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An Alternative to Prosecution: Victim Offender Mediation

Restorative justice mechanisms are increasingly being studied and utilized as a cost-effective alternative to the criminal justice system. It has been demonstrated to benefit victims, offenders, and the community. Following the lead of the United Nations Office on Drugs and Crime’s (UNODC) Basic Principles of Restorative Justice, the International Association of Prosecutors (IAP) and the Public Prosecution Service of the Republic of Korea are currently preparing the final draft for a set of global guidelines to give prosecution services worldwide a benchmark for implementing mediation mechanisms.

The Public Prosecution Service in South Korea introduced Victim Offender Mediation (VOM) in 2006 and introduced the nationwide implementation of VOM in 2007. The driving force was to secure a better resolution of disputes between victims and offenders involved in the many private complaint cases received by law enforcement and, in addition, to find a better and more cost-effective way of disposing of smaller cases that would otherwise take up limited resources in the prosecutorial and court system. Fraud and embezzlement cases provide an example of the effectiveness of VOM. In 2006, 80 percent of all such cases were initiated by private criminal complaints, but only 20 percent of them resulted in indictments. Within a short period of time after VOM’s introduction, the prosecution system found it a more efficient response to the complainants by providing restitution to the victim, a means of reconciliation between the parties involved, and an actual resolution to the dispute. Simultaneously, the court system was relieved of the resource-heavy burden of handling the cases.

The Korean VOM was organized as a real alternative to the court procedure and not as a supplement. Cases can be referred to mediation by request of the parties and can be referred ex officio. In all cases, consent of the parties is required. When referred, the case is handled by a VOM committee, consisting of a minimum two individuals. In Korea, this committee was originally placed under the district prosecutor’s office, but, since 2009, it has
been organized as an affiliated, yet separate, entity. In 2010, the revision of the Crime Victim Protection Act provided the current statutory foundation for the VOM arrangement. Chapter 6 of the revised Crime Victim Protection Act authorized prosecutors to refer smaller cases to the VOM committee when he or she regards the VOM process as appropriate to resolve the complaint, conditioned on the parties’ consent. Since 2010 there has been a number of improvements to the practical organization of VOM – for example allowing “temporary suspension of prosecution,” “on-site mediation,” and “mediation after 6 p.m. or on holidays.” As of 2016, 5.5 percent of the total number of cases (111,349 out of 2,024,545) handled by the district prosecutors’ offices have been referred to VOM. Of those, 60 percent has achieved settlement. External estimates suggest that approximately $2.4 million was invested yearly to manage the VOM system while $110 million was recovered for the victims.

The following case illustrates a typical case referred to the VOM: When A crossed the mid-line of a road to turn left, A crashed into B’s truck, injuring B and fellow passengers C & D. Those injured required 10 weeks of medical treatment. A blamed the road signs for the accident, saying that the signs obscured his vision. The victims brought evidence of their damages. With consent, the case was submitted to the Mediation Committee. After the case was submitted, mediators visited the site and identified a cause of the accident. A milepost had been placed in such a way as to partially obscure the driver’s sight. While persuading the suspect to compensate the victims, mediators also advised victims to understand that the suspect was only partly to blame. Both sides understood each other and reached a settlement. The mediators also proposed to the relevant authorities to translocate the milepost in question.

There are no estimates of the amount of money saved by referring cases to VOM. However, research carried out in 2015 found that the time saved was significant. The research found, that for financial damage cases, VOM took 35 days versus other formal trial cases which took 120 days to resolve. For physical damage cases, VOM required 20 days in contrast to formal trials, which required 114 days.

**Developing IAP Guidelines**

Since early 2017, the Korean Public Prosecution Service and the IAP have worked on preparing guidelines for other prosecution services that could benefit from similar arrangements. Building on the...
Korean experience, the Basic Principles on the Use of Restorative Justice Programmes (UNODC), the experiences gathered by the Justice Division, UNODC, and input from regional IAP expert members and other jurisdictions globally, a set of draft guidelines has been prepared. A final draft was presented for discussion at a joint IAP/UNODC special session on restorative justice at the IAP Annual Conference in Beijing in September 2017.

On a global scale, victim offender mediation represents a huge potential in handling smaller cases and sometimes combining trial procedures with VOM in more serious cases. Many jurisdictions have yet to implement a form of mediation and many jurisdictions have yet to implement a full scope of mediation. In doing so, it remains important that clear safeguards are installed and that only the right cases are diverted to VOM. The IAP guidelines are designed to propose which cases may be relevant, to ensure a solid process of selecting relevant cases for mediation, to advise on properly organizing VOM, to highlight the necessary procedural safeguards and how to institutionalize them, and, finally, to keep track of what outcomes to expect and aim for.

The IAP draft guidelines recommend using VOM in a range of property crimes and cases, such as defamation, insults, and trespassing, and also suggest using VOM when the offender is a juvenile. But, as the guidelines stipulate, other cases which the referring authority deems relevant for VOM can be referred as well. As mentioned above, indispensable in the process is the free and voluntary consent of the parties to the referral and to the outcome of the mediation. In some cases, diversion to mediation should not take place. For example, when there is insufficient grounds for prosecution, when there is reason to expect obstruction of justice or continued victimization, in some cases of sexual crimes, and, generally, cases of more serious crime that warrant society’s sanction, VOM is not advisable. These thresholds, however, are heavily dependent on the legal and penal culture of the jurisdiction in question.

The guidelines also emphasize the importance of both the use of an effective mediator and safeguarding the rights of the individual parties to the dispute. While, in some jurisdictions, mediation is left to law enforcement officers and prosecutors, the draft IAP guidelines recommend that the mediator(s) is affiliated with, has a good understanding of, and is respected in the community to which the parties are connected. These are important elements to ensure effective reconciliation with a sustainable outcome. At the same time, it is crucial that the mediation process does not become a vehicle for ignoring individual procedural and substantive rights of the parties involved. This is not a serious concern when the conflict is minor and the parties are resourceful. But when cases concern serious crimes, revictimization may be a high risk that requires the institution of formal legal safeguards. Furthermore, when the parties involved are vulnerable or are subject to strong community norms and family structures, active enforcement of due process guarantees may be required. Accordingly, the guidelines require the referring authority to actively ensure that there is evidence to prosecute, that the parties participate in the VOM freely and voluntarily, and that it falls upon the referring authority to follow up on the outcome of the VOM process. Furthermore, it also falls upon the mediator (e.g., the mediation council) to ensure that there is free and voluntary participation and that the individual human rights of the parties involved are respected.

Mediation and the organization of it will look different and must be practiced differently depending on the legal culture and the particular organization of investigation and prosecution. One size does not fit all. Notwithstanding, it is still possible to benchmark practices and principles essential to raising the standard of Victim Offender Mediation in prosecution services. The guidelines will inspire other jurisdictions to design their own particular mediation arrangement to benefit victims and offenders and to improve the efficiency of the criminal justice system. We aim to publish the final IAP guidelines in spring 2018.
The Ethical Duty of Technology Competence: What Does it Mean for You?

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Competent representation, as stated in the American Bar Association (ABA) Model Rule 1.1, has always been a hallmark of a lawyer’s duties. Then, in 2012, the ABA revised Rule 1.1, amending Comment 8 to explain what “competent representation” means. The comment now reads “to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.”

The amendment certainly served as a wake-up call that emphasized the importance of technology in the practice of law today. Since it was adopted, 28 states to date have either adopted the amended comment or otherwise advised attorneys to stay abreast of technology as it relates to the practice of law. Some states have adopted the amendment verbatim, while other states have adopted a modified, and in some cases, less stringent version. For example, the New Hampshire Bar’s comment reads:

ABA comment [8]...requires that a lawyer ‘should keep abreast of...the benefits and risks associated with relevant technology.’ This broad requirement may be read to assume more time and resources than will typically be available to many lawyers. Realistically, a lawyer should keep reasonably abreast of readily determinable benefits and risks associated with applications of technology used by the lawyer, and benefits and risks of technology lawyers similarly situated are using.

Some states have adopted the amendment and gone further. The Delaware Supreme Court created the Commission on Law and Technology to educate both the bench and bar on technology. Additionally, on January 1 of this year, Florida became the first state to require technology training as part of its ongoing continuing legal education (CLE) requirement.

Even if a state bar has not adopted the ABA amendment, it still serves as persuasive authority, and some states have addressed technology competence in later ethics opinions. For example, California issued Formal Opinion 2015-93, which posits that technological competence is an expectation and then goes on to articulate what the parameters of that expectation are.

So what does technical competence entail? The precise skills will vary depending on the lawyer’s area of practice, the case at hand, and the technology involved. For example, if the case involves the potential for production or review of electronically stored information (ESI) (and most civil litigation does in today’s world), the attorney must be competent in handling e-discovery tasks such as implementing preservation procedures, assessing the client’s data systems, identifying relevant ESI custodians, and producing relevant, non-privileged ESI in an appropriate format.

