

Child Victimization on South Dakota Indian Reservations: An Overview of Jurisdictional Policy

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ABSTRACT

Recent studies indicate that sex offenses are one of the fastest growing crimes handled in United States Federal courts. In 2006, nearly one-quarter of all criminal cases adjudicated in the Federal District of South Dakota involved sexual abuse. The majority of the victims in those cases were Native American children living on Indian reservations. Factors contributing to the overrepresentation of American Indian children from South Dakota reservations as sexual abuse victims are explored in depth.

This paper also describes the jurisdictional issues between individual tribal governments, the Federal government, and the state of South Dakota when dealing with the investigation and prosecution of child sexual abuse cases. The paper concludes with suggestions for policy improvement in investigation and prosecution of child sexual abuse on South Dakota reservations.

INTRODUCTION

Offenses against children are viewed in U.S. society as the most heinous of all crimes. An especially dim view is taken toward the sexual and physical victimization of children. The U.S. Department of Health and Human Services (2006) reported the victimization rate (physical, sexual, and emotional abuse as well as neglect) for American Indian children to be 15.9 per 1,000 American Indian children. This compares with 10.7 out of 1,000 Caucasian children becoming victims of abuse and/or neglect. When compared to non-Indian children, American Indian children are at especially high risk for abuse and/or neglect.

The issue of jurisdiction on Indian reservations is at the heart of child abuse investigations and prosecutions. Frequently there is confusion as to which governmental entity is in charge of the investigation and prosecution, which can lead to two major concerns. The first is that tribal, county, state, and federal agencies will all become involved, leading to turf wars and harmful repeated interviewing of the child victim. The second concern is when a referral of child abuse is made to a governmental agency that does not have jurisdiction and the matter is not passed on to the appropriate authorities. Thus, the possible abuse case falls through the cracks and is not investigated at all. Therefore, child abuse referrals on reservations are particularly susceptible to both over-investigation and under-investigation due to jurisdictional ambiguity.

JURISDICTIONAL ISSUES

When it comes to investigating and prosecuting offenses against children, the Federal government may become responsible, depending on the where the offense was committed, what type of offense was perpetrated, and the race of the victim and the perpetrator. Sex offenses have become one of the fastest growing crimes handled by investigators, prosecutors, and courts in the Federal criminal justice system. To illustrate this point, the Federal Bureau of Investigation (FBI) reported 1,658 investigations and 537 arrests in matters involving child sexual abuse between 2003 and 2006. During this same time period, the FBI investigated 134 allegations of child physical abuse and made 39 arrests. The physical and sexual abuse of children constituted 30% of all FBI investigations in Indian Country during this time frame (FBI Congressional Testimony, 2006).

Indian Country is defined in 18 U.S.C. Section 1151 as:

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

According to 2007 estimates from the United States Census, American Indians are the largest minority in South Dakota, comprising 8.3% of the state's population. In actual numbers, there are 67,941 American Indians living in South Dakota, a state whose population is 796,214. It is difficult to obtain an actual count of American Indians living on South Dakota reservations. According to the South Dakota Tribal Government Relations Office (2004), 94,036 enrolled tribal members live on reservations in South Dakota. This figure does not take into account the Native Americans living on reservations that are not enrolled members.

Many Native American individuals and families periodically move on and off the reservation. Factors pushing them away from the reservation are employment and education opportunities in more urban areas. They tend to be pulled back to their home reservation due to strong family ties

and lack of emotional support off the reservation. Tracking the American Indian population is further complicated when an individual or family has ties to more than one reservation as this increases the likelihood of moving off one reservation to another and/or moving to non-reservation areas. These push/pull factors are strong and contribute to the frequent relocation of Native Americans to and from reservation and non-reservation areas.

