

## RELOCATION REVISITED: SEX TRAFFICKING OF NATIVE WOMEN IN THE UNITED STATES

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## I. INTRODUCTION

*“We have never had this story told before . . . .”*<sup>1</sup>

In 2000, Congress passed the *Trafficking Victim Protection Act* (TVPA)<sup>2</sup> and funded a comprehensive public relations campaign<sup>3</sup> to bring attention to modern day slavery. As a result, there has been an unprecedented attention to sex trafficking in the United States during the past nine years.<sup>4</sup> This attention is long overdue. The federal government claims that global sex trafficking has reached crisis proportions and urges other countries to take notice and implement immediate corrective action.<sup>5</sup> Congressional appropriations have funded dozens of task forces to develop collaborative relationships among law enforcement, prosecutors, and victim advocates to combat sex trafficking in several metropolitan areas. The United States has also undertaken an extensive research agenda to better understand the nature of human trafficking. At least twenty-five federally funded studies and reports on human trafficking have been published since 2000.<sup>6</sup>

Many of these reports assert that the United States is a world

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1. Jessica Musicar, *Blood and Tears*, THE WORLD, July 20, 2009, available at <http://www.theworldlink.com/articles/2009/07/20/news/doc4a64a52a6b346607966876.txt>.

2. Trafficking Victim Protection Act, 22 U.S.C. § 7101 (2006) (amended 2008).

3. See ASSESSMENT OF U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2005 (2006) [hereinafter ASSESSMENT] (explaining the United States Department of Health and Human Services “Rescue and Restore Victims of Human Trafficking” public relations campaign). For example, the government partnered with singer Ricky Martin to produce television and radio public service announcements to raise awareness about human trafficking. *Id.* at 29.

4. The first contemporary international effort to address sex trafficking resulted in a 1904 legal document known as the “Agreement for the Suppression of the White Slave Traffic.” Agreement Between the United States and Other Powers for the Repression of the Trade in White Women, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

5. See, e.g., Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437 (2006) (discussing the nation’s unilateral role in international anti-trafficking laws).

6. See, e.g., TRACEY KYCKELHAHN, ALLEN J. BECK & THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS (2009) (describing the number and characteristics of suspected human trafficking investigations and their outcomes in the United States); JANICE G. RAYMOND & DONNA M. HUGHES, COALITION AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES (2001) (discussing both international and domestic trafficking of women for sexual exploitation in the United States).

leader in the international efforts to address this crime.<sup>7</sup> In claiming the role of “global sheriff,” Bush Administration officials—including Attorney General Gonzales—suggested that the most common manifestations of human trafficking in the United States originate in foreign countries.<sup>8</sup> Less publicized has been the finding that America is not only a destination for the commercial trade in human beings, but also a point of origin.<sup>9</sup> Although there are a small number of cases in which women have been trafficked from the United States to foreign countries, the problem has been identified primarily as domestic trafficking. In cases of domestic trafficking, women and girls are transported and sold within the United States for use in the commercial sex industry (primarily pornography, stripping, and prostitution).<sup>10</sup> Preliminary estimates reveal that domestic trafficking within the United States is as much a problem, if not a bigger problem, than international trafficking into the United States.<sup>11</sup>

Notably, most of the government-funded reports imply that the sex trafficking to, from, and within the United States is either a relatively new phenomenon, or one that has only recently experienced sudden and dramatic growth. This assumption is mistaken. Sexual trafficking has a long and storied history within the United States and failure to acknowledge this reality impedes the resolution of the epidemic of sexual exploitation within this country.

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7. See, e.g., ASSESSMENT, *supra* note 3, at 1 (claiming that “[t]he United States is among the nations leading the fight against this terrible crime”).

8. *Id.* at 34 (quoting Gonzales: “Today, its victims are usually aliens . . .”). Some articles and reports provide a list of the common countries of origin which usually include countries that “tend to be relatively unstable politically or economically disadvantaged.” David R. Hodge, *Sexual Trafficking in the United States: A Domestic Problem with Transnational Dimensions*, 53 SOC. WORK 143, 145 (2008).

9. Hodge suggests that “trends in international trafficking are easier to estimate than trends in domestic trafficking.” Hodge, *supra* note 8, at 144.

10. See RAYMOND & HUGHES, *supra* note 6, at 10 (“U.S. women are domestically trafficked across city, state and even national borders.”).

11. The full extent of modern sex trafficking is extraordinarily difficult to document because the sex industry includes a combination of both legal and illegal activities. Moreover, the victims of this crime are often reluctant to come forward for fear of the legal system or their captors. These sexual predators use violence, threats, and deception to subjugate their victims. Experts in this form of criminal enterprise have disagreed amongst themselves as to the true extent of the problem. In the United States, for example, the General Accounting Office has raised serious questions about the methodology used by the State Department to estimate the number of victims. See Bridget Anderson & Rutvica Andrijasevic, *Sex, Slaves and Citizens: The Politics of Anti-Trafficking*, 40 SOUNDINGS 135, 137 (2009). This article will not presume to quantify the precise number of victims beyond the adage of “even one is one too many.”

An honest analysis of sex trafficking in the United States must begin with recognition of the long history of the *legal* sex trade in the Western hemisphere. The sexual subjugation of women of color has been (and continues to be) a product of the European and American colonization projects.<sup>12</sup> Failure to understand this legacy makes the United States government's efforts seem disingenuous, if not dishonest, in the eyes of victims' advocates around the world.<sup>13</sup> The U.S. government's pronouncements on sex trafficking evince an inconsistent double standard that applies only to "third world" countries.<sup>14</sup>

This paper seeks to set the record straight. Although women from all segments of society are victims of sex trafficking and sexual violence, this paper will focus on the history of sexual oppression of American Indian and Alaska Native<sup>15</sup> women because they suffer sexual violence at the highest rate of any ethnic group within the United States, according to the federal government's own crime statistics.<sup>16</sup>

This paper further examines the sexual exploitation of Native women through the lens of the United States' own legal definition of trafficking. The abolition of human slavery is a laudable goal, and though the proactive role taken by the U.S. government in the last decade is commendable, the United States must be honest about its failings if it expects to reduce sexual slavery.

As one commentator observed,

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12. See Gary C. Anders, *Theories of Underdevelopment and the American Indian*, 14 J. ECON. ISSUES 681, 690 (1980) ("Colonialism is a theoretical model which stresses the domination of a people by a culturally different and more powerful group over which they have little influence.").

13. Deloria, Jr. explains: "There has not been a time since the founding of the republic when the motives of this country were innocent. Is it any wonder that other nations are extremely skeptical about its real motives in the world today?" VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 57 (1969).

14. Desyllas writes: "[C]ountries holding power and privilege have domineering policies and imperialistic frameworks and ideologies that are imposed upon the rest of the world." Moshoula Capous Desyllas, *A Critique of the Global Trafficking Discourse and U.S. Policy*, 34 J. SOC. & SOC. WELFARE 57, 58 (2007).

15. Terminology in this arena is fraught with difficulty and debate due to the history of unilateral labeling and naming by the English-speaking population. For the purposes of this article, I use "Indian," "Native," "indigenous," and "tribal" interchangeably to refer to indigenous people who live in the United States. This is meant to include Alaska Native people.

16. See STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, *AMERICAN INDIANS AND CRIME 1992-2002* (2004) [hereinafter PERRY (2004)]. See also RINET BACHMAN ET AL., *VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN* 3 (2008).

Members of Western society see themselves on the forefront of civilization, bringing the world technology, capitalism, and democracy. However, these same individuals often fail to recognize that centuries earlier, when native people presented their Western ancestors with some of these same societal notions, particularly the valuable contributions of women, Westerners were repulsed and dismissed these ideas immediately as a savage, inferior way of functioning.<sup>17</sup>

In light of recent efforts by the United States to address the global sex trafficking, it seems only fair to expose the long history of complicity of the United States and its colonial predecessors in sustaining the very behavior it professes to condemn.

Over the last five hundred years American Indians have been subject to war, conquest, rape, and genocide. All of these depredations have disconnected Indian people from both the land and their own bodies.<sup>18</sup> In fact, it has been suggested that sexual violence can be employed as a metaphor for the entire concept of colonialism.<sup>19</sup> Alienation from one's homeland provides a strong foundation upon which sexual victimization can take place. Indigenous scholar Jack D. Forbes explains the connection by asserting that colonial forces found it easy to shift "[f]rom the raping of a woman to the raping of a country to the raping of the world. Acts of aggression, of hate, of conquest, or empire-building [evolve to] Harems of women and harems of people; houses of prostitution and houses of pimps."<sup>20</sup>

A 2008 report on sex trafficking in Minnesota explains:

Traffickers seek out persons perceived to be vulnerable for various reasons, including: age, poverty, chemical dependency, history of abuse, lack of resources or support systems, or lack of immigration status. Traffickers then use various tactics to control these persons that may include: inflicting sexual, emotional or mental abuse; confiscating documents; inducing or enabling chemical addiction; withholding money or identification documents; and violent physical assaults

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17. Kathleen Ward, *Before and After the White Man: Indian Women, Property, Progress, and Power*, 6 CONN. PUB. INT. L.J. 245, 247 (2007).

18. Hilary N. Weaver, *The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women*, J. INTERPERSONAL VIOLENCE 1, 1–12 (2008).

19. Andrea Smith, *Sexual Violence and American Indian Genocide*, in REMEMBERING CONQUEST: FEMINIST/WOMANIST PERSPECTIVES ON RELIGION, COLONIZATION, AND SEXUAL VIOLENCE 31–49 (Nantawan Boonprasat Lewis & Marie M. Fortune eds., 1999).

20. JACK D. FORBES, COLUMBUS AND OTHER CANNIBALS 160 (1992).

or threats of assaults.<sup>21</sup>

These tactics of traffickers are consistent with many of the tactics used by colonial and American governments to subjugate Native women and girls. Indeed, the behavior is so deeply ingrained in American history that it is often rendered invisible and thus becomes normalized.

Previously, this author explored the devastating history of rape and sexual assault perpetrated against tribal communities and its continuing relevance in the lives of contemporary Native women.<sup>22</sup> 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. Today, the eroticized image of Indian women is so commonplace in our society that it is unremarkable—the image of a hypersexual Indian woman continues to be used to market any number of products and ideas.<sup>23</sup> Because Native women and girls are at a higher risk for experiencing some of the key predictive risk factors for prostitution, they have an elevated risk of becoming trafficked into the sex industry. For example, experiencing sexual assault at an early age is associated with an increased risk of prostitution.<sup>24</sup> The rate of sexual assault against Native women is the highest (per capita) in the nation, thus Native women experience this particular risk factor more than any other group in the United States.<sup>25</sup> This and other factors are discussed more in-depth in Part

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21. ANGELA BORTEL ET AL., SEX TRAFFICKING NEEDS ASSESSMENT FOR THE STATE OF MINNESOTA 4 (2008).

22. See Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455 (2005) [hereinafter Deer (2005)]; Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121 (2004).

23. See, e.g., KATHRYN SHANLEY, NATIVE WOMEN'S HISTORY IN EASTERN NORTH AMERICA BEFORE 1900: A GUIDE TO RESEARCH AND WRITING NATIVE PEOPLES (Rebecca Kugel & Lucy Eldersveld Murphy eds., 2007) (discussing representations and misrepresentations of Native women).

24. Cathy Spatz Widom & Joseph B. Kuhns, *Childhood Victimization and Subsequent Risk for Promiscuity, Prostitution, and Teenage Pregnancy: A Prospective Study*, 86 AM. J. PUB. HEALTH 1607, 1607 (1996).

25. PERRY (2004), *supra* note 16, at 6.

## VII.

This article focuses on human trafficking that results in prostitution and other forms of commercial sexual exploitation.<sup>26</sup> The U.S. Department of State recognizes that “prostitution is inherently harmful and dehumanizing, and fuels trafficking in persons, a form of modern-day slavery.”<sup>27</sup> In contemporary times, global sexual slavery has had a disproportionate effect on indigenous women.<sup>28</sup> Melissa Farley explains this dynamic: “Prostitution of Aboriginal women occurs globally in epidemic numbers with indigenous women at the bottom of a racialized sexual hierarchy in prostitution itself.”<sup>29</sup>

However, because this problem has rarely been acknowledged in the United States, there are currently very few empirical studies that focus on Native women involved in prostitution in the United States. The normalization of violence against Native women often renders the problem unremarkable, if not invisible. Recently, data has begun to emerge which suggests that Native women are significantly over-represented in “sex trade” work, which is consistent with much anecdotal information noted by direct service providers.<sup>30</sup>

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26. Sex trafficking is also associated with pornography and other forms of legalized sex work, such as dancing and stripping. These activities are also worthy of inquiry, particularly the illegal use of children in these industries. Moreover, evidence suggests that pornography and stripping are often “gateways” to forms of illegal prostitution. RAYMOND & HUGHES, *supra* note 6, at 10, 21, 57–58. See also 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, 14 (2002). For the purposes of this article, I will be concerned with the contemporary problem of prostitution, which is criminalized in all jurisdictions in the United States with the exception of thirteen counties in Nevada. Barbara G. Brents & Kathryn Hausbeck, *Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy*, 20 J. INTERPERSONAL VIOLENCE 270, 270–95 (2005); Ronald Weitzer, *Prostitution Control in America: Rethinking Public Policy*, 32 CRIME L. & SOC. CHANGE 83, 83–102 (1999).

27. U.S. DEP’T OF STATE, BUREAU OF PUBLIC AFFAIRS, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING I (2004) [hereinafter THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING].

28. See, e.g., U.N. Permanent Forum on Indigenous Issues, May 15–26, 2006, *Report of the Fifth Session*, ¶47, U.N. Doc. E/2006/43, (recommending immediate action to review and monitor the situation of indigenous women, with particular attention to sexual violence); ASIAN INDIGENOUS WOMEN’S NETWORK ET AL., PORTRAIT OF INDIGENOUS WOMEN IN ASIA (2005) (discussing issues facing indigenous women in Asia).

29. Melissa Farley et al., *Prostitution in Vancouver: Violence and the Colonization of First Nations Women*, 42 TRANSCULTURAL PSYCHIATRY 242, 257 (2005).

30. See Suzanne Koeplinger, *Sex Trafficking of American Indian Women and Girls in Minnesota*, 6 U. ST. THOMAS L.J. 129 (2008) (discussing the significant problem of the sexual exploitation of American Indian women and girls). For example, a recent study in Minneapolis, Minnesota, found that 24% of women on probation for

Sex trafficking, because of the reference to “trafficking,” is often commonly understood to require spatial movement—that is, involuntarily transporting a person through coercion, often threatening or using violence. However, most contemporary legal definitions do not require physical movement, but rather coercion, force, fraud, or abuse of power to maintain a victim in an exploitive situation.<sup>31</sup> For the purposes of this article, I will use trafficking as officially defined by the United States: the recruitment, enticement, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act.<sup>32</sup>

As this article demonstrates, 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), invariably transporting them far away from their homes. As European and American law gradually supplanted indigenous law, the commercialization of Native women’s bodies became commonplace. Removing women from their lands, homes, and families was an essential factor in depriving them of their personal liberty. The result was that the transport and sale of sex slaves throughout the Americas became so widespread because it was rarely criminalized. Often, this exploitation was *de jure* legal (in that it was legally sanctioned by the government). Even in those instances where sex slavery was declared illegal, it continued to flourish due to official indifference and in large part institutionalized racism and prejudice. Racism and Indian sex slavery were, therefore, *de facto* legal.

Trafficking in the United States long predates the current legal regime in power; the tactics used by sex traffickers today were used against Native peoples from the first moment of contact. These tactics were pioneered by the Spanish and Portuguese, the French and the English, the Dutch and the Russians. All of these invaders colonized the “New World” and its occupants. Colonial legal systems historically

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prostitution in North Minneapolis are Native women, which is more than ten times the proportion of Native people living in Minneapolis (2.2%). BORTEL ET AL., *supra* note 21, at 21 (citing LAUREN MARTIN & JULIE RUD, HENNEPIN COUNTY AND FOLWELL CTR. PROSTITUTION PROJECT, PROSTITUTION RESEARCH REPORT: DATA SHARING TO ESTABLISH BEST PRACTICES FOR WOMEN IN PROSTITUTION 11–12 (2007) (on file with author)). There have also been several anecdotal reports that American Indian girls have been trafficked for prostitution on ships in the seaport of Duluth. *Id.* at 109–10.

31. BORTEL ET AL., *supra* note 21, at 3.

32. 18 U.S.C. § 1591 (2006).

protected (and rewarded) the exploiters of Native women and girls and therefore encouraged the institutionalization of sexual subjugation of Native women and girls. This dynamic continues today, albeit in a different guise. Anderson and Andrijasevic explain how contemporary interventions into sex trafficking fail to contextualize the state's role in the social problems of oppression: "Concern becomes focused on the evil wrongdoers rather than more systemic factors. In particular it ignores the state's approach to migration and employment, which effectively constructs groups of non-citizens who can be treated as unequal with impunity."<sup>33</sup> In the context of indigenous populations, the problem is complicated by a different factor—the displacement of Indian people and dispossession of tribal lands.

This article contains four main parts to provide conceptual structure to this descriptive project. Part III explores the *enslavement* of Native people.<sup>34</sup> Part IV considers how enslavement created a foundation upon which the sexual *exploitation* of Native women and girls became commonplace.<sup>35</sup> Part V examines *exportation*, the forced removal, abduction and other forms of "movement" which have separated Native people from their homelands, facilitating the exploitation of people.<sup>36</sup> In each section, specific examples of these tactics (enslavement, exploitation and exportation) against Native peoples are provided to illustrate how these tactics have traumatized and devastated tribal communities with a particular focus on the lives of Native women and girls. Part VII examines how the historic legacy of colonizing tactics continues to play a role in tribal communities today, suggesting policy changes as well as areas for further study.<sup>37</sup> The weakening of tribal nations has been identified as a significant factor in high crime rates in other contexts (drug trafficking and domestic violence); the same dynamics are facilitating the sexual exploitation of Native women and girls today.

Applying contemporary standards in evaluating past wrongs is not without controversy.<sup>38</sup> The aim of this piece is not merely to lay retrospective blame, but to understand how historical events and

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33. See Anderson & Andrijasevic, *supra* note 11, at 135.

34. See *infra* Part III.

35. See *infra* Part IV.

36. See *infra* Part V.

37. See *infra* Part VII.

38. See generally Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47 (2008) (arguing that the Indian Child Welfare Act of 1978 constitutes partial reparation for past human rights violations against Native Americans).

policies continue to play a role in the lives of Native women and girls today. As Brave Heart and DeBruyn have noted, “[w]herever peoples are being decimated and destroyed, subsequent generations will suffer.”<sup>39</sup> Other scholars have established that the United States has committed acts consistent with the contemporary definition of “genocide.”<sup>40</sup> By examining the role that sexual exploitation has played in American history, particularly sexual violence—which has been reinforced by the policies of enslavement, exploitation and exportation—this article seeks to demonstrate how the behavior so recently condemned by the United States has been ongoing here for centuries.