The duty also involves competence in the technology lawyers use in the practice of law and in the technology their clients and client agencies are using, such as computers, tablets, scanners, printers, and copiers, as well as the use of email and electronic or cloud storage of documents. Such competence can extend to software and programming designed specifically for lawyers to streamline the practice of law, such as document review or calendaring software.
Additionally, trial attorneys need to have knowledge of, and familiarity with, technology that can be used in courtrooms.

No state has published a list of technologies that lawyers must master or skills that lawyers must acquire. If there were such a list, it might include email, document management software, and the Microsoft Office Suite, for starters. So, a first step might include an assessment of the technologies the lawyer uses and the technologies relevant to the cases he or she handles, followed by an honest evaluation of the lawyer’s competency in each of those technologies.

Then the lawyer should make a plan. For technologies in which the lawyer’s skills are lacking, technical competence can be gained through education and training. There are many CLE courses, webinars, and trainings available on technology issues, both from a basic level to more advanced subjects. Until that expertise is gained, note that Comment 2 to ABA Model Rule 1.1 provides that an attorney not yet achieving technical competence can partner with one with the required skills and expertise.

The ABA competency amendment and its state counterparts are not asking lawyers to be tech experts or geeks. They are, however, asking lawyers to make efforts to keep abreast of changing technologies and to obtain and use technology in an appropriate way consistent with the needs of their practice and the norms of their legal community.

Endnotes
1 Emphasis added. See https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html
3 https://www.courts.state.nh.us/rules/pcon/pcon-1_1.htm
5 https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html
Who Argues for the States in the U.S. Supreme Court?

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Every once in a while, an attorney general will ask me, “Should attorneys general argue in the U.S. Supreme Court?” I invariably answer that it depends. It depends on the subject matter of the case, how complex the issue is, how much preparation time the argument would require, the attorney general’s background and experience, the size of the attorney general’s office, and whether the office has a solicitor general hired specifically to handle the office’s most important appeals. All in all, it’s a tricky issue.

Less tricky is assessing who has, in fact, been arguing for the states in the Supreme Court. To answer that question, I reviewed the oral arguments presented by states in the three and a half most recent Supreme Court Terms and the oral arguments presented in the 2005 to 2007 Terms. The results were striking, and confirm the increasing prominence of state solicitors general (SG). Here are the results:

Before commenting on these results, let me provide a few words on methodology. I chose these two time periods because each covers enough arguments to be statistically significant; each covers a roughly similar number of arguments; and enough time has elapsed between them to reflect an evolution in attorney general office practice. The 2014-2017 Term time period goes through the oral arguments scheduled for December 2017. (The Court has not issued its argument calendars for January and February 2018.) I used my best judgment in placing arguing attorneys in the various categories. Although reasonable people might disagree with some of my calls, the most noteworthy takeaways from these figures would not be affected by moving a person or two from, say, the Civil AAG or DAG category into the Senior Member of Civil Litigation Unit category.

So what are the main takeaways? Most notably, state solicitors general and their deputies are dominating state advocacy before the Supreme Court. Fully two-thirds of the states’ arguments are now made by them, compared to only one-third a decade ago. And if you exclude arguments by outside counsel to see who within an attorney general’s office is making arguments, SGs and deputy SGs account for more than 75 percent of arguments in recent years (compared to 37 percent in the earlier period).

Solicitors general’s dominance in AG-office arguments should not come as a surprise. Over the past decade, more and more states have recognized the value of solicitor general units and have brought in elite appellate lawyers to head those units. The Justices and bar have taken notice. One observer recently commented: “Gone is the U.S. Solicitor General’s office’s monopoly on government appellate expertise, with a reported 39 states now boasting their own dedicated SG positions to boost the quality of advocacy in the Supreme Court and federal and state courts of appeal, a development that is enticing some of the nation’s top appellate talent with the chance to enter the ring in high-stakes cases.” Justice Scalia stated that “[t]he performance of State solicitors general is particularly fine,” and he expressed the hope that “the formation of that office in the States” will “continue to [be] encourage[d].”

With solicitors general and their deputies handling more and more of the states’ arguments in
the Supreme Court, other state attorneys had to give them up. Who? The answer is everyone else. Let’s start with the attorneys general. No attorney general argued before the Court in the 2014, 2016, and first-half-of-2017 Terms; and only two argued in the 2015 Term. By contrast, eight attorneys general argued in the 2005 to 2007 Terms. While that wasn’t a huge number — two to three a Term — it dwarfs attorneys general current presence behind the lectern.

The opposite end of the AG office organizational chart suffered an even greater reduction in arguments. Assistant attorneys general (AAG; called deputy attorneys general in California) argued 18 cases in the 2005 to 2007 Terms (more than 25 percent of the total), but only 3 cases in the 2014 to 2017 Terms. Again, hardly surprising. When an attorney general’s office creates an appellate unit and staffs it with first-rate appellate lawyers, that unit will inevitably argue cases that more “junior” lawyers in the office otherwise would have argued. And that is especially so when a case reaches the Supreme Court.

In between attorneys general and AAGs are chief deputies and the heads of criminal sections. You will note that chief deputies rarely argue in the Court. As I have written elsewhere, chief deputies “almost invariably have a host of other responsibilities that make it difficult to spend a significant amount of time on the office’s appellate practice. Only a solicitor general has the time and focus to broadly improve the office’s appellate product.” Meanwhile, the heads of criminal sections are arguing only half as many cases today as a decade ago, reflecting the increasing faith AG offices are placing in their solicitor general units.

Finally, a word on outside counsel. AG offices used outside counsel at the same rate — 13 percent of the time — in both periods. In other words, states don’t use them often: just two or three times a Term. Sometimes the state hires outside counsel at the start of the litigation because the case is immensely important and the office believes outside counsel is necessary to ensure the best chance of success. Other times, a state concludes that it needs to retain an experienced Supreme Court advocate to get certiorari granted. Still other times, a case involves an unusual area of law in which few members of the AG office are expert. And then there’s Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017), which presented such a complicated situation that a law school course could be taught on it.³ For all that, outside counsel arguing for a state in the Supreme Court remains the relatively rare exception.

* * * * *

Is the increasing dominance of solicitor general units a positive thing? The consumers (so to speak) of our arguments believe it is. In 2010, as the trend was gaining increasing force, Justice Stevens stated that “I think particularly the states are much better represented now than they were when I first came on the Court.”⁴ And Justice Kagan more recently remarked that “the state attorneys actually are exceptional . . . [N]ow most states have solicitor general offices which have really exceptional, skilled, experienced appellate counsel.”⁵ Well-deserved praise, indeed.

Endnotes

1 See Once Overlooked, State SGs Enjoying Time in the Sun, Law360 (April 14, 2017).
2 Letter from Justice Antonin Scalia to Dan Schweitzer (Nov. 24, 2008) (on file with author).
4 Bryan Garner, Interview with Supreme Court Justice John Paul Stevens, 13 SCRIBES J. LEG. WRITING 41, 45 (2010).
Recent Powers and Duties Decisions

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Arizona—Separation of Powers. The Arizona legislature enacted a statute under which “[a]t the request of one or more members of the legislature, the attorney general shall investigate any ordinance, regulation, order or other official action adopted or taken by the governing body of a county, city or town that the member alleges violates state law or the Constitution of Arizona.” Thus, under the statute, a single legislator, or group of legislators, may ask the attorney general to investigate whether a municipal ordinance violated state law. Once the attorney general investigates, and determines there is a violation the municipality is notified and given an opportunity to correct the violation. If no correction is made, the attorney general “shall file a special action in [the] supreme court to resolve the issue.”

The city of Tucson had an ordinance regarding the destruction of impounded firearms which conflicted with a state law prioritizing resale of those firearms, if possible. A legislator asked the attorney general to investigate, which he did, and, when the Tucson City Council declined to change its ordinance, the attorney general filed suit, as prescribed by the statute. The city challenged the suit as a violation of the separation of powers, among other grounds, alleging that the required actions by the attorney general unconstitutionally infringe on both executive and judicial powers.

The Arizona Supreme Court held that there was no separation of powers issue in the statutory scheme. The court applied a four-part test to analyze the separation of powers claim: (1) the essential nature of the power being exercised; (2) the legislature’s degree of control in the exercise of that power; (3) the legislature’s objective; and (4) the practical consequences of the action. In examining the first factor, the court stated that “interpreting the law . . . and enforcing legislative conditions on appropriations are essentially executive functions.” With regard to the second factor, the court noted that the legislature is not involved other than to request that the attorney general undertake an investigation. According to the court, the attorney general retains his discretion to apply independent judgment when determining whether a municipal action violates state law. Turning to the remaining factors, the court held that the statute’s purpose was not to usurp executive or judicial authority, but to encourage compliance with state law.
The court distinguished this statutory scheme from “a legislative attempt to direct the exercise of prosecutorial discretion in a criminal case or civil enforcement action.” The attorney general's determination that the municipal ordinance violates state law and the filing of a special action in the Supreme Court, as required by the statute, does not infringe on judicial power. “Rather, such determinations are legal opinions, which the Attorney General routinely and permissibly issues in other contexts.” The judiciary is the final arbiter of the issue. The court then held that the ordinance did, in fact, violate state law. State ex rel. Brnovich v. City of Tucson, 771 Ariz. Adv. Rep. 17 (Ariz. Aug. 17, 2017)

Illinois—Attorney General's Prosecutorial Discretion Affirmed. An inmate in an Illinois prison alleged that corrections employees had stolen a number of items from him. He filed a prison grievance and requested several times that the attorney general investigate the alleged thefts. The attorney general declined, and the inmate filed a mandamus action to compel the attorney general to investigate. In the course of upholding the trial court's dismissal of the mandamus action, the appellate court discussed the attorney general's discretion in performing her duties.

