive placement, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.
>
> (2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

Guidelines:

ICWA requirements apply to an action that may result in one of the placement outcomes, even if it ultimately does not. For example, ICWA would apply to an action where a court was considering a foster-care placement of a child, but ultimately decided to return the child to his parents. Thus, even though the action did not result in a foster-care placement, it may have culminated in such a placement and, therefore, should be considered a "child-custody proceeding" under the statute. The definition further makes clear that a child-custody proceeding that may culminate in one outcome (e.g., a foster-care placement) would be a separate child-custody proceeding from one that may culminate in a different outcome (e.g., a TPR), even though the same child may be involved in both proceedings.

This definition explicitly excludes emergency proceedings from the scope of a child-custody proceeding, as emergency proceedings are addressed separately.

This definition includes proceedings involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child.

Adoptions that do not involve TPR, for example, Tribal customary adoptions, are included within the definition of "child-custody proceeding" as either a "foster-care placement" or an "adoptive placement," because these terms, as defined, do not require TPR. *See* 25 U.S.C. 1903.

See § 23.103 and section B.2 of these guidelines. *See, also,* 81 FR 38799 (June 14, 2016) for additional information on this definition.

L.4 Continued custody and custody

Regulation:

§ 23.2

…*Continued custody* means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of a child.

Custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.

Guidelines:

The definition of "continued custody" includes custody the parent or Indian custodian "has or had at any point in the past" as there is no evidence that Congress intended temporary disruptions (e.g., surrender of the child to another caregiver for a period) not to be included in "continued custody." The definition also clarifies that the parent or custodian may have physical and/or legal custody under any applicable Tribal law or Tribal custom or State law.

These definitions clarify that physical and/or legal custody may be defined by applicable Tribal law or custom, or by State law, but do not establish an order of preference among Tribal law, Tribal custom, and State law because custody may be established under any one of the three sources.

L.5 Domicile

Regulation:

§ 23.2

…*Domicile* means:

(1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

(2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

Guidelines:

This definition reflects the common-law definition, which acknowledges that a person may reside in one place but be domiciled in another.

Note that, while the rule does not define "residing" or "residence," the Department interprets "residence" to mean the location where an individual is currently living but which is not their permanent, fixed home to which they intend to return – for example, a child might be domiciled with his or her parents but residing at a boarding school or university, or with family members while his or her parents are away for an extended period of time.

L.6 Emergency proceeding

Regulation:

§ 23.2

…*Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Guidelines:

See section C of these guidelines.

L.7 Extended family member

Regulation:

§ 23.2

…*Extended family member* is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

Guidelines:

Additional categories of individuals may be included in the meaning of the term if the law or custom of the Indian child's Tribe includes them.

"Extended family member" is not limited to Tribal citizens or Native American individuals.

L.8 Hearing

Regulation:

§ 23.2

…*Hearing* means a judicial session held for the purpose of deciding issues of fact, of law, or both.

Guidelines:

In order to demonstrate the distinction between a hearing and a child-custody proceeding, the definition of "child-custody proceeding" explains that there may be multiple hearings involved in a single child-custody proceeding.

L.9 Indian

Regulation:

§ 23.2

…*Indian* means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

Guidelines:

Note that this term includes only those individuals who are members of "Indian Tribes" (i.e., federally recognized Tribes) and members of Alaska Native Claims Settlement Act regional corporations.

L.10 Indian child's Tribe

Regulation:

§ 23.2

…*Indian child's Tribe* means:

(1) The Indian Tribe in which an Indian child is a member or eligible for membership; or

(2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in § 23.109.

Guidelines:

Note that while a child may meet the definition of "Indian" through more than one Tribe, ICWA establishes that one Tribe must be designated as the "Indian child's Tribe" for the purposes of the Act.

L.11 Indian custodian

Regulation:

§ 23.2

… *Indian custodian* means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary

physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.

Guidelines:

This definition allows for consideration of Tribal law or custom.

L.12 Indian foster home

Regulation:

§ 23.2

…*Indian foster home* means a foster home where one or more of the licensed or approved foster parents is an "Indian" as defined in 25 U.S.C. 1903(3).

Guidelines:

Note that a foster home does not meet the definition of an "Indian foster home" merely by virtue of an Indian child being present in the home; rather, one of the foster parents must meet the definition of "Indian."

L.13 Indian organization

Regulation:

§ 23.102

… *Indian organization* means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a tribe, or a majority of whose members are Indians.

Guidelines:

This term is used in § 23.107(c), regarding reason to know the child is an Indian child, and § 23.131, regarding foster-care placement preferences (the last preferred placement is an institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs).

L.14 Indian tribe

Regulation:

§ 23.2

…*Indian tribe* means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(c).

Guidelines:

Note that "Indian Tribe" under ICWA includes only federally recognized Tribes. States may have a more inclusive definition of "Indian Tribe" that includes State-recognized or other groups; however, the Federal ICWA statute and rule do not apply to those groups.

L.15 Involuntary proceeding

Regulation:

§ 23.2

… *Involuntary proceeding* means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

Guidelines:

See discussion in section B of these guidelines regarding ICWA's applicability to involuntary proceedings.

L.16 Parent or parents

Regulation:

§ 23.2

…*Parent or parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

Guidelines:

Note that the rule does not provide a Federal standard for acknowledgment or establishment of paternity. Many State courts have held that, for ICWA purposes, an unwed father must make reasonable efforts to establish paternity, but need not strictly comply with State laws.[58]

L.17 Reservation

Regulation:

§ 23.2

…*Reservation* means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.

Guidelines:

Note that this definition includes land that is held in trust but not officially proclaimed a "reservation."

Indian country generally includes lands within the boundaries of an Indian reservation, dependent Indian communities, Indian allotments, and any lands that are either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation. This definition does not include Alaska Native Villages unless they fall within one of these categories.

L.18 Status offenses

Regulation:

§ 23.2

…*Status offenses* mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (e.g., truancy, incorrigibility).

Guidelines:

See also the definition of "child custody proceeding," which includes proceedings where a child is placed in foster care or another out-of-home placement as a result of a status offense.

If the placement is based upon a status offense, ICWA provisions apply, regardless of whether the State is a PL-280 State.

[58] *See* 81 FR 38796 (June 14, 2016) for a discussion of case law articulating a constitutional standard regarding the rights of unwed fathers.

A placement, including juvenile detention, resulting from status offense proceedings meets the statutory definition of "foster-care placement" and such placement is therefore subject to ICWA.

L.19 Tribal court

Regulation:

§ 23.2

…*Tribal court* means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.

Guidelines:

Note that the definition includes any other administrative body of a tribe vested with authority over child-custody proceedings in recognition that a Tribe may have other mechanisms for making child-custody decisions (e.g., the Tribal council may preside over child-custody proceedings).

L.20 Upon demand

Regulation:

§ 23.2

…*Upon demand* means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.

Guidelines:

This definition is important for determining whether a placement is a "foster-care placement" (because the parent cannot have the child returned upon demand) under § 23.2, and therefore subject to requirements for involuntary proceedings for foster-care placement. Placements where the parent or Indian custodian can regain custody of the child upon demand are not subject to ICWA.

Examples of formalities or contingencies are formal court proceedings, the signing of agreements, and the repayment of the child's expenses.

L.21 Voluntary proceeding

Regulation:

§ 23.2

…*Voluntary proceeding* means a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

Guidelines:

The rule refers to "both parents" to allow for situations where both parents are known and reachable. If a parent refuses to consent to the foster-care, preadoptive, or adoptive placement or TPR, the proceeding would meet the definition of an "involuntary proceeding." Nothing in the statute indicates that the consent of one parent eliminates the rights and protections provided by ICWA to a non-consenting parent.

The definition specifies that placements where the parent agrees to the placement only under threat of losing custody is not "voluntary," by including the phrase "without a threat of removal by a State agency." The rule also specifies that a voluntary proceeding must be of the parent's or Indian custodian's free will to clarify that a proceeding in which the parent agrees to an out-of-home placement of the child under threat that the child will otherwise be removed is not "voluntary."

The distinguishing factor for a "voluntary proceeding" is the parent(s) or Indian custodian's consent, not whether they personally "chose" the placement for their child.

L.22 Other definitions

Regulation:

§ 23.2

… *Act* means the Indian Child Welfare Act (ICWA), Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 et seq.

Assistant Secretary means the Assistant Secretary – Indian Affairs, the Department of the Interior.

Bureau of Indian Affairs (BIA) means the Bureau of Indian Affairs, the Department of the Interior.

Secretary means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.

State court means any agent or agency of a state, including the District of Columbia or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

Tribal government means the federally recognized governing body of an Indian tribe.

Guidelines:

Note that while the regulation often refers to the "Secretary" of the Interior, generally, the Secretary has delegated authority for day-to-day matters arising under ICWA to BIA officials (e.g., BIA ICWA Specialist, BIA social services workers).

M. Additional Context for Understanding ICWA

M.1 ICWA's standards and the "best interests of the child" standard

In a child-custody proceeding, a party might argue that an aspect of ICWA or the rule is in tension with what is in the "best interests of the child." In most cases, this argument lacks merit. First, ICWA was specifically designed by Congress to protect the best interests of Indian children. In order to achieve that general goal, Congress established specific minimum Federal standards for the removal of Indian children from their families that are designed to protect children and their relationship with their parents, extended family, and Tribe.

One of the most important ways that ICWA protects the best interests of Indian children is by ensuring that, if possible, children remain with their parents and that, if they are separated, that support for reunification is provided. This is entirely consistent with the "best interests" standard applied in state courts, which recognizes the importance of family integrity and the preference for avoiding removal of a child from his or her home. If a child does need to be removed from her home, ICWA's placement preferences continue to protect her best interests by favoring placements within her extended family and Tribal community. Other ICWA provisions also serve to protect a child's best interests by, for example, ensuring that a child's parents have sufficient notice about her child-custody proceeding and an ability to fully participate in the proceeding (25 U.S.C. 1912(a),(b),(c)) and helping an adoptee access information about her Tribal connections (25 U.S.C. 1917).

Congress enacted ICWA specifically to address the problems that arose out of the application of subjective value judgments about what is "best" for an Indian child. Congress found that the unfettered subjective application of the "best interests" standard often failed to consider Tribal cultural practices or recognize the long-term advantages to children of remaining with their families and Tribes.[59] By providing courts with objective rules that operate above the emotions of individual cases, Congress was facilitating better State-court practice on these issues and the protection of Indian children, families, and Tribes.[60]

ICWA and the regulations provide objective standards that are designed to promote the welfare and short- and long-term interests of Indian children. However, the regulations also provide flexibility for courts to appropriately consider the particular circumstances of the individual children and to protect those children.

[59] H.R. Rep. No. 95-1386 at 19.
[60] See National Council of Juvenile and Family Court Judges, Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases 14 (2000).

N. Additional Resources

The Department encourages States and Tribes to collaborate to advance ICWA implementation and suggests looking to some of the tools developed by States to aid in implementation of ICWA. For example:

- New York has published a State guide to ICWA (see A Guide to Compliance with the Indian Child Welfare Act published by the New York Office of Children and Family Services at *http://ocfs.ny.gov/main/publications/pub4757guidecompliance.pdf*)
- Washington has established a State evaluation of ICWA implementation, which it performs in partnership with Tribes (see 2009 Washington State Indian Child Welfare Case Review at *https://www.dshs.wa.gov/sites/default/files/SESA/oip/documents/Region%202%20ICW%20CR%20report.pdf*)
- Michigan has established a "bench card" as a tool for judges implementing ICWA and the State counterpart law (see 2014 Michigan Indian Family Preservation Act (MIFPA) Bench Card (last visited Apr. 27, 2016), *http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Documents/BC_ICWA_MIFPA.pdf*)
- Several States have established State-Tribal forums to discuss child-welfare policy and practice issues (see Montana, North Dakota, Oklahoma, Oregon, Utah, and Washington)
- Several States have established State-Tribal court forums where court system representatives meet regularly to improve cooperation between their jurisdictions (see California, Michigan, New Mexico, New York, and Wisconsin).

In addition, several non-governmental entities offer tools for ICWA implementation, such as the National Council of Juvenile and Family Court Justices, National Indian Child Welfare Association, and Native American Rights Fund.

Appendix 1: BIA regional office addresses

§ 23.11 Notice.

(b)(1) For child-custody proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, or any territory or possession of the United States, notices must be sent to the following address: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.

(2) For child-custody proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices must be sent to the following address: Minneapolis Regional Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241.

(3) For child-custody proceedings in Nebraska, North Dakota, or South Dakota, notices must be sent to the following address: Aberdeen Regional Director, Bureau of Indian Affairs, 115 Fourth Avenue, SE, Aberdeen, South Dakota 57401.

(4) For child-custody proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), or the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods or Woodward, notices must be sent to the following address: Anadarko Regional Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6).

(5) For child-custody proceedings in Wyoming or Montana (except for notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), notices must be sent to the following address: Billings Regional Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11).

(6) For child-custody proceedings in the Texas counties of El Paso and Hudspeth or in Colorado or New Mexico (exclusive of notices to the Navajo Nation from the New Mexico counties listed in paragraph (b)(9)), notices must be sent to the following address: Albuquerque Regional Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Nation must be sent to the Navajo Regional Director at the address listed in paragraph (b)(9).

(7) For child-custody proceedings in Alaska (except for notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska), notices must be sent to the following address: Juneau Regional Director, Bureau of Indian Affairs, 709 West 9th Street, Juneau, Alaska 99802-1219. Notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11).

(8) For child-custody proceedings in Arkansas, Missouri, or the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Stephens, Tulsa, Wagoner, or Washington, notices must be sent to the following address: Muskogee Regional Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For child-custody proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi Tribe of Arizona and the San Juan Southern Paiute Tribe of Arizona) or Navajo (except for notices to the Hopi Tribe of Arizona); the New Mexico counties of McKinley (except for notices to the Zuni Tribe of the Zuni Reservation), San Juan, or Socorro; or the Utah county of San Juan, notices must be sent to the following address: Navajo Regional Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Southern Paiute Tribes of Arizona must be sent to the Phoenix Regional Director at the address listed in paragraph (b)(10). Notices to the Zuni Tribe of the Zuni Reservation must be

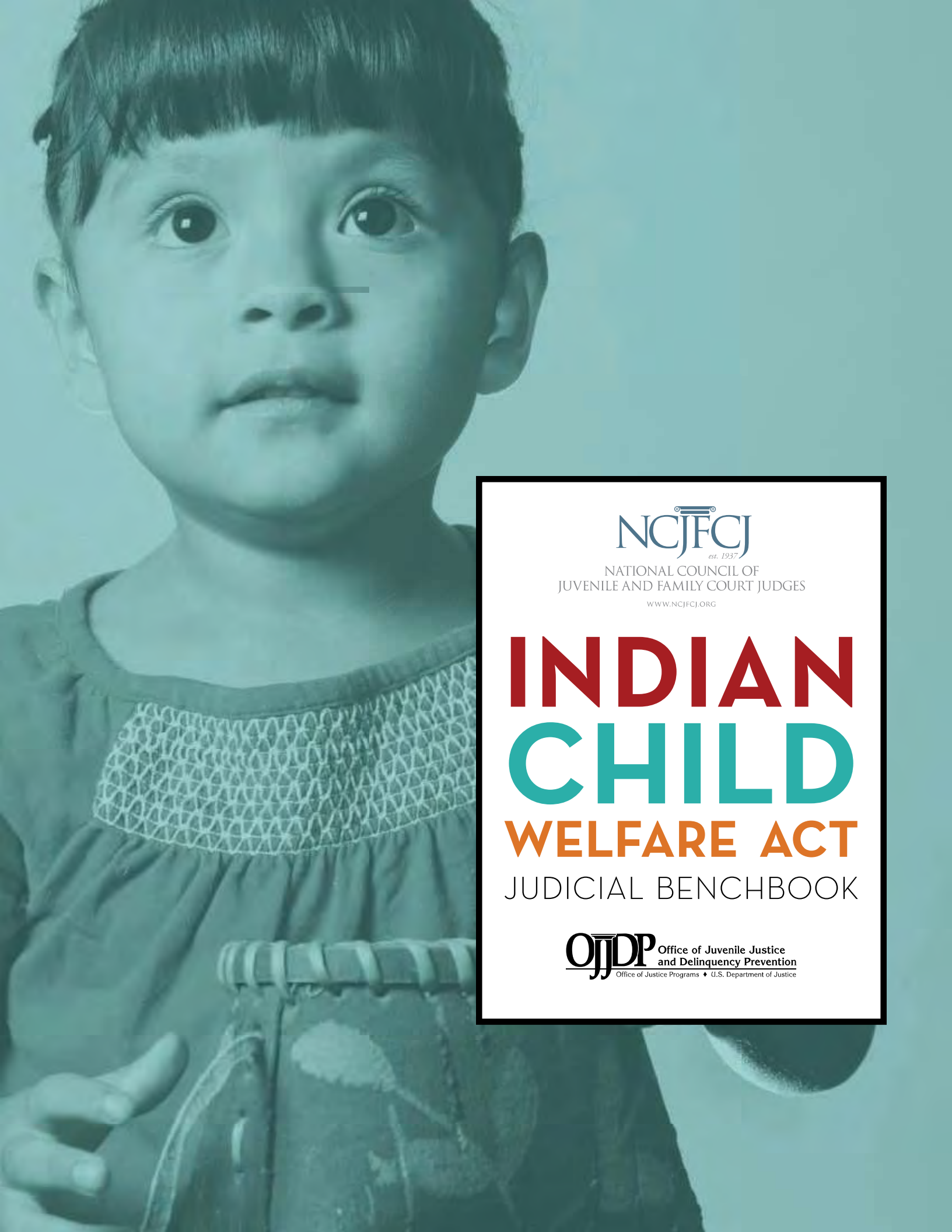
sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6).