The perspectives of Native women have rarely been documented, much less preserved in the historical record.<sup>41</sup> This article draws attention to a seldom-discussed facet of victimization. To that end, the goal is to lay the foundation for future discussions, focused research and studies, and supportive, humanizing interventions for victims.

## II. HISTORICAL OVERVIEW: PRELIMINARY NOTES ON CONTEXT

Warfare, slavery, and relocation played significant roles in the destruction of Indian nations and the subsequent commercialization

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39. Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 J. NAT'L CENTER FOR AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 60, 75 (1998).

40. See, e.g., Lindsay Glauner, *The Need for Accountability and Reparation: 1830–1976: The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911 (2002) (construing the treatment of Native Americans by the United States government as genocide and discussing appropriate reparations); Barbara Perry, *From Ethnocide to Ethnoviolence: Layers of Native American Victimization*, 5 CONTEMP. JUST. REV. 231 (2002) [hereinafter Perry (2002)] (discussing the systematic oppression of Native Americans in terms of ethnoviolence); Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT'L & COMP. L. 1017 (2001) (describing the truth commission model and its application to the historic treatment of Native Americans by the United States government); Yellow Horse Brave Heart & DeBruyn, *supra* note 39 (discussing the historical trauma and unresolved grief resulting from the American Indian holocaust).

41. See VIRGINIA MARIE BOUVIER, *WOMEN AND THE CONQUEST OF CALIFORNIA, 1542–1840: CODES OF SILENCE*, at x (2001) (“[F]irsthand female accounts are poorly (and rarely) indexed and tend to be scattered throughout archival collections. Many accounts have yet to be discovered.”). Gilfoyle explains that “[s]ource materials that articulate the voice of prostitutes simply do not exist in many cases.” Timothy J. Gilfoyle, *Prostitutes in History: From Parables of Pornography to Metaphors of Modernity*, 104 AM. HIST. REV. 117, 138 (1999), available at <http://www.jstor.org/stable/2650183>.

of Native women's bodies. These actions, like so many other government policies throughout the Americas, resulted in untold cruelty to tribal peoples.<sup>42</sup> The variety of tactics employed by colonial governments from the late fifteenth century to the late nineteenth century overlapped and reinforced each other, resulting in the destruction (or near destruction) of many tribal nations. Some tribal nations were completely destroyed through direct warfare and genocide. War and slavery were inseparable in the European mind in 1492. Slaves were considered the spoils of war by the Europeans. Tribal nations that survived these direct attempts were greatly weakened by murder and abduction of tribal members.

Beginning in the nineteenth century in the United States and Canada, forcing Native people to relocate to government-selected reservations at gunpoint became more and more commonplace. After tribes settled on reservations, both national governments decided to "civilize" tribes by forcing "savage" children to attend government and church-run boarding schools. At boarding schools the children learned "useful skills" that would allow them to get menial jobs working for white people in the cities. Beginning in the twentieth century, Native children were removed from tribal communities and adopted out to non-Indian families at an extraordinary rate. Urban relocation from the reservation was the next logical step on the agenda for "civilizing" tribes.

Exploitation of Native women began as soon as their initial contact with Europeans and continues to this day. Although warfare, boarding schools, and urban relocation are generally not identified as forms of human trafficking, they are an inextricable part of the destruction of tribal nations that weakened these nations to the point that they could not adequately protect women and children from abduction, removal, and sexual enslavement. Boarding schools were regarded as education from the white perspective, but were often regarded as kidnapping and brainwashing from an indigenous perspective.<sup>43</sup> Urban relocation was just another chapter in the long history of Native people being taken far from home by a hostile foreign power.<sup>44</sup>

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42. This article focuses primarily on North America. There is also a wealth of examples from South and Central America. Although these colonial governments are not the focus of my paper, they are inextricable parts of the oppression of Native peoples.

43. *See infra* Part V.

44. *See infra* Part V.

The continental United States was colonized generally by three distinct European sovereigns: English, Spanish, and French. The land now called “Alaska” was first colonized by Russia.<sup>45</sup> A brief background on the applicable laws under each type of colonial rule will explicate how these legal systems devalued indigenous people’s lives and denied them the protection of European laws.<sup>46</sup> Condensing over five hundred years of history into less than a hundred pages is not possible without oversimplifying or generalizing.<sup>47</sup> In this analysis, it is critical to pay attention to the policing of particular kinds of “space”—for a European to “stake a claim” in a plot of land was to ensure an entire legal system of ownership and control. “Property, space, and corporeal violence . . . are closely entangled.”<sup>48</sup> The doctrine of Manifest Destiny justified violent removal—either through annihilation or coerced relocation under threat of violence.<sup>49</sup> Such violence “was not only an outcome of law, but its realization.”<sup>50</sup>

### III. ENSLAVEMENT

*(3) Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.*

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*(7) Traffickers often make representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape. Such representations can have the same coercive effects on victims as direct threats to inflict such harm.*

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*(8) Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. Such trafficking is the fastest*

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45. Commerce Department of the State of Alaska, [http://www.commerce.state.ak.us/oed/student\\_info/learn/russianheritage.htm](http://www.commerce.state.ak.us/oed/student_info/learn/russianheritage.htm) (last visited Nov. 18, 2009).

46. See generally ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (providing an in-depth historical exploration of how European laws and legal theories have been applied to Indian people).

47. Ward, *supra* note 17, at 245 (noting that “the experience of one tribe is not necessarily the experience of another”).

48. Nicholas Blomley, *Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid*, 93 ANNALS ASS’N AM. GEOGRAPHERS 121, 123 (2003).

49. *Id.* at 126.

50. *Id.* at 129 (emphasis omitted). See also Perry (2002), *supra* note 40, at 236–38.

*growing source of profits for organized criminal enterprises worldwide. Profits from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide. Trafficking in persons is often aided by official corruption in countries of origin, transit, and destination, thereby threatening the rule of law.*<sup>51</sup>

To fully understand the historical scope of sexual exploitation in tribal communities, it is necessary to begin with a general overview of the enslavement of Indian people in the Americas, largely because the institution of slavery facilitates widespread sexual abuse. Most European settlements were largely financed through the slave industry, and once the institution became the foundation of local and regional economies, it took centuries to eradicate.<sup>52</sup> Europeans usually employed legal mechanisms (in addition to physical force) in order to stake their claim in the land *and* the people:

[L]aw was integral to European encounter [with tribal nations]. Law provided the means and the language for the actual construction of European social realities—facts on the ground, as it were—in America. It also provided a context in which Europeans encountered, reconstructed, and eventually displaced the competing legalities, or, to borrow Hermes's useful term, the jurisprudences, of indigenous others.<sup>53</sup>

#### A. *Pre-Colonial Human Captivity*

There is no denying that warfare and human captivity existed in North America prior to the arrival of Europeans. Scholarly inquiry, however, has suggested that the indigenous practices related to human captivity were fundamentally different from slavery as introduced by Europeans.<sup>54</sup> Pre-colonial human captivity had several

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51. Trafficking Victim Protection Act, 22 U.S.C. §§ 7101(b)(3), (b)(7), (b)(8) (2008). To fully understand the historical scope of sexual exploitation in tribal communities, it is necessary to begin with a general overview of the enslavement of Indian people in the Americas, largely because the institution of slavery facilitates widespread sexual abuse. *See infra* Part IV.

52. *See generally* Anders, *supra* note 12 (discussing how dependency theory and colonialism explains the problem of American Indian underdevelopment).

53. Christopher L. Tomlins, *Introduction: The Many Legalities of Early America*, in *THE MANY LEGALITIES OF EARLY AMERICA* 11 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

54. Juliana Barr, *A Currency in Women: The Gendered Heart of an 'Infamous Flesh Trade' in Indians* 2 (Mar. 3, 2004) (pre-circulated paper for the Colonial and Imperial Histories Colloquium, Princeton University), available at <http://www>

distinguishable qualities. It was not an indefinite, immutable state of affairs for the slave; Indian captives would often later become fully integrated or adopted into their new tribe.<sup>55</sup> Many tribal practices involved several ceremonies and rituals which accomplished this incorporation through a series of stages. Slavery was rarely an inherited status.<sup>56</sup> The wholesale commercialization of labor was completely unknown. Abuse and mistreatment of captives were the exception, rather than the rule.<sup>57</sup>

In contrast, the history of commercial slavery in the laws and mores of European culture can be traced back to at least the city-states of ancient Greeks and the Roman Republic.<sup>58</sup> The Vikings introduced human trafficking to the British when they violently raided the British Isles and sold Britons into slavery as far away as the Middle East.<sup>59</sup>

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.princeton.edu/~cihc/040303paper.pdf.

55. See *id.* at 4 (noting that rather than taking captives or slaves for labor, Indians took captives out of vengeance or, more often in the case of women and children, for adoption). See also Alice Nash, *None of the Women Were Abused: Indigenous Contexts for the Treatment of Women Captives in the Northeast*, in *SEX WITHOUT CONSENT: RAPE AND SEXUAL COERCION IN AMERICA* 18 (Merril D. Smith ed. 2001) (noting that under Mi'kmaq law, "captive women could change their status by demonstrating personal or spirit power and contributing to the welfare of the group").

56. See ALAN GALLAY, *THE INDIAN SLAVE TRADE* 46 (2002) (noting that it was not until the mid-seventeenth century that the English added inheritance as another rationale for enslavement).

57. ALMON WHEELER LAUBER, *INDIAN SLAVERY IN COLONIAL TIMES WITHIN THE PRESENT LIMITS OF THE UNITED STATES* 57 (Corner House Publishers 1970) (1913). See also CARL J. EKBERG, *STEALING INDIAN WOMEN: NATIVE SLAVERY IN THE ILLINOIS COUNTRY* 63 (2007) (describing the conflated distinction between Indian slavery and Indian concubinage); GALLAY, *supra* note 56, at 47 ("Many Europeans thought of Indians as their biological equals, positing that only circumstances of separation by the Atlantic had led to [the] Indians' very different social and political development.").

58. See PETER GARNSEY, *IDEAS OF SLAVERY FROM ARISTOTLE TO AUGUSTINE* 3 (2d ed. 1999). Garnsey traces the development of slavery in ancient thought by examining Aristotle's views on natural slaves and the response of Hellenistic philosophers. In doing so, he notes that "Athens in the fifth and fourth centuries BC is the best-known of the Greek city-states whose economies were based on chattel slavery. In the course of the third century BC a slave society evolved in Italy and Sicily, centered on the Imperial capital of Rome." *Id.* at 3. Garnsey also traces how slavery was reflected in the writing of the early Christian apostles and influential Christian scholars such as Saint Augustine. The Apostle Paul, for instance, counseled that, "for slaves [it] is [ ] in serving their masters well [that] they [also serve] Christ." *Id.* at 173. See also COLIN WELLS, *THE ROMAN EMPIRE* 215–21 (2d ed. 1984) (discussing the ubiquity of slaves in wealthy Roman households); THOMAS WIEDEMANN, *GREEK AND ROMAN SLAVERY* 15 (2004) (citing excerpts from a wide variety of philosophers and statesmen to explore the legal and theoretical underpinnings of slavery in the ancient world, and finding that "[b]oth Greeks and Romans assigned their slaves a legal position which clearly separated them from other, 'free' members of the community").

59. See KENNETH MORGAN, *SLAVERY AND THE BRITISH EMPIRE: FROM AFRICA TO*

Slave markets existed throughout the ancient and medieval worlds . . . . The Greeks and [] Romans recruited slaves from their own and neighbouring societies . . . . During the eighth and ninth centuries the Vikings plundered for slaves in Iceland, Greenland, Scotland, Ireland, and territories around the Baltic Sea. Some were absorbed into Norse society; others were sold to the Byzantine and Muslim empires. Between the eighth and eleventh centuries slave routes from the area around Kiev stretched westwards towards Slavic lands and southwards to Constantinople and the Black Sea.<sup>60</sup>

By way of comparison, North American Indian raiding parties would capture members of neighboring communities to increase the size of their own tribe, not to sell them into a global slave trade.<sup>61</sup> Indeed, the scope of geographic reach between European slavery and Native slavery is very different. No evidence exists to suggest that Indian people were engaged in selling captives to overseas enterprises.

Enslavement of Indian people by Europeans was commonplace from the days of early contact. Olexer explains that, “[t]he practice of kidnapping Indians to enslave as guides, informants and interpreters continued as long as there were frontiers to explore.”<sup>62</sup> Although not every colonial government officially condoned the institution of slavery, settlers and soldiers from Spanish, Portuguese, French, and English origins engaged in the behavior with little to no interference from their respective continental monarchies. Far from being illegal,

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AMERICA 1 (2007).

60. *Id.*

61. Barr, *supra* note 54, at 35 n.54. Over time, the nature of tribal captivity in some regions began to take on the same characteristics of European slavery. Some tribes, for example, began selling their human captives to Europeans for profit. *See id.* at 9; BARBARA OLEXER, *THE ENSLAVEMENT OF THE AMERICAN INDIAN* 238 (1982). Some scholars have suggested that this was a response to the tumultuous changes in the economies of tribal governments caused by disease and warfare. *See id.* (noting that “[a]t first, the traders encouraged the tribes to raid one another for slaves” and then “[l]ater, when the tribes sickened of the constant war that was destroying them, the traders used more direct methods” like overpricing the trade items to which they had become accustomed). *See generally* Barr, *supra* note 54, at 35 n.54 (noting that, for example, the Tonkawa joined with other groups because of “a need for defense, territorial displacement, and population decline due to disease”). In the sixteenth and seventeenth centuries, much of the Europeans used indigenous people as slaves primarily. DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 81 (2006). South Carolina was unusual in that it was founded with the intention of exploiting African labor primarily. *Id.* at 86. The Spanish, French, and British *all* enslaved Indians. LAUBER, *supra* note 57, at 7. However, the British also exploited European indentured servants extensively in some colonies, such as Virginia and Barbados. DAVIS, *supra*, at 81.

62. OLEXER, *supra* note 61, at 36.

much of this behavior was encouraged or incorporated into the transplanted legal systems.

*B. Indian Slavery under Spanish and Portuguese Law*

The European institution of commercial human trafficking was implemented only days after Christopher Columbus landed in North America. It took Columbus only moments to reflect on the profit potential of the indigenous people when he encountered them (on islands in what is now the Bahamas). As he noted in his journal on October 12–14: “They ought to make good and skilled servants, for they repeat very quickly whatever we say to them . . . . With 50 men [I] could subject everyone and make them do what [I] wish.”<sup>63</sup> Columbus returned to Spain with several Native captives, most of whom died during the journey.<sup>64</sup>

Thus the subjugation and enslavement began in the Caribbean and quickly spread throughout the islands and onto the mainland of what is today Central and South America. In the initial years of Spanish colonialism, the common law of Spain was not applicable.<sup>65</sup> King Ferdinand was reportedly outraged by the treatment of Indians, and directed theologians and academics to develop laws to address these “outrages.”<sup>66</sup> These early-codified Spanish laws pertaining to treatment of indigenous people are contained in a document known as “Leyes de Burgos” (Laws of Burgos)—referring to the town in Spain where the laws were promulgated in 1512.<sup>67</sup> The Leyes de Burgos were intended to forbid mistreatment and support Indian conversion to Catholicism.<sup>68</sup> However, scholars have noted that these laws were never truly enforced and the treatment of Native people actually deteriorated in the years following the adoption of Leyes de Burgos.<sup>69</sup>

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63. Internet Medieval Sourcebook, Christopher Columbus: Extracts from Journal, <http://www.fordham.edu/halsall/source/Columbus1.html> (last visited Nov. 13, 2009).

64. Peter Bakewell, 1512–1513 The Laws of Burgos, <http://faculty.smu.edu/bakewell/BAKEWELL/texts/burgoslaws.html> (last visited July 28, 2009).

65. NationMaster.com, Laws of Burgos, <http://www.statemaster.com/encyclopedia/Laws-of-Burgos> (last visited Nov. 10, 2009) [hereinafter *Laws of Burgos*].

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* See also RICHARD FLINT, NO SETTLEMENT, NO CONQUEST: A HISTORY OF THE CORONADO ENTRADA 238 (2008).

A close examination of the Leyes de Burgos reflects a colonial mindset in which Indian people were automatically presumed to be dispossessed of their land. Though the laws may have been intended to protect Indians, they actually formed the foundation by which the indigenous people of the islands were legally subjugated and driven from their ancestral lands to serve the needs of Spanish colonies (called *encomiendas*). The very first law, for example, mandated that the Indians were to be removed from their land and placed under the authority of Spanish *encomenderos*.<sup>70</sup> This foundational law also mandated that the Indians' original land shall be burned so that they could not return to it.<sup>71</sup> The second law authorized the use of force to remove the Indians from their land.<sup>72</sup> Although law number twenty-four indicates that "Indians are not to be physically or verbally abused for any reason," this directive seems diametrically opposed to the indirect authorization of force found just a few paragraphs earlier in the second law.<sup>73</sup>

Thirty years later, an attempt at reform was undertaken known as "Leyes Nuevas" (New Laws) in 1542.<sup>74</sup> The attempted reform had little impact.<sup>75</sup> The Indians were treated as "little more than chattel" by the *encomenderos*, who benefited financially from the continued subjugation.<sup>76</sup> Spain officially outlawed the enslavement of Indians in its empire in the sixteenth century, "though local governments and Spanish colonists found ways to skirt the laws and keep Indians in various states of unfree labor."<sup>77</sup>

The next stage of colonial expansion was the Spanish war against the indigenous people of South America. Spanish enslavement of Indian people for labor lasted for the next 150–200 years, extending all the way north to present day Northern Mexico and Southern Texas as early as the first decade of the 1600s.<sup>78</sup>

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70. Laws of Burgos, *supra* note 65. See also WILLIAM M. OSBORN, *THE WILD FRONTIER* 96 (2000) ("The land and the slaves were packaged together.").

71. Laws of Burgos, *supra* note 65.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Vanessa Ann Gunther, *Ambiguous Justice: Native Americans and the Legal System in Southern California, 1848–1890*, at 19 (June 2001) (unpublished Ph.D. dissertation, University of California-Riverside) (on file with author).