The Illinois Attorney General Act states that the duties of the attorney general, among others, “shall be” to investigate and prosecute alleged violations of the statutes which the attorney general has a duty to enforce. The inmate claimed that this statute made the attorney general's investigation and prosecution of his case a ministerial, mandatory duty. The court described the three elements of the test for mandamus relief: 1) plaintiff has clear right to the relief requested; 2) public officer has a clear duty to act; 3) public officer has clear authority to comply with a court order granting mandamus relief. In this case, the plaintiff failed to plead sufficient facts to satisfy the first part of the test because the Illinois attorney general does not represent private individuals, but rather the interests of all of the people of the state as a whole. He also failed to plead sufficient facts to satisfy the second part of the test because Illinois case law “establishes that the Attorney General’s duty to investigate and prosecute criminal offenses is discretionary in nature, regardless of the word “shall” in the Attorney General Act.” The court stated, “Rather than being a mandatory obligation, such matters belong to the discretion of the Attorney General to determine which complaints, out of the volume of complaints that the Attorney General receives each year, should be investigated and/or prosecuted.” LaBoy v. Madigan, 2017 IL App (3d) 150580-U (III. App. June 30, 2017).

Mississippi—Attorney General Disqualification. Plaintiff, the mother of a child profoundly injured by medical malpractice, challenged the actions of several trial judges in Mississippi Chancery Court in connection with the conservatorship and trusteeship of her daughter. One of the judges was found guilty of obstruction of justice and served time in prison; the other was reprimanded, fined, and suspended from the bench. The plaintiff then sought damages from, among other parties, the judges, alleging misappropriation of funds, malpractice, civil rights violations, breach of contract, breach of fiduciary duties, and negligence. The plaintiff also sought to disqualify the attorney general from defending the judges, arguing that, after the lawsuit had been filed, the attorney general should have referred the complaint to the proper state agency and opened a criminal investigation. She also argued that, because the attorney general works closely with the U.S. Attorney's Office and because that office was involved in the prosecution of the judge, there was a disqualifying conflict of interest. The trial court dismissed her claims on grounds that the judges were immune from suit and declined to disqualify the attorney general because she had no reasonable expectation of representation by the attorney general. She appealed to the state Supreme Court.

The appellate court held that the representation of the judges was within the attorney general's authority under Mississippi law. The court also held that prosecution of cases is solely in the name of the state, and the plaintiff could not, therefore, be a client of the attorney general. Because there was no conflict of interest, the attorney general was not disqualified. Newsome v. Shoemake, 2017 Miss. LEXIS 367 (Miss. Sept. 7, 2017).

Nevada—Bar Admission for Assistant Attorneys General: Nevada Bar rules require that attorneys practicing in Nevada be admitted to the state bar. An exception is made for attorneys employed in the Nevada Attorney General's Office. The applicable rule provides, “an attorney who is admitted to practice law in any other jurisdiction, and who becomes employed by the Nevada Attorney General, may be certified to practice before all courts of this state subject to the conditions of this rule . . . .” Another section of the rule states, “In no event shall certification to practice under this rule remain in effect longer than 2 years.” Several lawyers employed by the Nevada attorney general were told by Nevada Bar employees that they could renew the limited practice certification indefinitely. The state bar moved to revoke their licenses, and the attorneys sought a writ of mandamus from the
state supreme court, which was granted. The Nevada Supreme Court found that they had reasonably relied on the representations by the state bar employee and reinstated their licenses, directing them to take the state bar examination at the next opportunity, which at Journal press time was done.

In dissent, three justices argued that the attorneys did not “reasonably” rely on the bar employee’s representation, and the relief should not be granted. The dissenters characterized the information provided by the state bar employee as absurd, noting “this interpretation could result in the absurd situation in which an attorney could practice law in this state indefinitely--perhaps 5, 10, or 20 years or more--without being fully admitted to the bar, as long as he or she remained employed at the Attorney General’s Office and annually renewed his or her certification of limited practice.” The dissent described the limited practice exception for the attorney general’s office as allowing “the attorney general’s office to recruit attorneys from other states without first requiring that those attorneys gain full admittance to the Nevada bar.” Because the attorneys practicing under this rule must do so under the supervision of an active member of the bar, and continued renewal would require an attorney to have that supervision in perpetuity, the dissent did not believe the petitioners’ reliance on the bar employee’s interpretation was reasonable. Office of the Attorney General v. State Bar of Nevada, 2017 Nev. Unpub. LEXIS 369 (Nev. May 17, 2017)

Ohio—Attorney General May Be Sued for First Amendment Violations: Plaintiff law firm sued the Ohio attorney general, as well as employees of the Industrial Commission of Ohio, stating a First Amendment challenge to an Ohio statute on the grounds that it limits the law firm’s practice of advertising to potential workers’ compensation clients through the mail. The attorney general had issued grand jury subpoenas to entities working with the plaintiff law firm, although not to the plaintiff itself. Plaintiff sought a declaratory judgment that O.R.C. § 4123.88, which prohibits solicitation of workers’ compensation claimants for representation, was facially invalid.

After finding that the plaintiffs had standing to sue and had stated a First Amendment claim, the court addressed the attorney general’s argument that he was not a proper party to the case. The attorney general argued that Ohio’s Declaratory Judgment Act requires notice to, but not participation of, the attorney general in this case. The court held,

While this provision does not require the Attorney General’s participation in any lawsuit alleging that a statute is alleged to be unconstitutional, it also does not prohibit inclusion of the Attorney General in the case. Indeed, the Attorney General may properly be named a party to the lawsuit if he has “some connection with the enforcement of the act” and he “threaten[s] and [is] about to commence proceedings” to enforce it.

The court held that the attorney general had a sufficient connection to this case because he has an obligation to enforce the statute at issue, as described in the statute: “Upon the request of the industrial commission or the administrator of workers’ compensation, the attorney general . . . shall institute and prosecute the necessary actions or proceedings for the enforcement of this chapter.” Although the attorney general is not the official responsible for the rules of the Industrial Commission, he is still responsible for enforcing them. The attorney general also argued that he had not issued subpoenas to the plaintiff, but the court held “Grand Jury subpoenas may be and are issued by the Attorney General to witnesses in addition to, and in advance of, subpoenas issued to targets of investigations.” Because “a plaintiff need not wait until a prosecutor initiates adverse action to have standing to sue,” the court held that plaintiff’s claims should not be dismissed. Bevan & Associates v. DeWine, 2017 U.S. Dist. Lexis 92039 (S.D. Ohio, June 15, 2017).
Under the doctrine of “state sovereign immunity,” a state cannot be sued in federal and state court without its consent. Many academics and judges struggle to make sense of modern U.S. Supreme Court jurisprudence on sovereign immunity. While the Eleventh Amendment limits immunity to two specific situations in federal court, the Supreme Court held that immunity derives not from the Amendment, but “from the structure of the original Constitution itself.” Thus, the Court not only has expanded federal court immunity from suit well beyond the Eleventh Amendment’s explicit directives, but also has enshrined state sovereign immunity in state courts. As a result, in its own court, a state can invoke immunity even when sued under an otherwise valid federal law and has full authority to define the scope of their immunity from suits based on its own law. This has prompted the creation of a variety of sovereign immunity regimes among the states.

Section I of this monograph provides a quick overview of the history of state sovereign immunity, which plays a central jurisprudential role both in the current law and in theories that do not hold a majority of the Court. Then Section II walks through Supreme Court law and its application in federal courts, followed by an explanation of the four exceptions to the doctrine in Section III. Lastly, Section IV discusses sovereign immunity in state courts and lays out a handful of elements that most states include as part of their internal sovereign immunity law.

History of State Sovereign Immunity

There is considerable disagreement among legal scholars, and Supreme Court justices, over what legal authority underpins a state’s sovereign immunity. This disagreement has spawned several constitutional theories that try to make sense of the Eleventh Amendment and of precedent attempting the same. While a majority on the Supreme Court seems to have adopted one theory, other theories have dictated in the past and, in any event, every theory relies on history, in particularly the Framers’ understanding of the scope of the doctrine. A short synopsis of that history follows.

Sovereign immunity finds its origins in English common law and the king’s position at the “apex of the feudal pyramid.” In that pyramid, lords could not be sued in their own courts, “not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.” Thus, lords could only be sued in the courts of their superiors, but, for the king, “there was no higher court in which he could be sued.”

