

COMBATTING SEX TRAFFICKING IN INDIAN COUNTRY

Center for the Human Rights of Children

Native Trafficking Project

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Sources for Drafting a Tribal Sex Trafficking Provision

Background Reading

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Native Policy and Advocacy Organizations

Minnesota Indian Women's Resource Center, <https://www.miwrc.org/>. (Nonprofit social and educational services organization dedicated to empowering Native women and their families.)
National Indigenous Women's Resource Center, <http://www.niwrc.org/>. (Nonprofit organization led by Native women dedicated to safeguarding Native women and children from violence.)

National Indian Law Library, <http://www.narf.org/nill/>. (Law library devoted to Federal Indian and tribal law with legislative development guides.)

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Model Legislation

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<http://www.winnebago-tribe.com/images/joomlart/corporate/tribe/court/tribalcode/2015-WTN-TITLE-3-Criminal-Code.pdf>.

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http://www.narf.org/nill/codes/absentee-shawnee/criminal_offenses_ch_5.html.

Prairie Band Potawatomi Nation, Potawatomi Law and Order Code, Ch. 15-5 § 15-5-68:

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A NEW WILD WEST

Developing a Tribal Strategy to Address Sex Trafficking in Indian Country

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WHAT IS SEX TRAFFICKING?

- Sex trafficking is controlling a person so that others can engage in sexual activity with that person in exchange for money, drugs, or anything of value.
- Sex trafficking usually involves three parties: The person controlling the transaction (commonly known as a “pimp”), the person performing the sex act, and the person buying sex.



“CONTROLLING A PERSON”

- A controlling dynamic is not always physical. It might include physical restraint, the threat of harm, or another unequal power dynamic, including:
 - The promise of drugs or alcohol
 - Threats to family or loved ones
 - The promise of a job
 - Withholding love or affection
 - “Breaking” – the process by which pimps bring women under total psychological control



MINORS

- Under federal and state law, if a minor is used in prostitution, it is always sex trafficking
 - A minor cannot consent to prostitution and is never criminally responsible for prostitution
 - Even if it appears that the minor actively or independently agreed to sell sex, it is still sex trafficking



“ANYTHING OF VALUE”

- Sex acts may be performed in exchange for anything, not just money. This includes:
 - Satisfaction of a debt
 - Food
 - Shelter
 - Drugs/alcohol
 - Transportation
 - Safety



HISTORY AND PRESENT OF NATIVE TRAFFICKING

- Most studies and reports on the trafficking of Native people (focused on women) have come out of Minnesota (Duluth and Minneapolis)
- Video: “Native American Trafficking”
 - <https://www.youtube.com/watch?v=VjeDTTw8tco>
- Attention has been concentrated on areas where there are federally recognized tribes
- “Garden of Truth” and “Shattered Hearts” Reports
- See our Bibliography for all relevant U.S. Studies on Native Trafficking



RISK FACTORS

- Poverty
- Lack of opportunity (educational and occupational)
- Past history of abuse and exploitation (such as child abuse, domestic violence, or sexual assault)
- Child welfare system involvement
- Substance abuse or mental health issues
- Distrust of law enforcement, a criminal record, and/or prior adversarial experiences with law enforcement
- Another family member who has been trafficked



VULNERABILITY OF NATIVE POPULATIONS

- Native populations experience higher rates of these risk factors due to failed federal policies, intergenerational trauma, conditions in Indian Country, persistent poverty, and other social harms



HIGHER RATES OF NATIVE VICTIMIZATION (AND CRIMINALIZATION)

- “24% of women on probation for prostitution in North Minneapolis are Native women—more than ten times the proportion of American Indians living in the city (2.2%).” –Andrea L. Johnson, *A Perfect Storm: The U.S. Anti-Trafficking Regime’s Failure to Stop the Sex Trafficking of American Indian Women and Girls*, 43 *Colum. Hum. Rts. L. Rev.*, 621 (2012)
- The numbers are similarly high in other cities. Alaska Natives constitute 8% of the Anchorage population, but account for 33% of the city’s trafficked and prostituted women



A SEX TRAFFICKING LAW SHOULD

- Clearly define trafficking, to facilitate identification of cases, data collection on the scope of the problem, and enable an appropriate law enforcement response.
- This includes
 - Decriminalizing the most visible person in prostitution, the person who is prostituted, while imposing liability on the other actors;
 - Targeting the directors and facilitators of trafficking;
 - Providing for robust civil liability in trafficking, to attack the significant illicit assets that result from the crime;
 - And incorporating local culture and conditions into the law.