77. GALLAY, *supra* note 56, at 47.

78. See, e.g., Sarah Hornsby & Robert S. McPherson, "Enemies Like a Road Covered with Ice": *The Utah Navajos' Experience during the Long Walk Period, 1858–1868*, 33 *AM. INDIAN CULTURE & RES. J.* 1, 1 (2009) (noting that United States military actions

C. *Indian Slavery under English Law*

The original English model of colonization applied corporate law to encourage colonial expansion.<sup>79</sup> The Crown issued charters, which dispensed incentives to encourage exploration.<sup>80</sup> One scholar explains:

The charters reflected a private transaction between the king, acting in his person as the owner of all land in the New World, and the company board of directors. In effect, the charter was a form of contract. The king realized that the companies would send men and women to the New World, and he gave the directors of the companies the authority to govern their trading posts. The charters granted to merchant adventurers like Gilbert “full and meere power and authoritie to correct, punish, pardon, governe, and rule by their . . . good discretions.”<sup>81</sup>

This English arrangement coupled with armed conflict quickly devolved into widespread capture and enslavement of Indian people.<sup>82</sup> The Massachusetts Bay Colony (named for a deposed tribe) formally approved of slavery in 1680.<sup>83</sup> After a war with the Pequot tribe, Pequot women and children were forced into slavery in Puritan homes, and this arrangement was recognized by decree of the governor and ruling council.<sup>84</sup> The nature of the enslavement has often been presented as a benign form of farm hands and domestic servants, but there are some historical accounts that things were not necessarily peaceful:

Some English masters became so obsessed with fear of their Indian servants’ escape that they took extreme measures to

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against Navajo Indians in the mid-nineteenth century were preceded by a Spanish-initiated slave trade “against the ‘wild’ or unsettled (non-Puebloan) Indians that pitted various groups against their neighbors”).

79. Pommersheim explains that “[t]he purpose of a colony was to extend the influence of and, more important, to generate wealth for the home country.” FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 10 (2009).

80. PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 13 (1992).

81. *Id.*

82. Bethany Berger explains: “In 1675, the Massachusetts Bay Council ordered all Indians to confine themselves to three established Indian praying towns; should any Indian be discovered outside these limits, it would be lawful for any person ‘to kill and destroy them as they best may or can.’” Bethany R. Berger, *Red: Racism and the American Indian*, 56 *UCLA L. REV.* 591, 606 (2009) (footnote omitted).

83. Andrea Robertson Cremer, *Possession: Indian Bodies, Cultural Control, and Colonialism in the Pequot War*, 6 *EARLY AM. STUD.* 295, 300–01 (2008).

84. *Id.* at 298.

prevent it. Squaw Sarah's master went so far as to devise "an iron Engin made almost like pot hookes with a revett soe that would come about her necke, and a padlocke to keep it fast there."<sup>85</sup>

This legal structure was not limited to the Massachusetts Bay Colony. Even when certain colonies (like South Carolina) criminalized mistreatment of Indians, the infrastructure established by the traders insulated them from prosecution.<sup>86</sup> Gallyay notes: "All English colonies with the notable exception of Georgia during its first twenty years permitted slavery."<sup>87</sup>

#### D. *Indian Slavery under French Law*

The French experience in North America is interesting because the French had a more complex relationship with Native Americans, and fur traders tended to co-exist with tribes rather than confront them or attempt to conquer them. Perhaps this pattern would have changed if France had not essentially quit the North American fur trade after the Louisiana Purchase. Although French influence remains in areas such as Quebec and New Orleans, Louisiana, the French impact is limited. Due to the early withdrawal of French interests, their impact on the Native tribes is less extensive than the English or Spanish's colonial efforts. However, the French experience is worth examining due to its embrace of some aspects of Native culture. As one author noted: "[D]uring the first two decades of the eighteenth century, a French presence clearly had begun to introduce a commercial element into native captive-taking practices in the Southern Plains and Red River valley."<sup>88</sup>

Although the French settlers did forge many successful alliances with tribal nations, "they also developed an extensive system of Indian slavery that transformed thousands of Indian men, women, and children into commodities of colonial commerce in French settlements."<sup>89</sup> The French monarchy issued several decrees that prohibited slavery to no avail.<sup>90</sup>

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85. Kathleen Joan Bragdon, *Crime and Punishment Among the Indians of Massachusetts, 1675–1750*, 28 *ETHNOHISTORY* 23, 28 (1981).

86. STEVEN J. OATIS, *A COLONIAL COMPLEX: SOUTH CAROLINA'S FRONTIERS IN THE ERA OF THE YAMASEE WAR, 1680–1730*, at 103 (2004).

87. GALLYAY, *supra* note 56, at 47.

88. Barr, *supra* note 54, at 7.

89. Brett Rushforth, "A Little Flesh We Offer You": *The Origins of Indian Slavery in New France*, 60 *WM. & MARY Q.* 777, 777 (2003).

90. ERBERG, *supra* note 57, at 54–59.

*E. Indian Slavery in the United States*

The legacy of enslavement of blacks under United States law has long been the subject of legal scholarship.<sup>91</sup> Enslavement of Indians is less well-known, but was a common practice among the Spanish, English, and French colonies. Enslavement of Indians continued to be widely practiced in many regions of the United States after the 1700s. Although human enslavement was technically abolished throughout the United States upon the passage of the Thirteenth Amendment, slave-like conditions persisted for many years. Even forty years later, little seemed to have changed for freed blacks in the Deep South.<sup>92</sup> The practice of enslaving Indians also continued even after ratification of the Thirteenth Amendment. In California, for example, the “Law for the Protection of the Indian,” (passed in 1850) allowed Indians convicted of certain crimes (including vagrancy) to be bonded out to “the best bidder.”<sup>93</sup> The Indian would then be compelled to work for said “best bidder” until such time as the fine was paid in full.<sup>94</sup> These 1850 laws remained on the books until well after the ratification of the Thirteenth Amendment.<sup>95</sup>

#### IV. EXPLOITATION

*[Trafficking] involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services. The low status of women in many parts of the world has contributed to a burgeoning of the trafficking industry.*<sup>96</sup>

*Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats,*

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91. See, e.g., Mark Tushnet, *American Law and Slavery, 1810–1860: A Study in the Persistence of Legal Autonomy*, 10 LAW & SOC’Y REV. 119 (1975–1976).

92. See, e.g., JOSEPH A. RANNEY, *IN THE WAKE OF SLAVERY* 151 (2006) (noting that “[e]conomic conditions for many blacks were little better, and in some cases, worse than during slavery”).

93. 1850 Cal. Stat. 408–10 (cited in Chauncey Shafter Goodrich, *The Legal Status of the California Indian*, 14 CAL. L. REV. 83, 93 (1926)). See also Gunther, *supra* note 76, at 36.

94. Goodrich, *supra* note 93, at 93.

95. In 1926, Goodrich noted: “This act of 1850 for the government and protection of Indians has never been repealed *in toto* . . .” *Id.* at 94 n.44.

96. Trafficking Victim Protection Act, 22 U.S.C. § 7101(b)(2) (2008) (emphasis added).

*psychological abuse, and coercion.*<sup>97</sup>

The enslavement of Indians was commonplace and widespread from the time of first contact. A more specific investigation of how Native women and girls were impacted by this experience reveals the extent of the problem. Most forms of human slavery throughout history can be characterized as *de facto* sex trafficking if modern definitions are applied.<sup>98</sup>

Legal definitions of slavery almost always include language referencing ownership by the enslaver, which strips the enslaved of personal autonomy.<sup>99</sup> Sexual exploitation is a logical result of enslavement, and trafficking flows naturally from the combination of slavery and sexual violence.<sup>100</sup> First, the slave, by virtue of her captivity, is contained and unable to freely travel or migrate without the permission of her captor or captors. Second, under most forms of legal slavery, she has no legal right to refuse sexual contact with her captors.<sup>101</sup> It has been well established that rape and sexual abuse were common occurrences in African slavery.<sup>102</sup> Because the sexual abuse of slaves was not criminalized, it will never be possible to definitively say how common this was.

Though United States historians and popular audiences alike have identified slavery as primarily an African American experience and captivity as primarily a white female ex-

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97. *Id.* at § 7101(b)(6) (emphasis added).

98. There is no singular contemporary legal definition of “slavery.” See Jean Allain, *The Definition of Slavery in International Law*, 52 *How.L.J.* 239 (2009) (criticizing many contemporary understandings of “slavery” which broaden the conception to statuses beyond ownership).

99. *Id.* at 240–41.

100. See Adrienne Davis, *Don’t Let Nobody Bother Yo’ Principle: The Sexual Economy of American Slavery*, in *SISTER CIRCLE: BLACK WOMEN AND WORK* 107 (S. Harley ed. 2002). Davis also provides the example of an 1859 Mississippi case, in which the defendant (an enslaved man accused of raping an enslaved girl) had his conviction overturned, in part, based on the argument that “sexual intercourse [of slaves] is left to be regulated by their owners.” *Id.* at 113 (referencing *State v. George*, 37 *Miss.* 316 (1859)). Although this case (and Davis’s chapter generally) focuses on the enslavement of black people, this legal conception of slavery and sexuality is applicable to enslaved Indians.

101. As abolitionist William Goodell explained in 1853, under American slavery, “[s]laves, as Property, may be *used*, absolutely by their owners at will, for their own profit or pleasure. . . . Nothing, therefore, can *prevent* the master from putting [the slave] to any use he pleases.” William Goodell, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS* (1853), available at <http://www.dinsdoc.com/goodell-1-0b.htm>.

102. See, e.g., SHARON BLOCK, *RAPE AND SEXUAL POWER IN EARLY AMERICA* 80 (2006).

perience in North America, increasing attention has been brought to bear on the enslavement of Indians of late . . . . [H]owever, the gender dynamics of these exchanges are only beginning to be explored.<sup>103</sup>

In surveying over five hundred years of history, one must make generalizations. Again, this survey of general trends cannot explore every nuance of relationships between European men and their female Indian concubines and slaves, but will trace significant trends in the experience of Native women during colonization. Looking at these trends, one can detect patterns in the way Native women were treated. “European contact brought with it an almost exclusive emphasis solely on the sexuality of native women.”<sup>104</sup>

One of the greatest areas of culture “clash” between Europeans and Indians occurred with respect to gender.<sup>105</sup> Europeans and Indians often had fundamentally different perspectives about the nature of gender and appropriate roles of women.<sup>106</sup> Quite simply, European gender expectations were not met by most Indian cultures.<sup>107</sup> Where an Indian woman might be making a very individualized decision to engage in sex with men she had only recently met (as happened from time to time), the European observer might interpret that behavior as promiscuity (at best) or prostitution (at worst).<sup>108</sup> These misunderstandings resulted in Europeans developing a distorted view of Native women’s value to their own people. Another important dynamic in considering the relationships between Native women and European men was the gender imbalance; for the first 300 years after contact, there were far more Native women than white women on the continent.<sup>109</sup> White men, therefore, “sought Native

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103. Barr, *supra* note 54, at 2.

104. See Susan Armitage, *Women and the New Western History*, 9 ORG. AM. HISTORIANS MAG. HIST. (1994), available at <http://www.oah.org/pubs/magazine/west/armitage.html#Anchor-Wome-29667> (stating that the first European settlers focused almost exclusively on the sexuality of native women).

105. Weaver, *supra* note 18, at 1–2 (describing the colonial context of gender roles and violence against Indian women). See generally Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830–1934*, 21 AM. INDIAN L. REV. 1 (1997) [hereinafter Berger (1997)] (outlining the historical trends with the largest impact on Indian women).

106. See Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 KAN. J.L. & PUB. POL’Y 103, 106–09 (2004) [hereinafter Berger (2004)].

107. See *id.* at 106–08.

108. Woodworth-Ney suggests the term “sexual hospitality.” LAURA E. WOODWORTH-NEY, CULTURES IN THE AMERICAN WEST: WOMEN IN THE AMERICAN WEST 52 (Scott C. Zeman ed., 2008).

109. O’Meara references a noteworthy quote of an Aricara chief, from a journal

women to fulfill traditionally female roles as cooks, guides, and nurses as well as traders, interpreters, converts, sexual partners, wives, and rape victims.”<sup>110</sup>

Just as human captivity is not unique to Europe, the Americas were not devoid of arranged marriages and dowry practices prior to European contact. However, settlers often incorrectly interpreted Native marriage ceremonies as commercial business transactions.<sup>111</sup> The conception of sexuality itself was fundamentally different. Cultural practices related to sexuality varied widely among indigenous groups. In some cultures, for example, there was no taboo against extra-marital sex. Monogamy was not embraced by all indigenous people as the critical foundation of the family unit. Most European observers did not fully understand these cultural values because the worldview was so fundamentally different. These traditional practices were often misunderstood by European observers, who interpreted the marriage arrangements as a form of prostitution.<sup>112</sup> This perspective lessened the social value of Indian women to the Christian observers, and later would be used as one of the justifications for paternalistic and punitive policies governing Native women’s behavior. At the same time, this perceived devaluation of Native women likely laid the foundation for much of the indifference and denial that came to pervade “New World” responses to sex crimes against Native people.<sup>113</sup> “Although European men romanticized early encounters

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of Henry Marie Brackenridge, who encountered the chief in the 1700s: “I was wondering . . . whether you white people have any women amongst you . . . . Why is it that your people are so fond of women? One might suppose they have never seen any before.” WALTER O’MEARA, *DAUGHTERS OF THE COUNTRY: THE WOMEN OF THE FUR TRADERS AND MOUNTAIN MEN* 17 (1968).

110. NATIVE WOMEN’S HISTORY IN EASTERN NORTH AMERICA BEFORE 1900: A GUIDE TO RESEARCH AND WRITING, at xxx (Rebecca Kugel & Lucy Eldersveld Murphy eds., 2007).

111. See, e.g., GLENDA RILEY, *WOMEN AND INDIANS ON THE FRONTIER, 1825–1915*, at 22 (1984) (“Indian women seemed to many whites to be little more than chattel to be bought and sold at the whim of their men.”).

112. Whaley, for example, explains that prostitution has no “clear pre-colonial antecedent.” Gray Whaley, “*Complete Liberty?*” *Gender, Sexuality, Race, and Social Change on the Lower Columbia River, 1805–1838*, 54 *ETHNOHISTORY* 669, 669–95 (2007). Gilfoyle notes that “historians increasingly recognize that the sale of sexual services is hardly an essential feature of all societies in all historical eras.” Gilfoyle, *supra* note 41, at 119. See also RILEY, *supra* note 111, at 71 (“[W]hen [Europeans] moved on to a consideration of deeper issues, such as sexual behavior and marriage customs among Indian groups, their responses ranged from rationalization to acrimony.”).

113. See Oneida J. Meranto, *From Buckskin to Calico and Back Again: An Historical Interpretation of American Indian Feminism*, 23 *NEW POL. SCI.* 333, 336 (2001) (“There is no doubt that the oppression of women within European countries had a direct

with Indian women, sexual violence became a major problem for Indian women after the arrival of the Spanish, French, and British.”<sup>114</sup>

As noted earlier, both the nature and scope of slavery were qualitatively different than any form of slavery that existed in the Americas before contact. European slavery introduced a new milieu in human suffering, particularly when it came to the experience of women and girls.<sup>115</sup> In pre-colonial tribal cultures, captives eventually became integrated into their captors’ communities. This may explain why sexual abuse of captives among pre-contact tribal communities was virtually unknown.<sup>116</sup> Historians have been unable to establish that sexual abuse of non-Native women was a routine experience.<sup>117</sup>

The predatory nature of the European conquest has been ongoing since the first days of contact.<sup>118</sup> There is often an overt sense of sexual entitlement that accompanies colonialism in contemporary historical explorations of this time period, which are apparent to contemporary readers. For example, the initial encounter between Columbus and the indigenous people of the Caribbean was immediately couched in terms of captivity and enslavement.<sup>119</sup> Simultaneously, a violent sexual predation was taking place. On the “second voyage,” Michele de Cuneo, one of Columbus’s shipmates, kept a journal in which he boasted of his rape of a Carib woman—referencing his apparent experience with schools of “harlots.”<sup>120</sup> The

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impact on the treatment of women within the colonies of the ‘New World.’”).

114. RAYNA GREEN, *WOMEN IN AMERICAN INDIAN SOCIETY* 35 (Frank W. Porter III ed. 1992).

115. *See generally* Barr, *supra* note 54, at 1–28 (describing early Spanish and French enslavement and abuse of Indian females). *See also* Weaver, *supra* note 18, at 1–12.

116. There are some accounts written by European observers which purport to document customs authorizing sexual violence, including gang rape. *See, e.g.*, Ronald W. Walker, *Native Women on the Utah Frontier*, 32 *BYU STUD.* 87, 100 (1992). However, caution must be exercised in relying on Eurocentric perspectives which would likely not have recognized, for example, consensual sexual relations with multiple partners as anything other than gang rape.

117. *See* Berger (2004), *supra* note 106, at 111 (noting that the majority of reports “remark[] on the complete absence of sexual impropriety or coercion by Indians toward their female captives”).

118. *See id.* at 107 (describing the “sexual allure and colonial opportunity presented by Indian women”).

119. *See supra* Part III.A.

120. Michele de Cuneo recounted:

When I was in the boat, I captured a very beautiful Carib woman . . . having brought her into my cabin, and she being naked as is their custom, I conceived desire to take my pleasure. I wanted to put my desire to execution, but she was unwilling for me to do so, and treated me with her nails in such wise that I would have preferred never to have begun. But seeing this . . . I took a rope-end and thrashed her well, following which she produced such

continents of the Western hemisphere are themselves the namesake of Italian cartographer Amerigo Vespucci, who took note of Native women during his journey to present-day South America:

The women as I have said go about naked and are very libidinous; yet they have bodies which are tolerably beautiful and cleanly. Nor are they so unsightly as one perchance might imagine; for, inasmuch as they are plump, their ugliness is the less apparent, which indeed is for the most part concealed by the excellence of their bodily structure . . . . When they had the opportunity of copulating with Christians, urged by excessive lust, they defiled and prostituted themselves.<sup>121</sup>

Sexual violence perpetrated by European men represented the earliest form of institutionalized and officially sanctioned “sexual slavery” in the Western hemisphere. In many instances, Indian men were killed in battle, but the women and children were taken captive by the Europeans and used for sex, labor, or profit. Most historians agree that this behavior was one-sided. Native peoples had little to no interest in sexual conquest of European women.<sup>122</sup> Townsend notes: “The stories [of European captives] never went the other way around: later, when [European] women settlers went along, there emerged *no tales* of Spanish or English women being met by welcoming Indian chiefs who courted their favors.”<sup>123</sup> A commentator on King Philip’s War, for example, noted that Indians did not commit “any uncivil Carriage to any of the Females, nor ever attempted the chastity of any of them.”<sup>124</sup> A number of additional commentators came to the same conclusion in the next century. William Douglass, James Clinton, and William Martin all published accounts, which include noteworthy narratives about the so-called “restraint” of Indians in regards to white

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screaming and wailing as would cause you not to believe your ears. Finally we reached an agreement such that, I can tell you, she seemed to have been raised in a veritable school of harlots . . . .

Deer (2005), *supra* note 22, at 458.

121. Amerigo Vespucci, *Mundus Novus*, in *THE DISCOVERY OF AMERICA AND OTHER MYTHS: A NEW WORLD READER* 14 (Thomas Christensen & Carol Christensen eds., 1992).

122. See, e.g., *SEX WITHOUT CONSENT: RAPE AND SEXUAL COERCION IN AMERICA* 17 (Merril D. Smith ed., 2001) (“In general, sex and violence were not equated as a measure of manhood or prestige for Wabanaki men.”).