While the Constitution did not directly address state sovereign immunity, it certainly was discussed at Constitution ratification debates and, by many accounts, garnered the strong support of prominent Framers, though not all. Nevertheless, its textual absence posed a problem that the Supreme Court confronted shortly after ratification in Chisholm v. Georgia. In a suit brought by a South Carolina citizen against the state of Georgia to recover a Revolutionary War debt, the Court held that sovereign immunity did not protect the state of Georgia when sued by a citizen of another state in federal court. The Court adopted a literal reading of the text of Article III, which extends federal judicial power to “all Cases” involving federal law “in which a State shall be a party” and to “Controversies . . . between a State and Citizens of another State[,]” in finding that the federal courts had jurisdiction to hear the suit.

The decision surprised all and infuriated most, and, within two years, Congress had passed, and the states ratified, the Eleventh Amendment with near unanimity:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In the past two decades, nearly every major opinion on sovereign immunity—majority, concurrence, or dissent—recounts some version of this tale. This repetition only seems justified by the fact that the tale simply doesn’t add up. The decisive
reaction to *Chisholm* and the ringing endorsements from both federalists and antifederalists still cannot be squared with the text of the Eleventh Amendment, so much so that a “‘literal’ interpretation of the Eleventh Amendment has almost no adherents.”19 Ultimately, this history has served as a foundation for the Court’s jurisprudence and helps to explain its atypical approach in this area. That jurisprudence follows in the next section.

**State Sovereign Immunity Doctrine**

Under the doctrine of state sovereign immunity, nonconsenting states are immune from suit unless there was “a surrender of this immunity in the plan of the [Constitutional] convention.”20 To determine whether there was a surrender of immunity in a specific situation, courts examine “history and experience and the established order of things” as well as the “fundamental postulates implicit in the constitutional design.”21 As such, the text of the Amendment is not dispositive,22 a fact that has produced outcomes in apparent conflict with basic canons of statutory interpretation.23 This analysis in recent cases hones in on the impact that a denial of immunity may have on the state’s “dignity”24 and has at times employed Tenth Amendment principles to support this new focus.25

Applying this comprehensive historical test, the Court has held that a nonconsenting state can invoke sovereign immunity in suits brought by its own citizens in federal court;26 brought by anyone in a federal administrative procedure;27 in suits brought by foreign states;28 and in suits brought by private citizens in admiralty.29 Conversely, states cannot invoke sovereign immunity when sued by the federal government in federal court to enforce federal laws;30 by another state in federal court;31 by anyone in another state’s courts;32 in federal court on appeal of a state court conviction alleging a violation of federal law;33 or in a federal Bankruptcy court proceeding.34

If immunity is available, the state must nevertheless assert it, because it “does not automatically destroy original jurisdiction. Rather, [it] grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.”35

While ample uncertainty remains regarding the soundness, let alone the appropriate application, of this jurisprudence, this is but a portion of the Supreme Court’s broader sovereign immunity doctrine. The Court has also enumerated exceptions to the general rule, which follow in the next section.
Exceptions to Eleventh Amendment Immunity

There are four situations in which state sovereign immunity cannot be invoked in federal court. The first three are exceptions to the rule: congressional abrogation, the Ex Parte Young exception, and voluntary waiver. The fourth—when the entity sued is not an “arm of the state”—is less an exception than it is a case where immunity is not applicable in the first place, because the state is technically not being sued.

Congressional Abrogation

Congress has the ability to abrogate sovereign immunity and compel a state to court if two conditions are met. First, Congress must have “unequivocally expressed its intent to abrogate the immunity.”36 That intent is sufficiently clear if it is “obvious from a clear legislative statement[,]”37 which must be more definitive than a “general authorization for suit in [ ] court.”38 In Seminole Tribe, the Court found an unequivocal expression of intent in the Indian Regulatory Gaming Act, through the Act’s strongly-worded jurisdictional clause and the “various provisions” in that Act that reinforced the intent to abrogate sovereign immunity.39

In addition to an unequivocal expression of intent to abrogate, Congress must have acted “pursuant to a valid exercise of power”—that is the relevant statute must have been “passed pursuant to a constitutional provision granting Congress [the] power [to abrogate.]”40 This condition has rarely been satisfied: only twice has the Court found a constitution provision granting the power to abrogate, and only one of those cases is still good law.41 In Fitzpatrick v. Bitzer, the Court held that Section 5 of the Fourteenth Amendment, which gives Congress the “power to enforce [the Amendment], by proper legislation,”42 also gives Congress the power to abrogate sovereign immunity.43 Therefore, a law that enforces, for example, the due process clause or equal protection clauses of the Fourteenth Amendment and clearly expresses the intent to abrogate sovereign immunity will pass constitutional muster.

This exception has additional limitations, because developments in Fourteenth Amendment jurisprudence also curb Fitzpatrick’s applicability. For example, since Fitzpatrick, the Court has held that laws passed pursuant to Section 5 are only valid if “there is congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”44 As such, Congress’s power to abrogate under Section 5 only attaches to statutory sections that specifically remedy “conduct transgressing the Fourteenth Amendment’s substantive provisions.”45 In practice, this means that some causes of action within a specific law may abrogate immunity, while others do not.46

Ex Parte Young Exception

Second, while state officials can generally invoke sovereign immunity when sued in their official capacity,47 they cannot do so in one specific instance. In Ex Parte Young, the Supreme Court held that a private litigant can bring suit against a state officer for prospective injunctive relief in order to end “a continuing violation of federal law.”48 A state official who enforces “an unconstitutional legislative enactment . . . comes into conflict with the superior authority of [the] Constitution,’ and therefore is ‘stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impair to him any immunity from responsibility to the supreme authority of the United States.”49

To determine when Ex Parte Young applies, courts perform a “straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.”50 The Supreme Court has stressed that the focus of the inquiry is the relief sought, not who is bringing the claim.51 While that bar may seem low, courts nevertheless must hesitate to permit an Ex Parte Young action “where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right.”52

Waiver of Sovereign Immunity

Third, states always have the option to voluntarily waive state sovereign immunity. Sovereign immunity is a “personal privilege” that a state may waive “at [its] pleasure,”53 either by state statute (which, in some cases, gives a state official the authority to make the decision), state Constitution, or by acceptance of federal funds through a federal program.

The Supreme Court has created a “stringent” test for determining whether a state has voluntarily waived its Eleventh Amendment immunity, one that “will be strictly construed, in terms of its scope, in favor of the sovereign.”54 A state voluntarily waives
this immunity if the text of the relevant statute “unequivocally express[es]” the state’s intent to do so.\textsuperscript{52} The scope of the waiver will extend no further than what the state unequivocally expresses, whether that expression indicates a waiver only for a particular type of relief sought\textsuperscript{53} or a waiver only in a specific court.\textsuperscript{54} Mere participation in a federal program is not sufficient,\textsuperscript{55} and if generality or ambiguity in the relevant statute gives way to multiple interpretations, “courts will not consider a state to have waived” its immunity.\textsuperscript{56} Notably, while state law may factor in this inquiry, “whether a particular set of state laws, rules, or activities amounts to a waiver of the State’s Eleventh Amendment immunity is a question of federal law, not state law.”\textsuperscript{57}

It is less clear how this stringent test applies when a state effects a waiver through statutorily-permitted “affirmative litigation conduct.”\textsuperscript{58} \textit{Lapides v. Board of Regents} dealt with a case against Georgia filed in Georgia state court alleging violations of both federal and state law. The state by its own admission had waived its immunity from such suits under its own laws in its own courts but the issue of the federal claims remained. The Georgia Attorney General’s Office voluntarily removed the case to federal court seeking to use the advantage of the federal court to benefit the officials sued in their personal capacities and then sought to have the state law claims remanded to the state court. The Supreme Court held, though, that on those facts—that is, when a state voluntarily waives state-court immunity in a state law action and then removes that action to federal court—the state has waived the immunity it would otherwise have from suit in federal court.\textsuperscript{59} Notably, the Court shifted its focus from the purported financial impact on the state to the “unfair tactic advantages” that a stricter rule would gift the state, justifying this shift on the “Amendment’s presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness.”\textsuperscript{60} At least where the state voluntarily chose to come to federal court, it could not belatedly argue that the state official’s conduct in failing to raise an immunity defense could be excused.\textsuperscript{61}

Left conspicuously unanswered were two key questions: (1) what is the effect of removal when the state \textit{did not} waive immunity in state court and (2) what in the inquiry changes when there are also federal claims at issue.\textsuperscript{62} Circuit courts are split on whether to interpret \textit{Lapides} narrowly to cover only voluntary removal or more broadly to cover any affirmative litigation acts intended to “achieve litigation advantages.”\textsuperscript{63}