STEP ONE: INVESTIGATE (AND LISTEN)

- Talk to your most valuable source of information: victims, survivors, and victim's advocates
- Hold listening circles and ensure that everyone feels included and respected
- Talk to law enforcement (including Tribal Police, city police, county, state, and FBI/BIA)
 - What do they understand trafficking to be? How do they deal with prostitution?
- Review cases of trafficking in your local and federal courts
 - Talk to prosecutors and public defenders about their concerns
- Review existing studies and reports on trafficking and best practices for addressing trafficking



FORT PECK: WHERE THE BUFFALO ROAM



- Over 50% of Native children on the Reservation live in poverty
- High rates of trauma, substance abuse, mental illness, and childhood abuse
- High rates of child welfare system involvement

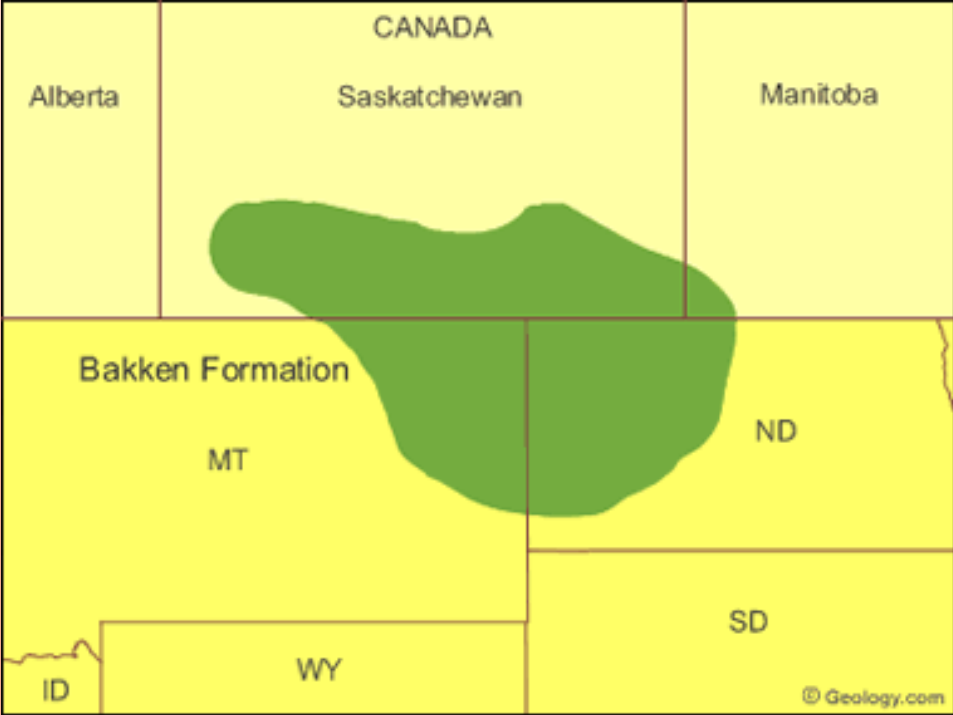


THE HIGH PLAINS

Fort Peck Reservation



The Bakken Shale Formation



THE ROAD TO THE BAKKEN



MAN CAMPS AND OIL TRAFFIC



CHALLENGE: LIMITED CRIMINAL JURISDICTION

- Tribal courts have only misdemeanor jurisdiction (1 year/\$5k fine per felony)
- Jurisdiction over Indian offenders only









JURISDICTIONAL MAZE

Jurisdiction for crimes committed in Indian Country

It will not always be clear at the outset of a criminal investigation where jurisdiction ultimately lies for prosecution, but once the status of the defendant, victim and land has been determined, here's who's in charge of what:

■ **Indian**
 ■ **Non-Indian**
 Victimless crime (such as prostitution, illicit drug use)

						
TRIBE	The tribe has jurisdiction for all offenses	The tribe has jurisdiction for all offenses	No jurisdiction*	No jurisdiction	The tribe has primary jurisdiction	No jurisdiction
STATE	No jurisdiction	No jurisdiction	No jurisdiction	Has jurisdiction for all offenses committed on the reservation	No jurisdiction	Jurisdiction primarily belongs to the state
FEDERAL	For most major felonies, but not misdemeanors	Felony and misdemeanor crimes, unless the tribe has already punished the defendant	Felony and misdemeanor crimes	No jurisdiction	Jurisdiction in some cases	Concurrent federal jurisdiction

* For the first time, this year some tribes are allowed to prosecute certain crimes of domestic violence committed by non-Indians in Indian Country.