123. CAMILLA TOWNSEND, *POCAHONTAS AND THE POWHATAN DILEMMA* 29 (2004) (emphasis added).

124. BLOCK, *supra* note 102, at 221 (quoting WILLIAM HUBBARD, *A NARRATIVE OF THE INDIAN WARS IN NEW-ENGLAND* 117 (Boston, Boyle 1775) (1677)) (internal quotation marks omitted).

women.<sup>125</sup> Liberated white female captives themselves noted that the Indians did not sexually violate them.<sup>126</sup> In fact, many commentators who knew Indian people quite well acknowledged that sexual mistreatment of any females—including captives—was considered criminal behavior by the tribes.<sup>127</sup>

Unlike the English, the Indians were rarely convicted of sexual misdeeds such as fornication or adultery, or accused of siring illegitimate children. More serious sexual crimes such as rape were equally rare among the Indians. In fact, while the cases relating to sexual misdemeanors make up only a small percentage of the crimes of which the Indians were accused, similar crimes amount to almost half of those reported for the English.<sup>128</sup>

Because sexual predation was not commonplace prior to contact, the evidence supports the conclusion that widespread, systemic sex slavery for profit was not present in the Americas after the arrival of Europeans.

Not all sexual activity between Native women and white men constituted sexual exploitation. Certainly there were thousands upon thousands of consensual sexual and romantic relationships between Native women and white men from the early days of contact. These

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125. *Id.* at 222 (citing WILLIAM DOUGLASS, A SUMMARY, HISTORICAL AND POLITICAL, OF THE FIRST PLANTING, PROGRESSIVE IMPROVEMENTS, AND PRESENT STATE OF THE BRITISH SETTLEMENTS IN NORTH-AMERICA (Boston, 1749); 4 PUBLIC PAPERS OF GEORGE CLINTON, FIRST GOVERNOR OF NEW YORK 702–03 (New York, 1899–1914), cited in BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION 196 (1972); Letter from William Martin to Lyman C. Draper (Dec. 1, 1842) (on file with State Historical Society of Wisconsin, Madison); Letter from William Martin to Lyman C. Draper (July 7, 1842) (on file with State Historical Society of Wisconsin, Madison)).

126. BLOCK, *supra* note 102, at 222–23 (citing MARY ROWLANDSON, THE NARRATIVE OF THE CAPACITY AND RESTORATION OF MRS. MARY ROWLANDSON 70–71 (Houghton Mifflin Co. 1930) (1682); ELIZABETH HANSON, AN ACCOUNT OF THE CAPTIVITY OF ELIZABETH HANSON (1728), reprinted in 6 GARLAND LIBRARY OF NARRATIVES OF NORTH AMERICAN INDIAN CAPTIVES, at 35 (Samuel Bownas ed., 1977); JAMES E. SEAVER, A NARRATIVE OF THE LIFE OF MRS. MARY JEMISON 72–73 (Allen W. Trelease ed., Cornith Books 1961) (1824)). Starting in the mid-late nineteenth century, the image of the savage Indian male became prominent in popular culture. See MICHAEL L. TATE, INDIANS AND EMIGRANTS: ENCOUNTERS ON THE OVERLAND TRAILS 7 (2006) (noting that nineteenth century travel narratives written by white people “contained highly descriptive examples of Indian tendencies toward violence and untrustworthiness”). Most scholars, however, have determined that this dynamic was significantly exaggerated in popular culture. See, e.g., *id.* at 6–7 (noting that nineteenth century art and literature tended to perpetuate negative stereotypes of Indians, including their supposed sexual aggression).

127. See BLOCK, *supra* note 102, at 224.

128. Bragdon, *supra* note 85, at 28.

non-coercive relationships, where they existed, were arguably atypical of the experience of most Native women.<sup>129</sup> Although it is important to acknowledge the existence of these consensual relationships, they were the exception, not the rule. Even with consensual relationships, caution must be exercised in reconstructing the social dynamics between Native women and white men. The relationships between French fur traders and Native women, for example, were incredibly complex and quite different from the experience of women enslaved by the Spanish and English.

Historical accounts indicate that white men who appeared to have entered into consensual relationships with Native women were labeled deviant by greater European society. Even the terms that were used to describe such men (such as the pejorative “squaw man”) reflected the disdain with which European-American society viewed even consensual sex with Indians. Calloway explains that “[o]f all the marginal peoples that emerged on the frontier, renegades [white men in relationships with Native women] aroused the most fear and loathing.”<sup>130</sup> This loathing was probably tied to a perspective that Native women (and those who associated with them) were fundamentally unclean as well as more general European perspective that interracial relationships (“race-mixing”) was unnatural. Most historians who acknowledge the tribal experience often focus on the deviant white male—little attention has been paid by historians to the Native woman who may or may not have consented to the relationship. Historian Juliana Barr explains:

In seeking to redeem the humanity of these women and to recognize the important roles they had to play in trade, diplomacy, and war, scholars have often conflated agency with choice, independent will, or resistance and, in the process, have lost sight of the powerlessness, objectification, and suffering that defined the exigencies of many of these women’s lives.<sup>131</sup>

#### A. *Sexual Exploitation Under Colonial Rule*

Early Spanish explorers and conquistadors did not limit their use

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129. For a parallel exploration of this issue in another colonial context (Australia), see Larissa Behrendt, *Consent in a (Neo)Colonial Society: Aboriginal Women as Sexual and Legal ‘Other’*, 15 AUSTL. FEMINIST STUD. 353 (2000).

130. Colin G. Calloway, *Neither White Nor Red: White Renegades on the American Indian Frontier*, 17 W. HIST. Q. 43, 43 (1986).

131. Barr, *supra* note 54, at 2.

of enslaved Indians to extracting profit from forced labor. Early accounts of conflict are rife with references to sexual subjugation. Philosopher Tzvetan Todorov describes this phenomenon: “When the Spanish conquistador appears, this woman is no more than the site where the desires and wills of two people meet. To kill men, to rape women: these are at once proof that a man wields power [as well as] his reward.”<sup>132</sup>

Besides the journals of Columbus, de Cuneo, and other Spanish explorers, there is ample evidence to suggest that mistreatment of Native women was ongoing from the time of the first contact. Even the preliminary language of the 1512 Laws of Burgos explicitly acknowledges concerns about the colonists’ treatment of female Indians: “[The Crown] will not permit their wives and daughters to be taken from them, as now happens . . . .”<sup>133</sup> Spanish conquistador Hernando de Soto, who was the first European to reach the Mississippi river, spent several decades in the Americas.<sup>134</sup> He was originally based in present-day Nicaragua where he launched aggressive attacks against the Inca Empire.<sup>135</sup> There are numerous eyewitness accounts of the sexual mistreatment of Indians at the hands of de Soto.<sup>136</sup>

[Captain de Soto] and his men were under strict orders from Pizarro to restrain themselves from raping and pillaging. However, the temptation of five hundred young women selected for their beauty, and cloistered right off the main Cajas plaza, apparently proved too much. Trujillo describes what happened to the virgins in a simple soldier’s terms. He says “the women were brought out on to the square, and there were over five hundred of them, [and] Captain [Soto] gave many of them to the Spaniards.” In other words, [Soto] and his men stormed into the virgins’ cloisters, forced the women outside at the point of a sword and then divided them up.<sup>137</sup>

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132. TZVETAN TODOROV, *THE CONQUEST OF AMERICA*, reprinted in *THE DISCOVERY OF AMERICA & OTHER MYTHS*, 157–64, at 159 (Thomas Christensen & Carol Christensen eds., Chronicle Books 1992) (1984).

133. Bakewell, *supra* note 64.

134. DAVID EWING DUNCAN, *HERNANDO DE SOTO: A SAVAGE QUEST IN THE AMERICAS* 99 (1997).

135. *Id.* at 434.

136. GALLAY, *supra* note 56, at 34.

137. DUNCAN, *supra* note 134, at 136. Perhaps not coincidentally, the iconic painting of de Soto discovering the Mississippi by William Powell features two Indian women cowering in fear at his arrival. The painting hangs in the Rotunda of the United States Capitol. See Matthew Baigell, *Territory, Race, Religion: Images of Manifest Destiny*, 4 SMITHSONIAN STUD. IN AM. ART 3, 14 (1990).

Even when Spanish colonial governments criminalized sexual mistreatment of women, it was rarely enforced. Flint notes that Coronado “failed to press investigation of the rape of the Tiguez woman.”<sup>138</sup> Chuchiak writes, “Maya accusations of fornication and sexual misconduct are widespread in colonial documents.”<sup>139</sup> The Mayan people reported a series of brutal sexual attacks committed by Padre Cristóbal de Valencia in the early 1600s.<sup>140</sup> Documented sexual abuse by Spanish soldiers continued late into the eighteenth century.<sup>141</sup> Although not all accounts detail specific instances of sexual abuse, the extreme response of some Native women to captivity would indicate that their experiences were not limited to mere menial labor.

Spanish records rarely detail this suffering, but a handful of incidents give mute testimony to it, none more powerfully than the stories of women who tried to take their own lives rather than remain captive. The Comanche woman who tried to kill herself upon recapture after her escape from the San Antonio mission in 1772 was not alone in her preference for death over enslavement. Jean Louis Berlandier recorded the tragic actions of another Comanche woman captured early in the nineteenth century, who “asked for a knife to remove a thorn she said was hurting her foot, but when they gave it to her she plunged it into her heart.”<sup>142</sup>

The first male English settlers in the New World also came with their own gendered sense of entitlement and control. The English mindset towards colonization and “primitive” peoples was often couched in sexual terms. One of the most articulate statements of this sexualized conquest of the New World comes from Captain John Smith<sup>143</sup> of Jamestown:

There is no question that John Smith and his peers—those

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138. FLINT, *supra* note 69, at 245.

139. John F. Chuchiak IV, *The Sins of the Fathers: Franciscan Friars, Parish Priests, and the Sexual Conquest of the Yucatec Maya, 1545–1808*, 54 *ETHNOHISTORY* 69, 72 (2007).

140. *Id.* at 69–70.

141. *Id.* at 86.

142. Barr, *supra* note 54, at 27.

143. John Smith, of course, is forever linked to one of the most iconic Native women in American history: Pocahontas. See Berger (2004), *supra* note 106, at 106 (discussing the historic connection between John Smith and Pocahontas). Although Pocahontas cannot be categorized as either a prostitute or a slave, many romantic and sexual stereotypes of Native women can be traced to the John Smith-Pocahontas mythology. See Tarrell Awe Agahe Portman & Roger D. Herring, *Debunking the Pocahontas Paradox: The Need for a Humanistic Perspective*, 40 *J. HUMANISTIC COUNSELING EDUC. & DEV.* 185, 190–91 (2001) (discussing the stereotypes of Native American women and their development).

who wrote . . . books [about the New World], and those who read them—embraced a notion of an explorer as a conqueror who strode with manly steps through lands of admirers, particularly admiring women. . . . No, the colonizers of the imagination were men—men imbued with almost mystical powers. The foreign women and the foreign lands wanted, even needed, these men, for such men were more than desirable. They were deeply good, right in all they did, blessed by God. [English chaplain Richard] Hakluyt himself said that Psalm 107 had inspired his work. “They that goe downe to the sea in shippes, that doe business in great waters, these see the workes of the Lord, and his wonders in the deepe.” They were the heroes of legend, even of the Bible, alive now in the real world. No wonder twenty-seven-year-old John Smith was determined to be one of them.<sup>144</sup>

Religious and racist hatred also fueled some of the violence in the lives of Native women. In 1766, two Indian women were raped and murdered by white men in Pennsylvania.<sup>145</sup> The crime was all the more abhorrent because one of the women was approximately nine months pregnant.<sup>146</sup> The murder was motivated by racist hatred. As one of the defendants reportedly told the court, “he thought it a Duty to extirpate the Heathen.”<sup>147</sup>

The sexualization of slavery in French settlements developed in similar ways. In some regions occupied by the French, the gender make-up of the slave population resulted in a significant gender imbalance in the master-slave relationship.<sup>148</sup> In most French outposts, for example, Indian women slaves outnumbered Indian male slaves two to one.<sup>149</sup> “Though the relations being formed by the trade were between men, the female sex of the majority of enslaved Indians determined the supply, demand, and thus very existence of the trade network. Simply put, women were what Frenchmen wanted, and women were what Indian warriors had for exchange.”<sup>150</sup>

Early in the eighteenth century life among the French of Louisiana, both rich and poor, was quite licentious, and one of the means of fostering this life was the use of Indian

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144. TOWNSEND, *supra* note 123, at 29 (footnote omitted).

145. BLOCK, *supra* note 102, at 83–84.

146. *Id.* at 84.

147. *Id.*

148. See Barr, *supra* note 54, at 13–14.

149. *Id.* at 14.

150. *Id.* at 10.

women, slave and free. The demoralization resulting from such a condition attracted attention, and in 1709 it was urged that girls suitable for wives be sent over in order “to prevent these disorders and debaucheries.”<sup>151</sup>

In Louisiana Territory, the sexual nature of this slave trade concerned members of the clergy. For example, “French missionary François le Maire bemoaned the trade in ‘savage female slaves’ who though reputedly bought to perform domestic services, in actuality became concubines.”<sup>152</sup> Indeed, the French preoccupation seems to have been that the Native women were a corrupting influence on French men.<sup>153</sup> Sexual abuse of Native women by French fur traders was common enough to raise concerns by the King, who actually revoked some charters and withdrew troops.<sup>154</sup>

As the United States pursued westward expansion after independence, the problem of sexual abuse committed by traders was an ever-present state of affairs with little or no legal intervention. Turning to the American legal system was often an exercise in futility. As Berger explains:

In coming to the courts, Indian women confronted a system that was unaccustomed and often resistant to acknowledging the political, domestic, and economic power that they often held. The result was decisions that stripped women of this power, sometimes in the name of civilization and sometimes in the name of the law.<sup>155</sup>

The concept of *desuetude* arises from laws that are unenforced for such a period of time that they become null and void—a vestige or relic.<sup>156</sup> Desuetude is distinct from, yet related to, under-enforcement or non-enforcement. As Peterson Del Mar notes, “[t]here was such a law [prohibiting killing of Indians], of course. But it did not count

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151. LAUBER, *supra* note 57, at 83 (footnote omitted).

152. Barr, *supra* note 54, at 13.

153. See EKBERG, *supra* note 57, at 27. In August of 1751, New Orleans Governor Vaudreuil ordered Major Macarty-Mactigue, who was preparing to take command of the Illinois County, to “prevent the marriages which the French have hitherto contracted with Indian women. Such alliances are shameful and of dangerous consequence for the familiarity to which they accustom the Indians with the French, and the ill breed which they produce.” *Id.*

154. ROBERT E. BIEDER, NATIVE AMERICAN COMMUNITIES IN WISCONSIN 1600–1960: A STUDY OF TRADITION AND CHANGE 62 (1995).

155. Berger (1997), *supra* note 105, at 12.

156. BLACK’S LAW DICTIONARY 513 (9th ed. 2009). Desuetude is the “doctrine holding that if a statute or treaty is left unenforced long enough, the courts will no longer regard it as having any legal effect even though it has not been repealed.” *Id.*

for much when so many denied or ignored it.”<sup>157</sup> Jesuit scholar Francis Paul Prucha has indicated that the victimization of Indians was so commonplace in and near frontier settlements that “control by judicial means proved impossible.”<sup>158</sup>

Failing to protect minority groups from criminal behavior has been identified as a key source of societal oppression—and it is this oppression of the groups that underpins the dominant social structure.<sup>159</sup> Anders explains that “[t]hese [colonial] bureaucratic institutions function to insulate the ruling class from the local populace so that there is little chance of endangering the colonial structure through direct confrontations.”<sup>160</sup>

The ironic undercurrent to documented accounts of sexual servitude is that U.S. officials often prided themselves on “rescuing” Native women from sexual subservience.<sup>161</sup> Because American perspectives on sexuality (especially in the late nineteenth century Victorian era) contrasted sharply with indigenous perspectives on healthy sexuality, many European and American policies served to penalize Native women for engaging in consensual sexual activity. Even seemingly sympathetic reformers, such as the “Friends of the Indians,” minimized the harm caused by sexual exploitation by pointing to the failure of Native women to adhere to Western standards of femininity.<sup>162</sup> This perception of Indian women as demure, helpless, or sexually exploited served to facilitate significant paternal and patriarchal constraints on their behavior.

The nineteenth century is replete with examples of brutality against Native people. Prucha notes that “[t]he frequency of offenses committed against Indians by the frontier whites—among which outright murder was commonplace—was shocking.”<sup>163</sup> Rape of Native women, like other non-white women, was not truly considered rape and received little (if any) response from the legal system. Lawrence Friedman has noted that:

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157. DAVID PETERSON DEL MAR, *BEATEN DOWN* 29 (2002).

158. See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* 198 (1962) (discussing the shocking frequency of unpunished crimes, particularly murder, committed by whites against Indians).

159. Cf. Anders, *supra* note 12, at 682–83 (discussing how colonizers gain economic and political power through exploitation and segregation of colonized people).

160. *Id.* at 682.

161. Berger (2004), *supra* note 106, at 106–11.

162. Rose Stremmlau, “To Domesticate and Civilize Wild Indians”: *Allotment and the Campaign to Reform Indian Families, 1875–1887*, 30 J. FAM. HIST. 265, 273–74 (2005).

163. PRUCHA, *supra* note 158, at 199.

[T]he law really protected only “respectable” white women (and their menfolk). Women who were not “respectable,” or who were black, or Native American, were effectively outside the circle of protection. Of course, the words of the statutes never *said* as much, but that was the practical result; it was rare for poor or black women to seek or get justice after rape.<sup>164</sup>

The failure to enforce the laws or apply them to Native people resulted in the *de facto* legalization of sexual servitude. Collusion, indifference, and corruption all played roles.<sup>165</sup> Consider that Native women who were exploited by frontier settlers had little recourse. Violence was commonplace. Courtwright references the advice of a “Rocky Mountain hunter” who purchased a Native girl in 1868: “The girl, when sold to a white man, is generally skeary for a while and will take the first chance to run away . . . . Should you take her again, and whip her well, and perhaps clip a little slice out of her ear, then she will stay.”<sup>166</sup>

Once tribal people were confined to reservations, they were completely dependent on the military for food, clothing, and shelter. Indian agents throughout the West documented how soldiers exploited this dynamic to secure sexual “favors” from women. W. L. Lincoln, an agent in Montana, wrote:

There is but little said in their favor regarding their moral standing, and for this there is no doubt but that the Government is largely to blame . . . . [When I first came here] the soldier had also come to stay. The Indian maiden’s favor had a money value, and what wonder is it that, half clad and half starved, they bartered their honor . . . for something to cover their limbs and for food for themselves and their kin.”<sup>167</sup>

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164. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 215 (1993).

165. Even in contemporary settings, police may collude with traffickers. See Hodge, *supra* note 8, at 144 (“Indeed, in some nations, police collude with traffickers, returning those who escape to their former exploiters in the sex or prostitution industry.”).