\textbf{“Arm of the State” Doctrine}

Finally, Eleventh Amendment immunity does not extend to all “lesser entities” associated with the state; rather it extends only to entities that the Court considers to be “arms” or “instrumentalities” of the state.\textsuperscript{64} The Court, by its own admission, has yet to provide a comprehensive test here, although it has directed courts to at least examine the “relationship between the sovereign and the entity in question”\textsuperscript{65} and the “essential nature and effect of the proceeding.”\textsuperscript{66} Varying weight has been given to two factors: the degree of state control over the entity and the state-law classification of the entity.\textsuperscript{67} The only factor singled out as “of considerable importance” is whether the state is “obligated to bear and pay [any potential legal] indebtedness of the [entity].”\textsuperscript{68} For this reason, towns, counties and other political subdivisions of the state cannot invoke sovereign immunity in federal courts, even if they exercise a “slice of state power.”\textsuperscript{69} Also, because indemnification does not affect the legal obligation to pay, the inquiry is unchanged when a third party would indemnify the relevant entity\textsuperscript{70} or when the state would indemnify a state official in a suit against him in his individual capacity.\textsuperscript{71}

Furthermore, for immunity purposes, multistate entities created via the Compact Clause\textsuperscript{72} are presumed to not be arms of the member states, unless “there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose.”\textsuperscript{73} If the facts do not indicate a clear answer, then the “twin purposes of the Eleventh Amendment” determine the question: does granting immunity protect the state’s dignity and its treasury?\textsuperscript{74} Thus, in \textit{Hess v. Port Authority Trans-Hudson Corporation}, when indicators of immunity proved inconclusive, the Court found that the entity was not an arm, based almost exclusively on the entity’s “anticipated and actual financial independence” and its “long history of paying its own way.”\textsuperscript{75}

Given the lack of clear definition for “arm,” there is substantial divergence among the circuits on the appropriate factors or the balance thereof, other than the added weight given to financial responsibility factor.\textsuperscript{76} This area of the law has taken on increasing importance of late because of the explosion of private contracting and public-private partnerships at the state level.
The next section turns to the other side of state sovereign immunity doctrine, that is, the state's sovereign immunity in its own courts. In this instance, the state holds the authority to determine the scope of its immunity.

**“Internal” State Sovereign Immunity**

When a suit is brought against a state in its own court, the state decides whether it is immune from suit. This section walks through the Supreme Court's decision in *Alden v. Maine*, which confirmed the state's primacy in its own courts and Congress's inability to abrogate sovereign immunity therein. Then the section summarizes the different choices that states have made regarding their immunity, before concluding with an overview of important aspects of that immunity where states take different approaches.

**Alden v. Maine – Sovereign Immunity in State Courts**

Until the turn of the century, the Supreme Court had exclusively decided questions of state sovereign immunity as it applies to federal court litigation. On occasion, however, it offered strong dicta that sovereign immunity was at its apex in the state's own court. *Alden v. Maine* not only affirmed that dicta but also placed sovereign immunity in the state-court context beyond Congress' abrogation power. As a case that concerned a federal cause of action in state court, *Alden* offered a fresh challenge to the atextual approach employed thus far. Where before, the Court's immunity doctrine purported to fill inexplicable textual gaps in the Eleventh Amendment, now the Court confronted the issue of in which courts a state was immune, touching on a substantially less ambiguous part of the Amendment's text and precedent. After all, “the state forum renders the Eleventh Amendment beside the point.” Nevertheless, the Court used its comprehensive approach to hold that a state possesses sovereign immunity from private suit in its own courts, and Congress cannot abrogate it through its Article I powers.

First, the Court looked at history for the “original understanding of the Constitution” and determined that “[t]he concerns voiced at the ratifying conventions, the furor raised by *Chisholm*, and the speed and unanimity with which the Amendment was adopted . . . underscore the jealous care with which the founding generation sought to preserve the sovereign immunity of the States.” Then turning to the structure of the Constitution, the Court recommitted to its atextual approach and examined the “fundamental postulates implicit in the constitutional design,” namely how an abrogation power would impact federalism principles. Naturally, this brought Tenth Amendment case law into the equation, with the Court condemning the state-law cause of action as not “consistent with the constitutional sovereignty of the States” and a “[denigration of] separate sovereignty of the States.” Of course, state courts are still obligated to uphold and enforce federal law, but it would be anomalous to hold that “Congress may in some cases act only through instrumentalities of the States.” The Court concluded by harkening *Erie R. Co. v. Thompkins* and, like the facts in that case, found the facts before it “an invasion of the authority of the State and, to that extent, a denial of its independence.”

Ultimately, *Alden* confirmed state-court sovereign immunity for both federal and state law claims, which lower courts have wrestled with ever
since. However, states had operated as if immunity for the latter claim had been theirs, either to keep or surrender. The next section walks through the different directions that states took their sovereign immunity, beginning with their state constitutions.

**Codification of Sovereign Immunity**

Although the original Constitution and the Eleventh Amendment failed to clarify how common law sovereign immunity interacts with Article III, it appears that the Framers believed that they possessed sovereign immunity with respect to state law. Most states have chosen to codify this immunity, or the version of it that they deemed appropriate, in their state constitutions. The largest portion of those states maintain the status quo and establish internal immunity on its own accord. The second camp chose to waive internal immunity in their constitutions, in most cases giving their legislature the inverse authority to create immunity by legislation. The remaining states did not cover immunity in their constitutions and have developed different systems either by legislation or court decision. The Supreme Court in at least one of those states created internal immunity on its own accord.

**Common Components of Internal Sovereign Immunity Regimes**

Despite these different baselines, most state legislatures have legislative authority to determine the suability of the state and the immunity regimes that they created share a handful of components. First, no state, even those whose constitutions did not give waiver authority to the legislature, maintains absolute internal immunity from suit.

Second, most states have created their own Tort Claims Act, which establishes a procedural requirement for suing the state, limits on damages or attorney fees, and rules for challenging on appeal. A common wrinkle not found in Eleventh Amendment law involves the suability of state officials. While state officials are generally entitled to sovereign immunity established in these acts, many will immunize an official’s “discretionary” acts—that is the acts of creating policy—and allow suits only based on “ministerial” acts of implementing that policy.

Finally, many states also have settled on an administrative process for dealing with claims against the state. This may include a separate judiciary court, like a state Court of Claims, or a commission or board that has sole authority to determine whether the relevant state statute grants sovereign immunity (or a waiver of it, depending on the jurisdiction).

**Conclusion**

Despite the confusion and disagreement surrounding the Eleventh Amendment, as it stands, the law of state sovereign immunity provides states with ample protection from suit and ample discretion to decide which situations warrant a waiver. Only in limited instances can the state itself be sued against its will and even the doctrine’s many wrinkles tend to favor of the state as sovereign.

**Endnotes**

2 U.S. Const. amend. XI.
4 Id. at 754.
5 For a review of those competing theories, see Bradford R. Clark, The Eleventh Amendment and the Nature of the Union, 123 HARV. L. REV. 1817 (2010).
6 Id. at 1825 (“[F]or more than a century the Supreme Court has treated the Amendment as merely indicative of a broader underlying constitutional immunity. This “immunity” theory maintains that the Amendment is not the exclusive, or even the primary, source of state sovereign immunity.”).
7 Clark, supra note 5, at 1820; see also William Baude, Sovereign Immunity and The Constitutional Text, 103 VA. L. REV. 1, 3-9 (2017) (explaining the differences in each theory’s historical approach).
8 Nevada v. Hall, 440 U.S. 410, 415 (1979). Courts and commentators regularly refer to the old English Law adage, “the King can do no wrong,” see 5 Kenneth Culp Davis, Administrative Law Treatise 6-7 (2d ed. 1984), with many recognizing that the saying was, in large part, a convenient fiction. Hall, 440 U.S. at 415 and n. 7. The Framers rejected the fiction while recognizing the importance of the structural aspects of immunity as a foundation of the “right to govern.” Hall, 440 U.S. at 415-16.
10 Hall, 440 U.S. at 415.
11 See, e.g., THE FEDERALIST No. 81, at 508 (Alexander Hamilton) (H. Lodge ed. 1908) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption . . . is now enjoyed by the government of
every State in the Union.”); 3 Debates on the Adoption of the Federal Constitution 533 (James Madison) (J. Elliot ed. 1854) ("Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court"); see also id. at 555 (John Marshall) ("It is not rational to suppose that [a state as] sovereign power should be dragged before a court."). Some observers point to other statements by these very men as evidence that their support is less certain. See generally Susan Randall, Sovereign Immunity & the Uses of History, 81 Neb. L. Rev. 1 (2002).

12 Those in favor of a narrower immunity point, for instance, to statements by James Wilson, 3 Debates on the Adoption of the Federal Constitution at 555 ("the government of each state ought to be subordinate to the government of the United States.").


16 See Hans v. Louisiana, 134 U.S. 1, 11 (1890) (stating that the decision in Chisolm created a "shock of surprise throughout the country"); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (1928) ("The decision fell upon the country with a profound shock.").

17 4 ANNALS OF CONG. 30-31, 476-78 (1794) (the Senate divided 23 to 2; the House 81 to 9).

18 U.S. Const. amend. XI. An account of the history of the passage of the Eleventh Amendment can be found in John Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889, 1926-33 (1983). The speed and near unanimity with which this matter was taken up and resolved has often been cited by the Supreme Court as proof that, despite the Chisholm holding, the national consensus in 1793 strongly favored sovereign immunity.