Source: Federal law enforcement officials



REZ JUSTICE



CHALLENGE: EXISTING TRIBAL LAW

- Do you have a prostitution law on the books?
- Who is criminally liable under that law?



FORMER FORT PECK TRIBAL LAW

Sec. 223. Prostitution and patronizing a prostitute.

A person who:

- (a) **Is an inmate of a house of prostitution,** ← Primary criminal liability placed on the person who is prostituted. No immunity for minors
manages a house of prostitution, or is otherwise engaged in sexual activity as a business; or
- (b) Solicits another person to hire a prostitute or commit an act of prostitution; or
- (c) Loiters in view of any public place with the intent of being hired to engage in sexual activity; or
- (d) Hires a prostitute to engage in sexual activity or enters or remains in a house of prostitution with intent to engage in sexual activity is guilty of prostitution or patronizing a prostitute.



Title 7 – Criminal Offenses
Chapter 2. Crimes Against Persons
Subchapter C. Sex Trafficking

Sec. 214. Sex trafficking.

(a) A person commits the offense of sex trafficking if the person intentionally or knowingly

(1) Entices, recruits, transports, harbors, isolates, provides, obtains, maintains, facilitates, directs, or arranges for an individual to provide commercial sexual activity;

(2) Offers or agrees to compensate an individual for sexual activity; or

(3) Benefits financially or by receiving anything of value from participation, other than as a victim of sex trafficking, in a venture, knowing that the venture has engaged or will engage in an act of sex trafficking that is classified as a felony under Subsection (b).

Pimp/
Trafficker



“Venture”



John/Buyer



VICTIMS SERVICES AND TRAINING

- What services would you like to offer to victims?
- Would you guarantee these services in your law?
- Would you require that a victim advocate be on the scene if law enforcement respond to a situation of suspected trafficking?
- Would you set up an interdisciplinary or interjurisdictional task force with the law?
- Would you require training?



CHALLENGE: SCARCE RESOURCES

- Does the tribe actually have the resources to offer victim's services?
- Are there traditional approaches to justice or healing that you would like to incorporate from tribal culture?
 - "Restorative Justice" Practices?
 - Talking Circles?
 - Council of Elders?
 - Sweats?
- How many different tribal cultures are represented within your reservation? Do they share these same values and practices?



Sec. 216. Victim immunity and affirmative defense.

(a) A person is not criminally liable or subject to a criminal proceeding for a nonviolent offense if the person committed the offense while a victim of sex trafficking under 7 CCOJ 214.



CHALLENGE: LIMITED TRIBAL CIVIL AUTHORITY UNDER ICRA AND *DOLLAR GENERAL*

- Civil forfeiture in criminal cases limited to \$5k?
 - Case law is not authoritative on this issue
- In *Dollar General v. Mississippi Band of Choctaw Indians*, the Supreme Court upheld tribal jurisdiction over corporation operating on tribal land where an employee sexually abused a tribal youth.
 - *However*: That was a 4-4 justice split and followed death of Justice Scalia
 - What will Trump appointees do with Indian Country?



Sec. 215

Forfeiture of assets aiding in or derived from a sex trafficking crime.

(a) Any person convicted of a felony violation of Section 214 of this Title shall forfeit to the Fort Peck Tribes, irrespective of any provision of State law:

- (1) Any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; and
- (2) Any of the person's property used, intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation.

(b) The court, in imposing a sentence on such person, shall order, in addition to any other sentence imposed pursuant to Section 214 of this Title, that the person forfeit to the Fort Peck Tribes any property described in Subsection (a), but not to exceed a total fair market value of five thousand dollars (\$5,000) for any one infraction of Section 214 of this Title.

Limited by
ICRA to \$5k



SPECIAL VAWA JURISDICTION

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

- (1) Domestic violence and dating violence.—An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.
- (2) Violations of protection orders.—An act that—
 - (A) occurs in the Indian country of the participating tribe; and
 - (B) violates the portion of a protection order



CHALLENGE: IMPLEMENTATION

- Must train
 - all law enforcement who are responsible for the reservation
 - tribal prosecutors and judges
 - community to recognize signs of trafficking
 - Teachers and young people
- Task Force?
 - Representation from
 - Victims services
 - Each law enforcement
 - Each prosecutor's office
 - Child welfare agency
 - Medical and mental health services
- Must make the federal government pay attention!