Federal, state, and individual tribal governments have jurisdiction within the borders of South Dakota Indian reservations. Although tribally-owned land is scattered throughout the state of South Dakota, nine actual reservations exist in the state: Cheyenne River Reservation, Pine Ridge Reservation, Rosebud Reservation, Lower Brule Reservation, Crow Creek Reservation, Yankton Reservation, Lake Traverse Reservation, Flandreau-Santee Reservation, and Standing Rock Reservation. It is noted that lands from the Lake Traverse Reservation and the Standing Rock Reservation extend into North Dakota. Each of these reservations has its own tribal government and acts independently of the other tribes.

Legal jurisdiction on reservation land is an extremely complex issue. Many of the law enforcement professionals in these communities are not entirely clear on which government agency retains jurisdiction. The Major Crimes Act sets forth Federal jurisdiction for “16 major criminal offenses (including child sexual abuse) if the crime was allegedly committed by an Indian defendant” (Office for Victims of Crime, 1999). A crime committed on reservation land can be investigated by tribal law enforcement, state law enforcement, and federal law enforcement. Police departments on the reservation are most commonly operated by either the Bureau of Indian Affairs (BIA) or by the tribe’s own police force under what is known as a 638 contract. A 638 contract allows for an individual tribe to contract with BIA Law Enforcement Services. (U.S. Department of Justice, 2001).

In addition to the involvement of multiple investigative agencies, crimes can be prosecuted in tribal court and then also be tried in either state or federal court. This does not constitute double jeopardy according to *U.S. v. Wheeler* (1978).¹

¹ The U.S. Supreme Court ruled in *U.S. v. Wheeler*, 435 U.S. 313 (1978) that when an Indian tribe criminally punishes a tribe member for violating Tribal law, the tribe acts as an independent sovereign and not as an arm of the

Race is also an important deciding factor in determining criminal jurisdiction. Tribal courts do not have jurisdiction over non-Indians, per *Oliphant v. Suquamish Indian Tribe* (1978).² Thus, when an offense is committed on reservation land by a non-Indian, the State or Federal government have jurisdiction. Tribal courts do, however, retain civil jurisdiction over non-Indians for circumstances such as failure to comply with a court order (Office for Victims of Crime, 1999). An Indian who commits a crime on non-reservation land is subject to State or Federal jurisdiction, depending upon the nature and circumstances of the crime. Therefore, an American Indian who commits an aggravated assault on non-reservation land is subject to the penalties of that state. An Indian who perpetrates a crime on reservation land is subject to both tribal and Federal prosecution. To further complicate matters, Public Law 83-280 allows for transfer of Federal criminal prosecution in Indian Country to the State. In South Dakota, however, the Federal government retains jurisdiction for felonies committed by Indians on the reservations.

According to the U.S. Department of Justice (2006), four Federal judicial districts handled 58%, or nearly 3 out of 5, sex abuse cases opened by U.S. Attorneys Offices from 2004-2006. Those districts were: Montana (5%); New Mexico (14%); Arizona (18%); and South Dakota (21%). In South Dakota alone, 37 defendants were arraigned in Federal Court for sexual abuse charges in 2006. Of those 37 defendants, nearly 92% were of American Indian heritage.

RISK FACTORS FOR ABUSE

There are several risk factors within the family and the environment that predispose children to physical and sexual abuse. American Indian families living on reservations tend to experience a high number and greater degree of these risk factors. Poverty plays a very important role in abusive families. In its American Community Survey: American Indians and Alaska Natives, the U.S. Census Bureau (2004) cites 31% of Native American children under the age of 18 are in poverty, compared to 11% of non-Hispanic white children. A lack of necessities, such as food,

Federal government, and since Tribal and Federal prosecutions are brought by separate sovereigns, they are not “for the same offense” and the Double Jeopardy Clause thus does not bar one when the other has occurred.

² In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Supreme Court ruled that criminal jurisdiction over non-Indians rests solely with the Federal government.

clothing, and shelter, causes a great deal of stress on parents and caretakers. Shannon County, which is completely encompassed by the Pine Ridge Reservation, was once cited as the poorest area in the United States (Kilborn, 1997). The U.S. Census Bureau (2007) found that 47.4% of the population in Shannon County was in poverty. South Dakotans in poverty comprised 13.2% of the population. When looking at the nation in its totality, 12.7% of United States citizens were in poverty. Therefore, the percentage of people in Shannon County who were in poverty was nearly three times the state rate and nearly four times the national rate.

