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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 Koeplinger, *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

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

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

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.humantraffickingsearch.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-american-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

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 & Koeplinger, *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.

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

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

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

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 & Koeplinger, *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 & Koeplinger, *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 & Koeplinger, *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 & Koeplinger, *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

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

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

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

Congress 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.

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.

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.

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 enforcement²⁰⁰, 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.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. Clawson et al., *supra* note 32 (“Obtaining more stable and reliable estimates of human trafficking 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."