CHALLENGE: THE SCHOOL SYSTEM

- Youth who are pushed out of school are far more likely to be trafficked
- Many Reservation and “border town” schools discriminate against Native children or impose unnecessarily harsh discipline, resulting in undereducation and alienation of those students



THE LAWYER'S ROLE

- Individual Direct Representation
- Class Actions:
 - State Constitutional Right to Education?
 - Fiscal Inequality Challenges
 - “Different Treatment” Discrimination Claims
 - DOJ Civil Rights Division will pursue “disparate impact” claims



HOW CAN WE CHANGE POLICY?

- Legislation
 - Strengthen due process protections for students
 - School funding equality
- Reduce classroom sizes
- Promote evidence-based school practices
 - Teacher training in cultural competence and trauma-informed approaches
 - Restorative Justice
 - Positive Behavior Interventions and Supports (PBIS)
 - Mentoring
 - Counseling
 - Culturally appropriate curricula and disciplinary approaches
- Recruit Tribal Staff and Administrators
- Tribal-run schools?



AGENDA AND GOALS

- Understand elements of the crime of sex trafficking
- Understand tribal, state, and federal law enforcement arrest authority and importance of cross-jurisdictional cooperation
- How to address victims to ensure support and cooperation

REVIEW: WHAT IS SEX TRAFFICKING?

- Sex trafficking is controlling a person so that others can engage in sexual activity with that person in exchange for money, drugs, or anything of value.

TRUE OR FALSE:

“Trafficking” means moving a person from one place to another, often across state lines, to force them to engage in a commercial sex act.

FALSE. A person can be trafficked from their hometown or even from within their own home. Victims can be coerced into selling sex in many ways, and kidnapping and physical restraint are not necessary components of sex trafficking.

TRUE OR FALSE:

Victims of trafficking are from another country outside the United States

FALSE. A person can be trafficked from their hometown or even from within their own home.

TRUE OR FALSE:

Victims of sex trafficking do not always identify as victims, and many do not seek help.

TRUE. Victims will often not be willing to seek help. They may mistrust law enforcement; may feel shame, fear of judgment, or blame themselves for their situation; or fear consequences from their trafficker if they seek help.

TRUE OR FALSE:

If a person agreed to engage in a commercial sex act, it is prostitution, not sex trafficking.

FALSE. Agreeing to sell sex does not mean that a person was not emotionally, psychologically, or financially coerced into doing so.

IS IT TRAFFICKING?

- For minors, prostitution is always sex trafficking
- For adults engaged in commercial sex:
 - Rather than “Did this person consent to sex?” we should ask whether they’re under the physical, emotional, or financial control of another person
 - We should also ask what is personally at stake (housing, income, children, survival) if they choose to stop
- “In over 20 years of research, the rates of rape and sexual assault of women in prostitution have consistently been found to range between 70 and 90 percent.” –Minnesota American Indian Women’s Resource Center, Shattered Hearts: The Commercial Sexual Exploitation of American Indian Women and Girls in Minnesota (2009)

ELEMENTS OF SEX TRAFFICKING

- Multiple parties involved
 - “John” / Buyer
 - “Pimp” / Trafficker
 - “Prostitute” / Victim
- Sexual activity is exchanged for anything of value
 - Doesn’t have to be money (and can include drugs or alcohol)
 - Can be to satisfy a debt
- Involves Force, Fraud, Coercion; OR
 - If a minor is being used in prostitution, it is automatically sex trafficking










JURISDICTION ON RESERVATIONS

- Who can investigate and make arrests for sex trafficking crimes on Indian reservations?
- Who can prosecute sex trafficking crimes on Indian reservations?

PROSECUTORIAL JURISDICTION

Jurisdiction for crimes committed in Indian Country

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	 Indian	 Non-Indian	 Victimless crime (such as prostitution, illicit drug use)				
							
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* For the first time, this year some tribes are allowed to prosecute certain crimes of domestic violence committed by non-Indians in Indian Country.