(10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9)), Nevada, or Utah (exclusive of San Juan County), notices must be sent to the following address: Phoenix Regional Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For child-custody proceedings in Idaho, Oregon, or Washington, notices must be sent to the following address: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, must also be sent to the Portland Regional Director.

(12) For child-custody proceedings in California or Hawaii, notices must be sent to the following address: Sacramento Regional Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

* * *



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INDIAN CHILD WELFARE ACT

JUDICIAL BENCHBOOK

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INDIAN CHILD WELFARE ACT JUDICIAL BENCHBOOK

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INDIAN CHILD WELFARE ACT JUDICIAL BENCHBOOK

OVERVIEW

Congress passed the Indian Child Welfare Act (ICWA) in 1978 in response to the wholesale removal of Indian children from their families. Congressional findings memorialized in ICWA included "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions" 25 U.S.C. § 1901(4) and that states "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5)

In 2003, the National Council of Juvenile and Family Court Judges (NCJFCJ) published its first-ever checklists to guide judges and judicial officers in implementing ICWA. The checklists have been highly utilized by courts across the nation. Viewed as a priority, the NCJFCJ Board of Directors also passed a resolution in support of full implementation of ICWA in 2013.

The Department of Interior, Bureau of Indian Affairs (BIA) promulgated federal regulations governing ICWA in 2016. These binding regulations provide additional definitions, timelines, and required judicial findings that must be made on the record in an effort to create more consistency in ICWA implementation.

The statute and regulations together create the minimum federal requirements for Indian families. States may increase protections and requirements, but may not decrease them beneath the floor created by the law. 25 C.F.R § 23.101; 25 C.F.R. § 23.106 This benchbook is designed for a national audience and only addresses the federal requirements. Judges should check their own jurisdictions to determine if state law provides higher protections for Indian children and families.

In response to these changes, this benchbook was created to build upon the original checklists with updated language to be consistent with the statute, regulations, and best practices, commonly promoted by the NCJFCJ.

Courts should always remember, "[t]he Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children..." 25 U.S.C. § 1902 The standards of ICWA are considered the gold standard for children and families.

In passing the Indian Child Welfare Act (ICWA), the clear intent of Congress was to "protect the best interest of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902 Oversight and enforcement authority regarding the provisions of ICWA was left to judges presiding over child custody cases.

Since the passage of ICWA in 1978, policies and procedures for implementation and application of ICWA's remedial provisions have varied across the country and within individual states. The disproportionate numbers of American Indian and Alaska Native children in our child welfare system persist almost 40 years after ICWA became law. Consequently, the new ICWA Rules and Regulations (25 C.F.R. §§ 23.1 – 144) were enacted in 2016 to promote the uniform application of ICWA and to advance and protect Indian children's best interests.

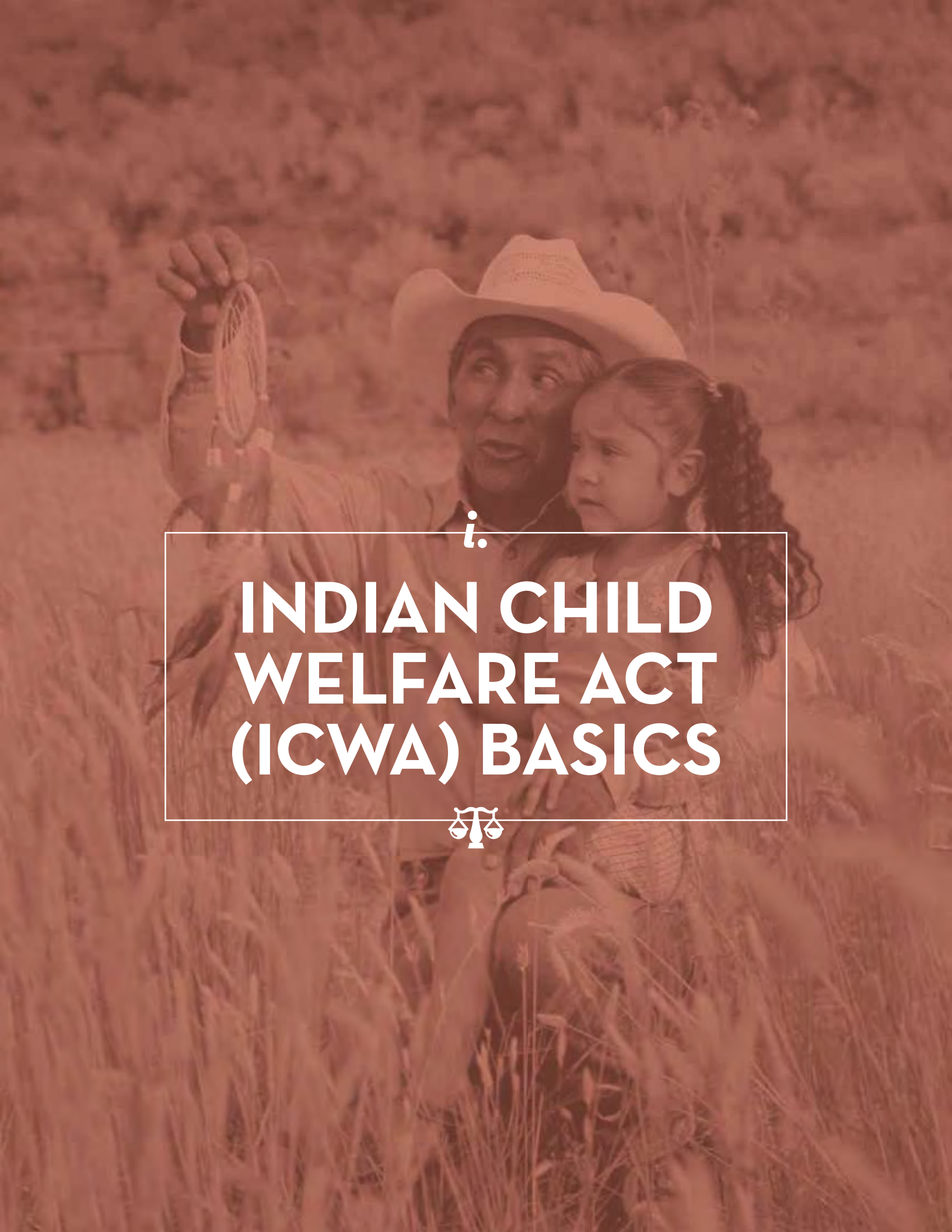
The revised ICWA judicial benchbook was developed to provide judicial officers with necessary and thorough information to assist with cases involving American Indian or Alaska Native children. As "inquiring magistrates", juvenile and family court judges provide vital judicial leadership by making necessary inquiries at every stage of a child custody case. The revised benchbook will encourage incisive questions that elicit detailed answers in support of each finding required by federal law and the Regulations.

Our American Indian and Alaska Native children are essential to the security and stability of each tribe. In each ICWA proceeding the judicial officer and other court professionals should be mindful that children are the heart of the law. Committed uniform application of ICWA and the Regulations will advance and protect the best interests of each child and enhance tribal security and stability.

THE HONORABLE JOHN J. ROMERO, JR.

SECOND JUDICIAL DISTRICT COURT, CHILDREN'S COURT DIVISION, ALBUQUERQUE, NEW MEXICO

PRESIDENT-ELECT, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES



i.

INDIAN CHILD WELFARE ACT (ICWA) BASICS

i. INDIAN CHILD WELFARE ACT (ICWA) BASICS

THE CHILD IS AN "INDIAN CHILD" UNDER THE INDIAN CHILD WELFARE ACT (ICWA) IF:

- He or she is an unmarried person under the age of 18, **and**
- 1. The child is a member of a federally recognized Indian tribe; **or**
- 2. a) Eligible for membership in a federally recognized Indian tribe **and**
- 2. b) Is the biological child of a member/citizen of a federally recognized Indian tribe. 25 U.S.C. § 1903(4)

DETERMINATION OF TRIBAL MEMBERSHIP:

- Tribes have sole authority to determine their own membership. The state court may not substitute its own determination.
- To make a judicial designation of the Indian child's tribe, the state court may rely on documents or testimony indicating membership.
- If the child can be a member of more than one tribe:
  - Deference should be given to the tribe in which the child is already a member, unless otherwise agreed upon by the tribes;
  - Provide opportunity for the tribes to determine which should be designated;
  - If the tribes are unable to reach an agreement, the tribe with which the child has more significant contacts. 25 C.F.R. § 23.109

WHEN DOES ICWA APPLY?

- The proceedings are child custody proceedings as defined in 25 U.S.C. § 1903(1); and
- The court knows or has reason to know the child is an "Indian child." 25 U.S.C. § 1903(4)

Child custody proceedings are defined as:

- **Foster care placements** – this includes any action where the child is removed from his or her parent or Indian custodian for temporary placement in a home or institution, including guardianship and conservatorship, and where the parent or custodian cannot have the child returned upon demand but where parental rights

have not been terminated. 25 U.S.C. § 1903(1)(i)

- **Termination of parental rights** 25 U.S.C. § 1903(1)(ii)
- **Pre-adoptive placements** 25 U.S.C. § 1903(1)(iii)
- **Adoptive placements** 25 U.S.C. § 1903(1)(iv)
- **Status offenses** 25 C.F.R. § 23.103(a)(iii)
- **Voluntary proceedings** – a proceeding that could prohibit the parent or Indian custodian from regaining custody upon demand. 25 C.F.R. § 23.103(a)(ii)
- **Emergency proceedings** – this includes any time a child is removed on an emergency basis from the home. 25 U.S.C. § 1922

If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because a child reaches 18 during the pendency of the proceeding. 25 C.F.R. § 23.103(d)

WHEN DOES ICWA *NOT* APPLY?

- An award of custody pursuant to a divorce where one of the parents will obtain custody of the child. 25 U.S.C. § 1903(1)
- A voluntary placement that does not prohibit the child's parent/Indian custodian from regaining custody upon demand. "Upon demand" means upon simple verbal request without any formalities or contingencies. 25 C.F.R. § 23.2
- A placement based upon an act which, if committed by an adult, would be deemed a crime. 25 U.S.C. § 1903(1)

DEFINITIONS:

Active efforts – Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. 25 C.F.R. § 23.2

Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring. 25 C.F.R. § 23.2

Bureau of Indian Affairs (BIA) – Indian Affairs (IA) is the oldest bureau of the United States Department of the Interior. The BIA's mission is to: "...enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve

the trust assets of American Indians, Indian tribes, and Alaska Natives."[1]

Domicile – For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere. For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent. 25 C.F.R. § 23.2

Extended family member – Defined by the law or custom of the Indian child's tribe, or in the absence of such law or custom, is a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. 25 U.S.C. § 1903(2)

Indian child's tribe – The Indian tribe in which an Indian child is a member or eligible for membership, or in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe described in 25 C.F.R. § 23.109 (the Indian tribe with which the Indian child has the more significant contacts). 25 U.S.C. § 1903(5)

Indian custodian – Any person who has legal custody of an Indian child under tribal law or custom or under state law; or to whom temporary physical care has been transferred by the part of the child. 25 C.F.R. § 23.2

Indian tribe – Any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians. 25 U.S.C. § 1903(8)

Qualified expert witness – A person who will testify that the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child at both the foster care hearing and termination of parental rights, and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe. A person may be designated by the child's tribe. The court or any party may request the assistance of the child's tribe in locating persons qualified to serve as expert witnesses. The witness cannot be the social worker assigned to the case. 25 U.S.C. § 1912 (e) & (f); 25 C.F.R. § 23.122(a)

1 Bureau of Indian Affairs https://www.bia.gov/about-us.

ii.

PRELIMINARY PROTECTIVE HEARING


BY PHAT

ii. PRELIMINARY PROTECTIVE HEARING

At the initial hearing when a child is removed, if a court determines during the hearing it has reason to know the child involved is an Indian child, the court should immediately apply emergency standards under 25 U.S.C. § 1922.

Emergency Removal

If the child resides or is domiciled on the reservation but is temporarily off the reservation, the court may order an emergency removal from the parent or Indian custodian to prevent imminent physical damage or harm to the child up to 30 days (except in extraordinary circumstances). 25 U.S.C. § 1922; 25 C.F.R. § 23.113(e)

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Indian custodian or other custodial adults; 25 U.S.C. § 1903(6); 25 U.S.C. § 1912
- Extended relatives, as defined by child's tribe, other tribal members, or other Indian families who may serve as placement resource for child; 25 U.S.C. § 1903(2); 25 U.S.C. § 1915(b)
- Qualified expert witness; 25 U.S.C. § 1912(e); 25 C.F.R. § 23.122

In an emergency situation it may not be possible to immediately find a qualified expert witness, but once the court has determined that removal is necessary to prevent imminent physical damage or harm to the child, it is required to "expeditiously initiate" a child custody proceeding subject to all ICWA hearing requirements to determine if clear and convincing evidence exists that removal or placement is still necessary to prevent serious emotional damage or harm to the child, which would require a qualified expert witness. 25 U.S.C. § 1922; 25 U.S.C. § 1912(e); 25 C.F.R. § 23.113

- Assigned caseworker;
- Tribal caseworker if available;
- Agency attorney;
- Attorney for parents;
- Attorney or representative for child's Indian tribe;
- GAL/CASA or advocate for the child;[2]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders, or child's extended relatives.

COURT CAN MAKE SURE PARTIES AND KEY WITNESSES ARE PRESENT BY:

- Requiring quick and diligent notification efforts by the agency.
- Requiring both oral and written notification in language understandable to each party and witness.
- Requiring notice to include reason for removal; purpose of hearing; availability of legal assistance; right to intervene for parents, guardians, Indian custodians, and the child's tribe.
- Requiring caseworkers to encourage attendance of parents, Indian custodians, and other parties.

In emergency hearings, none of these actions may be possible, but judges can inform agency workers that these actions will be required for upcoming hearings.

FILING THE PETITION:

- A sworn petition or complaint should be filed at or prior to the time of the preliminary protective hearing.
- The petition should be complete and accurate.
- If the petition is filed at the time or immediately before (24-72 hours) of the hearing, the court must use the evidentiary standard set forth in 25 U.S.C. § 1922.

2 The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child; (2) The name and address of the child's parents and Indian custodians, if any; (3) The steps taken to provide notice to the child's parents, custodians, and tribe about the emergency proceeding; (4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov); (5) The residence and the domicile of the Indian child; (6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with that reservation or village; (7) The tribal affiliation of the child and of the parents or Indian custodians; (8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action; (9) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the tribe and transfer the child to the tribe's jurisdiction; and (10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody. 25 C.F.R. § 23.113(d)

INQUIRIES TO BE MADE BY THE COURT:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) If there is no reason to know the child is an Indian child, the court must instruct parties to inform the court if they subsequently receive information that provides reason to know. *Id.*
- If proper notice (registered or certified mail return receipt requested) was received at least 10 days prior to a hearing by the child's parent, including the putative father, or Indian custodian. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1)
- If proper notice (registered or certified mail return receipt requested) was

received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional Bureau of Indian Affairs (BIA) office. 25 C.F.R. § 23.111(e)

- If a copy of the notice was sent to the regional BIA office. 25 C.F.R. § 23.11
- If the child was in the custody of an Indian custodian prior to the hearing. 25 U.S.C. § 1903(6)
- If the child resides or is domiciled on a reservation or if the child is already a ward of a tribal court (regardless of domicile). If any of these apply, the tribal court has exclusive jurisdiction and the state court must expeditiously notify the tribal court. 25 U.S.C. § 1911(a); 25 C.F.R. § 23.110(a)
- What efforts, if any, were made by the agency to identify extended family or other tribal members or Indian families for placement of the child. Has the agency attempted to create a family chart or genogram, or solicited assistance from neighbors, family, or members of the Indian community who may be able to offer information? 25 U.S.C. § 1915(b); 25 C.F.R. § 23.2(4)
- Do the parents or Indian custodian understand English? If not, what efforts have been made to ensure that the parent understands the proceedings and any action the court will order?
- **If there is reason to know the child is an Indian child, but there is not yet sufficient evidence or notice was not sent prior to the hearing, the court must:**
  - Apply the standard of 25 U.S.C. § 1922 to determine if the child should remain in state care and inquire if the removal is required to prevent imminent physical damage or harm to the child. Is the removal or placement necessary to prevent imminent physical damage or harm to the child? This must be on the record. 25 U.S.C. § 1922; 25 C.F.R. § 23.113(b)(1)
  - Determine if there is new information that indicates the emergency removal or placement is no longer necessary? If so, the emergency removal or placement must terminate immediately. 25 U.S.C. § 1922; 25 C.F.R. § 23.113(a)
  - Expeditiously schedule a child custody proceeding under 25 U.S.C. § 1912.
  - Confirm (report, declaration, or testimony) on the record that the agency or other party is using due diligence to identify and work with all tribes where the child may be eligible for membership and verify whether the child is in fact a member (or the parent is a member and the child is eligible).