Poor living conditions can add to the overall stress on a family. It has been said that going onto a reservation can be like going back in time when comparing the plumbing, heating, and sanitation between reservation and non-reservation households. The U.S. Census Bureau (1995) noted that in 1990, 10.6% of households on the Cheyenne River Indian Reservation did not have complete plumbing facilities in the home, while the average for the United States as a whole was 1%. The lack of plumbing facilities for the United States had not comprised 10% of the households since the 1960 Census. It was also found that 26.2% of households on this reservation did not have a motor vehicle. Further, 8.7% of households on the Cheyenne River reservation were without complete kitchen facilities. Conditions in this county and other reservation counties are similar to those found in some Third World countries.

Unemployment is another stressor on families. An unemployed parent is more likely to suffer from low self-esteem, depression, and anxiety (Crosson-Tower). In Shannon County, 48.8% of the residents age 16 and over are unemployed. This compares with the state unemployment average of 30.4% and the national unemployment average of 35.3% (U.S. Census Bureau, 2007). On many reservations, the only industry is the tribally-owned casino. If one wants to remain on the reservation with family and friends, then it is often at the expense of finding employment. If one leaves the reservation to seek employment, family and friends may elect to remain on the reservation.

Isolation, both social and geographical, is an important risk factor in abusive families. While social isolation can occur in the midst of a large city, geographical isolation is especially predominant on Indian reservations in South Dakota. Many reservation inhabitants live in

remote, rural areas in which the closest neighbor lives several miles away. Others on the reservation live in small communities which are isolated from the rest of society. Kemp (1998) concluded that abusive families tend to withdraw from social activities, lack positive support networks, and are more isolated.

Substance abuse is a primary risk factor for physical and sexual victimization of children. Hayes and Emshoff (1993) discussed the comorbidity of substance abuse and family violence, linking over half of child abuse and neglect cases directly to substance abuse within the family. Parents who abuse substances are ineffective caretakers in that they can be apathetic, euphoric, drowsy, or neglectful of their children (Crosson-Tower, 2008). An estimated 14 million people, or 6.0% of the U.S. population aged 12 and over, are active drug users (National Household Survey on Drug Abuse, 2001). The World Health Organization (2009) found that Americans age 15 and older consumed an average of 8.6 liters of alcohol per person in 2003. American Indians have a high rate of chemical dependency. Research compiled by Indian Health Service (2001) revealed that American Indians and Alaska Natives had a 638% greater chance of dying from alcoholism than all other races combined. The National Survey on Drug Use and Health (2007) found that American Indians and Alaska Natives were more likely than members of other racial groups to have a past year alcohol disorder and a past year illicit drug use disorder. In a study conducted by the U.S. Department of Health and Human Services (2003), the prior month's alcohol and drug use were reported by individuals of various races/ethnicities who were age 12 and over. Of those studied, 6.1% of non-Hispanic whites indicated they had used an illicit substance within the past month. American Indians/Alaska Natives were about a third more likely to report the same (9.3%). Participants were also questioned about heavy alcohol consumption in the past month. Heavy alcohol consumption was defined as five or more drinks on the same occasion on at least 5 or more days in the month prior to the assessment. In response to this question, 6.0% of whites indicated they engaged in heavy alcohol consumption, while 13.7% of American Indians/Alaska Natives did so. Native Americans/Alaska Natives were over twice as likely as non-Hispanic whites to engage in excessive drinking. When a parent is under the influence they provide less child supervision, which can result in physical and/or sexual abuse of that child by other family members, acquaintances, or strangers. An unattended child is a prime victim for familial and non-familial perpetrators.