166. DAVID T. COURTWRIGHT, *VIOLENT LAND: SINGLE MEN AND SOCIAL DISORDER FROM THE FRONTIER TO THE INNER CITY* 64 (1996).

167. ANNE M. BUTLER, *DAUGHTERS OF JOY, SISTERS OF MISERY: PROSTITUTES IN THE AMERICAN WEST 1865–90*, at 10 (1985) (quoting W. L. Lincoln, Report of the U.S. Indian Agent, Montana, in *OFFICE OF INDIAN AFFAIRS, DEP’T OF THE INTERIOR, 1885 COMMISSIONER INDIAN AFF. ANN. REP. 130* (1885)). In 1870, a Colorado Indian agent reported that “[t]he whole tribe is infected with syphilis. I do not believe there is a single squaw who is not suffering from this disease.” *OFFICE OF INDIAN AFFAIRS, DEP’T*

Another source of evidence indicating a high level of sexualized violence on the frontier are the documented cases of venereal disease, which was of great concern to the Indian agents, particularly when it spread to white people.<sup>168</sup> The Commissioner on Indian Affairs carefully documented the annual rate of sexually transmitted disease, although there was little acknowledgment that coerced sexual contact was likely at the root of many outbreaks.

The victimization of prostitutes has traditionally been outside the bounds of the law—in that the act of solicitation itself is a crime. Traditionally, victims of crime who had been engaging in illegal behavior at the time of the victimization have not encountered the same level of protection (or compassion) as an “innocent” victim. Women who are involved in prostitution are criminally stigmatized first, and seen as a victim second (if at all).<sup>169</sup> Friedman explains this jurisprudence: “[I]n actuality, the law protected ‘the unsullied virgin and the revered, loved and virtuous mother.’ One could hardly expect it to defend the ‘lewd and loose prostitute . . . whose arms are open to the embraces of every coarse brute who has money.’”<sup>170</sup>

In the context of Native women, for the last five hundred years, prostitution was often the last resort in order to avoid starvation and death. In this historical framework, “prostitution did reflect the destruction of the Indian social order.”<sup>171</sup> William B. Hennessey, a Minnesota historian, explained that Dakota women were forced to prostitute themselves “in a large measure [due to] their indigence. They would resort to anything to the end that they might procure wherewith to eat.”<sup>172</sup>

There are very few first-hand accounts of the experiences of Na-

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OF THE INTERIOR, 1870 COMMISSIONER INDIAN AFF. ANN. REP. 129 (1870). The agent also reported that an eight-year-old Indian girl died of syphilis, and simply noted that he had heard of other children of that age who had been “used for improper purposes.” *Id.* at 129–30.

168. See David T. Courtwright, *Disease, Death, and Disorder on the American Frontier*, 46 J. HIST. MED. 457, 477–78 (1991) (discussing the high prevalence of venereal diseases among prostitutes on the frontier, and the fear frontiersmen had of contracting those diseases).

169. Jody Gordon, *When the Victim is “Deviant:” An Analysis of Newspaper Articles on Violence Against Women Who Prostitute, 1975–1993* (Nov. 20, 1996) (unpublished M.A. thesis, Simon Fraser University) (on file with Simon Fraser University Library) (concluding that the news media’s portrayal of violent crimes against women is greatly affected by the victim’s ascribed moral and social status).

170. FRIEDMAN, *supra* note 164, at 217.

171. BUTLER, *supra* note 167, at 12.

172. MARK DIEDRICH, *OLD BETSEY: THE LIFE AND TIMES OF A FAMOUS DAKOTA WOMAN AND HER FAMILY* 34 (1995) (quoting William B. Hennessey).

tive women who were prostitutes in frontier days:

[T]hese [Native] women had very few economic choices, and they left virtually no written record of their experiences. They lived mean existences in seedy brothels, second-story rented rooms, and alley basements. The de facto acceptance of prostitution throughout the late 19th-century West contributed to a flourishing trade in sex slaves.<sup>173</sup>

Nowhere, however, was the problem as severe as it was in California. Sociologist Tomás Almaguer explains:

Their complete devaluation in the white man's eyes reduced them to mere property or sexual commodities. White men believed that they could freely have their way with Indian women, even if the latter were married.

In the early 1850s, Indian women were routinely captured and either held as concubines by their kidnappers or sold to other white men for their personal use. One Anglo pioneer in Trinity County [California] reported that traffickers of Indian women had even devised a system which classified them into "fair, middling, inferior, [and] refuse" categories of merchandise.<sup>174</sup>

Tribal nations often protested and resisted when women and children were mistreated. Indeed, many tribally initiated conflicts and "uprisings" were responses to kidnapping and mistreatment of tribal members, particularly women. For example, prior to the so-called Dakota Uprising of 1862 (in Minnesota), the Office of Indian Affairs had "failed to investigate charges of . . . mistreatment of Indian women by white men."<sup>175</sup> Often, the history books have focused on land intrusions, food rationing, and/or delayed annuity payments as the precursor to tribal violence.<sup>176</sup> However, a closer examination

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173. WOODWORTH-NEY, *supra* note 108, at 212.

174. TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA 120 (2009) (citations omitted).

175. THROUGH DAKOTA EYES: NARRATIVE ACCOUNTS OF THE MINNESOTA INDIAN WAR OF 1862, at 19 (Gary Clayton Anderson & Alan R. Woolworth eds., 1988). Jerome Big Eagle, one of the Dakota warriors condemned to die by the military after the uprising, received a reprieve from and was exiled to a prison camp in Iowa. He was pardoned by President Lincoln in 1864. *Id.* at 21. He spoke to a reporter in 1894 and told him that just prior to the uprising, "some of the white men abused the Indian women in a certain way and disgraced them, and surely there was no excuse for that." *Id.* at 24.

176. It should also be noted that retaliatory behavior was not exclusively an Indian characteristic. *See, e.g.*, LARRY C. SKOGEN, INDIAN DEPREDATION CLAIMS, 1796–1920, at 11 (1996) (noting that "[t]he colonials' capacity for unleashing vengeful destruction on the Indians . . . demonstrates that revenge was not a characteristic of only American Indians").

reveals that the attacks on women and children were also a significant aggravating factor for hostile relationships between frontier communities and Indian tribes.

It is important to note that the responses from tribal communities were often preceded by non-violent legal overtures and an attempt to follow legal procedures. “While Indians surely did kill some whites, it is clear that they did so in retaliation or when pushed to desperation.”<sup>177</sup> Violence was indeed often a last resort—after other attempts to address the behavior failed. Most tribal government structures provided formal, non-violent forums for the resolution of grievances long before contact with Europeans.<sup>178</sup> Unfortunately, these legal avenues for redress offered little protection when Europeans simply ignored them.

### *B. Commodifying Native Women Through Marriage*

Another seldom-discussed facet of profiting from Native women is less intuitive: commoditization through marriage. There have been times in American history when a white man could profit handsomely from marrying an Indian woman and thereby gaining access to her wealth.

For example, in the early nineteenth century, an intermarriage dynamic developed in the Southeast when non-Indians sought valuable farmland held by tribes. At that time, tribal legal systems did not readily make these lands alienable to non-members.<sup>179</sup> Some non-Indians devised to become legal owners of tribal land by marrying into the tribe. For example, when the Cherokee Nation was engaged in ongoing legal disputes with the State of Georgia regarding land holdings, “[m]arrying Indian wives was the only way for non-Cherokee men to gain control over land and citizenship rights within the Nation.”<sup>180</sup> After allotment, when federal law required a dissection and dispersal of tribal lands to individual Indians, white men married Indian women as an attempt to gain ownership of valuable land. Thomas Priestly, who was the federal Indian agent for the Yakama

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177. Albert L. Hurtado, *Introduction to the Bison Book Edition to THE DESTRUCTION OF CALIFORNIA INDIANS*, at v, xv (Robert F. Heizer ed., Bison Books 1993) (1974).

178. See Carol Chiago Lujan & Gordon Adams, *U.S. Colonization of Indian Justice Systems*, 19 WICAZO SA REV. 9, 10–11 (discussing the Indian systems of justice and their focus on “restorative justice”).

179. PRUCHA, *supra* note 158, at 199.

180. Fay Yarbrough, *Legislating Women’s Sexuality: Cherokee Marriage Laws in the Nineteenth Century*, 38 J. SOC. HIST. 385, 388 (2005).

Agency in Washington State in the 1880s, noted that the white men who married Indian women for such purposes were “not of the better class.”<sup>181</sup>

In the early twentieth century, a few tribes became suddenly cash-rich after the discovery of oil or some other natural resource. In many of these situations, a non-Indian man could gain access to the riches if he married into the tribe. This made Indian women and girls particularly attractive to outsiders. A 1910 Oklahoma City newspaper article entitled, “Dusky Maidens are in Demand” reported that:

Dusky maidens of the Yakima Indian reservation are receiving no end of attention from white suitors. Many a mixed blood marriage has been made lately because of the money that Indian maids bring their husbands. A Toppenish quarter-breed was recently married to a white man after a two weeks’ courtship. She owns a well-placed allotment of Indian lands and her mother’s real estate is figured at \$50,000. [The] very pretty Indian belle, who is still heart whole and fancy free . . . has many admirers among the palefaces, as well as among the redskins . . . .<sup>182</sup>

The motivations to marry Indian women of means were sometimes less than admirable. Once the “husband” had access to the land and/or wealth—the Native women were often abandoned or mistreated.<sup>183</sup> The social dynamic, then, was one in which Native women were valued not as human beings, but rather commodities.

## V. EXPORTATION

*Traffickers often transport victims from their home communities to unfamiliar destinations, including foreign countries away from family and friends, religious institutions, and other sources of protection and support, leaving the victims defenseless and vulnerable.*<sup>184</sup>

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181. Even in contemporary settings, police may collude with traffickers. See Hodge, *supra* note 8, at 144 (“Indeed, in some nations, police collude with traffickers, returning those who escape to their former exploiters in the sex or prostitution industry.”).

182. *Dusky Maidens are in Demand*, THE OKLAHOMAN, Dec. 11, 1910, at 21.

183. See generally LAWRENCE J. HOGAN, THE OSAGE INDIAN MURDERS: THE TRUE STORY OF A MULTIPLE MURDER PLOT TO ACQUIRE THE ESTATES OF WEALTHY OSAGE TRIBE MEMBERS (1998) (discussing the first FBI investigation which responded to a series of oil-related murders).

184. Trafficking Victim Protection Act, 22 U.S.C. § 7101(b)(5) (2006) (amended 2008).

This section considers specific historical events which can be conceptually categorized as “trafficking”—that is, forced or coerced movement. The term “sex trafficking” conjures up the image of a woman being abducted (or tricked) into leaving her homeland by criminals who coerce her into sexual slavery once she has arrived in a foreign country without any friends or family nearby, unable to speak the language, and likely to be imprisoned as an illegal alien if discovered by authorities. Isolation and transportation are key tools of the contemporary international sex trafficking trade.

Whether leaving home for business or pleasure, traveling can be disorienting, exhausting, and can disrupt one’s life. But for many Native people, leaving their home is traumatic in and of itself because their spirituality ties them to their homeland. Therefore, forced removals of Natives are spiritually harmful as well as constituting an infringement on their liberty and autonomy.<sup>185</sup> Schwarz explains: “Such ‘slow death’ results from being cut off from the personal renewal attained from communion with one’s special area.”<sup>186</sup> When coupled with sexual violence, the disorientation is compounded. One tactic of modern day human traffickers identified by both the United Nations<sup>187</sup> and the U.S. Department of State<sup>188</sup> is the confiscation of passports from the victims. Once a victim has been taken from her home, her passport is confiscated by her abductors, leaving her without a confirmed political identity in a foreign place. Although Native women were not taken to foreign lands, their homelands were treated as hostile nations by the United States. This characterization left the women vulnerable to the same kind of victimization.

Sexual abuse of Indian women went hand-in-hand with removal. The ongoing dispossession of Indians by European forces through warfare and kidnapping is often linked to sexual predation.<sup>189</sup> For example, kidnapping and subsequent rape of Indian women by Spanish soldiers was of great concern to the clergy at missions in early

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185. Maureen Trudelle Schwarz, *Unraveling the Anchoring Cord: Navajo Relocation, 1974 to 1996*, 99 AM. ANTHROPOLOGIST 43, 50 (1997).

186. *Id.*

187. United Nations Dep’t of Pub. Info., *The Race Dimensions of Trafficking in Persons—Especially Women and Children*, WORLD CONF. AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE, Aug. 31–Sept. 7, 2001, available at [http://www.un.org/WCAR/e-kit/trafficking\\_e.pdf](http://www.un.org/WCAR/e-kit/trafficking_e.pdf).

188. Office to Monitor & Combat Trafficking in Persons, U.S. Dep’t of State: *Trafficking in Persons Interim Assessment, Malaysia*, para. 3 (2008), <http://www.state.gov/g/tip/rls/reports/2009/116114.htm>.

189. BOUVIER, *supra* note 41, at 46–47.

Spanish settlements.<sup>190</sup> There are many accounts of Spanish soldiers who abducted women from their communities, raped them, and returned them to their communities.<sup>191</sup> This was apparently a widespread problem and, according to some theorists, caused the depopulation of many communities because women impregnated by Spanish soldiers induced abortions.<sup>192</sup> This was a major concern for the clergy, whose mission was to convert as many of the “gentiles” as possible.<sup>193</sup>

Father Luis Jayme wrote a letter in 1772 to the head of the Franciscan College, Father Rafael Verger, that provides detailed testimony on the seizure and rape of Kumeyaay Indian women living in that vicinity. Jayme wrote that he had received numerous reports from at least four rancherias near the San Diego mission where soldiers had raped indigenous girls. Many of the Indians from the rancherias were fleeing to the mountains so that the soldiers would not take their women.<sup>194</sup>

Even when this kind of behavior was criminalized under law, prosecution was the exception—not the rule. After an exhaustive search of two centuries of Spanish mission records in California, historian Bouvier identified a single 1773 San Diego court proceeding concerning “the rape of two young Indian girls” (one of whom died as a result) as the “one specific case during that time period.”<sup>195</sup>

Given the evidence of widespread sexual assault under Spanish rule, one prosecution in two hundred years shocks the conscience. Even in that case, the perpetrators (three Spanish soldiers) ultimately were released from imprisonment.<sup>196</sup> That same year, Father Serra reported to some Mexican colleagues that soldiers were using lassos to catch Indian women.<sup>197</sup> The Spanish clergy do not appear to have been particularly concerned about the harm to individual women.<sup>198</sup> Rather, the widespread sexual abuse presented practical barriers to both evangelism and the expansion of land holdings, because of

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190. *Id.*

191. *Id.*

192. *Id.* at 130.

193. *See id.* at 147 (describing how the soldiers “misbehavior” was hurting the evangelical converting efforts).

194. *Id.* at 46–47.

195. *Id.* at 47.

196. *Id.* at 47–48.

197. *Id.* at 48.

198. *Id.*

Native “hostilities” against the Spanish military.<sup>199</sup>

As noted earlier, the Gold Rush in California during the late 1800s quickly deteriorated into wholesale abduction and sale of Native peoples.<sup>200</sup> There are numerous accounts of kidnapping, rape, sex slavery and murder associated with the influx of white settlers into California.<sup>201</sup> The original official Humboldt County history (published by the Historic Record Company in 1915) includes several accounts which demonstrate that the kidnapping of Indian women for sexual purposes was quite common in the 1800s.<sup>202</sup>

One Lassik woman, T’teetsa (also known as Lucy Young) “fell prey to men engaged in the widespread practice of kidnapping Indian children and selling them as servants to white settlers.”<sup>203</sup> After numerous escapes and recaptures, T’teetsa was sold to a white trader, Arthur Rutledge, who “kept her chained at his place because she always ran away.”<sup>204</sup> Rutledge’s sexual abuse of T’teetsa resulted in numerous pregnancies and miscarriages.<sup>205</sup> T’teetsa’s story is a rare first-person account of this widespread treatment. In the early twentieth century, she was interviewed by several ethnologists who were able to record her poignant perspective:

White people come find us. Want to take us all to Fort Seward. We all scared to dead. . . . I hear people tell ‘bout what [Indian] do early days to white man. Nobody ever tell what white man do to [Indian]. That’s reason I tell it. That’s history. That’s truth. I seen it myself.<sup>206</sup>

Several different kinds of colonial-initiated physical movement of Native people have been associated with sexual mistreatment. Forced migration, mandatory boarding school education, and urban relocation are all “movements” which are correlated with sexual abuse.

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199. *Id.* at 51.

200. OSBORN, *supra* note 70, at 203.

201. California Genealogy and History Archives, History of Humboldt County California, <http://www.calarchives4u.com/history/humboldt/hum1915-ch8.txt> (last visited Nov. 23, 2009).

202. *Id.* (“It is said that bands of white men, consisting of three or four depraved wretches, would often catch a young squaw or two and detain them for several days or weeks at their cabins and then permit them to make their way home as best they could.”).

203. Lucy (T’teetsa) Young, *Out of the Past: Lucy’s Story*, in NO ROOMS OF THEIR OWN 47, 49 (Ida Rae Egli ed., 1992).

204. *Id.*

205. *Id.*

206. *Id.* at 52–58.

A. *Forced Migration—“Trails of Tears”*

The history of the United States contains numerous instances of the involuntary relocation of Native people at government control and expense.<sup>207</sup> Removal was originally seen as a solution to the challenges posed by conflicts between white settlers and Indians in the Southeastern United States. Federal law was often explicit in its terms. The Indian Removal Act, for example, provided legal authority and military funding to move Indians west of the Mississippi.<sup>208</sup> The “Trail of Tears” of Southeastern Indians (including Cherokee, Creek, Seminole, Chickasaw and Choctaw Indians) in the 1830s is the most well-known of these forced marches,<sup>209</sup> but there are numerous other “migrations” and “relocations” almost all of which involved women and children who were at the mercy of a colonial military that neither prevented nor punished sexual predation of the Indian captives.<sup>210</sup> There is no doubt that many of these forced migrations resulted in crippling fatigue, starvation, and death.<sup>211</sup> For many Indians, these forced marches were death marches.

It is impossible to determine the full extent of sexual violence that occurred during these forced migrations because it was not identified as a crime. The best we can do is catch glimpses of these assaults through accounts that survive in the historical literature. Moreover, because this kind of brutality was so commonplace, it was likely not considered noteworthy in the eyes of contemporary record-keepers.

Sexual assault during relocation by military forces meets the definition of sex trafficking as recently promulgated by the U.S.

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207. See, e.g., T. S. Twibell, *Rethinking Johnson v. McIntosh (1823): The Root of the Continued Forced Displacement of American Indians Despite Cobell v. Norton (2001)*, 23 GEO. IMMIGR. L.J. 129, 150 (2008).

208. Indian Removal Act, Pub. L. No. 148, §1, 4 Stat. 411 (1830).

209. Russell Thornton, *Cherokee Population Losses During the Trail of Tears: A New Perspective and a New Estimate*, 31 ETHNOHISTORY 289, 293 (1984).