25 C.F.R. § 23.107(a)(1)

- Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an Indian child. 25 C.F.R. § 23.107(a)(2)

If the proceeding is an emergency proceeding under 25 U.S.C. § 1922, the court must decide if the Indian child should be returned home because the threat of imminent physical harm passed or the tribal court asserted jurisdiction. If the child remains in care, the court must expeditiously schedule a hearing in conformity with 25 U.S.C. § 1912(e).

KEY DECISIONS THE COURT MUST MAKE:

- If either the parent or tribe has requested transfer to tribal court, the court shall transfer the proceeding. 25 U.S.C. § 1911(b)

Transfer is not allowed if: *Either parent objects; The tribal court declines the transfer; Good cause exists for denying the transfer. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117*

Good cause may not include: *(1) Whether the proceeding is at an advanced stage and the parent, Indian custodian, or tribe did not receive notice until an advanced stage; (2) Whether prior petitions involving the child were not transferred; (3) Potential placements; (4) The child's cultural connections to the tribe or reservation; (5) Socioeconomic conditions or perceived inadequacies of the tribal or BIA social services or judicial system. 25 C.F.R. § 23.118(c)*

- If transfer is denied it should be either orally on the record or in a written order. 25 C.F.R. § 23.118(d)
- Did the agency or party use due diligence to identify and work with all the tribes where the child may be a member or eligible for membership? This must be confirmed in the record. 25 U.S.C. § 23.107(b)(1)
- Did the agency make active efforts to prevent the breakup of the Indian family?[3] 25 U.S.C. § 1912(e)
- Has the agency made a diligent search to identify responsible extended family or other tribal members or Indian families to serve as a placement for the child, if necessary? 25 U.S.C. § 1915(b); 25 C.F.R. § 23.132(c)(5)

3 For a more detailed definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.

- Is it in the best interest of the child to appoint counsel for the child? 25 U.S.C. § 1912(b)
- If the state law makes no provision for the appointment of counsel, has the court notified the Secretary of Interior upon appointment of counsel so that reasonable fees and expenses may be appropriated? 25 U.S.C. § 1912(b)
- Is the child placed within the placement preferences as required by 25 U.S.C. § 1915(b)? In assessing whether an individual who meets the placement preferences is an appropriate placement for the child, has the agency relied upon the social and cultural standards of the Indian community in which the parent or extended family reside, or with which the parent or extended family maintain social and cultural ties? 25 U.S.C. § 1915(d)
- What additional efforts need to be made to ensure that the child is placed with extended family or within his/her tribal community?
- What culturally relevant services will allow the child to remain at home?
- Are restraining orders or orders expelling an allegedly abusive parent from the home appropriate or necessary?
- Are orders needed for examinations, evaluations, or other immediate services?
- What are the terms and conditions of family time by parents or Indian custodian?

REQUIRED NOTICE AND ADVICE OF RIGHTS:

- Review notice to missing parties and relatives.
- Serve parties with a copy of the petition.
- Advise parties of their rights.
- Advise the parent and/or Indian custodian that they have a right to a court-appointed attorney if they are indigent. 25 U.S.C. § 1912(b)
- Advise the parents of the content of the petition, their right to examine reports and other documents under 25 U.S.C. § 1912(c), their rights to request an additional 20 days to prepare for the hearing under 25 U.S.C. § 1912(a), and all admonitions necessary to explain the consequences of failing to comply with the Adoption and Safe Families Act and state statutory requirements to prevent the filing and adjudication of a Petition to Terminate Parental Rights. These admonitions would also include an explanation of the grounds for a Termination of Parental Rights proceeding. This should be repeated in each subsequent hearing held after the Preliminary Hearing.

- Advise the Indian custodian of his/her right to be a full party to the case. 25 U.S.C. § 1911(c)
- Ensure that the agency mails notice of the next scheduled hearing and a copy of the petition and advice of rights under ICWA to the child's parent if he/she is not at the hearing. Notice must be sent by registered or certified mail, return receipt requested. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(c)
- Ensure that the agency mails notice of the next scheduled hearing and a copy of the petition and advice of rights under ICWA to the Indian custodian if he/she is not at the hearing. Notice must be sent by registered or certified mail, return receipt requested. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(c)
- Ensure that the agency mails notice of the next scheduled hearing and a copy of the petition and advice of rights under ICWA to the child's tribe. Notice must be sent by registered or certified mail, return receipt requested. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(c)

SUBMISSION OF REPORTS TO THE COURT:

- The court should require submission of agency and/or law enforcement reports at least one hour prior to the hearing.
- Reports to the court should describe all circumstances of removal, any allegations of abuse or neglect, and all efforts made to try to ensure safety and prevent the need for removal.

KEY WRITTEN FINDINGS THE COURT MUST MAKE:

- Whether at the time of removal, the child lives or is domiciled on a reservation or is already a ward of a tribal court thereby depriving the state court of jurisdiction. 25 U.S.C. § 1911(a)
- Whether at the time of removal, the child was in the custody of an Indian custodian. 25 U.S.C. § 1903(6)
- Whether the removal or placement is necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922; 25 C.F.R. § 23.113(b)(1)

If all notice was properly done prior to the hearing:

- Whether active efforts were made prior to removal to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Whether there was clear and convincing evidence, supported by the testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Whether the parent, Indian custodian, or child's tribe requested an additional 20 days to prepare for the hearing. 25 U.S.C. § 1912(a)

IF THE CHILD IS PLACED OUTSIDE OF THE HOME:

- Specify why the removal or placement is necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922; 25 C.F.R. § 23.113(b)(1)
- Alternatively, specify why, under the clear and convincing evidence standard including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and what active efforts were done to prevent the removal. 25 U.S.C. § 1912(e)
- Specify whether the child is to be placed in a home that meets the priority placement preferences mandated by 25 U.S.C. § 1915(b):
  - A member of the Indian child's extended family;
  - A foster home licensed, approved, or specified by the Indian child's tribe;
  - An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
  - An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.
- If the child is not to be placed within the priority placements mandated by 25 U.S.C. § 1915(b), specify whether:
  - The child's tribe issued a resolution establishing a different preferred order and the placement is the least restrictive setting appropriate to the particular needs of the child. 25 U.S.C. § 1915(c)

OR

  - There is good cause not to follow the placement preferences.[4] 25 U.S.C. § 1915(a)
- Order the agency to make ongoing, diligent search efforts to locate a placement that meets the preferences established within ICWA.
- Specify the terms of family time with the parent(s), Indian custodian, and extended family.
- Order the agency to arrange for the child to visit with other tribal members if no extended family is available and to coordinate with the child's tribe to arrange for the child to attend significant cultural and familial events.

4 For a more detailed definition of good cause, see *iii. Adjudication Hearing*.

iii.

ADJUDICATION HEARING

iii. ADJUDICATION HEARING

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Indian custodian or other custodial adults; 25 U.S.C. § 1903(6)
- Extended relatives, as defined by child's tribe; 25 U.S.C. § 1903(2)
- Qualified expert witness under 25 U.S.C. § 1912(e);
- Assigned caseworker;
- Tribal caseworker or representative;
- Agency attorney;
- Attorney for parents or Indian custodian;
- Attorney or representative for child's tribe;
- GAL/CASA or advocate for the child;[5]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Foster parents;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders, or child's extended relatives.

INQUIRIES THE COURT MUST MAKE:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) If there is no reason to know the child is an Indian child, the court must instruct parties to inform the court

5 The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

if they subsequently receive information that provides reason to know. *Id.*

- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by child's parent, including the putative father, or Indian custodian. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1)
- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional BIA office. 25 C.F.R. § 23.111(e)
- If copies of these notices were sent (registered or certified mail, return receipt requested or personal delivery) to the appropriate BIA Regional Director. 25 C.F.R. § 23.11(a) & (b)
- Where the child is currently placed and if the placement is within the placement preferences required by law.

KEY DECISIONS THE COURT SHOULD MAKE ON THE RECORD:

- Whether the child is, or the court has reason to know the child is an Indian child as defined by ICWA. 25 U.S.C. § 1903(4); 25 C.F.R. § 23.107(a)
- Whether the state court lacks jurisdiction because the child is already a ward of a tribal court or is either domiciled on or resides within the reservation. 25 U.S.C. § 1911(a)
- Which allegations of the petition have been proved or admitted.
- Whether there is a legal basis for continued court and agency intervention.
- Whether the agency made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. If so, were these efforts successful?[6] 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120(b)
- If a request is made to transfer the case to tribal court, whether or not the case will be transferred. 25 U.S.C. § 1911(b)

6 For a more detailed definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.

TRANSFER IS NOT ALLOWED IF: Either parent objects; The tribal court declines the transfer; Good cause exists for denying the transfer. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117

GOOD CAUSE MAY NOT INCLUDE: (1)Whether the proceeding is at an advanced stage and the parent, Indian custodian, or tribe did not receive notice until an advanced stage; (2) Whether prior petitions involving the child were not transferred; (3) Potential placements; (4) The child's cultural connections to the tribe or reservation; (5) Socioeconomic conditions or perceived inadequacies of the tribal or BIA social services or judicial system. 25 C.F.R. § 23.118(c)

- If transfer is denied it should be either orally on the record or in a written order. 25 C.F.R. § 23.118(d)
- Whether the parent or Indian custodian is able to read English.

ADDITIONAL DECISIONS THE COURT MAY NEED TO MAKE ON THE RECORD:

- Depending on the length of time between the adjudication and next hearing, the judge will need to make temporary decisions at the conclusion of the adjudication, such as:
  - Determine where the child is to be placed and whether the child is placed within the placement preferences under 25 U.S.C. § 1915(b), and if not, whether the child's tribe issued a resolution establishing a different preferred order, as long as the placement is the least restrictive setting appropriate to the particular needs of the child. 25 U.S.C. § 1915(c)
  - If any party asserts that good cause not to follow the placement preferences exists, the reason for that belief or assertion must be stated orally on the record or provided in writing to the parties to the proceeding and the court.[7] 25 C.F.R. § 23.132(a)
  - The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is good cause to depart from placement preferences. 25 C.F.R. § 23.132(b)

7 For more detailed information about placement preferences, see *ii. Permanency Planning Hearing* pp. 18.

If good cause is asserted, the reasons must be stated orally on the record or in writing. 25 C.F.R. § 23.132(a) The party seeking departure bears the burden of proving by clear and convincing evidence good cause exists. 25 C.F.R. § 23.132(b)

In addition, "(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations: (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference; (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made; (3) The presence of a sibling attachment that can be maintained only through a particular placement; (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties."

"(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement."

"(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." 25 C.F.R. § 23.132

- Order any necessary testing or evaluation of the child, parent(s), or Indian custodian in preparation for the disposition hearing and ensure that all assessments or evaluations are culturally appropriate.
- Make sure the agency is, in preparation for disposition, making prompt and diligent efforts to identify and evaluate extended family or, if no family member is available, other tribal members or other Indian families to serve as caretakers.

- Order an alleged perpetrator to stay out of the family home and have no contact with the child.
- Direct the agency to continue its efforts to notify non-custodial parents, including unwed fathers whose paternity has been acknowledged or established. 25 U.S.C. § 1903(9)
- Set terms for family time, support, and other intra-family communication including parent-child and sibling visits when the child is in foster care prior to disposition.
- Transmit a copy of the decision to place the Indian child in foster care to the BIA, Division of Human Services. 25 U.S.C. § 1951(a); 25 C.F.R. § 23.140
- Order the state to maintain records in accordance with ICWA under 25 C.F.R. § 23.141.

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW MUST:

- Specify whether the child is an Indian child under ICWA and, if known, whether the child's tribe has been provided adequate notice, sufficient information, and an opportunity to determine the child's membership eligibility. 25 U.S.C. § 1903(4)
- Specify whether the child either resides or is domiciled on a reservation, or is already a ward of a tribal court, thereby depriving the state court of jurisdiction. 25 U.S.C. § 1911(a)
- Specify what efforts, if any, have been made to identify the child's tribe.
- Specify whether the agency has mailed notice and necessary information to all tribes in which the child may be eligible for membership to enable each tribe to ascertain whether the child is either a member or eligible for membership at least 10 days prior to the hearing. 25 U.S.C. § 1912(a)
- Specify whether written notice was sent to the appropriate regional BIA office if the child's tribe is not yet known. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(e)
- Specify whether the child was in the custody of an Indian custodian at the time of removal. 25 U.S.C. § 1903(6)
- Specify whether the agency mailed notice of the hearing and a copy of the petition and advice of rights to the parent or Indian custodian, registered or certified mail, return receipt requested. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(c)
- Specify whether the agency mailed notice of the hearing and a copy of the petition and advice of rights to the child's Indian tribe, if known, by registered or certified mail, return receipt requested. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(c)
- Ascertain whether the child's tribe seeks to intervene in the proceedings and, if so, grant that request at any point in the proceeding. 25 U.S.C. § 1911(c) If the child is eligible for membership in more than one tribe, ascertain which tribe is

the child's tribe for purposes of ICWA.[8] 25 U.S.C. § 1903(5); 25 C.F.R. § 23.109

- Ascertain whether the parent or Indian custodian seeks to intervene in the proceedings and, if so, grant that request at any point in the proceeding. 25 U.S.C. § 1911(c)
- If the child's tribe, parent, or Indian custodian requested an additional 20 days in which to prepare for the hearing, grant that request and reschedule the hearing. 25 U.S.C. § 1912(a)
- Specify whether a parent, Indian custodian, or the child's tribe has filed a motion or petition to transfer the case to tribal court. 25 U.S.C. § 1911(b)
- If the court declined to transfer the case, specify whether either parent vetoed the transfer, the tribal court declined to accept jurisdiction, or the reasons, if any, why there is good cause not to transfer the case to the tribal court. 25 U.S.C. § 1911(b)
- Specify whether the court advised the parent(s) or Indian custodian they have a right to a court-appointed attorney if they are indigent. 25 U.S.C. § 1912(b)
- Provide sufficiently detailed information to justify why the court found by clear and convincing evidence, including the testimony of one or more qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Address the placement of the child and whether it conforms with 25 U.S.C. § 1915(b).
- Provide sufficiently detailed information to justify agency and court choices for treatment and services.
- Write the order in easily understandable language so that all parties know how the court's findings relate to subsequent case planning.
- Indicate whether the parent or Indian custodian can read English and, if not, what steps will be taken to ensure that the parent or Indian custodian understands the court's written order.
- Set the date and time of the next hearing, and ensure all of the parties receive notice.

8 For more detailed information on how to ascertain which tribe, see *i. Indian Child Welfare Act (ICWA) Basics*.

iv.

DISPOSITION HEARING

iv. DISPOSITION HEARING

- **WHO SHOULD ALWAYS BE PRESENT:**
- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Indian custodian or other custodial adults; 25 U.S.C. § 1903(6)
- Extended relatives, as defined by child's tribe, or other tribal members or Indian families who may serve as a placement for the child; 25 U.S.C. § 1903(2)
- Assigned caseworker;
- Tribal caseworker or representative;
- Agency attorney;
- Attorney(s) for parent(s) or Indian custodian;
- Attorney or representative for child's Indian tribe;
- GAL/CASA or advocate for the child;[9]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Foster parents;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders, or child's extended relatives.

SUBMISSION OF PREDISPOSITION REPORTS TO THE COURT SHOULD INCLUDE:

- A statement of family changes needed to correct the problems necessitating state intervention, with timetables for accomplishing them.
- A description of services to be provided to

9 The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

the family, including those that the tribe or an Indian organization may offer and make available.