Family structure also plays an important role in families in which abuse occurs. Research suggests that families headed by a single parent are more likely to have children victimized by sexual abuse than children from two-parent families (Crosson-Tower, 2008). This is most likely due to the fact that, at least theoretically, one parent cannot supervise a child as well as two parents. Crosson-Tower (2008) describes Native American families as giving their children many freedoms on the reservation because they do not believe any danger will befall the child. Less supervision tends to mean more opportunities for people to physically or sexually assault the child. The National Survey on Drug Use and Health (2004) revealed that 33.8% of American Indian and Alaska Native youths in the sample did not have curfews or limits on the amount of time they could spend with friends on school nights.

One parent may be under a greater deal of stress, economically and socially, than if two adults were sharing parenting responsibilities within the home. Families in which there is marital discord, such as constant arguing and even domestic violence, tend to have higher rates of abused children (Crosson-Tower). Another family structure issue deals with step-father or non-paternal male presence in the home. When an adult male lives in the home with children that are not his biologically, the likelihood of abuse increases dramatically. There is less of a social barrier for a man to physically or sexually abuse a step-child or the child of a girlfriend. Another family structure indicator of sexual abuse of children is if the mother was sexually abused. Research shows that children who were victims of incest tend to have mothers who were also sexually victimized as either in childhood or as an adult (Crosson-Tower, 2008; Bolen, 2001).

FACTORS THAT IMPEDE THE INVESTIGATION

Investigation becomes extremely complicated when dealing with child abuse on Indian reservations. Due to the complex jurisdictional issues on reservations, abuse victims may be interviewed by tribal, state, local, and federal officials. Not only can multiple interviews cause emotional trauma to the child, but the information received from the child may become distorted after repeated questioning (Winton & Mara, 2001). This is especially true if the interviewers are not properly trained in child victimization issues and interviewing techniques. The opposite problem occurs when the abuse referral is made to an agency which does not have jurisdiction

and that agency fails to pass the information on to the proper authorities. Thus, the child victim is not interviewed by any agency and the case essentially falls through the cracks.

Indian reservations in South Dakota are in remote areas of the state. Therefore, a social worker or law enforcement officer may spend the better part of one day traveling to the home of the child, interviewing the victim, suspected perpetrator, and others involved in the case, and then returning back to the investigator's office. Further, helping agencies such as social services and law enforcement are notoriously understaffed on reservations. There is a high turnover in employment, as newly hired social workers and law enforcement officers that are not from the reservation area tend to transfer to a less remote area as soon as the opportunity arises. As Matthew J. Hickman noted in a January 2003 Bureau of Justice Fact Sheet, the Cheyenne River Tribal Police Department had 53 full-time sworn personnel, but this averaged out to only five officers per 1,000 residents. The Cheyenne River Reservation is comprised of 4,260 square miles, which averages out to 1 full-time sworn officer per 100 square miles. Social service agencies have the same territory to cover, but typically employ fewer than ten full-time social workers. Obviously, social services and law enforcement are stretched very thin and cannot investigate each and every claim of child abuse and neglect. Unfortunately, when issues such as under-staffing and long distances arise, only the more serious cases are investigated on reservations.

Law enforcement officers and social workers frequently take abused children to forensic interviews, medical examinations, and psychological treatment. In South Dakota, these services primarily exist in the larger cities of Sioux Falls, which is located in the southeastern part of the state, and Rapid City, which is located along the western border. A child from the Cheyenne River Reservation may have to travel nearly 400 miles for one roundtrip appointment to meet with medical/psychological practitioners. For some children, the extent of their physical injuries and/or the difficulty in obtaining specific details in an interview may necessitate multiple appointments with these specialists. Hence, some children will repeatedly travel long distances for potentially traumatic physical and psychological testing and treatment.

Child abuse may not be disclosed due to closed family structures and/or a distrust of government officials. Closed family structures may reinforce the norm of taking care of its own problems without outside intervention. There may be a rule, spoken or implied, in the household discouraging one from hanging out the family's dirty laundry. Further, the family may not believe the child or they discourage the child from reporting the abuse due to possible family disruption (Crosson-Tower, 2008). Distrust of social services and law enforcement officers may stem from the less than positive relationships between Indian tribes and various branches of government that have existed for over two hundred years. This is especially true when the social workers and law enforcement officers work for non-tribal agencies such as the FBI or the state Department of Social Services. They may be viewed as outsiders trying to interfere where they do not belong.