210. Unaddressed sexual violence continues to be a problem in the United States military. See, e.g., Jessica L. Cornett, *The U.S. Military Responds to Rape: Will Recent Changes Be Enough?*, 29 WOMEN'S RTS. L. REP. 99 (2008) (exploring the problem of rape and how the military has handled this problem in light of its unique culture regarding power, opportunity, and gender, which arguably contributes to a climate conducive to sexual abuse, and examining the military's response to the problem of rape by looking at the amended Uniform Code of Military Justice (“UCMJ”), which contains the military's rape code); Jodie Friedman, *Reporting Sexual Assault of Women in the Military*, 14 CARDOZO J. L. & GENDER 375 (2008) (examining the procedure of sexual offense prosecution in the military and the effectiveness of the new reporting policy).

211. See, e.g., Yellow Horse Brave Heart & DeBruyn, *supra* note 39, at 62.

government.<sup>212</sup> Consider the experience of a Native woman being forced to march at bayonet or gunpoint by soldiers of a foreign military—she was at the mercy of the military and vulnerable to sex crimes with little chance for legal recourse. Reporting the crime to the “authorities” was futile, because it was the authorities who were committing the crimes. If she reported the crime to her own people, they were unable to take action because their laws and, indeed, their political and legal existence, were not honored or respected by military officials or soldiers.

Forced migration certainly dispossessed tribal people from their land, but it did much more than that. Even sympathetic accounts of these forced migrations often gloss over the graphic accounts of torture and abuse.<sup>213</sup> The “tears” of the “Trail of Tears” were not limited to tears about lost land or material possessions.<sup>214</sup> Navajo scholar Laura Tohe writes that the Dine’ people call Fort Sumner (the place where they were marched), “Hwéeldi” (The Place of Extreme Hardship) because of their experiences of starvation and rape at the hands of the U.S. government.<sup>215</sup> Native people often arrived at their new “home” or place of captivity with little more than the clothes on their back; soldiers often took advantage of this state of affairs to coerce Native women into trading sexual favors for food, clothing, and blankets.<sup>216</sup>

Scholarship exploring first-hand oral narratives from this time period is exceedingly rare—probably because, as scholar Tohe notes, “[t]he response to such death and violence was to not speak of it in any casual way.”<sup>217</sup> Most records of these experiences have been

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212. KYCKELHAHN, ET AL., *supra* note 6, at 14.

213. See, e.g., Thornton, *supra* note 209 (detailing a new perspective regarding the probable population losses during removal, but offering very little with respect to the details of abuse and torture that took place).

214. Hershberger provides some contextualization for loss of land as a profound disruption in identity for Cherokee women:

The *Missionary Herald* printed a Cherokee woman’s lengthy protest against land expropriation, which concluded that “white people seem to aim at our destruction. . . . This grieves me more than I can tell . . . we shall be driven away from the land of our fathers, which is as dear to us as our lives.”

Mary Hershberger, *Mobilizing Women, Anticipating Abolition: The Struggle Against Indian Removal in the 1830s*, 86 J. AM. HIST. 15, 20 (1999).

215. Laura Tohe, *Hwéeldi Béehániih: Remembering the Long Walk*, 22 WICAZO SA REV. 77, 77–82 (2007).

216. See, e.g., Berger (2004), *supra* note 106, at 110 (citing LYNN R. BAILEY, BOSQUE REDONDO: THE NAVAJO INTERNMENT AT FORT SUMNER, NEW MEXICO, 1863–1868, at 145 (1998) (describing “hog farms,” as brothels were called, that arose in Fort Sumner)).

217. Tohe, *supra* note 215, at 79.

preserved, not on paper, but in the oral histories of tribal people. A typical passage in this rare, oral history comes from a series of stories transcribed by a Creek woman, describing her grandmother's recollection of the Trail of Tears: "Sometimes, as weeks went by these soldiers would tear the clothing off young girls twelve years of age . . . or young mothers and molest them."<sup>218</sup>

These stories continue to be shared and passed on in contemporary settings. One example of this is a story from the Coos tribal community (now part of the federally-recognized Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians). In July 2009, after many years of efforts, a hiking trail in coastal Yachats, Oregon was formally named in remembrance of a brutal journey experienced by a Coos woman known only as "Amanda."<sup>219</sup> Amanda's Trail sits on property owned by Yachats resident Joanne Kittel, who told reporters, "[t]his property is so precious, so that I didn't really feel like an owner, [sic] I felt like a steward."<sup>220</sup> The story of the trail's namesake, Amanda, is a grisly and brutal account of a young, blind Coos woman who was kidnapped by U.S. Cavalry in 1864 and forced to walk for 80 miles along the jagged rocks of the Oregon coast to the so-called "Great Reservation."<sup>221</sup> According to a tribal council member, Wendy Williford, the cuts on Amanda's feet left a "trail of blood in her wake."<sup>222</sup> Little else is known about Amanda, not even the fate of her half-white, eleven-year-old daughter Julia, who was left behind by the soldiers whose primary mission was to ensure that no Coos people remained free within the state borders.<sup>223</sup> Oregon, which had achieved statehood status in 1859, had criminalized assault and abduction, but Amanda would not have been considered a worthy victim under the eyes of the law. Even the murder of Indians was, for all intents and purposes, legal at that point in time in Oregon.<sup>224</sup> There are no doubt dozens of tribal communities scattered across the United States who have their own "Amanda" stories. These stories are often common knowledge around the community—as well as the fear

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218. ELIZABETH SULLIVAN, *INDIAN LEGENDS OF THE TRAIL OF TEARS AND OTHER CREEK STORIES 2* (1974).

219. Barbara B. Covell, *An Unforgotten Legacy Yachats Commemorates the History of the Amanda's Trail*, S. LINCOLN COUNTY NEWS, Aug. 4, 2009, available at [http://www.southlincolncountynews.com/V2\\_news\\_articles.php?heading=0&page=72&story\\_id=989](http://www.southlincolncountynews.com/V2_news_articles.php?heading=0&page=72&story_id=989).

220. Musicar, *supra* note 1.

221. Covell, *supra* note 219.

222. Musicar, *supra* note 1.

223. Covell, *supra* note 219.

224. See DEL MAR, *supra* note 157, at 29.

and terror that is been passed down with these tales.<sup>225</sup>

Once Native people were sufficiently weakened and relocated onto bounded land, the wars and forced migrations ended, at least for the time being. The last major military actions on Indian land occurred near the end of the nineteenth century.<sup>226</sup> However, the experience of Native women did not improve. Indeed, as the twentieth century began, the predatory forces at work to sexually denigrate Native women took on new forms. With the collective trauma of surviving war and relocation not yet fully addressed, new government policies launched a different kind of attack on tribal cultures: boarding schools.<sup>227</sup> Unlike the nineteenth century migrations, which were the result of overt violence, boarding schools involved official coercion of a different kind.<sup>228</sup> However, when viewed in the context of a century of rape, murder, and starvation by soldiers and Indian agents, the boarding schools strategy is seen as a continuation of the legacy of oppression.

Once tribal nations were placed on reservations, the children of Native families were removed—which sent a variety of messages to the tribal communities, but particularly to mothers.<sup>229</sup> The dominant society disapproved of the way Native people parented.<sup>230</sup> The boarding schools can be seen as an essential step in the colonial project. Colonization required the indoctrination of Indian children.<sup>231</sup> In the 1950s, as tribal communities continued to make efforts to remobilize and establish roots in the prescribed space, the government again retooled its approach to tribal people—this time,

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225. In the 2009 PBS series, “We Shall Remain: Wounded Knee,” Madonna Thunder Hawk explains the terror Native women experienced in South Dakota in the 1970s: “There was [sic] towns you didn’t drive through, didn’t go through. Especially women. You didn’t walk down the street of any border town by yourself because you’d be accosted by any white man that felt like it.” *We Shall Remain: Wounded Knee* (PBS television broadcast May 2009), available at <http://www.pbs.org/wgbh/amex/weshallremain/>.

226. *Id.*

227. *Id.*

228. *See id.* (discussing the ways in which the boarding schools attempted to assimilate the children, forcing them to cut their hair, speak only English, and repress the lives they once knew).

229. Yellow Horse Brave Heart & DeBruyn, *supra* note 39, at 63 (noting that “[t]he destructive and shaming messages inherent in the boarding school system . . . were that American Indian families are not capable of raising their own children”).

230. *Id.*

231. *See id.* at 63–64 (discussing the assimilation of Indian children through boarding schools).

moving them from their reservation communities to urban centers.<sup>232</sup> Although other scholars have addressed the legal and social impact of these larger policies on tribal communities, they have not considered these actions in the context of human trafficking. When viewed through the lens of human trafficking, these relocations by the U.S. government left Native people vulnerable to victimization. Indeed, these relocations ensured that yet another generation of Native women would be exposed to sexual abuse and degradation and the genocide of Native peoples would be advanced.

*B. Trafficking in Native Children: Mandatory Boarding Schools*

Targeting children is one of the most sinister methods of attacking a community, destroying it from the inside out. American Indian children were easy victims for this strategy, which reached its zenith in the early twentieth century. In an effort to promote assimilation of tribal people, after war failed to exterminate all of them,<sup>233</sup> the government endorsed the widespread removal of children from their communities to be “educated” in government and church-run boarding schools throughout the United States and Canada.<sup>234</sup> This

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232. *Id.* at 64–65.

233. Congressional debates from 1871 provide some evidence that Congress moved tribes to reservations rather than exterminating them, in part because it was less expensive than the costs of continued warfare. CONG. GLOBE, 41st Cong., 3d Sess. 733 (1871) (statement of Sen. Beck).

234. See DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE 1875–1928, at 95–163 (1995) (arguing that the goal of boarding Indian children was to remove them from their savage surroundings and to place them in a purified environment in order to learn to look, act, and think like their white counterparts); DELORIA, *supra* note 13, at 16 (recounting laws and practices that forced Indians to conform to white institutions, including the kidnapping of Indian children and forcing them into boarding schools); SANDRA DEL VALLE, LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES: FINDING OUR VOICES 276–86 (2003) (discussing the prohibition on children speaking their native Indian languages in boarding schools and how this helped stigmatize and destroy Indian culture); AMELIA V. KATANSKI, LEARNING TO WRITE “INDIAN”: THE BOARDING-SCHOOL EXPERIENCE AND AMERICAN INDIAN LITERATURE 133–34 (2007) (discussing how boarding schools changed Indian self-identity through an examination of Indian children’s writing at boarding schools); KATHLEEN MALLEY-MORRISON & DENISE A. HINES, FAMILY VIOLENCE IN A CULTURAL PERSPECTIVE: DEFINING, UNDERSTANDING, AND COMBATING ABUSE 70–72 (2004) (asserting that adult Natives could not be influenced to assimilate into white civilization, and thus Native children were targeted through education in boarding schools to abandon Native culture); BARBARA PERRY, SILENT VICTIMS: HATE CRIMES AGAINST NATIVE AMERICANS 31–33 (2008) (discussing the violence against Indian children in the government-sponsored boarding schools, as well as the violence against their culture); ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 35 (2005) (exploring the federal

involuntary movement of Native children was often directly or indirectly tied to sexual exploitation. Perry explains that the schools were “coercive, often violent sites for forced assimilation. The history of the ‘lost generation’ of Native American youths, shuffled off to Bureau of Indian Affairs (BIA) boarding schools is itself a history of violence, intimidation, and repression.”<sup>235</sup>

For many Native people, the boarding school era is synonymous with sexual abuse and sexual exploitation on a grand scale.

For example, forced attendance at boarding schools, where youth often were sexually, physically, emotionally, and verbally abused, was a traumatic event with the potential for being internalized and later manifesting as psychological symptoms. The resulting psychological symptoms may have been transmitted. . . onto family members (secondary traumatic stress) and passed onto subsequent generations (intergenerational transmission), in the absence of culturally appropriate ways for healing (unresolved grief).<sup>236</sup>

Children were sent hundreds, sometimes thousands, of miles from home on steamboats, trains and wagons.<sup>237</sup> When they refused to go, their families were threatened with starvation and incarceration.<sup>238</sup> Some Indian schools engaged directly in abduction of Native children in order to “maintain student enrollment levels.”<sup>239</sup> Gov-

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establishment and subsequent history of Grant’s Peace Policy of 1869, which gave administrative power of Indian reservations to Christian denominations to erect and run schools); Clifford E. Trafzer, et al., *Introduction: Origin and Development of the American Indian Boarding School System*, in *BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES* 1, 13–19 (Clifford E. Trafzer et al. eds., 2006) (discussing the establishment of the first government-sponsored boarding schools and the literal stripping-away of any and all semblances of the Indian children’s culture).

235. Perry (2002), *supra* note 40, at 236.

236. Janelle F. Palacios & Carmen J. Portillo, *Understanding Native Women’s Health: Historical Legacies*, 20 *J. TRANSCULTURAL NURSING* 15, 21 (2009).

237. ADAMS, *supra* note 234, at 98 (describing several documented accounts of the “final farewells”).

238. In 1892, the Commissioner of Indian Affairs, Thomas J. Morgan, issued a rule that Indians who attempted to “prevent the attendance of children at school” were guilty of an offense and subject to imprisonment “for not less than ten days.” Subsequent offense could be punished by as much as 6 months incarceration. H.R. DOC. NO. 52-1, pt. 5, at 28–31 (1892), *reprinted in* Thomas J. Morgan, *Rules for Indian Courts*, in *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880–1900*, at 300 (Francis Paul Prucha ed., 1973). *See also* ADAMS, *supra* note 234, at 209–14 (discussing the various ways parents would attempt to keep their children from being taken to the schools and the reasons why they would do so).

239. K. TSINANINA LOMAWAIMA, *THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL* 36 (1994). *See also* Frank Wilson Blackmar, *The Socialization*

ernment documents indicate that there were efforts to keep members of the same tribe apart, which was likely designed to facilitate assimilation.<sup>240</sup> The institutions themselves were “often harsh and repressive.”<sup>241</sup>

As part of the overall effort to remove children from their homeland and culture, many schools did not allow children to return home during the summer months.<sup>242</sup> Although assimilation or indoctrination was the primary goal of the boarding schools, commercialization and profit was a by-product of these boarding school efforts; the local communities often benefited from cheap or free labor as a result of the process.<sup>243</sup> In Phoenix, for example, girls and young women were required to provide domestic services for white families—often with substandard (or no) pay.<sup>244</sup>

One report noted that some girls were compelled by their mistresses “to do all the dirty work of the house, kept tolling from early to late, never given a word of encouragement, never permitted to enter the living rooms of the home, [and] compelled to always eat [their] meals from a plate in the kitchen alone.” Another observed that some families cared nothing for the girls “except for the work they can get from them.”<sup>245</sup>

Indian girls were also expected to follow strict social codes as established by Victorian-era morality.<sup>246</sup> “In the minds of many

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*of the American Indian*, 34 AM. J. SOC. 653, 658 (1929) (noting that the reluctance of Indian parents to send their children away “kept the agents busy running over the country and gathering in their students”).

240. OFFICE OF INDIAN AFFAIRS, DEP’T OF THE INTERIOR, 1889 COMMISSIONER INDIAN AFF. ANN. REP. 424 (1889).

241. LOMAWAIMA, *supra* note 239, at xiv.

242. Berger (1997), *supra* note 105, at 49 (“To ensure that the female pupils would not backslide into Indian ways, the girls were ‘placed out’ during vacation to give them experience with a non-Indian family.”).

243. Robert A. Trennert, *Victorian Morality and The Supervision of Indian Women Working in Phoenix, 1906–1930*, 22 J. SOC. HIST. 113, 115 (1988) [hereinafter Trennert (1988)]. The federal government itself noted that income from the labor of Indian students could be used to help fund the establishment of additional schools. OFFICE OF INDIAN AFFAIRS, DEP’T OF THE INTERIOR, 1889 COMMISSIONER INDIAN AFF. ANN. REP. 424 (1889).

244. Trennert (1988), *supra* note 243, at 115. *See also* Berger (1997), *supra* note 105, at 49 (discussing the policy of placing Indian girls in white homes to learn domestic service, often leading to a permanent position when they were done with school); Margaret D. Jacobs, *Working on the Domestic Frontier*, 28 FRONTIERS 165 (2007) (discussing the experiences of Indian girls working in white households in the San Francisco Bay area).

245. Trennert (1988), *supra* note 243, at 115.

246. *Id.* at 114.

[V]ictorians, Indian women by nature were prone to filth, ‘animal gratification,’ lewd, licentious, and promiscuous behavior. . . .”<sup>247</sup> The federal agenda was clear: “[T]rain Indian girls in subservience and submission to authority.”<sup>248</sup> In other words, indoctrinate the dominant paradigm of the patriarchy into Native women. Many boarding school experiences also included widespread sexual abuse.<sup>249</sup> Corporal punishment was acceptable, and in fact, was the subject of some well-publicized controversies in the early twentieth century.<sup>250</sup> The boarding school facilities often included jail cells used to punish children who disobeyed orders.<sup>251</sup> In recent years, some survivors of the boarding schools have disclosed that sexual abuse was common in the boarding schools.<sup>252</sup> Victims often report that there was no option for filing grievances in these situations—indeed, as children they were powerless to take any action to stop the abuse.<sup>253</sup> Lynne explains: “These children were terrorized sexually with no avenues of escape. When they were allowed to visit their families during holidays, these

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247. *Id.* at 113.

248. LOMAWAIMA, *supra* note 239, at 81.

249. SMITH, *supra* note 234, at 43.

250. See Robert A. Trennert, *Corporal Punishment and the Politics of Indian Reform*, 29 HIST. EDUC. Q. 595 (1989) (discussing executive secretary of the American Indian Defense Association John Collier’s report on corporal punishment at Phoenix Indian School in 1930, which the author argues was undertaken to force the Bureau of Indian Affairs to restructure and for political gain).

251. *Id.* The Phoenix Indian School building included a jail as early as 1893, three years after opening its doors. *Id.* at 598. At Chilocco Indian School in Oklahoma, “Punishment . . . was solitary confinement in the ‘dark room,’ where the only light entered through a four-inch square in the door.” LOMAWAIMA, *supra* note 239, at 23 (citation omitted). While attendance at boarding schools is no longer mandatory, some original punitive policies have continued with little or no modification. At least one “holding cell” in a government-run Indian boarding school was documented to exist as recently as 2003: Cindy Lou Bright Star Gilbert Sohappy, a sixteen-year-old student, died in the “holding cell” at Chemawa Boarding School in Oregon (a federally-run boarding school which originally opened in 1880). EARL E. DEVANEY, OFFICE OF INSPECTOR GENERAL, INVESTIGATIVE REPORT ON THE CHEMAWA INDIAN SCHOOL DETENTION FACILITY 3–6 (2005). An official federal report on the death indicates that Cindy Lou was placed in a cell due to alcohol intoxication. *Id.* at 3. Despite regulations that required her well-being to be monitored every fifteen minutes, Cindy Lou was left alone in the cell for nearly three hours, during which time she died of alcohol poisoning. *Id.* at 5.