- A description of services being provided to ensure the child's ongoing connection to his/her culture, including attendance at significant cultural events, while placed outside of his/her family.
- A description of actions taken by the parent(s) or Indian custodian to correct the identified problems and any steps the parent or Indian custodian has taken thus far.

WHEN THE AGENCY RECOMMENDS FOSTER PLACEMENT, AN AFFIDAVIT DOCUMENTING ACTIVE EFFORTS SHOULD BE SUBMITTED. THE FOLLOWING ARE SOME KEY ELEMENTS OF THE AFFIDAVIT:

- A description of the active efforts made by the agency to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and an explanation why these efforts were unsuccessful.[10] 25 U.S.C. § 1912(d); 25 C.F.R. § 23.3.
- A description of the efforts made to coordinate with the child's tribe or any Indian organization in assisting the Indian parent or Indian custodian with services needed to avoid the need for placement, and an explanation if the services were unsuccessful.
- An explanation of why the child cannot be protected from the identified problems in the home, even if services are provided to the child and family.
- An explanation of the diligent efforts made to contact the child's extended family about providing a placement for the child, or, if family members are not known, diligent efforts made to contact the child's tribe and other local Indian organizations for assistance in identifying and contacting extended family, other tribal members, or Indian families for placement.
- A description of arrangements made by the agency to ensure family time with extended family, or, if there is no family in the area, with other tribal members, to support the child's cultural connections.
- A description of the agency's plan to coordinate with the child's tribe and family to identify significant cultural and important familial events and arrange for the child's attendance.

INQUIRIES THE COURT MUST MAKE:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) If there is no reason to know the child is an Indian child, the court must instruct parties to inform the court if they subsequently receive information that provides reason to know. *Id.*
- If proper notice (registered or certified mail, return receipt requested) was

10 For a more detailed definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.

received at least 10 days prior to a hearing by child's parent, including the putative father, or Indian custodian. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1).

- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional BIA office. 25 C.F.R. § 23.111(e)
- If copies of these notices were sent (registered or certified mail, return receipt requested or personal delivery) to the appropriate BIA Regional Director. 25 C.F.R. § 23.11(a)(b)

KEY DECISIONS THE COURT MUST MAKE:

- Whether there is a need for continued placement.
- Does the agency's proposed case plan address the needs of the child and the parent(s) or Indian custodian? Does this plan meet the requirements of active, not just reasonable efforts?
- Is the parent or Indian custodian able to read the proposed case plan and, if not, what efforts will be made to ensure that the parent or Indian custodian fully understands the requirements of the plan?
- Is the continued removal of the child necessary to prevent serious emotional or physical damage to the child? 25 U.S.C. § 1912(e)
- Is the child placed within the placement preferences under 25 U.S.C. § 1915(b) or under the tribe's preferences?[11] 25 U.S.C. § 1915(c)

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD:

- Determine the legal disposition of the case, including the custody of the child, based upon the statutory options provided under federal law, unless state law provides a higher degree of protection, or unless there is a governing state-tribal agreement. 25 U.S.C. § 1921
- State the long-term plan for the child (e.g., maintenance of the child in the home of a parent or Indian custodian, reunification with a parent or Indian custodian, guardianship or permanent placement with a relative or other tribal member or Indian family, or placement of child in a permanent adoptive home).
- Document the active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian child's family. 25 U.S.C. § 1912(d)
- Specify whether the child was placed

11 For more detailed information about placement preferences, see *ii. Permanency Planning Hearing* pp. 18.

within the placement preferences under ICWA, 25 U.S.C. § 1915(b), and, if not, whether the child's tribe issued a resolution establishing a different preferred order, as long as the placement is the least restrictive setting appropriate to the particular needs of the child. 25 U.S.C. § 1915(c)

- Specify whether the agency relied upon the social and cultural standards of the Indian community in which the parent or extended family reside or with which the parent or extended family maintain social and cultural ties when the agency determined whether an individual is an appropriate placement for the child.
- If the child's tribe did not issue a resolution indicating a different preferred order for the placement of the child, specify whether the party seeking departure from the placement preferences met the burden of proving by clear and convincing evidence that there is good cause to deviate from the placement preferences. 25 U.S.C. § 1915(b); 25 C.F.R. § 23.132(b)

If good cause is asserted, the reasons must be stated orally on the record or in writing. 25 C.F.R. § 23.132(a) The party seeking departure bears the burden of proving by clear and convincing evidence good cause exists. 25 C.F.R. § 23.132(b)

In addition, "(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations: (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference; (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made; (3) The presence of a sibling attachment that can be maintained only through a particular placement; (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties."

"(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement."

"(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." 25 C.F.R. § 23.132

- If there is not good cause to deviate from the placement preferences, and there is no tribal resolution re-ordering the placement preferences, order the agency to move the child to a home that complies with the placement preferences. 25 U.S.C. § 1915(b)
- If placement or services are ordered and were not agreed upon by the parties, specify the evidence or legal basis upon which the order is made.
- If applicable, specify why continuation of the child in the home would be contrary to the child's welfare.
- If the state's case plan conflicts with or does not meet the requirements of ICWA, disapprove or modify the agency's proposed case plan.

NOTES

V. REVIEW HEARING

v. REVIEW HEARING

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Indian custodian or other custodial adults; 25 U.S.C. § 1903(6)
- Extended relatives, as defined by child's tribe, or other tribal members or Indian families who may serve as a placement for the child; 25 U.S.C. § 1903(2)
- Assigned caseworker;
- Tribal caseworker or representative;
- Agency attorney;
- Attorney(s) for parent(s);
- Attorney or representative for child's Indian tribe;
- GAL/CASA or legal advocate for the child;[12]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Foster parents;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including extended relatives, tribal members or elders.

SUBMISSION OF REPORTS TO THE COURT:

- A statement of family changes needed to correct the problems necessitating state intervention, with timetables for accomplishing them.
- A description of services to be provided to assist the family, specifically identifying those made available with assistance from the tribe or an Indian organization.

12 The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

- A description of services to be provided to ensure the child's ongoing connection to his/her culture while placed outside of his/her family, including attendance at significant cultural events.
- A description of actions to be taken by the parents to correct the identified problems, and of the parents' participation and compliance with the case plan thus far.

WHEN THE AGENCY RECOMMENDS FOSTER PLACEMENT, AN AFFIDAVIT DOCUMENTING ACTIVE EFFORTS SHOULD BE SUBMITTED. THE FOLLOWING ARE SOME KEY ELEMENTS OF THE AFFIDAVIT[13]:

- A description of the active efforts made to reunify the family since the last disposition or review hearing and, if those efforts were not successful, an explanation why. 25 U.S.C. § 1912(d)
- A description of the efforts made to coordinate with the child's tribe or any Indian organization in assisting the Indian parent or Indian custodian with services needed to avoid the need for placement, and if those efforts were not successful, an explanation why.
- An explanation of why the child cannot be protected from serious emotional or physical harm if the child remains in the home, even if services are provided to the child and family. 25 U.S.C. § 1912(e)
- An explanation of the diligent efforts made to contact the child's extended family about providing a placement for the child, or, if family members are not known, diligent efforts made to contact the child's tribe and other local Indian organizations for assistance in identifying and contacting extended family, other tribal members, or Indian families for placement.
- Efforts made by agency to ensure child's visitation with extended family, or, if none is available, with other tribal members, to ensure the child's ongoing participation in his/her culture.
- Efforts made by agency to coordinate with the child's tribe and family to make arrangements for the child to attend significant cultural and important familial events.

INQUIRIES TO BE MADE BY THE COURT:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) If there is no reason to know the child is an Indian child, the court must instruct parties to inform the court if they subsequently receive information that provides reason to know. *Id.*
- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by child's parent, including the putative father or Indian custodian. 25

13 For a complete definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.

U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1)

- If proper notice (registered or certified mail, return receipt requested) received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional BIA office. 25 C.F.R. § 23.111(e)
- If copies of these notices were sent (registered or certified mail, return receipt requested or personal delivery) to the appropriate BIA Regional Director. 25 C.F.R. § 23.11(a)(b)

KEY DECISIONS THE COURT MUST MAKE:

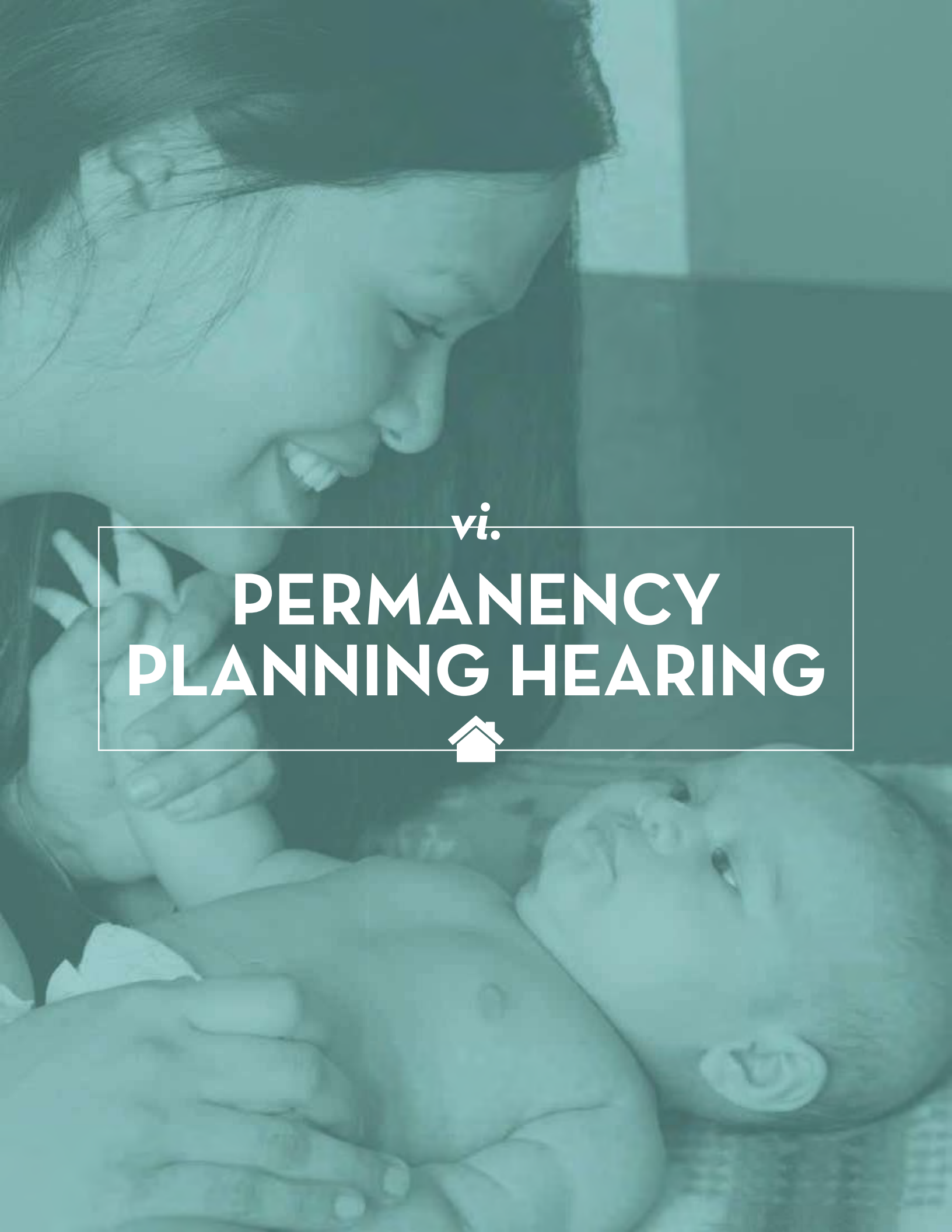
- Whether there is a need for continued placement.
- Whether active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and, if so, whether the services were successful. 25 U.S.C. § 1912(d); 25 U.S.C. § 23.3
- Whether efforts were made to ensure that the parent or Indian custodian understands the case plan, especially if the parent or Indian custodian does not read English.
- Whether the court-approved, long-term permanent plan for the child remains the best plan for the child.
- Whether the services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances.
- Whether the child is placed according to the placement preferences in ICWA, and, if not, whether the child should be moved into a preferred placement. 25 U.S.C. § 1915(b)[14]
- Whether the visitation terms need to be modified.
- Whether any additional court orders need to be made to move the case toward successful completion.
- What time frame should be established for goals to achieve reunification or other permanency plan for each child.

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD:

- Indicate whether the agency has identified the child's tribe.
- Specify whether the agency sent proper notice of the hearing and a copy of the petition and advice of rights to the parent(s), Indian custodian (if any), and child's tribe by registered or certified mail, return receipt requested. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(c)

14 For more detailed information about placement preferences, see *ii. Permanency Planning Hearing* pp. 18.

- Specify whether the tribe has been afforded a full opportunity to participate in the proceedings and, if so, whether the agency provided the child's tribe with copies of the petition, reports, and information concerning the child. 25 U.S.C. § 1911(c) & (d); 25 U.S.C. § 1912(a)
- Set forth findings as to why the child is in need of either continued placement outside the parent's home or continued supervision, articulating the clear and convincing evidence that continued custody of the child by the parent or Indian custodian would likely result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Set forth findings as to whether family reunification and an end to court supervision continues to be the long-term case goal and why.
- Set forth detailed findings of fact and conclusions of law as to whether the agency has made active efforts to provide remedial services and rehabilitative programs designed to eliminate the need for placement outside the home of the parent or Indian custodian and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Set forth detailed findings as to whether the agency has made an ongoing, diligent search to locate extended family, a tribal member, or other Indian family for placement if the child is not already within a preferred placement. 25 U.S.C. § 1915(b)
- Set forth orders for the agency to make additional efforts necessary to meet the needs of the family and move the case toward completion, including culturally relevant services that may be available with assistance from the tribe or local Indian organization.
- Write the order in easily understandable language that allows the parent(s) or Indian custodian to fully understand what action they must take to have the child returned to their care. An interpreter should be provided for parent or Indian custodian whose first language is not English.
- Approve proposed changes in the case plan and set forth any court-ordered modifications needed as a result of information presented at the review.
- Identify an expected date for final reunification or other permanent plan for the child.
- Where the state's case plan conflicts with or does not meet the requirements of ICWA, disapprove or modify the agency's proposed case plan to conform to ICWA requirements.
- Make any necessary orders to resolve the problems that are preventing reunification or the completion of another permanent plan for the child.
- Set a date and time for the next hearing, if needed.



vi.

PERMANENCY PLANNING HEARING

vi. PERMANENCY PLANNING HEARING

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Relatives with legal standing or other custodial adults; 25 U.S.C. § 1903(6)
- Qualified expert witness; 25 U.S.C. § 1912(e)
- Attorney or representative for child's tribe;
- Assigned caseworker;
- Attorney for child;
- Attorney for parents or Indian custodian;
- CASA/GAL, or advocate for the child;[15]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Extended family members;
- Foster parents;
- Prospective adoptive parents;
- Judicial case management staff;
- Service providers; and
- Other witnesses, including tribal members or elders.

SUBMISSION OF REPORTS TO THE COURT:

- Specify the permanency relief being sought and address the issues that the judge needs to determine.
- Set forth a plan to carry out the placement decision.

15 The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

- **When the petition or report requests that a child be returned home on a specific date, it should set forth:**
  - How the conditions or circumstances leading to the removal of the child have been corrected;
  - A description of actions taken by the parent(s) or Indian custodian to correct the identified problems;
  - The frequency of recent visitation and its impact on the child; and
  - A plan for the child's safe return home and follow-up supervision after family reunification.
- **When the petition or report requests termination of parental rights, it should set forth:**
  - Facts and circumstances supporting the grounds for termination;
  - A detailed description of the active efforts made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and an explanation of why these efforts were unsuccessful;
  - A detailed description of the active efforts made to coordinate with the child's tribe or an Indian organization in assisting the Indian parent or custodian with services needed to avoid termination of parental rights and an explanation of why these efforts were unsuccessful;
  - An explanation of why the child cannot be protected from the identified problems in the home;
  - A summary of the agency's understanding of the tribe's position regarding the permanency plan, including an attachment with any correspondence or supporting documentation sent by the tribe to the agency;
  - A description of the active efforts made to contact the child's tribe, extended family, and other local Indian organizations for assistance in identifying and contacting extended family and other tribal members or Indian families about providing an appropriate placement for the child;[16]
  - If the child is not placed with an extended family member, another tribal member, or another Indian family, an explanation of why the child cannot be moved to a placement that meets the preferences established within ICWA; 25 U.S.C. § 1915(a)
  - A description of arrangements made by the agency to ensure visitation with extended family, and of all efforts made to support the child's cultural connections; and
  - A permanency plan for the child.