POLICY RECOMMENDATIONS

In order to ensure that child abuse referrals are being effectively investigated on reservations, a number of policy recommendations are made. First, a protocol for investigation should be developed. That is, a memorandum of understanding between Federal, State, Local, and each individual Tribal government would ensure that all parties know when they are to investigate a child abuse referral. Further, if an agency who does not have jurisdiction receives the referral, there should be a protocol regarding which agency should receive the information. The referral should be passed on from one agency to the next, as there is no guarantee that a person who makes a referral to the wrong agency will take the initiative to report it to the correct one. Perhaps a clearinghouse for referrals could be established. This would allow all agencies to know of suspected child abuse on the reservation, even when it is not their jurisdiction. The goal is to have child abuse cases adequately investigated but not repeatedly by multiple agencies.

Second, the formation or improvement of Multidisciplinary Teams would facilitate communication between various agency professionals such as social workers, various branches of law enforcement, school counselors, probation/parole officers, abuse shelter staff, prosecutors, judges, and others. Multidisciplinary Teams that meet on a weekly basis could effectively share information about child abuse referrals, ongoing investigations and prosecutions, prevention of

abuse, status updates on victims, etc. It would be less likely for a child abuse referral to fall through the cracks if several people from many different agencies were aware of the matter.

Third, advanced training is a must for all social workers, law enforcement officers, and prosecutors who handle child abuse cases on the reservation. This training would involve issues such as awareness of Indian culture, services available for victims, and interviewing of child victims. Since the federal government has the greatest resources, perhaps they could sponsor the trainings and invite other agencies (federal, state, local, and tribal) to participate. Joint training would ensure that all of the helping agencies are receiving the same information.

Fourth, child abuse cases on reservations should be made a high priority. Frequently, FBI agents assigned to work on reservations are anxious to move to an urban area to investigate more high-profile, career-building cases. If agents receive accolades for investigating physical and sexual abuse cases on the reservation, then the agents may be more likely to remain in the area. High turnover of agents results in a constant training of new people to handle the investigations. Hiring more tribal, state, local, and federal law enforcement officers, as well as social workers, would be another way of making child abuse cases a high priority. When there are not enough people to adequately investigate the number of referrals, some child abuse cases are neglected. Further, the professionals assigned to these cases tend to “burn out” when constantly overloaded with more child abuse investigations than they can reasonably handle.

Finally, community policing strategies can be used to gather more information on suspected child abuse cases. This can be accomplished by assigning officers to specific areas and encouraging them to become familiar with the residents and build a rapport with them. Further, the officers can solicit information about child abuse, as well as other law violations, during casual conversations with neighborhood residents. An individual may be reluctant to go to a police station to report an abuse incident; however, they may feel comfortable enough to talk to an officer who frequently comes by the home informally to talk about a variety of topics.

CONCLUSION

Abuse of children is a societal problem which demands attention, action, and reevaluation of existing investigative and prosecutorial protocols. The most need for modification of current

child abuse protocols seems to be on American Indian reservations. Jurisdictional confusion allows child physical and sexual abuse allegations to be investigated by multiple agencies, resulting in trauma to the child due to repeated interviewing. This jurisdictional confusion also has the opposite effect, which is no agency handles the abuse referral because each party thinks another agency has jurisdiction.

A number of professionals are involved in the investigation and/or prosecution of child abuses. They are law enforcement officers, social workers, prosecutors, judges, probation/parole officers, school counselors, chemical dependency treatment staff, juvenile residential home staff, medical personnel, and others. By following the policy recommendations above, those involved in child abuse cases can ensure that child abuse referrals on reservation areas are being investigated and prosecuted in the most efficient manner with the least amount of trauma to the victim.

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