19 Jonathan R. Siegel, Waivers of State Sovereign Immunity & Ideology of the Eleventh Amendment, 52 Duke L.J. 1167, 1174 (2003). For example, nothing in the amendment prohibits a citizen from suing her own state, which has been labelled "an absurdity on its face." Hans, 134 U.S. at 15. But see Clark, supra note 5, at 1835-38 (arguing that certain assumptions underlying the "absurdity" claim in Hans are faulty and that the Amendment would have made perfect sense to the Framers).

20 Hans, 134 U.S. at 13 (citing The Federalist No. 81, at 508 (Alexander Hamilton)); Alden, 527 U.S. at 728; Principality of Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934).

21 Alden, 527 U.S. at 727 (citing Hans, 134 U.S. at 14), 729.

22 Hans, 134 U.S. at 15 (calling a strict textualist approach to the Eleventh Amendment "an attempt to strain the Constitution and the law to a construction never imagined or dreamed of"); Alden, 527 U.S. at 727, 730 ("To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States sovereign immunity since the discredited decision in Chisholm."); Seminole Tribe of Fla. v. FLA., 517 U.S. 44, 69 (1996).

23 See, e.g., Blatchford, 501 U.S. at 775 (affirming state immunity in suits brought by Native American tribes, even though Native Americans are not mentioned in the Eleventh Amendment); see also Baude, supra note 7, at 10-11 (noting that the Supreme Court has found immunity despite "the absence of constitutional text that says so in so many words, and despite the presence of a constitutional amendment that seems to pointedly exclude broad immunity").

24 See Peter J. Smith, States as Nations: Dignity in Cross-Doctrinal Perspective, 81 VA. L. Rev. 1, 11-20 (2003) (discussing dignity's growing prominence starting with Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) and reaching its pinnacle with Alden). This upstart justification has been called into question. See Alden, 527 U.S. at 801 (Souter, J., dissenting) (referring to the Court's resort to dignity interests as "symptomatic of the weakness of [its] structural notion" and "thoroughly anomalous").

25 Alden, 527 U.S. at 713-14 (discussing the rights reserved to the states), 731-35 (discussing Congress's enumerated powers and citing Tenth Amendment cases).

26 Hans, 134 U.S. at 16, 15 (finding that that "suability of a State without its consent was a thing unknown to the law" and therefore "was not contemplated by the Constitution when establishing the judicial power of the United States").

27 Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 756 (2002) (finding that federal administrative proceedings are "the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union" and that the Framers would have considered it to be an "affront to the State's dignity" to find otherwise).

28 Monaco, 292 U.S. at 322-23 (noting that, even though the Eleventh Amendment did not explicitly cover foreign states, the states retain "the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign State").

29 Ex parte New York, 256 U.S. 490 (1912) (holding so despite the Amendment only mentioning cases "in law or equity").

30 Seminole Tribe, 517 U.S. at 44 (reaffirming United States v. Texas, 143 U.S. 621, 644-45 (1892) ("[The Framers] could not have overlooked the possibility that . . . the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine [controversies between a state and a foreign state] according to the recognized principles of law.")).

32 Nevada v. Hall, 440 U.S. 410, 426-27 (1979) (holding that neither the Eleventh Amendment nor comity principles command one state to honor the sovereign immunity that another state has in its own courts). Some commentators believe that Hall was primed to be overruled in Franchise Tax Board v. Hyatt, 136 S. Ct. 1277 (2016), but for the untimely passing of Justice Antonin Scalia, which created a tie on the sovereign immunity issue in that case. See Baude, supra note 7, at 3.

33 See Cohens, 19 U.S. 264.

34 Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 362 (2006) (holding that the Bankruptcy Clause, U.S. CONST. art. I, § 8, cl. 4, “reflects the States’ acquiescence in a grant of congressional power to subordinate to the pressing goal of harmonizing bankruptcy law sovereign immunity defenses that might have been asserted in bankruptcy proceedings”). See also Baude, supra note 7, at 22.


36 Seminole Tribe, 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

37 Seminole Tribe, 517 U.S. at 55 (quoting Blatchford, 501 U.S. at 786).


39 Seminole Tribe, 517 U.S. at 56-57 (where, to be sure, Congress nevertheless failed the second step).

40 Id. at 55 (quoting Mansour, 474 U.S. at 68), 59.

41 Before Seminole Tribe overruled Union Gas, the Commerce Clause was a second. Id. at 55. The Court has noted that the Fourteenth Amendment may be appropriately unique in this regard, because, unlike other parts of the Constitution, “the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.” Id. at 65-66.

42 U.S. CONST. amend. XIV, § 5.


46 Compare Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003) (finding that one section of the Family & Medical Leave Act, which allowed private individuals to sue employers, including states, that did not give sufficient leave for family-related reasons (birth or adoption), remedied sex-based discrimination in family-related leave practices), with Coleman v. Court of Appeals, 566 U.S. 30 (2012) (alternatively finding that a different FMLA section—which created a private cause of action for damages against employers that did not give sufficient leave for self-care reasons—did not remedy 14th Amendment harms).

47 See Lewis v. Clarke, no. 15-500, slip op. at 6 (April 27, 2017) (stating that suits against state officials in their official capacity are barred because these suits “represent only another way of pleading an action against an entity of which an officer is an agent”) (quoting Kentucky v. Graham, 473 U.S. 159, 165-66 (1985) (internal quotation marks omitted)).


49 Va. Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 254 (2011) (quoting ex Parte Young, 209 U.S. at 159-60). Note also that a state is not a “person” suable under § 1983. See Will v. Mich. Dep’t of State Police, 491 U.S. 58 (1989). State officials sued in the official capacity are persons under § 1983 but are entitled to sovereign immunity, because the suit is functionally a suit against the state. Hafer v. Melo, 502 U.S. 21 (1991). Lewis v. Clarke, No. 15-500 (U.S. April 27, 2017) also fleshed out this distinction between individual and official suits, holding that sovereign immunity does not shield state officials when sued in their personal or individual capacity, even if the state would indemnify that employee. Borrowing from “arm-of-the-state” principles, infra Section II.D, the Court reasoned that the “critical inquiry is who may be legally bound by the court’s adverse judgment, not who will ultimately pick up the tab.” Lewis, slip op. at 9.

50 Compare Verizon Md. Inc. v. Public Serv. Comm’n of Md., 535 U.S. 635, 645 (2002) (allowing suit against a state official that, the plaintiff pled, did not produce medical records as required by federal law and seeking production of those medical records) with Edelman v. Jordan, 415 U.S. 651 (1974) (not allowing exception where the injunctive relief sought was to obtain payment from State treasury, i.e., not properly characterized as prospective).

51 Stewart, 563 U.S. at 256-57 (allowing an independent state agency to sue state officials for production of documents).

52 Seminole Tribe, 517 U.S. at 74. (finding that the intricate multiple-provision remedial scheme in the Indian Gaming Regulatory Act precludes an Ex Parte Young remedy).


55 Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985). When the case concerns a federal program that the state has joined, the “relevant statute” is the governing federal statute that creates conditions for receipt of federal funds.

56 Lane, 518 U.S. at 192 (finding waiver of immunity for certain forms of relief does not amount to a waiver for monetary claims).

57 College Savings Bank, 527 U.S. at 676 (holding that a waiver of immunity in state courts does not amount to waivers in federal court); Pennhurst State School and Hospital v. Haldeman, 465 U.S. 89, 99 (“a State’s constitutional interest in immunity encompasses not merely whether it may be sued but where it may be sued”); see also Kennecott Copper Corp. v. State Tax Comm’n, 327 U.S. 573 (1946) (where Court found clear indication of waiver in state court, but refused to extend in federal court because the statute only said waiver in “court of competent jurisdiction”), affirmed in Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 75-76 (2000) (finding waiver for state and federal court, where statute stated waiver in any “State or Federal court of competence”).

58 College Savings Bank, 527 U.S. at 680.

59 Sossamon, 563 U.S. at 287. In Sossamon, the Court held
that states did not waive immunity by accepting federal funds pursuant to the Religious Land Use & Institutionalized Persons Act, which created a private cause of action against states for “appropriate relief.” § 2000cc-2(a). The Court determined that “appropriate relief” was “open-ended and ambiguous” to the point that it could not “be certain that the state in fact [consented].” 563 U.S. 285-86. See also Florida Dept. of Health & Rehabilitative Servs. v. Florida Nursing Home Assn., 450 U.S. 147, 149-50 (1981) (per curiam) (finding no waiver in federal court where the State stated its intention to “sue and be sued”).


61 Lapides, 535 U.S. at 620 (noting that, in this context, the “judicial need to avoid inconsistency, anomaly, and unfairness” trumps the “State’s actual preference or desire, which might, after all, favor selective use of ‘immunity’ to achieve litigation advantages”).

62 Id. (finding waiver, even though the state claimed that the Attorney General was not authorized to waive).

63 Id. at 620.

64 Cf. Ford Motor Co. v. Dept. of Treasury of Indiana, 323 U.S. 459 (1945) (where state defendant sued initially in federal court raised immunity for first time in Supreme Court, it was still entitled to the benefit of the defense).