16 For a more detailed definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.

- **When another planned permanent living arrangement is proposed, the report should set forth:**
  - Facts and circumstances refuting the grounds for termination of parental rights and showing that although the child cannot be placed with parents, termination is not in the best interests of the child;
  - A description of why the planned permanent living arrangement is in the best interests of the child;
  - An explanation of the active efforts made to contact the child's tribe, extended family, and other local Indian organizations for assistance in identifying and contacting extended family and other tribal members or Indian families to identify a culturally appropriate placement for the child;
  - If the child is not placed with an extended family member, another tribal member, or another Indian family, an explanation of why the child cannot be moved to a placement that meets the preferences established within ICWA; 25 U.S.C. § 1915(a)
  - A description of arrangements made by the agency to ensure visitation with extended family, or, if there is no extended family, with other tribal members, to support the child's cultural connections;
  - A summary of the agency's understanding of the tribe's position regarding the permanency plan, including an attachment of any correspondence or supporting documentation sent by the tribe to the agency; and
  - A plan to ensure the stability of the planned permanent living arrangement.

AFFIDAVIT DOCUMENTING ACTIVE EFFORTS:

- When the agency recommends a permanency plan, an affidavit documenting active efforts made must be submitted. The following are some of the requisite elements of the affidavit:
  - A detailed description of the active efforts made to reunify the family since the last disposition or review hearing and, if those efforts were not successful, an explanation why; 25 U.S.C. § 1912(d)
  - A description of the efforts made to coordinate with the child's tribe or any Indian organization in assisting the Indian parent or Indian custodian with services needed to avoid the need for placement, and an explanation why these services were unsuccessful;
  - An explanation of why the child cannot be protected from serious emotional or physical damage if the child remains in the home, even if services are provided to the child and family; 25 U.S.C. § 1912(e)
  - An explanation of the diligent efforts

made to contact the child's extended family about providing a placement for the child, or, if family members are not known, diligent efforts made to contact the child's tribe and other local Indian organizations for assistance in identifying and contacting extended family, other tribal members, or Indian families for placement;

- Efforts made by the agency to ensure child's family time with extended family, or, if none is available, with other tribal members, to ensure the child's ongoing participation in his/her culture; and
- Efforts made by the agency to coordinate with the child's tribe and family to make arrangements for the child to attend significant cultural and important familial events.

INQUIRIES THE COURT MUST MAKE:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) If there is no reason to know the child is an Indian child, the court must instruct parties to inform the court if they subsequently receive information that provides reason to know. *Id.*
- If proper notice (registered or certified mail return receipt requested) was received at least 10 days prior to a hearing by the child's parent, including the putative father, or Indian custodian. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1)
- If proper notice (registered or certified mail return receipt requested) was received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional BIA office. 25 C.F.R. § 23.111(e)
- If copies of these notices were sent (registered or certified mail, return receipt requested or personal delivery) to the appropriate BIA Regional Director. 25 C.F.R. § 23.11(a)(b)

KEY DECISIONS THE COURT SHOULD MAKE:

- Can the child be safely returned home on a specific date?
- Whether active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of the family.
- If the child cannot be safely returned home, is there a placement option with a member of the child's family, as defined by the tribe's customs?
- If placement cannot be found within the child's family, can placement be found with a member of the child's tribe?
- Will the child be legally freed for adoption?

THE COURT'S WRITTEN FINDING OF FACT AND CONCLUSIONS OF LAW SHOULD INCLUDE:

- Whether the agency has identified the child's tribe.
- Whether the agency sent proper notice of the hearing and a copy of the petition and advice of rights to the parent(s), Indian custodian (if any), and child's tribe by registered or certified mail, return receipt requested. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(c)
- Whether the tribe has been afforded a full opportunity to participate in the proceedings and, if so, whether the agency provided the child's tribe with copies of the petition, reports, and information concerning the child in a timely manner. 25 U.S.C. § 1911(c) & (d); 25 U.S.C. § 1912(a)
- Set forth findings as to why the child is in need of either continued placement outside the parent's home or continued supervision, articulating the clear and convincing evidence that continued custody of the child by the parent or Indian custodian would likely result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Set forth detailed findings of fact and conclusions of law as to whether active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and eliminate the need for placement of the child outside the home of the parent or Indian custodian and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Set forth detailed findings as to whether the agency has made an ongoing, diligent search to locate extended family, a tribal member, or other Indian family for placement if the child is not already within a preferred placement. 25 U.S.C. § 1915(b)
- If an argument has been made that there is good cause to deviate from placement preferences, and whether the party seeking departure from the placement preferences has proven this through clear and convincing evidence.[17] 25 C.F.R. § 23.132(b)
- Write the order in easily understandable language that allows the parent(s) or Indian custodian to fully understand what action they must take to have the child returned to their care (interpreter should be provided for parent or Indian custodian whose first language is not English).
- Set forth the court's determination of permanency and provide documentation for the plan to return home, proceed to termination of parental rights, or plan another permanent living arrangement.

17 For a more detailed definition of good cause, see *iii. Adjudication Hearing*.

NOTES

vii.

TERMINATION OF PARENTAL RIGHTS

vii. TERMINATION OF PARENTAL RIGHTS

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents, including any putative father who has acknowledged or established paternity, even if he has not yet legally established paternity under state law;
- Indian custodian; 25 U.S.C. § 1903(6)
- Qualified expert witness; 25 U.S.C. § 1912(e); 25 C.F.R. § 23.122
- Assigned caseworker;
- Caseworker or representative from child's Indian tribe;
- Agency attorney;
- Attorney(s) for parent(s);
- Attorney or representative for child's Indian tribe;
- GAL/CASA, or legal advocate for the child;[18]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Domestic violence advocate for parent;
- Age-appropriate children whose testimony is required;
- Prospective adoptive parents;
- Judicial case management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders or the child's extended relatives. 25 U.S.C. § 1903(2)

INQUIRIES TO BE MADE BY THE COURT IN INVOLUNTARY PROCEEDINGS:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) If there is no reason to know the child is an Indian child, the court

18 The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

must instruct parties to inform the court if they subsequently receive information that provides reason to know. *Id.*

- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by child's parent, including the putative father, or Indian custodian. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2) & (3); 25 C.F.R. § 23.112(b)(1)
- If proper notice (registered or certified mail, return receipt requested) was received at least 10 days prior to a hearing by all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(1); 25 C.F.R. § 23.112(b)(2) If the tribe was unknown, was notice sent to the regional BIA office. 25 C.F.R. § 23.111(e)
- If copies of these notices were sent (registered or certified mail, return receipt requested or personal delivery) to the appropriate BIA Regional Director. 25 C.F.R. § 23.11(a) & (b)

KEY DECISIONS THE COURT MUST MAKE:

- Whether written notice was provided to the child's tribe by registered or certified mail, return receipt requested. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(c)
- Whether written notice was provided to the parents or Indian custodian by registered or certified mail, return receipt requested. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(c)
- Whether active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120(a) The active efforts must be documented in detail on the record.[19] 25 C.F.R. § 23.120(b)
- Whether the active efforts were unsuccessful. 25 U.S.C. § 1912(d)
- Whether efforts were made to ensure that the parent or Indian custodian understood the case plan, especially if the parent or Indian custodian does not read English.
- Whether there is evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(f)
- If a request is made to transfer the case to tribal court, and whether or not the case will be transferred. 25 U.S.C. § 1911(b)

19 For a more detailed definition and examples of active efforts, see *i. Indian Child Welfare Act (ICWA) Basics*.

TRANSFER IS NOT ALLOWED IF: Either parent objects; The tribal court declines the transfer; Good cause exists for denying the transfer. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117

GOOD CAUSE MAY NOT INCLUDE: (1)Whether the proceeding is at an advanced stage and the parent, Indian custodian, or tribe did not receive notice until an advanced stage; (2) Whether prior petitions involving the child were not transferred; (3) Potential placements; (4) The child's cultural connections to the tribe or reservation; (5) Socioeconomic conditions or perceived inadequacies of the tribal or BIA social services or judicial system. 25 C.F.R. § 23.118(c)

- If transfer is denied it should be either orally on the record or in a written order. 25 C.F.R. § 23.118(d)

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW TO TERMINATE PARENTAL RIGHTS SHOULD:

- Specify that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, and that they were unsuccessful. 25 U.S.C. § 1912(d)
- Specify what evidence, including testimony of a qualified expert witness, supports the finding beyond a reasonable doubt that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Specify any other state statutory grounds supporting termination of parental rights, if state law requires satisfaction of dual burden of proof.

INQUIRIES TO BE MADE BY THE COURT IN VOLUNTARY PROCEEDINGS:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a); 25 C.F.R. § 23.124(a)
- Whether either the parent or Indian custodian fully understood the explanation of the terms and consequences of the consent to termination of parental rights in English, or that it was interpreted into a language that the parent or Indian custodian understood. 25 U.S.C. § 1913(a)
- When the consent to termination of parental rights was given, and ensure it was not given prior to or within 10 days after the birth of the child, as consent is not valid under these circumstances. 25 U.S.C. § 1913(a)
- Whether the consent was voluntary and informed, that it was not obtained through fraud or duress, and that all alternatives to termination of parental rights were explained. 25 U.S.C. § 1913(d)

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AT VOLUNTARY TERMINATION OF PARENTAL RIGHTS HEARING MUST INCLUDE:

- A thorough description of the conditions and circumstances under which consent to termination of parental rights was obtained. Parental consent must be executed in writing in the presence of the judge and must be accompanied by the judge's certificate that the terms and consequences of the consent were explained in detail and that the parent or Indian custodian fully understood these terms. 25 U.S.C. § 1913(a)
- Certification that either the parent or Indian custodian fully understood the explanation of the terms and consequences of the consent to termination of parental rights in English, or that it was interpreted into a language that the parent or Indian custodian understood. 25 U.S.C. § 1913(a)
- Certification that the consent to termination of parental rights was not given prior to or within 10 days after the birth of the child, as consent is not valid under these circumstances. 25 U.S.C. § 1913(a)
- Certification that the consent was voluntary and informed, that it was not obtained through fraud or duress, and that all alternatives to termination of parental rights were explained. 25 U.S.C. § 1913(d)
- Certification that the parent understands that he/she may withdraw consent to termination of parental rights for any reason prior to the entry of the final decree of termination of parental rights and that the child will be returned to the parent. 25 U.S.C § 1913(c); 25 C.F.R. § 23.125(b)(2)(ii)

If termination of parental rights was uncontested because the parent failed to appear, or appeared but neither contested nor consented to termination, treat it as a contested termination.

viii.

ADOPTION HEARING

viii. ADOPTION HEARING

WHO SHOULD ALWAYS BE PRESENT AT THE UNCONTESTED ADOPTION HEARING:

- Judge;
- Adoptive parents;
- Caseworker, if one was assigned;
- Tribal caseworker or representative;
- GAL/CASA or advocate for the child;[20]
- Court reporter or suitable technology; and
- The child.

WHO SHOULD ALWAYS BE PRESENT AT THE CONTESTED ADOPTION HEARING:

- Judge;
- Prospective adoptive parents;
- Assigned caseworker;
- Agency attorney;
- GAL/CASA or advocate for the child;
- Tribal representative and/or attorney;
- Parties contesting the adoption (including Indian custodian if there is one);
- Attorneys for all parties;
- Court reporter or suitable technology; and
- Security personnel.

WHO MAY ALSO BE NEEDED AT THE CONTESTED ADOPTION HEARING:

- The child;
- Interpreter;
- Judicial case management staff; and
- Other witnesses, including tribal elders, members of the child's extended family, and other tribal members.

INQUIRIES TO BE MADE BY THE COURT:

- Whether each participant knows or has reason to know that the child is an Indian child. This must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a) If there is no reason to know the child is an Indian child, the court must instruct parties to inform the court if they subsequently receive information that provides reason to know. *Id.*

20 The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

KEY DECISIONS THE COURT MUST MAKE:

- Whether written notice was provided to the child's tribe by registered or certified mail, return receipt requested. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(c)

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD:

- Determine whether the child is within the exclusive jurisdiction of a tribe because the child either resided or was domiciled on a reservation or is already a ward of a tribal court, thereby depriving the state court of jurisdiction. 25 U.S.C. § 1911(a)
- Determine whether all the necessary consents to adoption have been provided, including the consent of the agency with the custody of the child, the consent of the child (if the child is old enough that consent is required under state law), and the consent of a parent or Indian custodian whose rights have not been terminated.
- Thoroughly describe the conditions and circumstances under which parental consent to adoption was obtained. Parental consent must be executed in writing in the presence of the judge and must be accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and that the parent or Indian custodian fully understood these terms. 25 U.S.C. § 1913(a)
- Certify that either the parent or Indian custodian fully understood the explanation of the terms and consequences of the consent to adoption in English, or that it was interpreted into a language that the parent or Indian custodian understood. 25 U.S.C. § 1913(a)
- Certify that the adoption consent was not given prior to or within 10 days after the birth of the child, as the consent would not be valid under these circumstances. 25 U.S.C. § 1913(a)
- Determine whether the consent was voluntary and informed, that it was not obtained through fraud or duress, and that all alternatives to adoption were explained. 25 U.S.C. § 1913(d)
- Determine whether the child is placed in an adoptive home where the adopting individual is a member of:
  - The child's extended family;
  - The child's tribe; or
  - Another Indian family. 25 U.S.C. § 1915(a)
- If the child is not placed in one of the placement preferences established by federal law, determine whether:
  - The agency made a diligent search to locate a placement that meets the preferences establi-shed within ICWA. 25 C.F.R. § 23.2

- There is good cause not to place the child according to the placement preferences. 25 U.S.C. § 1915(a)
- If any party asserts that good cause not to follow the placement preferences exists, the reason for that belief or assertion must be stated orally on the record or provided in writing to the parties to the proceeding and the court. 25 C.F.R. § 23.132(a)
- The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is good cause to depart from placement preferences. 25 C.F.R. § 23.132(b)

If good cause is asserted, the reasons must be stated orally on the record or in writing. 25 C.F.R. § 23.132(a) The party seeking departure bears the burden of proving by clear and convincing evidence good cause exists. 25 C.F.R. § 23.132(b)

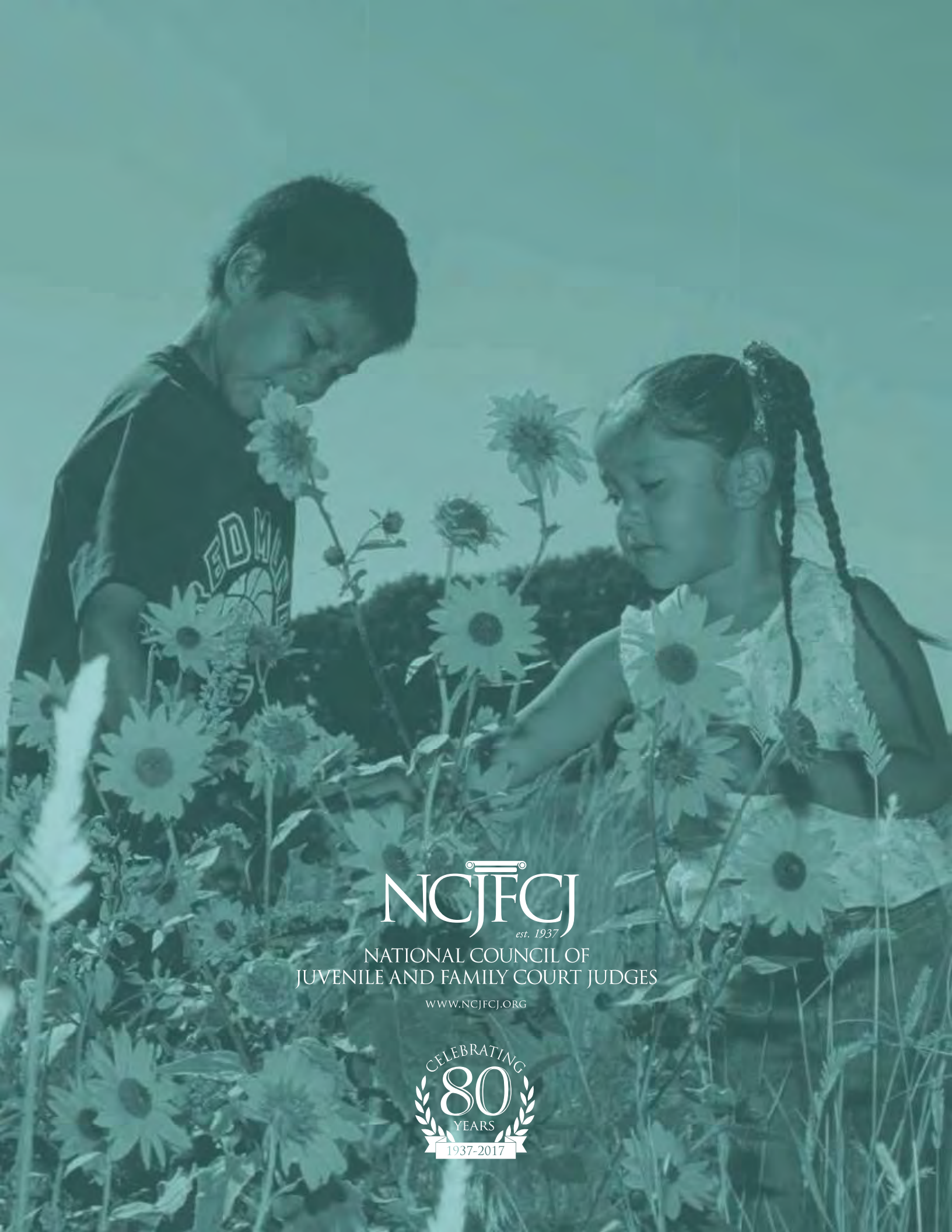
In addition, "(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations: (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference; (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made; (3) The presence of a sibling attachment that can be maintained only through a particular placement; (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties."