Source: Federal law enforcement officials

PUBLIC LAW 280 EXCEPTIONS

Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin are “mandatory” PL 280 states, meaning the federal government:

- extended state criminal jurisdiction and the application of state criminal laws onto Indian reservations in those states and
- eliminated special federal criminal jurisdiction over reservation areas in the affected states

CROSS-JURISDICTIONAL AGREEMENT?

Whereas, the Tribes have contracted with the United States to provide law enforcement services on the reservation pursuant to 25 U.S.C. § 450-450n, and

Whereas, the parties wish to establish a mechanism whereby citation and arrest authority of the Tribes over Indians on the reservation is extended to commissioned law enforcement officials of the State of Montana, Roosevelt County, Poplar and Wolf Point, and citation and arrest authority of the State of Montana Highway Patrol, Roosevelt County, Poplar, and Wolf Point over non-Indians on the Reservation is extended to commissioned officers of the Tribes,

LAWS THAT CONTROL SEX TRAFFICKING

- Federal
 - Trafficking Victims Protection Act
 - 18 USC 1591 (reauthorized 2015)
- State
 - Montana House Bill 89 (enacted 2015)
 - S.D. Codified Laws §22-49-1 (2016)
- Tribal
 - Fort Peck Tribes, 7 CCOJ 214-218
 - MHA Nation, “Loren’s Law”
 - Snoqualmie Tribe, SNOQ. TRIBAL CODE § 7.21
 - Oglala Sioux Tribe, Oglala Sioux TR. Code Ch. 7, § 701-515 (2015).

LEGAL DEFINITIONS OF SEX TRAFFICKING

- Force
- Fraud
- Coercion
- Victim
- Commercial Sexual Activity

TRAFFICKING LAWS

- Federal definition of human trafficking: “Trafficking in persons” and “human trafficking” are umbrella terms for the act of “recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion.”
- State laws mirror cumbersome federal definition or the National Conference of State Legislatures’ model legislation

FEDERAL LAW, 18 USC 1591

- Victims of Trafficking and Violence Protection Act of 2000 (TVPA)
 - Sex Trafficking: The recruitment, enticing, harboring, transportation, provision, advertises, maintains, obtaining, or soliciting of a person for the purpose of a commercial sex act
 - Commercial Sex Act: Any sex act on account of which anything of value is given to or received by any person
 - Severe Forms of Trafficking: Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age
- No force, fraud, or coercion required if the victim is under the age of 18
- Jurisdiction = Indian Country

NOTE ON FEDERAL ARREST AUTHORITY

- Jurisdictional element of TVPA
 - “in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States”
- TVPA always applies to cases of trafficking in Indian Country (on reservations) because it is a “territorial jurisdiction of the United States”
- Federal officers may also make arrests for violations of the TVPA off-Reservation
 - Need only have probable cause that the crime is “economic in nature”
 - U.S. v. Walls (9th Cir., 2015)
 - Gonzales v. Raich 545 U.S. 1 (2005)

FORT PECK CODE OF JUSTICE

7 CCOJ 214-218

- Criminalizes the act of sex trafficking on Fort Peck
- Broadens definition of sex trafficking beyond the physical crimes of kidnapping and slavery to include exploitive and psychological controlling by the trafficker
- Provides for civil forfeiture of \$ gained from trafficking
- Creates an unlimited statute of limitations for victims who were trafficked while under 18 years old
- Not a defense that a trafficker or buyer lacked knowledge that the victim was under 18 years old

FORT PECK CODE OF JUSTICE

7 CCOJ 214-218

- I have full text copies; also available at <http://www.fptc.org/ccoj/ccoj.html>
- Creates consistency of law enforcement efforts
 - Mirrors Federal and State sex trafficking laws, with same elements of crime
- Safeguards victims
 - 7 CCOJ 216 removes criminal liability for person being trafficked (the victim) and provides immunity from prosecution for non-violent crimes committed while a victim of trafficking
- Promotes best practices for law enforcement
 - arrest the john
 - investigate/arrest trafficker
 - call victim services for victim – no arrest

THE IMPORTANCE OF CROSS-JURISDICTIONAL COLLABORATION

- Information-sharing is critical
 - when working within the Indian Country “jurisdictional maze”
 - because sex trafficking cases often cross reservation, county, and state lines
 - different pieces of sex trafficking operations occur in different places (i.e., the sexual encounter is at a motel on the Reservation while the drug/sex trafficking cartel is run from another city)
- If it looks like an isolated incident of voluntary prostitution, where does victim come from? Where do others involve come from?
 - contact law enforcement from other potentially involved jurisdictions