65 Lapides, 535 U.S. at 617-18. The Court remanded the case to the district court and left it to that court to determine when further remand to the state court was appropriate, seeming to imply that the state court, in this pure state-law claim, should determine whether the original waiver was valid under state law.

66 Id. at 620. Compare In re Bliemeister, 296 F.3d 858, 862 (9th Cir. 2002) (finding waiver of immunity where the state makes a “tactical” decision to argue the merits of the case and gain an unfair advantage of hearing the court’s substantive comments on the merits of a case before asserting immunity), with Ku v. Tennessee, 322 F.3d 431, 435 (6th Cir. 2003) (stating that the rule of [Lapides] is consistent only with the view that the immunity defense in cases otherwise falling within a federal court’s original jurisdiction should be treated like the defense of lack of personal jurisdiction”).

67 Alden, 527 U.S. at 756.


69 Id.

70 Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 51 (1994); see also Lewis, slip op. at 10 (noting that courts have immunized private insurance companies acting as fiscal intermediaries in federal programs because they are essential state instrumentalities “as the governing regulation makes clear”).

71 Id.


73 Doe, 519 U.S. at 429-31 (where the Court found a state university to be an arm of the state in an action brought by a state employee, even when the Federal Government had agreed to indemnify the state).

74 Lewis, slip op. at 9. See discussion on individual capacity suits against state officials, supra note 49.

75 U.S. CONST. art. 1, § 10.


77 Hess, 513 U.S. at 51. The court purports to create a test specifically for multistate compacts, but it appears to employ an identical analysis.

78 Id. at 50.

79 See Appendix A.

80 Hall, 440 U.S. at 410, declined the states immunity from suit in the courts of other states.

81 See, e.g., Nevada v. Hall, 440 U.S. 410, 414 (1979) (“The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries.”); Hans v. Louisiana, 134 U.S. 1, 13 (1890) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”) (quoting THE FEDERALIST No. 81 (Alexander Hamilton)); Beers v. Arkansas, 61 U.S. 527, 529 (1858) (“It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.”).

82 See discussion, supra note 19.

83 See Baude, supra note 7, at 16 (“For those still focused on the text of the Eleventh Amendment or of Article III, this may seem gratuitously antitextual. . . . Even if you think that the Eleventh Amendment should be read to ban federal suits by all citizens, it bans only federal suits. Even if you think that Article III preserves state sovereign immunity and that Congress can’t change Article III, suits in state court have nothing to do with Article III.”).

84 Alden, 527 U.S. at 761 (Souter, J., dissenting); U.S. CONST. amend. XI (“The Judicial power of the United States . . . .) (emphasis added).

85 Alden, 527 U.S. at 741, 743,748-49 (confirming sovereign immunity in state courts by looking at the Founders’ silence regarding state court immunity during debate over federal court immunity, unanimity in passing of Eleventh Amendment, and federalism principles).

86 Id. at 741 (confirming this interpretation of history with the early congressional practice of never creating state-court causes of action).

87 Id. at 729; see also id. at 731 (stating that sovereign immunity is not “directly related to the scope of judicial power established by Article III of the Constitution, but inheres in the system of federalism established by the Constitution”).

88 The Supremacy Clause on its own cannot provide the means to overcome immunity, said the Court, because it would run counter to the logic of Hans and because that clause “merely raises the question whether a law is a valid exercise of the national power.” Id. at 731 (citing THE FEDERALIST No. 33, at 204 (A. Hamilton) (“But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residual authorities of the smaller societies, will become the supreme law of the land”).
Training Calendar

A wide variety of courses are available for professional development and management leadership to NAAG membership. Details, including registration, for all courses may be found at www.naag.org/nagtri/nagtri-courses.php

National Courses

- Sexual and Interpersonal Violence on College Campuses: What Attorney General Staff Needs to Know
  New York, N.Y. | Dec. 7-8, 2017
- Negotiation Skills
  Fort Worth, Texas | Dec. 12-13, 2017
- Representation of Educational Agencies and Institutions
  Las Vegas, Nev. | Jan. 17-18, 2018

Mobile Courses

- Ethics for OAG-CT
  Nov. 20, 2017
- Overdose Death Investigation and Prosecution Training for OAG-DC
  Nov. 29, 2017
- E-Discovery for OAG-VA
  Nov. 29, 2017
- Trial Advocacy for OAG-MA
  Jan. 23-26, 2018
- Overdose Death Investigation and Prosecution Training for OAG-NJ
  Jan. 24, 2018
- Trial Advocacy for OAG-FL
  Jan. 11-12, 2018
- Overdose Death Investigation and Prosecution Training for OAG-CO
  Feb. 6, 2018

and Printz v. United States, 521 U.S. 898, 924-25 (1997)).
98 Id. at 732.
99 Id. at 754.
100 Id. (quoting 304 U.S. 64, 78-79 (1938)).
101 In fact, dicta in Alden has led many courts to find that there are now two species of sovereign immunity. See supra section II.C. See, e.g., Beaullieu v. Vermont, 807 F.3d 478, 483 (2d Cir. 2014) (noting two species of immunity, federal-court immunity and a “broader sovereign immunity, which applies against all private suits, whether in state or federal court”); Murphy v. Smith, 844 F.3d 653 (7th Cir. 2016); Lombardo v. Pa., Dep’t of Pub. Welfare, 540 F.3d 190, 194-95 (3d Cir. 2008) (seeing an immunity from suit in federal court and a broader immunity from liability in all venues); Stewart v. North Carolina, 393 F.3d 484, 487-88 (4th Cir. 2005); McCants v. NCAA, No. 1:15-cv-176, 2017 U.S. Dist. LEXIS 64887 (M.D.N.C. Apr. 26, 2017); see also Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559 (2001); Jessica Wagner, Note, Waiver by Removal? An Analysis of State Sovereign Immunity, 102 Va. L. Rev. 549 (2016).
102 See supra Section I; Clark, supra note 5, at 1838 (“The Constitution conferred no power on the federal government to regulate or coerce states, and that the Constitution imposed no affirmative obligations on states necessitating suits by individuals against states”); Alden, 527 U.S. at 715-16 (“[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.”); Chisholm v. Georgia, 2 U.S. 419 (1793) (Iredell, J., dissenting) (“I believe there is no doubt that neither in the State now in question, nor in any other in the Union, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed.”); id. at 452 (opinion of J. Blair) (When sovereigns are sued in their own Courts, such a method may have been established as the most respectful form of demand; but we are not now in State-Court; . . .”).
This advocacy and investigative techniques program will enhance the participants’ trial and investigative skills in a constructive and positive learning environment, facilitated by experienced attorneys and law enforcement personnel serving as faculty. While the program will challenge participants to perform at their best, the program’s primary goal is to afford participants the opportunity to build upon the skills they have, take what they learn and apply it during their subsequent performances, and to finish the program with a better understanding of how to persuasively and professionally further their clients’ interests during investigations and at trial.

The program will contain a mix of topical presentations on various aspects of trial and investigative practice and “learn-by-doing” workshops. The emphasis in the workshops will be on participant performance of various investigative and trial skills followed by constructive faculty critiques. Each participant’s performance will be critiqued by faculty members during the workshops. This course is open to both attorneys and investigators and the next training on this topic will be held in Phoenix, Ariz., Feb. 21-23, 2018. Check out more courses like this one on our course schedule.
Collaboration, Cooperation, Commitment: Working Together to End Human Trafficking

JUDY MCKEE, NAGTRI DEPUTY DIRECTOR

The challenge of accurately estimating the number of human trafficking victims, both world-wide and in the United States, is daunting because, in its very nature, modern slavery is a hidden crime. A few years ago, The Washington Post in its “Fact Checker” column gave four “Pinocchios” to the Global Slavery Index, sponsored by the Walk Free Foundation, which had estimated the number of victims in 2013 at 29.8 million and then, in 2014, raised that number to a “more precise estimate” of 35.8 million.

A new report, issued in September by the United Nations’ International Labor Organization (which included new data from the Walk Free Foundation), estimated that, at any given time in 2016, an estimated 40.3 million people were victims of modern slavery world-wide. According to the report, one out of four of these victims were children, and women and girls were disproportionately affected, comprising 99 percent of the victims in the commercial sex industry and 58 percent in other sectors.

Estimating the human trafficking crime rate and the number of victims in the United States is no less daunting. This is especially true in sex trafficking where victims often don’t self-identify as victims, sometimes because they are told by the traffickers that law enforcement will see them as offenders, not victims, or because they consider themselves to be in a romantic relationship with their traffickers. The number of federal human trafficking prosecutions in 2016 – 241 – provides only a snapshot view of the problem since it does not reflect the cases that state and local prosecutors have prosecuted. It is also important to remember that, even though investigations reveal that there is sufficient evidence to charge human trafficking, in some cases, victims are uncooperative, disappear, or refuse to testify, making prosecution extremely difficult. Another incomplete snapshot of what is happening in the United States is provided through looking at the number of individuals and family members that received assistance from non-governmental organizations (NGOs). In 2016, grantees of U.S. Department of Justice (DOJ) grants reported 5,655 open client cases that included 3,195 new clients. Sixty-six percent of clients served during the reporting period were U.S. citizens; 34 percent were foreign nationals.