"(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement."

"(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." 25 C.F.R. § 23.132

- If the child's tribe established a different preferred placement order, ascertain whether the placement is the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. 25 U.S.C. § 1915(b) & (c)
- If the child's consenting parent evidenced a desire for anonymity, the court shall give weight to that desire in applying the preferences. 25 U.S.C. § 1915(c)
- Determine that the child is doing well in the adoptive home and that the adoptive parents have made a clear and knowledgeable commitment to care for the child on a permanent basis.
- Determine that the adoptive parents fully understand the legal and financial consequences of adoption. Review with the parents and agency the need for and sufficiency of any adoption subsidy arrangements.
- Certify that the parent understands that he/she may withdraw consent to adoption for any reason prior to the entry of the final decree of adoption and that the child will be returned to the parent. 25 U.S.C § 1913(c); 25 C.F.R. § 23.125(b)(2)(iii)
- At contested adoption hearings, determine whether the adoption should be granted. A contested adoption hearing must be conducted with procedural fairness, and should include notice to the parties and the child's tribe even if the tribe has not yet become a party in previous stages of the child custody proceedings. 25 U.S.C. § 1912(a)
- Conclude the proceeding without undue delay, applying principles of case flow management.
- Include in the record all information about tribal affiliation of the individual's biological parents and such other information as may be necessary to protect the rights flowing from the individuals' tribal relationship. 25 U.S.C. § 1917
- Transmit a copy of the record, including the above listed information to the BIA, Division of Human Services. 25 U.S.C. § 1951(a); 25 C.F.R. § 23.140
- Order the state to maintain records in accordance with ICWA under 25 C.F.R. § 23.141.

NOTES



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California Tribal Families Coalition

In 1978, nearly 40 years ago, the passage of the Indian Child Welfare Act, 25 U.S.C. §§1901 et seq. (ICWA), was considered landmark civil rights legislation. When California later enacted legislation to adopt many of those federal protections into state law – Cal-ICWA – it was another milestone for tribes. Unfortunately, the protections promised in both the federal ICWA and the Cal-ICWA have not been realized.

In 2015, the California ICWA Compliance Task Force (Task Force), co-chaired by Tribal Council members from six tribes across the state and one Tribal Court judge, convened at the invitation of the California Attorney General. The Task Force gathered narratives and data regarding compliance with the ICWA and Cal-ICWA. Their goal was to use the narratives and data in a concerted effort to target reform at non-compliant entities within the state dependency system. Their lengthy and detailed report documented compliance issues and offered 20 targeted recommendations to remedy civil rights violations and non-compliance. The 2017 ICWA Compliance Task Force Report (Report) was presented to Attorney General Xavier Becerra in March 2017 at a meeting with the Task Force co-chairs.

The Report was an essential first step in examining the issues and framing solutions to achieve compilance. The California Tribal Families Coalition (CTFC) was formally organized in May 2017 to continue to press for the implementation of the Task Force Report recommendations. The CTFC Board of Directors is comprised of nine Tribal Council leaders from across the state, including five of the seven Task Force co-chairs.

CTFC is organized as a 501(c)(4) nonprofit membership corporation formed to promote social welfare, and to promote and protect the health and welfare of tribal children and families through litigation, legislation, regulations, and policy initiatives. As a force for change, CTFC and its member tribes can impact how state and national policies and judicial decisions address the implementation of ICWA to achieve the promises first made to tribes and their families in 1978.

The initial roadmap for the organization lies in the recommendations contained in the Report. The CTFC Board of Directors has established a multi-pronged approach to advance its mission which includes: regional meetings of tribal social workers and ICWA advocates; convening an attorney advisory panel of tribal attorneys in the state; and the establishment of the Children's Commission, a high-level executive body of tribal leaders, judges, and subject matter experts to provide the Board of Directors with a broad perspective and recommendations to better protect the health, safety and welfare of tribal children and families.

OUR MISSION

To protect the health, safety and welfare of tribal children and families, which are inherent tribal governmental functions and are at the core of tribal sovereignty and tribal governance.

BOARD MEMBERS

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CALIFORNIA TRIBAL FAMILIES COALITION

November 4, 2017

Conference of Western Attorneys General
1300 I Street
Sacramento, CA 95814

Via email to ccoppin@cwagweb.org

RE: *Brackeen, et al. v. Zinke, et al.*; Indian Child Welfare Act

Dear CWAG Members,

The Conference of Western Attorneys General has often been a leader on the Indian Child Welfare Act (ICWA) and other tribal issues because of its deep understanding of Indian law, and close connection to area tribes. These connections are invaluable to the understanding of tribal issues generally and Indian child welfare issues specifically. Indeed, the need to protect tribal children as citizens of their tribes by state attorneys general was evident in their amicus support in *Adoptive Couple v. Baby Girl*.[1] The critical time has come again for state attorneys general to stand with tribes in defense of the law that protects tribal children and families.

On October 25, 2017, Texas and two foster care parents filed a lawsuit challenging the constitutionality of the ICWA in federal district court in the northern district of Texas.[2] When Congress passed ICWA in 1978 pursuant to its trust responsibility and the Indian Commerce Clause, "recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people",[3] it agreed that maintaining and protecting Indian families was well within its power. ICWA is grounded in the political relationship between sovereign entities, not on a racial classification of Native Americans.[4] While we recognize state attorneys general and tribes may differ on some Indian law issues, we believe we can all agree the fundamental provisions of ICWA provide much-needed protections for a vulnerable population.

[1] *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013).
[2] *Brackeen, et al. v. Zinke, et al*., Complaint and Prayer for Declaratory and Injunctive Relief, No. 17-cv-00868 (N. D. Texas, Oct. 25, 2017).
[3] 25 U.S.C. § 1901.
[4] *Morton v. Mancari*, 417 U.S. 535, 553-555 (1974).

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To protect the health, safety and welfare of tribal children and families, which are inherent tribal governmental functions and are at the core of tribal sovereignty and tribal governance.

ICWA is considered the gold standard of child welfare practice by at least 17 national child welfare organizations, such as the National CASA Association, the National Association of Social Workers, Casey Family Programs and the Annie E. Casey Foundation.[5] ICWA is critical to protecting the safety of Indian children and protecting their rights as tribal citizens in the child welfare system. It works to preserve families and keep Indian children connected to their families and communities when they cannot safely return home. These are foundational principles to good social work practice and are embedded throughout many federal child welfare laws.[6] The Texas case is not only an assault on ICWA but out of line with best practices and other federal mandates.

In the nearly 40 years since ICWA was passed, no state, until now, has challenged its constitutionality. In fact, at least 33 states have passed state statutes to strengthen its application.[7] California passed Senate Bill 678 in 2006 which not only codified ICWA but expanded its protections in some areas and created Judicial Council forms and Rules of Court, as well as an ICWA Initiative (now the Tribal Court-State Court Forum). In addition to state legislation, many states have established ICWA commissions, developed ICWA workgroups or negotiated tribal-state child welfare agreements. States have applied ICWA in child custody proceedings throughout the United States for 40 years, protecting Indian children, preserving Indian families and securing the future of Indian tribes.

This Texas case continues an unfortunate new theme in Indian Country. Anti-ICWA advocates are pursuing a legal strategy to have ICWA declared unconstitutional. These individuals and organizations paint a bleak picture of the destruction of an Indian child's life when ICWA is applied in a child custody proceeding. This high-level propaganda is fundamentally untrue. We know - those of us who were raised in Indian Country, those of us who raise our children on the reservations, those of us who know Indian families – ICWA protects our children. This targeted and well-financed attack on ICWA only reminds tribes of the long and tortured history we have endured in the United States.

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[5] *See* Brief of Casey Family Programs & Child Welfare League of America, et al. as Amici Curiae Supporting Respondent, Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013) 2013 WL 1279468 at 1 ("Amici are united in their view that, in the Indian Child Welfare Act, Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children . . .").

[6] *See e.g.* 25 U.S.C. 671(a)(19)(relative preference requirement for states to receive federal foster care funding).

[7] *See* National Conference of State Legislatures, State Statutes Related to the Indian Child Welfare Act (July 19, 2017) available at http://www.ncsl.org/research/human-services/state-statutes-related-to-indian-child-welfare.aspx.

Tribes feel a tremendous responsibility to protect and promote the health, safety and welfare of tribal children. We ask you to stand with tribes in protecting tribal children and families—by defending ICWA. To learn more about how to join tribes in our effort to uphold ICWA, please contact our Executive Director, Delia Sharpe, at delia.sharpe@caltribalfamilies.org or 916-583-8289.

Sincerely,

Robert Smith
Chairman

SESSION 5: FORUM PRIORITIES 2018-2019 AND ANNUAL AGENDA/WORK PLAN

Tribal Court–State Court Forum
Annual Agenda[1]—2018
Approved by E&P:

I. COMMITTEE INFORMATION

Chair:	Hon. Abby Abinanti, Chief Judge, Yurok Tribal Court Hon. Dennis M. Perluss, Presiding Justice, Court of Appeal, Second Appellate District, Division Seven
Lead Staff:	Ms. Ann Gilmour, Attorney, Center for Families, Children & the Courts

Committee's Charge/Membership:

Rule 10.60 of the California Rules of Court states the charge of the Tribal Court–State Court Forum (Forum), which is to make recommendations to the Judicial Council for improving the administration of justice in all proceedings in which the authority to exercise jurisdiction by the state judicial branch and the tribal justice systems overlap. Rule 10.60(b) sets forth additional duties of the Forum.

The Forum currently has 25 members, (with three vacancies – a representative from the Civil and Small Claims Advisory Committee; a representative of the Executive Branch and a trial court judge from a county with a tribal court).

- Thirteen tribal court judges (nominated by their tribal leadership, representing 16 of the 23 tribal courts currently operating in California; these courts serve approximately 27 tribes)
- Director of the California Department of Social Services Office of Tribal Affairs.
- One appellate justice
- Seven chairs or their designees of the following Judicial Council advisory committees:
  - Advisory Committee on Providing Access and Fairness
  - Governing Committee of the Center for Judicial Education and Research
  - Civil and Small Claims Advisory Committee (this position is currently vacant)
  - Criminal Law Advisory Committee
  - Family and Juvenile Law Advisory Committee
  - Probate and Mental Health Advisory Committee
  - Traffic Advisory Committee
- Five trial court judicial officers (currently one of these positions is vacant)
- One retired judge (advisory)

[1] The annual agenda outlines the work a committee will focus on in the coming year and identifies areas of collaboration with other advisory bodies and the Judicial Council staff resources.

The current roster is available on the committee's web page.

Subcommittees/Working Groups[2]:

Existing from the 2017 Annual Agenda

Participate in the joint ad hoc rules and forms subcommittee to implement Tactical Plan for Technology, 2017–2018**.**

New for the 2018 Annual Agenda

Subcommittee on the Indian Child Welfare Act (ICWA) to review and respond to California ICWA Compliance Task Force Report (new project #1) and newly adopted federal *Regulations for State Courts and Agencies in Indian Child Custody Proceedings* and *Guidelines for Implementing the Indian Child Welfare Act* (ongoing project #2), 2018–2019

[2] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

II. COMMITTEE PROJECTS

#	New or One-Time Projects[3]	
1.	***Project Title:*** **Review and respond to California ICWA Compliance Task Force Report and Recommendations**	***Priority 2***[4]
	Project Summary: In March of 2017, the California ICWA Compliance Task Force presented its report to California Attorney General Xavier Becerra[5]. The report includes a number of issues and recommendations related to compliance with the Indian Child Welfare Act in California. A number of the findings and recommendations relate to the work of the judicial branch. ***Status/Timeline:*** The Forum will undertake a review of the report recommendations related to the work of the Judicial Branch and make recommendations for action to the Judicial Council by January 1, 2019. ***Fiscal Impact/Resources:*** Judicial Council's Center for Family, Children & the Courts (CFCC), Governmental Affairs, Legal Services, and Center for Judicial Education and Research (CJER) staff. ***Internal/External Stakeholders:*** **External stakeholders include the California Department of Social Services, the California Attorney General's Office and the California Tribal Families Coalition.** ***AC Collaboration:*** Family and Juvenile Law Advisory Committee, Probate and Mental Health Advisory Committee, and the Governing Committee of the Center for Judicial Education and Research, with respect to recommendations that impact the work of those bodies.	
2.	***Project Title:*** **Develop a legislative proposal to facilitate recognition of tribal court orders regarding the division of marital assets as "qualified domestic relations order" within the meaning of 29 USC §1056(d)(3)(B) for the purpose of dividing pensions and other benefits within the scope of the Employee Retirement Income Security Act (ERISA).**	***Priority 2b***[4]

[3] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.
[4] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.
[5] Available at https://www.caltribalfamilies.org/news/ICWAComplianceTaskForceFinalReport2017.pdf/view

#	New or One-Time Projects[3]
	Project Summary[5]: As part of its charge under Rule 10.60(b)(2) the Forum is to make recommendations relating to the recognition and enforcement of court orders that cross jurisdictional lines. Domestic relations is an area where tribal courts in California are increasingly exercising jurisdiction. The effectiveness of these orders is undermined when they are not fully recognized and enforced. Tribal courts report that some of their clients are having difficulty having division of marital assets orders issued with respect to pension benefits subject to ERISA recognized by plan administrators. As part of its statute governing the recognition and enforcement of foreign money judgements, Oregon has adopted a provision to recognize qualifying tribal court orders as domestic relations orders for ERISA purposes. The Judicial Council sponsored legislation in 2014 to establish the Tribal Court Civil Money Judgement Act (Code of Civ. Proc. §§1730-1742). A provision could be added, similar to the Oregon provision, to clarify that qualifying tribal court orders must be considered as domestic relations orders for ERISA purposes under California law. ***Status/Timeline:*** Subject to approval by Judicial Council and Legislature: likely effective date would be January 1, 2020. ***Fiscal Impact/Resources:*** CFCC, Legal Services, and CJER staff. ***Internal/External Stakeholders****:* External stakeholders could potentially include members of the family law bar and pension plan administrators. ***AC Collaboration:*** Civil and Small Claims Advisory Committee.

#	Ongoing Projects and Activities[3]	
1.	***Project Title:*** **Policy Recommendations: Revise Pro Hac Vice Requirements for attorneys representing Indian Tribes and Indian Parents in Indian Child Welfare Act Cases**	***Priority 2b[4]***
	Project Summary[5]: This project was on the 2017 annual agenda as item 8(ii) at page 10. The issue gained new urgency with the release of the California ICWA Compliance Task Force Report in March of 2017 which addressed pro hac vice rules in its recommendations.[6] ***Status/Timeline****:* Anticipate that a proposal to amend rule 9.40 will circulate during the Spring 2018 RUPRO cycle. If approved by the Judicial Council, the amendment would come into effect January 1, 2019. ***Fiscal Impact/Resources:*** CCFC staff. ***Internal/External Stakeholders:*** Internal stakeholders include the liaison from the Supreme Court to the State Bar. External stakeholders include the State Bar and the California Tribal Families Coalition. ***AC Collaboration:*** None.	
2.	***Project Title:*** **Policy Recommendations: Review of newly adopted federal *Regulations for State Courts and Agencies in Indian Child Custody Proceedings* and *Guidelines for Implementing the Indian Child Welfare Act.***	***Priority 2[4]***
	Project Summary[5]: Review the newly adopted *Regulations for State Courts and Agencies in Indian Child Custody Proceedings* (as published in the Federal Register on June 14, 2016 (Vol. 81 FR No. 114 38778) and the updated *Bureau of Indian Affairs Guidelines for Implementing the Indian Child Welfare Act* (as published in the Federal Register on December, 30, 2016 (Vol. 81 FR No. 251 96476), for possible recommendations to the Judicial Council for sponsored legislation or legislative positions on bills that will be introduced to implement the new regulations and guidelines in California. ***Status/Timeline****:* This is an ongoing item from the Forum's 2017 Annual Agenda. During the past year staff to the Forum have prepared analysis of the implications of the regulations and guidelines for California law and practice and have prepared an alert concerning the regulations.[7] Several members of the Forum have volunteered to work with staff to prepare initial recommendations for interpretation and implementation of the regulations and guidelines. Those discussions are ongoing. The Forum expects to have final recommendations for the Judicial Council by January 1, 2019.	