VICTIM SENSITIVITY

- Victims often do not self-identify
- Victims will become resistant to cooperating with investigation and prosecution if they are treated as potential suspects
 - Victims (even minors) very often have had prior negative interactions with law enforcement and/or criminal records, which will affect their reaction to police (and your reaction to them)
- Language issues

BASIC VICTIM NEEDS

- Immediate needs
 - Food, Sleep
- Longer term needs
 - Safe and secure housing for victim and family members
 - Medical and mental health care (and culturally grounded healing)
 - Job assistance

WHAT IS YOUR ROLE?

- What is your role as a victim advocate or counselor?
- What is your role as law enforcement?
- What is your role as a medical professional?

CASE EXAMPLE #1

- You are a law enforcement officer. Janeese is a 16 year old girl living in Poplar. Her mom sometimes lives with her and sometimes she is on her own or with friends. Janeese's teacher has noticed that she has not been coming to school much lately and mentions this to you. A few days later, you get a noise complaint for a 2 a.m. party at the local motel, and the night manager says that railroad workers have been in and out all night. When you arrive, you see Janeese. She doesn't work there, and you've never seen her there before. She is with an older guy you do not know. She doesn't want to talk to you. Do you intervene? If so, how?

BEST PRACTICES

- Talk to Janeese privately in a neutral and safe space
- Immediately involve a victim advocate
- Ask if Janeese is in need of medical attention and be sure any other immediate needs are met
- Avoid treating Janeese as a suspect, avoid judgmental or disrespectful language. Avoid interrogation
- Keep in mind that people close to Janeese, such as family members, may also be involved

CASE EXAMPLE #2

- You are a victim's advocate and therapist. Jordan and Caroline are two local kids on the reservation. Jordan is 17 and Caroline is 18. They are best friends. They went missing a few weeks ago. Caroline's mother is one of your victim's services clients, and she tells you that she heard from a friend that they were last seen talking at the gas station with some outsider men. Neither Jordan or Caroline has been seen for a week.
- A few days later, Jordan is back, but not Caroline. You see Jordan walking in town. Jordan has a bruise on her cheek. How, if at all, do you intervene?

BEST PRACTICES

- Talk to Jordan privately; avoid judgmental language or interrogation. Keep your conversations confidential, and make sure she is aware of her right to confidentiality.
- Ask Jordan if she is in need of medical or other emergency attention.
- Be wary of possible peer power dynamics – Jordan may be trying to protect Caroline, or to avoid implicating others in her situation.
- Find out information about Jordan's support network, where she is staying, and if she has access to basic needs.
- Contact other jurisdictions' law enforcement
- Consider approach to inter-generational trauma issues

CASE EXAMPLE #3

- Casey is a 15 year old boy who has been arrested multiple times for possession of methamphetamine and underage consumption of alcohol. One night, you hear a commotion in the park and see Casey fighting with an older man. You go to see what is going on and discover empty beer cans around the park. Casey appears under the influence of drugs. You do not know the man with Casey, but the he is drunk and his pants are unzipped and clothes askew. What, if anything, do you do?

LAW ENFORCEMENT RESOURCES

- E-Guide for Human Trafficking Task Forces
<https://www.ovcttac.gov/taskforceguide/eguide/>
- International Association of Chiefs of Police
<http://www.iacp.org/childtrafficking>
 - (Law Enforcement Officers can sign up on this website to request toolkit which includes training videos- <https://leim.wufoo.com/forms/mdhw8y41iwc2h/>)
- National Human Trafficking Resource Center
<http://traffickingresourcecenter.org> 1-888-373-7888
- Community Oriented Policing Services Flyer
<http://www.cops.usdoj.gov/pdf/2014AwardDocs/CTAS/COPS-Tribal-TTA-Flyer-FY-2015.pdf>
- U.S. Department of Health and Human Services
<http://www.acf.hhs.gov/programs/endtrafficking>

VICTIM ADVOCACY RESOURCES

- Report trafficking or seek services confidentially 24/7
 - National Human Trafficking Resource Center 1 (888) 373-7888
- Can always report trafficking or an emergency to 911
- Tribal Law and Policy Institute “Sex Trafficking Resources for Sexual Assault and Domestic Violence Tribal Coalitions”
 - <http://www.tribalcoalitions.org/>