Trying to get an accurate counting and relying on statistics to see the face of the problem, however, is an issue for social scientists and policy makers, not for law enforcement and prosecutors. They are focused on identifying victims, rescuing them from their servitude, and ensuring that the traffickers are held accountable for their crimes. Successful investigation and prosecution of human trafficking often involves various jurisdictions, including foreign countries, the need for surveillance and wiretaps, and a combined federal and state response. The Bureau of Justice Administration at DOJ has promoted the Enhanced Collaborative Model for states and the federal government to use in countering this crime. An example from Chicago, which has utilized this type of task force, demonstrates how effective such a model can be when local, state, and federal law enforcement work together to hold traffickers responsible for their crimes.

People v. Tyrelle Lockett, Myrelle Lockett, and Nathan Nicholson

This case involves a different type of crime family: Nathan Nicholson and his twin sons, Tyrelle and Myrelle Lockett, specialized in pimping out both teenagers and adult women. The twins first came to the attention of Cook County authorities after the State’s Attorney Office began its human trafficking initiative in January 2010. After identifying the Salvation Army’s STOP IT program as an advocacy ally for the
task force, prosecutors in the State’s Attorney Office reached out to local vice sergeants in the Chicago Police Department (CPD) and the Cook County Sheriff’s Police (CCSP). They explained the charges that could be brought in a sex trafficking case and asked these experienced officers to begin looking for appropriate cases to bring to prosecutors. In response, the CCSP began searching Backpage.com ads, looking for individuals who appeared young.

In May, the CCSP vice team found a possible victim advertised on Backpage and answered the ad. Through a series of calls that facilitated counter-surveillance for law enforcement, the undercover officer was led to a motel in Lansing, Ill. The surveillance team saw a male and a female arguing in the parking lot before the undercover officer arrived. The female entered the motel room and, when met by the undercover officer, began to cry. She said that she had been coerced into “doing this.” She had red marks like a hand print on her neck and a bruise on her arm and leg. She also reported that her ID and belongings were in a duffle bag in the car and that her computer had been smashed. The undercover radioed the team outside who arrested the man in the car, Tyrelle Lockett. A search of the car confirmed the 18-year-old’s statements and the hotel registry and video confirmed the room rental.

Later investigation revealed that the girl (victim #1) had met Tyrelle and his brother in a class mandated by the juvenile probation office. After they began dating, Tyrelle asked her to start making money for him, telling her that Myrelle’s girlfriend was doing the same and that she could show her how easy it was. She resisted, but he roughly her up so she went on several “dates” over a period of days. The day that she encountered police, she had told Tyrelle she wanted to stop and wanted to go home. That was when he choked her and smashed her computer.

Police located Myrelle and his girlfriend. She was 17. This young girl (victim #2) gave a similar account to victim #1 of how she had met Myrelle. She corroborated the first victim’s account of how she was trained into “the game,” but insisted (at that time) that she, herself, had never been forced or coerced to prostitute herself. However, she admitted that she had turned over all of her earnings to Myrelle. She also had Myrelle’s name recently tattooed on her chest. Both Myrelle and Tyrelle were arrested and charged with human trafficking.

Months later, the brothers (who were just turning 18) eventually pled guilty to a minimum sentence of four years in prison with a recommendation of a boot camp program which could earn them early release. They were paroled after two years in custody. Prosecutors and law enforcement were notified of their parole and kept an eye on their contacts with police by monitoring the Law Enforcement Agencies Data System (LEADS). Tyrelle was arrested for domestic battery against a new girlfriend who insisted that police had made a mistake with their report, so charges were dropped. Both Tyrelle and Myrelle subsequently were arrested for marijuana possession in Indiana and were also arrested in Phoenix, Ariz., but these arrests did not amount to charges being filed.

Subsequently, CPD ran into Myrelle coming out of a parking lot of a motel in Chicago with a 16-year-old female from rural Indiana. There was no evidence of commercial sex and the young girl denied having sex with him at the motel. However, days later, police began to notice ads on Backpage that featured the girl. Both CPD and the CCSP made it a point to recover her every time they spotted an ad, but there was no evident connection with Myrelle. One time a 19-year-old female was spotted driving her to her “date.” She was arrested and charged with trafficking a minor. In the meantime, the boys’ father, Nathan Nicholson, was caught pimping out an adult female. With no evidence of force, prosecutors charged him with promoting prostitution. He pled guilty to that felony and was sentenced to a year in jail.

A year after the twins’ parole expired, prosecutors received a call from a human trafficking task force member in Minnesota. He reported that they received a 911 call from a man in his 20s saying his girlfriend had texted him that she was being kidnapped by pimps and taken to Chicago. Myrelle had found her on Facebook and contacted her under false pretenses. That night, the Locketts took her to their dad’s house in Chicago. Nicholson told the boys to give her a new name, one they could use to advertise her on the Internet. When nobody was watching, the victim (victim #3) saw an opportunity to escape. She found the front door locked, but discovered the back door open. When she got into the yard, she encountered a high fence around the back yard with a locked gate. Pushing trash cans against the fence, she climbed over, ran, and found a police car, reporting the crime. Myrelle was arrested by CPD and charged with involuntary servitude and kidnapping. Since neither Tyrelle nor his father had been present when she objected to going to Chicago, they were not charged with the kidnapping.
While the state was continuing pursuing the kidnapping indictment against Myrelle, the interstate kidnapping charge attracted the attention of the FBI and it began investigating the historical cases of the Locketts and Nicholson. Two FBI agents and the CCSP vice team from the original 2010 arrest worked together on the investigation. The 16-year-old Indiana girl was uncooperative as to what happened to her, but the investigators found other girls from her hometown that had been recruited with her help. During the course of the investigation, it was learned that the 19-year-old that had earlier been charged with trafficking a minor was actually Myrelle’s “bottom,” not a pimp. Once her underlying facts and circumstances were known, she was identified as a victim, and the state dropped the indictment against her. She became an important witness in the federal case against all three.

After joint evaluation of the sex trafficking and kidnapping charges, which spanned multiple states, it was decided that federal court would be the best venue for the case, and the state kidnapping and sex trafficking indictment was superseded by a federal indictment covering a much broader scope of illegal conduct committed by all three traffickers. Myrelle was transferred to federal custody, and the other two were arrested by FBI and CCSP. The defendants were detained without bail and pled guilty to the federal indictment. The evidence gathered by the joint investigation showed that Nicholson groomed his sons to become pimps and taught them to recruit minor girls from Chicago-area malls by promising them money for going on dates. Once the girls expressed interest, Nicholson photographed them partially clothed, and then “tested” them by requiring them to have sex with the twins. Thereafter, Nicholson and his sons caused the girls to perform commercial sex acts with Nicholson keeping the proceeds. The twins then began to recruit their own women and expanded their search areas to neighboring states. A three-day contested sentencing hearing resulted in the twins being sentenced to 17 years, 8 months in federal prison and the father to 16 years. Tyrelle was ordered to pay $9,050 to three victims and Myrelle was ordered to pay $75,600 to one victim.

Conclusion

The successful federal conviction of this crime family was based on the early investigative work of local law enforcement, the State’s Attorney Office’s commitment to prosecuting human traffickers and protecting victims, and following up on the twins’ activities after their release from prison. The cooperation and immediate response to a message from the Minnesota task force and the close working relationship between Chicago police and prosecutors and their federal counterparts, developed from working together on a task force against human trafficking, ensured that all parties were committed to working towards the goal: protecting the victims and ensuring that these three traffickers paid the price for their crimes.

Not every locality, however, has the benefit of a federally-funded task force which has worked together for more than six years to investigate and prosecute human trafficking. Often relationships between local and state law enforcement and prosecutors and their federal counterparts become strained due to personality clashes, political differences, or other issues that do not promote cooperative behavior. However, especially in fighting human trafficking...
crime, it is essential that these differences be put aside and police and their federal counterparts from the FBI and U.S. Department of Homeland Security and local prosecutors and their counterparts in the local U.S. Attorney’s Office reach out to one another in a collaborative manner. Where states or localities have set up ad hoc meeting groups discussing human trafficking issues, invitations should always be issued to their federal counterparts and, equally, federal law enforcement and attorneys working on human trafficking investigations and cases should be reaching out to their state and local counterparts. Establishing personal relationships among professionals prior to having cases that would benefit from a collaborative effort helps to establish an atmosphere of mutual trust and respect so that these professionals can work together to investigate offenses, save victims, and prosecute traffickers.

**Endnotes**


4 However, it is very important to remember that, as the UCR report itself states, many of these crimes are never reported to police and not all local law enforcement agencies have the capacity or actually contribute data to the UCR. For instance, the 2016 UCR shows no cases in Massachusetts. However, newspaper reports from 2016 indicate that Massachusetts law enforcement investigated and cleared at least 11 sex trafficking cases. U.S. Dep’t of Just., FBI, *2016 Crime in the United States (Human Trafficking, Table 1)*, [https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/cius-2016/additional-publications/human-trafficking](https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/cius-2016/additional-publications/human-trafficking).

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