[6] The report of the California ICWA Compliance Task Force is available at https://www.caltribalfamilies.org/news/ICWAComplianceTaskForceFinalReport2017.pdf/view. See recommendation 1 at page 95.
[7] Available at http://www.courts.ca.gov/documents/ICWA_New-federal-regulation.pdf

#	Ongoing Projects and Activities[3]	
	Fiscal Impact/Resources: CFCC staff. ***Internal/External Stakeholders:*** Internal stakeholders include the Forum, Family and Juvenile Law Advisory Committee, and the Probate and Mental Health Advisory Committee. ***AC Collaboration:*** Staff are coordinating with the Family and Juvenile Law Advisory Committee, and the Probate and Mental Health Advisory Committee and staff to those committees as the Indian Child Welfare Act affects the work of those committees as well.	
3.	***Project Title:*** **Policy Recommendations: Judge to Judge communication between state and tribal court judges.**	***Priority 2[4]***
	Project Summary[5]: As part of the Forum's charge under rule 10.60(1) and (2), the Forum considers whether, in different case types, it is necessary and appropriate to facilitate judge to judge communication between state and tribal courts in order to promote the recognition and enforcement of orders across jurisdictional lines. Provision for such communication is included in California Code of Civil Procedure section 1740 and in Family Code section 3410. As tribal courts in California expand their activities, it may be appropriate to include such provisions in relation to other case types. ***Status/Timeline****:* Ongoing. ***Fiscal Impact/Resources:*** CFCC staff. ***Internal/External Stakeholders:*** None. ***AC Collaboration:*** None.	
4.	***Project Title:*** **Policy Recommendations: Legislation to improve the recognition and enforcement of tribal court orders.**	***Priority 2[4]***
	Project Summary: As part of its mandate under rule 10.60(b)(2) to make recommendations relating to the recognition and enforcement of court orders that cross jurisdictional lines, the Forum continuously looks for areas where legislative action would be appropriate. In the past the Forum has partnered with the Civil and Small Claims Advisory Committee to recommend legislation (SB 406) which established the Tribal Court Civil Money Judgement Act (Code of Civ. Proc. §§1730-1742). As originally passed, that Act was to sunset on January 1, 2018. This past year the Forum worked with staff of the Judicial Council's Governmental Affairs to provide information to the California Law Revision Commission studying the effect of the Act and other statutes governing recognition and enforcement of foreign orders. Legislation was finalized that lifted the sunset.	

#	Ongoing Projects and Activities[3]	
	This coming year the Forum will further this objective through item 3 in new projects above and will work with the Traffic Advisory Committee to determine if it would be feasible to create a proposal to improve the recognition and enforcement of tribal court traffic orders. ***Status/Timeline:*** January 1, 2019. ***Fiscal Impact/Resources:*** CFCC and Governmental Affairs staff. ***Internal/External Stakeholders:*** None. ***AC Collaboration:*** Traffic Advisory Committee.	
5.	***Project Title:*** **Policy recommendations: Ethics**	***Priority 2[4]***
	Project Summary[5]: State and tribal court judges may sit on each other's benches and hear cases in the other jurisdiction through a joint-jurisdiction court or on an ad hoc or ongoing basis. The Forum will continue to work with the California Supreme Court's Advisory Committee on the Code of Judicial Ethics and make recommendations and request advisory opinions or amendments to the canons as appropriate and necessary to facilitate such collaborations. ***Status/Timeline****:* Ongoing. ***Fiscal Impact/Resources:*** CFCC staff. ***Internal/External Stakeholders:*** None. ***AC Collaboration:*** Advisory Committee on the Code of Judicial Ethics.	
6.	***Project Title:*** **Policy Recommendation: Tribal Access to the Child Abuse Central Index**	***Priority 2[4]***
	Project Summary[5]: The Tribal Access to the Child Abuse Central Index (Index) is used to aid law enforcement investigations and prosecutions, and to provide notification of new child abuse investigation reports involving the same suspects and/or victims. Information is also used to help screen applicants for licensing or employment in child care facilities, foster homes, and adoptive homes. The purpose of	

#	Ongoing Projects and Activities[3]	
	allowing access to this information on a statewide basis is to quickly provide authorized agencies, including tribal agencies, with relevant information regarding individuals with a known or suspected history of abuse or neglect. While tribal agencies can obtain information from the Index, they cannot readily submit information to the Index. This practice poses several problems: (1) Suspected or known abusers may remain in the home of a child posing safety risks; (2) Unnecessary duplication of effort by agencies; (3) Delays in entry into the Index due to double investigations; and (4) Barriers to sharing information among tribal and nontribal agencies that should be working together to protect children. The forum will explore consulting with the Department of Justice to consider executive branch action to permit tribal access to the Index. ***Status/Timeline****: Ongoing.* ***Fiscal Impact/Resources:*** *CFCC staff.* ***Internal/External Stakeholders:*** *The California Department of Justice.* ***AC Collaboration:*** *Family and Juvenile Law Advisory Committee.*	
7.	***Project Title:*** **Policy Recommendation: Technological Initiatives**	***Priority 2[4]***
	Project Summary[5]: (A) Both federal and state law require mutual full faith and credit for domestic violence restraining orders issued by tribal and state courts. A crucial aspect of promoting the mutual recognition and enforcement of such court orders is facilitating knowledge between state and tribal courts as to the protective orders issued by their respective courts. The Forum and staff have worked to provide tribal courts with the ability to read orders contained in the California Courts Protective Order Registry (CCPOR) and to facilitate entry of appropriate orders issued by tribal courts into CCPOR. ***Status/Timeline:*** In 2017, one tribal court was trained on accessing CCPOR. ***Fiscal Impact/Resources***: CFCC staff, CJER staff, and Information Technology (IT) staff. ***Internal/External Stakeholders:*** External stakeholders include tribal courts.	

#	Ongoing Projects and Activities[3]	
	AC Collaboration: None.	
	(B) Since its inception the Forum has been exploring ways to improve and simplify the process of doing inquiry and providing notice in cases governed by the Indian Child Welfare Act (ICWA). The Forum will continue to explore these opportunities, including whether document assembly programs might be helpful in reducing the time required and errors in ICWA inquiry and populating forms with the information gathered. The Forum will also monitor any ongoing e-notice pilot programs or other technological advances in other jurisdictions and make recommendations to the Judicial Council on replicating those in California. ***Status/Timeline:*** This is an ongoing Forum charge. ***Fiscal Impact/Resources***: Information Technology staff and Center for Families, Children & the Courts (CFCC) staff with document assembly expertise. ***Internal/External Stakeholders:*** None. ***AC Collaboration:*** None.	
8.	***Project Title:*** **Policy Recommendation: Funding for Innovative Practices and System Improvements**	***Priority 2[4]***
	Project Summary[5]: The Forum seeks to support innovative practices and system improvements including seeking funding for such initiatives as a pilot program to facilitate tribal participation and improve outcomes in ICWA cases by providing appointed counsel for tribes in these cases. ***Status/Timeline:*** Last year the Judicial Council submitted a federal grant application which would have provided inter alia funding for a pilot project to provide appointed counsel to tribes in ICWA cases. The Forum and Tribal/State Programs Unit staff will continue to seek out available funding. ***Fiscal Impact/Resources***: CFCC staff. ***Internal/External Stakeholders:*** None. ***AC Collaboration:*** None.	

#	Ongoing Projects and Activities[3]	
9.	***Project Title:*** **Increase Tribal/State Partnerships: Sharing Resources and Communicating Information About Partnerships**	***Priority 2[4]***
	Project Summary[5]: One of the guiding principles of the Forum is to improve access to justice by providing tribal and state courts access to resources for capacity building and collaboration on an equal basis, sharing resources, and seeking out additional resources. 1. Identify Judicial Council and other resources that may be appropriate to share with tribal courts. 2. Identify tribal justice resources that may be appropriate to share with state courts. 3. Identify grants for tribal/state court collaboration. 4. Share resources and information about partnerships through Forum E-Update, a monthly electronic newsletter. 5. Publicize these partnerships at conferences, on the Innovation Knowledge Center (IKC), and at other in-person or online venues. 6. Disseminate information to tribal court judges and state court judges on a monthly basis through the Forum E-Update, a monthly electronic newsletter with information on the following: o Grant opportunities; o Publications; o News stories; and o Educational events. 7. Foster tribal court/state court partnerships, such as the Superior Court of Los Angeles County's Indian Child Welfare Act Roundtable and the Bay Area Collaborative of American Indian Resources—court-coordinated community response to ICWA cases in urban areas and the providing technical assistance to the joint-jurisdiction collaborations between the Yurok Tribe and the Superior Court of California, County of Humboldt and the Shingle Springs Band of Miwok Indians and the Superior Court of California, County of El Dorado. ***Status/Timeline:*** Ongoing. During this year the Northern California Intertribal Court System was provided with access to a number of unlocked Judicial Council Juvenile, Family, Probate and Domestic Violence forms that the staff of the Northern California Intertribal Court System adapted for use by member courts. The adapted forms have been posted and made available to other tribal courts. ***Fiscal Impact/Resources:*** CFCC staff. ***Internal/External Stakeholders****:* None. ***AC Collaboration:*** None.	
10.	***Project Title:*** **Increase Tribal/State Partnerships: Tribal/State Collaborations that Increase Resources for Courts**	***Priority 2[4]***

#	Ongoing Projects and Activities[3]	
	Project Summary[5]: A primary goal of the Forum is to improve relationships between state and tribal courts and foster collaboration between those courts. There are currently two active joint-jurisdiction projects ongoing between Forum member state and tribal courts – the Superior Court of California, County of El Dorado collaborative with the Shingle Springs Band of Miwok Indians Tribal Court and the Superior Court of California, County of Humboldt collaboration with the Yurok Tribal Court. ***Status/Timeline:*** Ongoing. This year the JCC staff are supporting these collaborations by sharing resources and agreements, and offering technical assistance on collaborations. Humboldt Superior Court also received an innovation grant from the Judicial Council for the joint-jurisdiction court project. ***Fiscal Impact/Resources:*** Collaboration and joint-jurisdiction courts should provide fiscal savings by improving the sharing of resources across jurisdictions. CFCC staff will continue to provide support to this project. ***Internal/External Stakeholders:*** External stakeholders include superior courts and tribal courts. ***AC Collaboration:*** None.	
11.	***Project Title:*** **Increase Tribal/State Partnerships: Education and Technical Assistance to Promote Partnerships and Understanding of Tribal Justice Systems**	***Priority 2[4]***
	Project Summary[5]: The Forum will continue to develop educational events, resources and tools, and provide technical assistance to promote partnerships and understanding between state and tribal justice systems including: 1. Make recommendation to Judicial Council staff to continue providing educational and technical assistance to local tribal and state courts to address domestic violence and child custody issues in Indian country. 2. Make recommendation to Judicial Council staff to provide technical assistance to evaluate the joint jurisdictional court and to courts wishing to replicate the model. 3. Make recommendation to the Judicial Council staff to continue developing civic learning opportunities for youth that exposes them to opportunities and careers in tribal and state courts. 4. Make recommendation to explore, at the option of tribes, opportunities for state and federal court judges to serve as a tribal court judge. 5. Develop and implement strategy to seek resources for tribal/state collaborations. 6. Continue to provide the **S**tate/**T**ribal **E**ducation, **P**artnerships, and **S**ervices (S.T.E.P.S.) to Justice—Domestic Violence and Child Welfare programs and provide local educational and technical assistance services.	

#	Ongoing Projects and Activities[3]	
	7. Continue the first joint jurisdictional court in California. The Superior Court of El Dorado County, in partnership with the Shingle Springs Band of Miwok Indians, is operating a family wellness court and next year will provide technical assistance to evaluate the joint jurisdictional court. (See Court Manual). 8. Establish partnership between the Superior Court of Humboldt County and the Yurok Tribal Court to develop a civics learning opportunity for youth in the region. ***Status/Timeline:*** Ongoing. ***Fiscal Impact/Resources:*** CFCC staff and CJER staff. ***Internal/External Stakeholders****:* Center for Judicial Education and Research. ***AC Collaboration:*** Governing Committee of the Center for Judicial Education and Research.	
12.	***Project Title:*** **Education: Judicial Education**	***Priority 2***
	Project Summary[5]: CJER toolkits, located on the Judicial Resources Network, will be updated to include federal Indian law. Develop 10-minute educational video to be posted online and shared statewide with justice partners. In collaboration with the CJER Curriculum Committees, consult on and participate in making recommendations to revise the CJER online toolkits so that they integrate resources and educational materials from the forum's online federal Indian law toolkit. Forum judges are working together with committee representatives from the following curriculum committees: (1) Access, Ethics, and Fairness, (2) Civil, (3) Criminal, (4) Family, (5) Juvenile Dependency and Delinquency, and (6) Probate. ***Status/Timeline:*** Ongoing. This year and next, Forum members and staff of the Tribal/State Programs Unit are collaborating with CJER to create a "Continuing the Dialogue" episode on the Indian Civil Rights Act of 1968. When completed, that video will be screened by CJER and housed on the Judicial Resources Network. ***Fiscal Impact/Resources****: CFCC staff and CJER staff.* ***Internal/External Stakeholders:*** None. ***AC Collaboration:*** Governing Committee of the Center for Judicial Education and Research.	
13.	***Project Title:*** **Education: Truth and Reconciliation**	***Priority 2[4]***

#	Ongoing Projects and Activities[3]
	Project Summary[5]: Consider collaboration among the three branches of state government in partnership with tribal governments to promote a truth and reconciliation project that acknowledges California's history, as described in Professor Benjamin Madley's book, *An American Genocide: The United States and the California Indian Catastrophe*, with respect to indigenous peoples, fosters an understanding of our shared history, and lays a foundation for reconciliation, which promotes a call to action. ***Status/Timeline:*** Ongoing. As a step towards the goal of Statewide Truth and Reconciliation, Forum members and staff of the Tribal/State Programs Unit are participating in a civic engagement project in Humboldt County which will infuse curriculum with an understanding of local Indian history. ***Fiscal Impact/Resources:*** *CFCC staff* ***Internal/External Stakeholders:*** External stakeholders include Tribal Governments and Humboldt County Civic Engagement Project. ***AC Collaboration:*** None.