252. See LOMAWAIMA, *supra* note 239, (detailing alumni accounts of life at the Chilocco Indian Agricultural School).

253. Jackie Lynne, *Colonialism and the Sexual Exploitation of Canada’s First Nations Women* (Aug. 17, 1998) (paper presented at the American Psychological Association 106th Annual Convention, San Francisco, California), *available at* <http://www.prostitutionresearch.com/colonialism.html> (discussing historical cases of sexual exploitation of Native American women).

children often felt increasing loneliness and despair due to a widening sense of cultural estrangement, and abandonment.”<sup>254</sup>

## VI. RELOCATION REVISITED

In the Trafficking Victims Protection Act of 2000, Congress found that:

Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin. Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.<sup>255</sup>

This section seeks to reframe the relatively sanitized word “relocation,” which has often been used to refer to the Indian urbanization policies of the 1950s. In practice, “relocation” is a continuation of the colonial indifference of the inherent protection offered by one’s relatives’ homeland and apathy to the conditions in which the relocated people find themselves. As with other strategies implemented by America and its European predecessors, this process created new avenues for predators to manipulate, coerce, and force Native women into the commercial sex industry.

Razack has argued that the urbanization process is one in which “slum administration replaces colonial administration.”<sup>256</sup> Consider that in 1940, only 7.2% of Native people lived in urban areas.<sup>257</sup> In 1943, the BIA launched a comprehensive program to transition Indian people from the reservations to the cities. A second initiative, launched in 1952 was initially called “The Voluntary Relocation Program.”<sup>258</sup> Within a few short years, the number of Native people

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254. *Id.*

255. Trafficking Victim Protection Act, 22 U.S.C. § 7101(b)(4) (2008).

256. Sherene H. Razack, *Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George*, 15 CAN. J.L. & SOC’Y 91, 97 (2000).

257. Ann Metcalf, *Navajo Women in the City: Lessons from a Quarter-Century of Relocation*, 6 AM. INDIAN Q. 71, 83 (1982).

258. Joan Ablon, *American Indian Relocation: Problems of Dependency and Management in the City*, 26 PHYLON 362, 362 (1965). The word “voluntary” was probably employed to differentiate the program from the involuntary “relocation program” established to imprison Japanese-Americans during World War II. Dillon S. Myer, the civilian

living away from their tribal community had dramatically increased.<sup>259</sup> Official government policy and Congressional legislation encouraged this transition.<sup>260</sup> By 1960, 33,466 Indians had been relocated.<sup>261</sup> This number has steadily increased. In 1980, the Bureau formally suspended the project, but the urban migration continued.<sup>262</sup> By 1990, the Census indicated that nearly 60% of Native people reside in urban areas.<sup>263</sup>

The relocation project was often presented as a benevolent opportunity.<sup>264</sup> Living conditions on many reservations had deteriorated to the level of abject poverty.<sup>265</sup> Federal employees from the BIA traveled to reservations and recruited young Native people to move to the city, where they were promised that jobs and housing were plentiful. This era can be seen as a logical next step after the subjugation and forced migrations of the prior century. Overt violence was no longer required. Indian people had been economically and emotionally subjugated by centuries of officially sanctioned violence and often had very limited options for their own well-being. Further, many Indian people were living hundreds of miles from their ancestral homelands on reservations that were places of suffering at the hands of the federal government. In order to take advantage of the small stipends available for relocation, an Indian person had to go through an interview and approval process.<sup>266</sup> There was no compensation or support to return home (even in cases of family illness or

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official in charge of the Japanese-American internment camps in the 1940s, served as the Commissioner of Indian Affairs during the pinnacle of the Indian urban relocation programs during the 1950s. *See generally* RICHARD DRINNON, KEEPER OF CONCENTRATION CAMPS: DILLON S. MYER AND AMERICAN RACISM, at xxvi–xxvii (1987) (discussing the policies of and actions taken by Myer during both the Japanese Internment and the early Indian urban relocation programs). The program was later named “Employment Assistance Program.” Ablon, *supra*, at 362.

259. Metcalf, *supra* note 257, at 72.

260. *See* Indian Relocation Act of Aug. 3, 1956, Pub. L. No. 84-959, 70 Stat. 986 (1956).

261. United Sioux Tribes of South Dakota Development Corporation Services, <http://unitedsioux.com/services.html> (last visited Nov. 18, 2009).

262. Metcalf, *supra* note 257, at 83.

263. COMMITTEE ON POPULATION, COMMISSION ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION & NATIONAL RESEARCH COUNCIL, CHANGING NUMBERS, CHANGING NEEDS: AMERICAN INDIAN DEMOGRAPHY AND PUBLIC HEALTH 109 (Gary D. Sandefur et al. eds., 1996).

264. *See* Ablon, *supra* note 258, at 362 (explaining the perks of moving to the city as part of the relocation project).

265. *See* Theodore D. Graves, *Urban Indian Personality and the “Culture of Poverty,”* 1 AM. ETHNOLOGIST 65, 66 (1974).

266. Metcalf, *supra* note 257, at 73.

death).<sup>267</sup> The intended goal was to force Native people to assimilate into mainstream society.<sup>268</sup>

It can safely be said that there were no comprehensive efforts to ensure that Native women had access to any social services should they be fall victim to sexual exploitation in the cities.<sup>269</sup> Few programs exist even today.<sup>270</sup> Native people often found themselves unemployed soon after arriving in the city.<sup>271</sup> In 1965, one social scientist estimated that “more than 75 percent of the Indians who have relocated would choose to return to their reservations as soon as possible.”<sup>272</sup> Schwarz explains, “[t]he physical, social, and mental costs of such prolonged stress are staggering.”<sup>273</sup> “[I]n 1969 the Indian unemployment rate was eight to ten times the national average, and individual incomes were less than half the national poverty level.”<sup>274</sup> All of these “urbanization” factors created the perfect opportunity for pimps and predators to gain a foothold in the lives of Native people. Alison Cole explains how such circumstances constitute trafficking:

Female trafficking involves powerful persons enforcing the detainment and exploitation of economically marginalised or otherwise vulnerable women, for the purposes of forced prostitution. Trafficking for forced prostitution is distinct from its composite crimes such as rape, torture and unlawful detention because it represents the culmination of all these

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267. See *id.* at 73 (stating that “the BIA provided one-way transportation to the selected city”).

268. Jennifer B. Unger, Claradina Soto & Natalie Thomas, *Translation of Health Programs for American Indians in the United States*, 31 EVALUATION & HEALTH PROF. 124, 124 (2008).

269. Ablon noted that “[t]he Bureau of Indian Affairs has had no program to follow-up relocatees except through chance encounters or by the ‘grapevine,’ and has not followed the progress of self-relocatees at all.” Ablon, *supra* note 258, at 370.

270. See Yellow Horse Brave Heart & DeBruyn, *supra* note 39, at 64 (asserting that American Indians living in urban areas “face a concerted lack of economic and health resources”).

271. Ablon, *supra* note 258, at 363. Many Native people found it difficult to secure employment due to racial prejudice, specifically targeted at Indians. For example, a University of Minnesota study of South Minneapolis businesses in 1970 revealed that anti-Indian sentiment was not uncommon. RICHARD P. GIBBONS ET AL., INDIAN AMERICANS IN SOUTHSIDE MINNEAPOLIS: ADDITIONAL FIELD NOTES FROM THE URBAN SLUM (1970) (on file with author). Among some of the interviewees were a flower shop owner (“[Indians] don’t belong in the city but back at home on the reservation with their own people.”), *id.* at 7, a real estate agent (“[Indians] are very dishonest and only tell you what you want to hear.”), *id.* at 10, and a gas station owner (“[T]he Indian women, they’re pigs.”), *id.* at 13.

272. *Id.* at 365.

273. Schwarz, *supra* note 185, at 50.

274. Graves, *supra* note 265, at 66 (internal quotations omitted).

acts through the complete deprivation of personal autonomy.<sup>275</sup>

Situating Indians within urban settings also provided more convenient opportunities for social scientists to “study” Indian culture and adaptation styles. A review of this literature is illuminating, as it becomes clear that social scientists and other non-Indian observers in the mid-twentieth century often blamed tribal culture as the root cause of “deviant” behavior, rather than considering the effects of forced acculturation, institutionalized racism, and poverty.<sup>276</sup> One expert, for example, explained that Indians suffered poverty and other social ills in the urban locations because they were incapable of comprehending the “basic instrumental values of modern urban industrial society.”<sup>277</sup>

Although most of the studies of urban Indians focused on men, some reports did devote attention to gender dynamics, and a few focused on women. Although this body of literature often acknowledged behavior that might have indicated sexual exploitation, it was rarely categorized as such. Sexual exploitation by white men was rarely understood as predatory behavior—sometimes it was couched as “experimentation” or directly tied to drinking. Social scientists often implied that Native women were simply engaging in promiscuous behavior with non-Native men. Consider the following observation from 1963: “For the young [Native] females, drinking seems to help them overcome sexual inhibitions; this is crucial to their popularity with many of the young Whites.”<sup>278</sup> Another social scientist in the same time period (1968) wrote:

This rejection of native males, and the valuing of transient white males, results in a situation of mutual exploitation between the transients and the [native] girls. The girls will go so far as to seek out Navy men, construction and barge workers (both single and married), gaining presents from

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275. Alison Cole, *Reconceptualising Female Trafficking: The Inhuman Trade in Women*, 12 *CARDOZO J. L. & GENDER* 789, 790 (2006).

276. See, e.g., DONALD H. J. CLAIRMONT, *DEVIANCING AMONG INDIANS AND ESKIMOS IN AKLAVIK, N.W.T.* (1963) (finding that Native people have difficulty adapting to a “middle-class white culture”). Clairmont’s report, which is typical of social science publications on Native people during that time period, explicitly establishes the ideal social standards as “middle class white values.” *Id.* at ix. The report then references “official” whites, who offered critiques of the parenting of Native parents as the cause of social problems such as poverty, “illegitimacy,” and alcohol abuse. *Id.*

277. Albon, *supra* note 258, at 368.

278. CLAIRMONT, *supra* note 276, at 61.

them, most notably in the form of beer.<sup>279</sup>

This typical characterization of the relationships as “mutual exploitation” is directly followed by observations that reveal a more one-sided dynamic:

Generally speaking, the [native] girls do not profit in the long run from this mutual sexual exploitation. Many of them are burdened with illegitimate children and contract venereal diseases which are especially prevalent. Very few of the transients marry native girls.<sup>280</sup>

It should come as no surprise that these Indian women, marooned in an unfamiliar urban environment, without any social support network or job skills, were easy prey for organized crime. No empirical data is available to determine the extent to which sex traffickers in the mid-to-late twentieth century may have targeted Native women. Anecdotal evidence, however, indicates that Native women who left the reservations for urban areas were vulnerable to such exploitation.<sup>281</sup> For instance, testimony provided to Congress by Amabel Bulin in 1944 indicates that the sex trafficking of Native girls was common in Minnesota. Bulin, an activist in Minneapolis in the 1940s and 1950s, testified in 1944 in front of a House committee that Indian girls in Minneapolis were illegally being sold liquor and this made them vulnerable to “exploitation” and “immorality.”<sup>282</sup>

A 1970 article entitled “Promiscuity and Prostitution in Urbanized Indian Communities” provides some insight into the approach mainstream (white male) experts had toward prostituted Native women.<sup>283</sup> Written by a physician and well-known biochemist, the

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279. A.M. ERVIN, *NEW NORTHERN TOWNSMEN IN INUVIK* 11 (1968) (footnote omitted).

280. *Id.*

281. Farley explains how this dynamic presents itself: “First Nations youth who leave their home communities for urban areas are particularly vulnerable to sexual exploitation in that they are both homeless and in an unfamiliar cultural environment.” Farley et al., *supra* note 29, at 257. See also Nancy Shoemaker, *Urban Indians and Ethnic Choices: American Indian Organizations in Minneapolis, 1920–1950*, 19 *W. HIST. Q.* 431, 443 (1988).

282. *Investigate Indian Affairs: Hearings Before Subcomm. of Comm. of Indian Affairs*, 78th Cong. 675–77 (1944) (testimony of Mrs. Amabel K. Bulin, volunteer social worker, Minneapolis Indian Service). Although Mrs. Bulin was Indian, her testimony reflects racial prejudice against Black people—particularly the “colored men” she accused of taking advantage of the Indian girls in the “slums” of Minneapolis. *Id.* at 675.

283. See generally Robert E. Kuttner & Albert B. Lorincz, *Promiscuity and Prostitution in Urbanized Indian Communities*, 54 *MENTAL HYGIENE* 79 (1970) (expressing two doctors’ opinions on factors promoting prostitution of Native women in an urban

article notes that prostitutes are “habitual liars” and “chronic alcoholi[cs].”<sup>284</sup> The authors claim that “random factors and forces” are responsible for Native women entering prostitution, ignoring the role of sexual predators (and history) in the criminal ecosystem of sexual slavery.<sup>285</sup>

## VII. CONTEMPORARY ISSUES

*“Future generations will not excuse those who turn a blind eye to [human trafficking].”<sup>286</sup>*

Although sex trafficking is now criminalized in the United States,<sup>287</sup> the legacy of enslavement, exploitation, and exportation is reflected in the lives of Native girls in the sex trade and Native women who want to leave the sex trade. The U.S. government has ceased officially engaging in the reprehensible activities described throughout this paper. The military no longer permanently occupies reservations or forces Native people at gunpoint to travel hundreds of miles on foot. There is no longer widespread official endorsement of removing Native children from their families.<sup>288</sup> Tribal members are no longer pressured by federal agents into leaving the reservation for the city. Indeed, the federal government has provided some degree of support for tribal self-determination and cultural revitalization.<sup>289</sup>

The United States has never formally acknowledged most of the reprehensible actions that contributed to the disparities of income, health, well being, and life expectancy experienced by Native

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setting).

284. *Id.* at 80, 82.

285. *Id.* at 84.

286. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 1 (2006), *available at* <http://www.state.gov/documents/organization/66086.pdf> (quoting a speech made by President George W. Bush on the topic of human trafficking) (emphasis added).

287. Trafficking Victim Protection Act, 22 U.S.C. § 7101 (2006) (amended 2008).

288. However, reports show that Native children continue to be significantly overrepresented in the foster care system. *See, e.g.*, CHILD WELFARE P’SHIP, OR. CHILD WELFARE EQUITY TASK FORCE, DISPROPORTIONALITY AND DISPARITIES IN OREGON’S CHILD WELFARE SYSTEM 1–6 (2009) (noting that Native American children are more likely to be in foster care, and are likely to be in care the longest of any racial group). A recent study from Oregon found that Native children are six times more likely to be placed in foster care than white children. *Id.* at 4.

289. The Indian Self-Determination and Education Assistance Act, for example, transferred some federal funding to the control of tribal governments. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975). This act affected self-governance activities, including education, law enforcement, and natural resources management. *Id.*

people.<sup>290</sup> The laws of the United States have changed for the better. However, the historical legacy of sexual oppression still has a considerable impact on the lives of individual Native women today. Yellow Horse Brave Heart and DeBruyn note: “When a society disenfranchises the legitimacy of grief among any group, [it] inhibits the experience and expression of the grief . . . that is, sadness and anger [are expressed as] shame.”<sup>291</sup> Razack asserts that prostitution is inherently colonial, the act “through enabling men to mark the boundary between themselves and [the oppressed ‘other’], and the law’s treatment of it as a contract, [effectively] sustain[s] a colonial social order.”<sup>292</sup> There is significantly more research on Native women in the sex trade in Canada, which shares a boundary with the United States and also a strikingly similar history when it comes to the oppression of its indigenous population.<sup>293</sup> Canadian statistics have demonstrated that aboriginal women and girls are prostituted at disproportionate rates.<sup>294</sup> “A study conducted in 2000 estimated that

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290. See Weston, *supra* note 40, at 1018. In 2000, the Assistant Secretary of Indian Affairs, Kevin Gover (Pawnee), did issue a comprehensive apology from the Bureau of Indian Affairs, acknowledging that agents of the United States government perpetrated “acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually.” Kevin Gover, Assistant Sec’y Indian Affairs, Dep’t of the Interior, Remarks at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs (Sept. 8, 2000). However, Secretary Gover was careful to explain, “I do not speak today for the United States.” *Id.* The Commonwealth of Virginia issued a resolution in 2007, which offered acknowledgment “with profound regret [for] the involuntary servitude of Africans and the exploitation of Native Americans.” S.J. Res. 332, 2007th Sess. (Va. 2007).

291. Yellow Horse Brave Heart & DeBruyn, *supra* note 39, at 67 (citing GERSHEN KAUFMAN, *THE PSYCHOLOGY OF SHAME: THEORY AND TREATMENT OF SHAMEBASED SYNDROMES* (1989)).

292. Razack, *supra* note 256, at 94.

293. See Yellow Horse Brave Heart & DeBruyn, *supra* note 39, at 61 (noting that “indigenous people throughout the world can trace social pathologies and internalized oppression to similar historical legacies”). Many of the official strategies used to deal with the “Indian problem” in the United States have a parallel strategy in Canada. For example, the urbanization of Native people in both countries was part of an effort to find employment. See, e.g., Allison M. Williams, *Canadian Urban Aboriginals: A Focus on Aboriginal Women in Toronto*, 1 CAN. J. NATIVE STUD. 75, 79–80 (1997) (discussing the push factors of the Aboriginal Reserve and the pull factors of the government, both of which caused employment to be a major factor in Aboriginal people moving into cities, where they were subject to assimilation strategies).

294. See Farley et al., *supra* note 29, at 245 (noting that “[i]n a number of communities across Canada, Aboriginal youth comprise ‘90% of the visible sex trade’”) (quoting SAVE THE CHILDREN CANADA, YEAR ONE: 1999–2000 OUT OF THE SHADOWS AND INTO THE LIGHT: A PROJECT TO ADDRESS THE COMMERCIAL SEXUAL EXPLOITATION OF GIRLS AND BOYS IN CANADA 7 (2000)).

70 percent of street prostitutes working in the most dangerous and lowest paying 'tracks' in the Downtown Eastside [Vancouver] were Aboriginal women under the age of twenty-six, and most are mothers."<sup>295</sup> In Winnipeg, one advocate reported that hundreds of teen and pre-teen girls, as young as eight and averaging about thirteen, are working the streets.<sup>296</sup> Even more are abused behind closed doors, with about 80% of child prostitution taking place in gang houses and "trick pads."<sup>297</sup> An estimated 70% of these girls were Aboriginal.<sup>298</sup>

Researchers in Canada have also found links between the historical legacy and present-day concerns.<sup>299</sup> A qualitative study on aboriginal women living with HIV in Winnipeg, for example, found that "[r]elocation, through government apprehension or running away, resulted from the perceived inadequate or abusive parenting that thrived within an environment permeated with absence/loss."<sup>300</sup> Displacement is a particularly useful word in describing the experience of a person who is unable to govern what happens to her own body. Although comparable statistics are not available within the United States, it is indisputable that the legacy of relocation, chronic poverty, lack of decent education, and societal trauma significantly reduce the opportunities available to Native women and make them vulnerable to victimization and the sex trade.