III. LIST OF 2017 PROJECT ACCOMPLISHMENTS

#	Project Highlights and Achievements
1.	**Education: Documentary-Judicial Education** JCC staff consulted on a documentary on tribal courts in California and tribal court – state court collaboration which featured a number of Forum members. That documentary "Tribal Justice" was completed in February of 2017 and was widely screened at film festivals and on PBS Point of View. http://www.pbs.org/pov/tribaljustice/
2.	**Education: Information Bulletin and Video on Duty to Recognize and Enforce Tribal Court Protective Orders** Forum members collaborated with the California Office of the Attorney General and the Sheriffs Association to develop a 10-minute mentor video on the Information Bulletin relating to the recognition and enforcement of tribal protection orders, issued by the California Office of the Attorney General. This Information Bulletin was the culmination of work by the forum in partnership with the California Department of Justice (DOJ), the California State Sheriffs' Association, the U.S. Attorney General's Office, and other justice partners. Both the Information Bulletin and the explanatory video have been widely shared with justice partners and are now posted on the Tribal/State Programs Unit website here
3.	**Policy Recommendation: Rules and Forms – Juvenile Records** The Forum worked with the Family and Juvenile Law Advisory Committee to propose an amendment to California Rules of Court, rule 5.552 to conform to the requirements of subdivision (f) of section 827 of the Welfare and Institutions Code, which was added effective January 1, 2015, to clarify the right of an Indian child's tribe to have access to the juvenile court file of a case involving that child. At that time, no changes were made to rule 5.552, which implements section 827 of the Welfare and Institutions Code. Contrary to section 827 as amended, rule 5.552, continued to require that representatives of an Indian child's tribe petition the juvenile court if the tribe wanted access to the juvenile court file. This inconsistency created confusion. The proposal was approved by the Judicial Council and the amended rule will come into effect January 1, 2018.
4.	**Policy Recommendation: Rules and Forms – Child Support** Revise California Rule of Court, rule 5.372 in response to the need for consistent procedures for determining the orderly transfer of title IV-D child support cases from the state court to the tribal court when there is concurrent subject matter jurisdiction. Since implementation of the rule of court, over 40 cases have been considered for transfer between the state courts in Humboldt and Del Norte counties and the Yurok Tribal Court. The Yurok Tribe intends to seek transfer of cases currently under the jurisdiction of state court in the following counties: Lake, Mendocino, Shasta, Siskiyou, and Trinity. In addition, at least one other tribe located in Southern California is expected to soon begin handling title IV-D child support cases. Based on the experience with the transfers that have taken place so far, the participants of a cross-court educational exchange have suggested amendments to rule 5.732 to streamline the process, reduce confusion, and ensure consistency and efficient use of court resources. The amended rule will come to effect January 1, 2018.
5.	**Policy Recommendations: Recognition and Enforcement of Tribal Court Orders.** The Forum partnered with the Civil and Small Claims Advisory Committee to sponsor legislation (Sen. Bill 406) which established the Tribal Court Civil Money Judgement Act (Code of Civ. Proc. §§ 1730-1742). As originally passed, that Act was to sunset on January 1, 2018. This past year the Forum worked with staff of the Judicial Council's Governmental Affairs to provide information to the California

#	Project Highlights and Achievements
	Law Revision Commission studying the effect of the Act and other statutes governing recognition and enforcement of foreign orders. Assembly Bill 905, Money Judgements of Other Jurisdictions, signed by the Governor on August 7, 2017, lifted the sunset on the Tribal Court Civil Money Judgement Act.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Proposed Legislation for Recognition of Tribal Court Orders Relating to the Division of Marital Assets

Proposed Rules, Forms, Standards, or Statutes
Amend California Code of Civil Procedure §1736

Proposed by
California Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Dennis M. Perluss, Cochair

Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 8, 2018

Proposed Effective Date
January 1, 2019

Contact
Ann Gilmour, 415-865-4207
ann.gilmour@jud.ca.gov

Executive Summary and Origin

As a result of comments from tribal court judges and advocates, the California Tribal Court–State Court Forum (Forum) and the Family and Juvenile Law Advisory Committee (Committee) have considered and recommend amendments to section 1736 of the California Code of Civil Procedure to address the need for domestic relations orders issued by a tribal court to comply with the requirements of the Employee Retirement Income Security Act of 1974 (ERISA) in order to effectively divide employee pension benefits plans subject to ERISA.

Background

California is home to more people of Indian ancestry than any other state in the nation. Currently there are 109 federally recognized tribes in California, second only to the number of tribes in the state of Alaska. Each tribe is sovereign, with powers of internal self-government, including the authority to develop and operate a court system. At least twenty tribal courts are currently operating in California, and several other courts are under development.

Tribal courts in California hear a variety of case types including child abuse and neglect cases; domestic violence protective orders; domestic relations (e.g., divorce and dissolution); contract disputes and other civil cases for money judgments; unlawful detainers, property disputes, nuisance abatements, and possession of tribal lands; name changes; and civil harassment protective orders.

Some tribal courts in California issue domestic relations orders including divorce and dissolution decrees. For these domestic relations orders to be effective, tribal courts must be able to address division of assets, including pension benefits governed by the federal Employee Retirement Income Security Act of 1974 (ERISA). In 2011 the U.S. Department of Labor issued Guidance on when a domestic relations order issued under tribal law would be a "judgment, decree or order …made pursuant to a State domestic relations law within the meaning of federal law.[1] That guidance concluded that:

> In the Department's view, a tribal court order may constitute a "judgment, decree or order . . . made pursuant to State domestic relations law" for purposes of ERISA section 206(d)(3)(B)(ii), if it is treated or recognized as such by the law of a State that could issue a valid domestic relations order with respect to the participant and alternate payee.

Section 206(d)(3)(B)(ii) or ERISA is codified as 29 U.S.C. §1056(d)(3)(B)(ii).

In 2012, the Judicial Council proposed legislation that eventually became the *Tribal Court Civil Money Judgment Act* Stats. 2014, Ch. 243 (SB 406, Evans) and added sections 1730-1741 to the California Code of Civil Procedure to clarify and simplify the process for recognition and enforcement of tribal court civil judgments consistent with the mandate set out in rule 10.60 (b) of the California Rules of Court to make recommendations concerning the recognition and enforcement of court orders that cross jurisdictional lines.

The Proposal

The proposal would add to subsection (c) to section 1736 of the Code of Civil Procedure as follows:

> (c) For the purposes of 29 U.S.C. §1056(d)(3)(B)(ii), a judgment of a tribal court filed with and entered by the superior court that otherwise meets the requirements of 29 U.S.C. §1056(d)(3)(B)(ii), is a domestic relations order made pursuant to the domestic relations laws of this state.

Alternatives Considered

The Forum and committee considered taking no action, but this risks inefficiencies if tribal court dissolution orders could not be fully implemented.

[1] Available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2011-03a

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are anticipated. It is expected that proposal will improve efficiencies by ensuring that parties can effectively resolve dissolution issues in tribal court and not have to take pension issues to a different venue.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee [or other proponent] is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee [or other proponent] also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would __ months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed legislation – page 4.

The Code of Civil Procedure would be amended, effective January 1, 2019, to read:

SECTION 1. Subdivision (c) is added to section 1736 of the California Code of Civil Procedure as follows:

(c) For the purposes of 29 U.S.C. §1056(d)(3)(B)(ii), a judgment of a tribal court filed with and entered by the superior court that otherwise meets the requirements of 29 U.S.C. §1056(d)(3)(B)(ii), is a domestic relations order made pursuant to the domestic relations laws of this state.

U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

February 2, 2011

Stephen B. Waller
Miller Stratvert Law Offices
500 Marquette N.W., Suite 1100
Albuquerque, NM 87102

2011-03A
ERISA SEC.
206(d)(3)

Dear Mr. Waller:

This is in response to your letter on behalf of PNM Resources, Inc., requesting guidance regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). In particular, you ask whether a domestic relations order issued under tribal law by a Family Court of the Navajo Nation, a federally-recognized Native American tribe, would be a "judgment, decree, or order . . . made pursuant to a State domestic relations law" within the meaning of section 206(d)(3)(B)(ii) of ERISA.

You represent that PNM Resources, Inc., its affiliates and subsidiaries (collectively "PNM") sponsor and administer various employee pension benefit plans (Plans) for their employees. The Plans have formal procedures in place to determine the qualified status of domestic relations orders. Employees of PNM who participate in the Plans reside throughout the State of New Mexico. New Mexico residents include members of twenty-two federally-recognized Native American tribes. Some of PNM's employees are people who are part of the Navajo Nation.

PNM received multiple draft domestic relations orders issued by the Family Court of the Navajo Nation. The Family Court of the Navajo Nation is a "tribal court" for the peoples comprising the Navajo Nation. PNM has determined that the draft orders, other than having been issued by a tribal court, are in compliance with the procedures adopted by the PNM Plans for determining the qualified status of domestic relations orders issued pursuant to State domestic relations laws.

Section 206(d)(1) of ERISA generally requires that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) of ERISA states that section 206(d)(1) applies to an assignment or alienation of benefits pursuant to a domestic relations order, unless the order is determined to be a "qualified domestic relations order" (QDRO). Section 206(d)(3)(A) further provides that pension plans must provide for the payment of benefits in accordance with the applicable requirements of any QDRO.[1]

[1] Section 514(a) of ERISA generally preempts all State laws insofar as they relate to employee benefit plans covered by Title I of ERISA. However, section 514(b)(7) states that preemption under section 514(a) does not apply to QDROs within the meaning of ERISA section 206(d)(3)(B)(i).

Section 206(d)(3)(B)(i) of ERISA defines the term QDRO for purposes of section 206(d)(3) as a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan," and which meets the requirements of section 206(d)(3)(C) and (D).

The term "domestic relations order" is defined in section 206(d)(3)(B)(ii) as "any judgment, decree, or order (including approval of a property settlement agreement) which – (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to a State domestic relations law (including a community property law)."

Section 3(10) of ERISA provides that "[t]he term 'State' includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone."

Section 206(d)(3)(G) of ERISA requires the plan administrator to determine whether a domestic relations order received by the plan is qualified, and to administer distributions under such qualified orders, pursuant to reasonable procedures established by the plan. When a pension plan receives an order requiring that all or part of the benefits payable with respect to a participant be distributed to an alternate payee, the plan administrator must determine that the judgment, decree, or order is a domestic relations order within the meaning of section 206(d)(3)(B)(ii) of ERISA - i.e., that it relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of the participant, and that it is made pursuant to a State domestic relations law by a State authority with jurisdiction over such matters.

A principal purpose of ERISA section 206(d)(3) is to permit the division of marital property on divorce in accordance with the directions of the State authority with jurisdiction to achieve an appropriate disposition of property upon the dissolution of a marriage, as defined under State law. Nothing in ERISA section 206(d)(3) requires that a domestic relations order be issued by a State court. Rather, the Department has previously concluded that a division of marital property in accordance with the proper final order of any State authority recognized within the State's jurisdiction as being empowered to achieve such a division of property pursuant to State domestic relations law (including community property law) would be considered a "judgment, decree, or order" for purposes of ERISA section 206(d)(3)(B)(ii). *See also* EBSA Frequently Asked Questions About Qualified Domestic Relations Orders (available at www.dol.gov/ebsa/faqs/faq_qdro.html).

Federal law, however, does not generally treat Indian tribes as States, or as agencies or instrumentalities of States. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002). *See also Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2nd Cir. 1996) ("[T]ribes are not States under OSHA"). The definition of "State" at section 3(10) of ERISA does not include Indian tribes.[2] In addition, although the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901 *et. seq.*, grants Indian tribes jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, no such federal statute exists with respect to the recognition of domestic relations orders of tribal courts involving divorce and the division of marital property on divorce.

We note, nonetheless, that some States have adopted laws to address tribal court jurisdictional issues relating to domestic relations orders. *E.g.,* Oregon Revised Statutes 24.115(4). In the Department's view, a tribal court order may constitute a "judgment, decree or order . . . made pursuant to State domestic relations law" for purposes of ERISA section 206(d)(3)(B)(ii), if it is treated or recognized as such by the law of a State that could issue a valid domestic relations order with respect to the participant and alternate payee.

We are unable to conclude that the instant orders, which involve individuals residing in New Mexico, are "domestic relations orders" within the meaning of ERISA section 206(d)(3)(B)(ii). Neither your submission nor our review of New Mexico law indicates that New Mexico recognizes or treats orders of the Family Court of the Navajo Nation as orders issued pursuant to New Mexico state domestic relations law.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions. This letter relates solely to the application of the provisions of Title I of ERISA.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

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[2] Congress recently amended the definition of "governmental plan" at ERISA section 3(32) to expressly include certain plans maintained by Indian tribal governments. Pub. L. 109-280, 120 Stat. 780 (Aug. 17, 2006). Before this amendment, the term "governmental plan" was limited to plans established or maintained by the "Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Indian Child Welfare Act – Exemption of certain pro hac vice requirements for attorneys representing tribes, Indian parents, or Indian custodians in cases governed by the *Indian Child Welfare Act*, 25 U.S.C. §1903 *et seq.*

Proposed Rules, Forms, Standards, or Statutes
Amend California Rules of Court, rule 9.40

Proposed by
Tribal Court–State Court Forum

Action Requested
Review and submit comments by June 8, 2018

Proposed Effective Date
January 1, 2019

Contact
Ann Gilmour, ann.gilmour@jud.ca.gov; 415-865-4207

Executive Summary and Origin

This proposal would amend California Rules of Court, rule 9.40 governing out-of-state counsel appearing *pro hac vice*. The proposal would exempt from two of the requirements of rule 9.40 attorneys representing an Indian tribe in a child custody proceeding governed by the *Indian Child Welfare Act*, 25 U.S.C. §§1903 – 1963 (ICWA). Under ICWA, Indian parents and custodians are entitled to appointed counsel, and Indian tribes and custodians are entitled to intervene in state court child custody proceedings governed by ICWA. The California ICWA Compliance Task Force suggested that certain *pro hac vice* requirements should be waived for out-of-state attorneys in cases governed by the *Indian Child Welfare Act* to improve tribal representation in ICWA cases in California Courts.

Background

California has a high number of appeals related to the Indian Child Welfare Act.[1] Tribal advocates suggest that one reason for the high number of appeals is that tribes are often not able to fully participate in cases involving their children because, unlike every other party to a child welfare case, an Indian child's tribe is not entitled to appointed counsel. Removing barriers to

[1] See report from Professor Kathryn E. Fort for 2016 ICWA appeal numbers. In 2016 California had 114 appeals related to ICWA. https://turtletalk.wordpress.com/2017/01/04/2016-icwa-appellate-cases-by-the-numbers/

full and effective tribal participation in child welfare proceedings involving their children could improve ICWA compliance and reduce appeals.

Further, tribes assert that they have a federally protected right to participate in these cases which cannot be burdened by states' laws regulating attorneys and the practice of law.[2]

California's Indian population includes a large number of people affiliated with out-of-state tribes or tribes whose territories and primary headquarters are based in neighboring states such as the Washoe, Fort Mojave, Chemehuevi, Colorado River and Quechan tribes.[3]

In March of 2017, the California ICWA Compliance Task Force presented its report to California Attorney General Xavier Becerra.[4] Among the many recommendations contained in that report is a recommendation that "California's pro hac vice rules should be amended to permit an out-of-state attorney who represents an Indian tribe to appear in a child custody proceeding without being required to associate with local counsel…" (page 95). Several other states have recently taken steps to waive certain pro hac vice requirements for attorneys representing tribes in Indian Child Welfare Act cases.[5] The goal is to remove barriers to tribal participation in these cases. The Forum and Committee considered that the restriction on repeated appearances could also create a barrier, particularly in the case of tribes along the border with other states.

The Proposal

The proposal would amend California Rule of Court, rule 9.40 by adding subsection (g) to exempt an attorney representing an Indian tribe in a child custody proceeding governed by the *Indian Child Welfare Act* from the requirement to associate with an active member of the State Bar of California. It would further remove the restriction on multiple appearances by an attorney representing a tribe in a child custody proceeding governed by the *Indian Child Welfare Act*, by deeming that representation to be a special circumstance. The proposal is intended to improve compliance with the requirements of the *Indian Child Welfare Act*, reduce appeals and improve outcomes for Indian children and families by facilitating tribal participation in Indian child custody cases governed by the *Indian Child Welfare Act*.

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[2] *State ex rel Juvenile Department of Lane County v. Shuey*, 119 Ore.App. 185 (1993); *In the Interest of N.N.E.*, 752 N.W.2d 1 (2008)

[3] See California Native American Statistical Abstract: Population Characteristics http://www.courts.ca.gov/documents/Tribal-ResearchUpdate-NAStats.pdf and Tribal Homelands and Trust Land Map here http://www.water.ca.gov/tribal/docs/maps/CaliforniaIndianTribalHomelands24x30_20110719.pdf

[4] The California ICWA Compliance Task Force is available here: https://www.caltribalfamilies.org/news/ICWAComplianceTaskForceFinalReport2017.pdf/view

[5] See for example Nebraska Revised Statute 43-1504 https://nebraskalegislature.gov/laws/statutes.php?statute=43-1504 ; Oregon Uniform Tribal Court Rules 3.170 http://www.osbar.org/_docs/rulesregs/UTCR3.170.pdf; Michigan Court Rules, rule 8.126 http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2016-04_2017-05-24_FormattedOrder_AmendtOfMCR8.126.pdf; and Washington State proposed amendment to Washington State Court Rules: Admission for Practice Rules 8 http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=622.

Alternatives Considered

The Tribal Court–State Court Forum considered taking no action, but determined that an amendment to the rule supports the goal of removing barriers to tribal participation in *Indian Child Welfare Act* cases involving their tribal children.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are anticipated.

Request for Specific Comments

In addition to comments on the proposal as a whole, the Forum and advisory committee are interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The Forum and advisory committee also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would __ months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed amendments to Cal. Rules of Court, Rule 9.40, at page 4.

Title 9. Rules On Law Practice, Attorneys, And Judges

Division 4. Appearances and Practice by Individuals Who Are Not Members of the State Bar of California

Rule 9.40. Counsel *pro hac vice*

(a)– (f) ***

(g) Representation in cases governed by the *Indian Child Welfare Act, 25 U.S.C. §1903 et seq.*

(1) The requirement in subdivision (a) that the applicant associate with an active member of the State Bar of California does not apply to an applicant seeking to appear in a California court to represent an Indian tribe in a child custody proceeding governed by the *Indian Child Welfare Act*; and

(2) The fact that an applicant is seeking to appear in a California court to represent an Indian tribe in a child custody proceeding governed by the *Indian Child Welfare Act* constitutes a special circumstance for the purposes of the restriction in subdivision (b) that an application may be denied due to repeated appearances.

(h) ***