Trafficking of any kind is notoriously difficult to research, and the invisibility of victims is a common problem.<sup>301</sup> The subject of Native women as contemporary sex trafficking victims in the United States has only recently received attention in a few select regions (the most notable being the September 2009 report "Shattered Hearts" commissioned by the Minnesota Indian Women's Resource Cen-

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295. Dara Culhane, *Their Spirits Live Within Us*, 27 AM. INDIAN Q., 593, 597 (2003) (citing SUE CURRIE, MINISTRY OF WOMEN'S EQUAL., PROVINCE OF B.C., ASSESSING THE VIOLENCE AGAINST STREET INVOLVED WOMEN IN THE DOWNTOWN EASTSIDE/STRATHCONA COMMUNITY (2000)).

296. Mike McIntyre, *Hundreds of Kids in Sex Trade*, WINNIPEG FREE PRESS, Feb. 20, 2007, available at <http://www.cyc-net.org/features/viewpoints/c-sextrade.html>.

297. *Id.*

298. *Id.*

299. *See id.* (noting that the statistics indicate "the importance of placing prostitution in historical context").

300. Iris McKeown, Sharon Reid & Pamela Orr, *Experiences of Sexual Violence and Relocation in the Lives of HIV Infected Canadian Women*, 63 INT'L J. CIRCUMPOLAR HEALTH 399, 403 (2003).

301. *See Hodge, supra* note 8, at 148 ("Traffickers deliberately seek out obscure venues to avoid detection. Victims often remain in the shadows because of the fear of arrest; reprisals from traffickers; or the fear that officials are corrupt, unconcerned, or aligned with the traffickers . . .").

ter).<sup>302</sup> Native women are likely significantly overrepresented in the United States sex industry. First, Native women and girls suffer disproportionately from risk factors which social scientists have identified as correlated with prostitution.<sup>303</sup> Second, many tribal communities are currently targeted by criminal enterprises due to a variety of jurisdictional limitations and resource shortages.<sup>304</sup> These criminal enterprises often carry benchmarks that have been correlated with sex trafficking in other contexts. These are the societal risk factors, but there are also individual risk factors. I will address each factor in turn.

#### A. *Individual Risk Factors*

The arrest rate of Native women for prostitution is understudied, but one study concluded that “70% of female inmates in American prisons were initially arrested for prostitution.”<sup>305</sup> Social scientists and government officials have identified a multitude of risk factors that are correlated with entry into sex work generally. All of these factors are present in many tribal communities where tribal members experience some of the highest crime rates in the nation.<sup>306</sup> Recent scholarship on trafficking has explored how traffickers exploit certain kinds of social vulnerabilities.<sup>307</sup> A variety of risk factors have been identified as establishing a higher likelihood of entering the sex industry, including sexual abuse,<sup>308</sup> poverty,<sup>309</sup> and drug/alcohol

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302. See ALEXANDRA (SANDI) PIERCE, MINNESOTA INDIAN WOMEN’S RESOURCE CENTER, SHATTERED HEARTS (2009).

303. See Koepplinger, *supra* note 30, at 130.

304. See Christopher B. Chaney, *Overcoming Legal Hurdles in the War Against Meth in Indian Country*, 82 N.D. L. REV. 1151, 1155 (2006) (noting that “drug dealers are targeting Indian country jurisdictions for drug trafficking”).

305. Debra K. Boyer & Jennifer James, *Prostitutes as Victims*, in DEVIANTS: VICTIMS OR VICTIMIZERS? 109, 131 (Donald E. J. MacNamara & Andrew Karmen eds., 1983).

306. See PERRY (2004), *supra* note 16, at iv (“American Indians experienced a per capita rate of violence twice that of the U.S. resident population.”). Because prostitution is not specified as a type of criminal victimization, there is no statistical estimation as to how many Native children and women might be targeted by traffickers in the United States.

307. See Hodge, *supra* note 8, at 146 (stating that traffickers might target “unsuspecting individuals who lack social ties”).

308. See Robert W. Deisher et al., *The Pregnant Adolescent Prostitute*, 143 AM. J. DISEASES OF CHILD. 1162, 1164 (1989). *But cf.* CATHY SPATZ WIDOM, NATIONAL INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, VICTIMS OF CHILDHOOD SEXUAL ABUSE—LATER CRIMINAL CONSEQUENCES 2–5 (1995), available at <http://www.ncjrs.gov/pdffiles/abuse.pdf> (pointing out, however, that “the majority of the sexually abused children in this study do not have an official criminal history as adults”).

309. Linda Cusick, *Youth Prostitution: A Literature Review*, 11 CHILD ABUSE REV. 230,

abuse.<sup>310</sup> Native women and girls disproportionately experience these risk factors. The U.S. government acknowledges the high rates of sexual abuse and rape committed against Native women and girls.<sup>311</sup> Prostitution is also strongly correlated with drug and alcohol abuse<sup>312</sup>—the relationship is particularly strong in the lives of prostituted children.<sup>313</sup> Women and girls who are addicted to an illegal drug may be coerced to engage in prostitution (sometimes called “survival sex”)<sup>314</sup> both on and off the reservation in order to pay for their habit. Illegal drug distributors, for example, may put pressure on their customers to pay off debt through prostitution. “Survival sex” is therefore prostitution due to poverty, intimidation, and fear. Many of the Native prostitutes in the United States and Canada were likely introduced into sex work while children in order to survive.<sup>315</sup>

Whether prostitution can ever be a freely made choice—or even a “victimless” crime—continues to be the subject of rigorous scholarly and practitioner debates.<sup>316</sup> However, there is no denying that the

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234 (2002).

310. Widom & Kuhns, *supra* note 24, at 1611.

311. BACHMAN ET AL., *supra* note 16, at 33; Perry (2002), *supra* note 40, at 6.

312. In one study, the federal government determined that 85% of women arrested for prostitution in twenty-four cities tested positive for drugs. See U.S. DEP’T OF JUSTICE, FACT SHEET: DRUG-RELATED CRIME 2 (1994).

313. Widom & Kuhns, *supra* note 24, at 1607.

314. Jody M. Greene, Susan T. Ennett & Christopher L. Ringwalt, *Prevalence and Correlates of Survival Sex Among Runaway and Homeless Youth*, 89 AM. J. PUB. HEALTH 1406, 1406 (1999) (“‘Survival sex’ refers to the selling of sex to meet subsistence needs. It includes the exchange of sex for shelter, food, drugs, or money.”).

315. Madeleine Baran, *Trafficking of Native Women is Widespread*, THE CIRCLE: NATIVE AMERICAN NEWS AND ARTS, Dec. 6, 2009, available at [http://thecirclenews.org/index.php?option=com\\_content&task=view&id=329&Itemid=75](http://thecirclenews.org/index.php?option=com_content&task=view&id=329&Itemid=75). Baran states:

Sixty percent of the women surveyed entered prostitution or pornography before the age of 18. And about one-fifth had been sexually exploited before their thirteenth birthday. When the girls become adults, the exploitation often continues. They remain in prostitution, but the law often no longer views them as victims, but as criminals. The 126-page report, called *Shattered Hearts*, written by research scientist Alexandra Pierce, focuses on women who live outside of reservations. The report compiles statistics, identifies flaws in the legal system, draws parallels to the historic exploitation of Native people, and makes dozens of suggestions about how to address the problem. Pierce incorporated the Resource Center’s own studies, interviews with social service workers, and available government data.

*Id.*

316. The public policy debate as to whether “abolition versus autonomy” is the best response to prostitution is beyond the scope of this paper. The focus here is on those who are prostituted as children or those who wish to leave prostitution as adults.

prostitution of underage girls is illegal and immoral.<sup>317</sup> Statistics consistently indicate that most women prostitutes enter into the “profession” before the age of eighteen.<sup>318</sup> The U.S. State Department has found that prostitution and related activities “fuel the growth of modern-day slavery,”<sup>319</sup> yet the standard American law enforcement response to prostitution continues to be to arrest and prosecute women and girls who are prostituted.<sup>320</sup> Incarcerating and stigmatizing the women and children engaged in prostitution further alienates these victims from networks of assistance and safety. Native women are already over-represented in the prison population, and some common reasons are related to the intertwined issues of drug abuse and prostitution.<sup>321</sup>

Even social service agencies sometimes fail to identify the experience of a prostitute as a form of victimization. Often women and girls are blamed for their predicament, which discourages them from seeking assistance. One Minnesota report provides an example of this victim-blaming behavior:

[A]n American Indian girl disclosed to a . . . service provider that she was trafficked into prostitution from a reservation in another state. The girl reported . . . that the . . . service provider minimized her experience. The girl described how the service provider blamed her for the situation, as though she had “[gotten] herself into it.” This attitude clearly created barriers to this girl seeking safety

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317. See David Finkelhor & Richard Ormrod, *Prostitution of Juveniles: Patterns From NIBRS*, JUV. JUST. BULL. (June 2004).

318. Hodge, *supra* note 8, at 145. One study of aboriginal women prostitutions in Vancouver found that “[t]he youngest age at recruitment into prostitution was 10 years.” Farley et al., *supra* note 29, at 249.

319. THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING, *supra* note 27, at 1.

320. ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 7 (7th ed. 2009). See also BORTEL ET AL., *supra* note 21, at 17 (“With some exceptions, the government response to sex trafficking in Minnesota currently focuses on the arrest, prosecution, and punishment of prostituted women rather than sex traffickers. This misplaced focus leads to harmful criminal and/or immigration consequences for trafficked persons.”).

321. Elizabeth Grobsmith, *Review of Inventing the Savage: The Social Construction of Native American Criminality by Luana Ross*, 9 GREAT PLAINS RES. 175, 176 (1999). See also Lori De Ravello, Jessica Abeita & Pam Brown, *Breaking the Cycle/Mending the Hoop: Adverse Childhood Experiences Among Incarcerated American Indian/Alaska Native Women in New Mexico*, 29 HEALTH CARE WOMEN INT’L 300, 301–02 (2008). Incarceration rates are extremely high among Native populations. For example, in Alaska, Native people make up 30%–40% of the incarcerated population in the state, but less than 10% of the population overall. David Blurton, *Alaska Native Inmates: The Demographic Relationship Between Upbringing And Crime*, 83 THE PRISON JOURNAL 90 (2003).

from her trafficker.<sup>322</sup>

*B. Community Risk Factors*

Global trafficking research has suggested that “poverty or political instability” can create environments conducive to a predatory criminal enterprise.<sup>323</sup> There is ample evidence that organized criminal behavior and gangs are common in many tribal communities.<sup>324</sup> Perceived and actual limitations on tribal criminal authority attract criminals, including sex traffickers. The federal government itself has acknowledged this problem and in response funded programs to focus on the illegal drug traffic that is associated with some tribal communities. Generally, the sex industry is inseparable from organized crime rings.<sup>325</sup> Tribal law enforcement responses, as noted earlier, are often too little, too late.

The process of colonization has never truly ended in the United States and it continues to be embedded within the American legal system. More recently, extensive legal damage has been done by the U.S. Supreme Court, which has gradually chipped away at the sovereign authority of tribal nations. In 1978, for example, the U.S. Supreme Court eliminated tribal criminal authority over non-Indians,<sup>326</sup> which means that tribal governments must depend on federal and/or state governments to prosecute non-Indian pimps and drug pushers who target tribal citizens in Indian Country. Tribal governments do have the legal authority to take criminal action where Indian perpetrators are involved,<sup>327</sup> but have been limited in the

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322. BORTEL ET AL., *supra* note 21, at 43.

323. Hodge, *supra* note 8, at 150.

324. The United States Senate Committee on Indian Affairs held hearings in summer 2009 to examine the increase of gang activity on Indian reservations. *Oversight Hearing to Examine the Increase of Gang Activity in Indian Country: Hearing on SD 628 Before the S. Comm. Indian Affairs*, 111st Cong. 1 (2009).

325. Raymond & Hughes, *supra* note 6, at 10 (“Recruiters, traffickers and pimps are involved in other criminal activity, such as fraud, extortion, migrant smuggling, theft and money laundering, in addition to trafficking and prostitution.”). See also Hodge, *supra* note 8, at 144 (asserting that “organized crime . . . has increasingly dominated sexual trafficking”).

326. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

327. A review of tribal codes yielded no criminal statutes that can be categorized as anti-trafficking statutes. However, tribal codes often contain crimes of kidnapping, prostitution, rape, and sexual abuse, which often apply in trafficking cases. In *Fort Peck Tribes v. Martell*, the tribal court prosecuted a crime that could be categorized as trafficking. See *Fort Peck Assiniboine & Sioux Tribes v. Martell*, Fort Peck Tribal Court, Appellate Opinion No. 090 (1990), available at [http://www.fptc.org/appellate\\_opinions/090.html](http://www.fptc.org/appellate_opinions/090.html). In that case, the defendant (an adult tribal member)

exercise of sentencing authority.<sup>328</sup> Resource limitations are often cited as one of the primary causes of high crimes rates in Indian country.

Today, most tribal governments struggle with crime control, due to significant underfunding, decades of indifference, and jurisdictional limitations.<sup>329</sup>

### *C. Sex Trafficking and Murder: An Undeniable Link*

Prostitution puts women and girls at a higher risk for other forms of violent victimization, including murder. As noted earlier, more investigation into the Native women trapped in the sex industry has been done in Canada than the United States. In Canada, an estimated five hundred aboriginal women and girls have disappeared (presumably abducted, most likely murdered) in the last thirty years, which has caught the attention of mainstream human rights organizations, including Amnesty International.<sup>330</sup> At least two serial killers have been identified who targeted primarily aboriginal prostituted women.<sup>331</sup>

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was charged with transporting a fourteen-year-old female to Havre, Montana (off-reservation) and using alcohol and or drugs to coerce the victim to have intercourse with him. *Id.* The defendant raised several defenses, including a challenge to tribal jurisdiction over a crime that was alleged to have occurred, in part, outside of tribal territory. *Id.* After the trial court dismissed the case with prejudice for lack of jurisdiction, the tribal appellate court determined that since elements of the crime occurred on-reservation (the coercion and initial transportation), the tribes retained criminal jurisdiction. *Id.*

328. The Indian Civil Rights Act (ICRA) limits tribal sentencing authority to a maximum of one year incarceration or \$5,000 fine or both. Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301–1303 (1990).

329. *See generally*, AMNESTY INTERNATIONAL, MAZE OF INJUSTICE—THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 27–41 (2007), available at <http://www.amnestyusa.org/women/maze/report.pdf> (discussing jurisdictional issues); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 110–36 (1983) (discussing the Indian judicial system); CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, at 45–125 (1997) (discussing jurisdiction over reservation Indians).

330. AMNESTY INTERNATIONAL, STOLEN SISTERS: DISCRIMINATION AND VIOLENCE AGAINST INDIGENOUS WOMEN IN CANADA 24 (2004), available at <http://www.amnesty.ca/stolensisters/amr2000304.pdf>.

331. Robert William Pickton, a Canadian pig farmer, is suspected in at least twenty-six murders and was convicted for six of them. His case is currently on appeal. Steve Mertl, *Pickton's Lawyer Wants Top Court Appeal*, CNEWS, Sept. 10, 2009, available at <http://cnews.canoe.ca/CNEWS/Canada/2009/09/10/10824936-cp.html>; *see also* Keith Bonnell, *Highways a Hunting Ground for Killers*, VANCOUVER SUN, Aug. 10, 2009, at B2 (discussing suspected serial killers have dumped over thirty-two aboriginal women's bodies along one stretch of Canadian highway from Prince George to Prince

In the summer of 2009, the Federal Bureau of Investigation announced that it believes a serial killer or killers employed in the trucking industry may be responsible for hundreds of murders, several of whom were Native women trapped in prostitution.<sup>332</sup> This American report is quite similar to the reports from Canada. Although the FBI has not indicated the percentage of victims who were Native women, it noted that “[t]he victims in these cases are primarily women who are living high-risk, transient lifestyles, often involving substance abuse and prostitution. They’re frequently picked up at truck stops or service stations and sexually assaulted, murdered, and dumped along a highway.”<sup>333</sup>

*D. Where Do We Go From Here?*

First, more research would be helpful. Although the research in the United States is not as extensive as that in Canada, the shared history and proximity between the United States and Canada suggests the problem with sex trafficking of Native women and girls is similar in both countries. Federally funded research found that some counties in the United States have rates of murder against American Indian and Alaska Native women that are *more than ten times* the national average.<sup>334</sup> In order to implement effective interventions, it is critical to have comprehensive data that focuses on the specific experiences of Native women.

Second, developing culturally appropriate responses to the sex trafficking of Native women and girls is necessary. However, the development of such resources presents unique challenges. After centuries of indifference, a Native-specific intervention model will be necessary.<sup>335</sup> Centuries of indifference have understandably led to significant distrust of authority, and many Native women may continue to feel wary of engaging with the Western criminal justice system. Federal grant dollars have been made available to tribal

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Rupert). John Martin Crawford was convicted in 1996 of killing three Native women prostitutes in Saskatoon. Warren Goulding describes how law enforcement failed to follow-up on several initial reports of Crawford’s sixteen-year violent crime spree directed toward aboriginal women. WARREN GOULDING, *JUST ANOTHER INDIAN: A SERIAL KILLER AND CANADA’S INDIFFERENCE* (2001).

332. Federal Bureau of Investigation, *Highway Serial Killings: New Initiative on an Emerging Trend*, [http://www.fbi.gov/page2/april09/highwayserialkillings\\_040609.html](http://www.fbi.gov/page2/april09/highwayserialkillings_040609.html) (last visited Nov. 10, 2009).

333. *Id.*

334. See BACHMAN ET AL., *supra* note 16, at 25.

335. BORTEL ET AL., *supra* note 21, at 65.

governments for developing culturally-specific interventions, but the statutory language usually limits the programming to women and girls who have been victimized by domestic violence, sexual assault or stalking—not prostitution and trafficking.<sup>336</sup>

The time has come to ensure that all Native women be accorded full value and protection by the American legal system. Specific interventions are warranted because of the unique position that historical factors that play in the victimization of Native women and girls.<sup>337</sup> Recognizing that transporting (or coercing) a Native girl or woman across sovereign lines (i.e. from a reservation to a city in the United States or Canada or from one reservation to another) for the purpose of slavery and/or sex work should be considered “international trafficking.” Defining it in such a way will ensure that more appropriate and stringent measures be taken by tribal, state, and federal governments to stop it.

The victimization of Native people is a story five hundred years in the making and we cannot remedy these problems overnight, but our best chance of breaking the cycle of victimization is the development of culturally appropriate interventions to help Native women and girls break the shackles of history and prejudice.

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336. See, e.g., *supra* note 327.

337. Palacios & Portillo, *supra* note 236, at 1 (“Interventions to address these health disparities should be based on research findings that foster an understanding of marginalization and the context from which it arises.”).