

## UNGUARDED INDIANS: THE COMPLETE FAILURE OF THE POST-OLIPHANT GUARDIAN AND THE DUAL-EDGED NATURE OF *PARENS PATRIAE*

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*Indian Country is the only location in the United States where the race of both the victim and the offender are relevant for purposes of jurisdiction and prosecution. As a result, American Indian women and children are victimized at astonishingly higher rates than the rest of society, primarily by non-Indian offenders. Pedophiles have found employment as teachers in Bureau of Indian Affairs schools even after being caught molesting Indian children, and their predation of Indian children has continued with little or no fear of prosecution. American Indian females are victims of violence more than two and a half times the national average. One-third of all Indian women will be raped in their lifetime. What is even more troublesome is that in more than ninety percent of these cases, the offender is a non-Indian.*

*In twenty-first century America, how is it that the race of the perpetrator and victim determines the availability of justice on Indian reservations? The fault lies with both Congress and the Supreme Court, which have together created a jurisdictional void on most Indian reservations. If a non-Indian assaults an Indian, the tribe cannot prosecute, and neither can the state; only the U.S. Attorney can prosecute. This void allows any non-Indian offender to commit a crime on a reservation with a much higher probability of remaining free than anywhere else in the United States.*

*Although this situation has been roundly criticized for more than three decades, nothing has been done to solve the problem. This Article suggests that *parens patriae*, the very legal doctrine originally used to subjugate Indian Country, can instead be used by tribes to re-*

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*store their inherent sovereignty and finally provide the necessary protection for tribal members.*

#### TABLE OF CONTENTS

Introduction .....	1120
I. The Jurisdictional Maze in Indian Country.....	1126
A. Tribal Jurisdiction Before 1790.....	1127
B. The Arrival of European Settlers and the Doctrine of Discovery .....	1128
C. Assertion of Congressional Authority .....	1132
D. Public Law 280 .....	1136
E. The <i>Oliphant</i> in the Room that Congress Refuses to Acknowledge.....	1139
II. The Legacy of <i>Oliphant</i> : The Guardian Is Not Guarding .....	1140
A. Alarming Trends, Disturbing Numbers: Statistical Data.....	1141
B. Recent Law Enforcement on Reservations.....	1144
C. Cooperation Between Tribes and the U.S. Attorney for the Western District of Michigan.....	1146
D. Declinations of Prosecution.....	1149
E. Further Difficulties in Prosecuting .....	1151
III. The Guardian-Ward Relationship: The Doctrine of <i>Parens Patriae</i> .....	1154
A. The Tension Between “Domestic Dependent Nations” and the Federal Government .....	1155
B. The Doctrine of <i>Parens Patriae</i> .....	1157
C. <i>Parens Patriae</i> as Standing to Sue.....	1159
IV. <i>Parens Patriae</i> as Sword and Shield .....	1162
A. Tribes that Are Not in Public Law 280 States.....	1163
B. Tribes in Public Law 280 States .....	1165
C. Court Reversal of <i>Oliphant</i> .....	1165
D. Congressional Reversal of <i>Oliphant</i> .....	1166
Conclusion .....	1167

#### INTRODUCTION

*For more than a decade, a white man married to an Indian woman sexually terrorized his entire family on the Eastern Cherokee reservation in North Carolina. If his wife complained about the rapes and beatings with a baseball bat, he shocked her with a Taser. While raping his wife, he would force his teenage daughters to stand by so he could fondle their genitalia to compensate for erectile dysfunction. Afterward, he would show them his AK-47 and threaten to kill them if they ever left him or told anyone.*

*Despite those threats, his wife finally reported the incidents to tribal police. Eastern Cherokee Prosecutor James Kilbourne wanted*

*to prosecute, but the tribe did not have criminal jurisdiction over the non-Indian husband. Local and state authorities didn't have jurisdiction either because the victims were Indians.*

*In 21<sup>st</sup> century America, how is it that the availability of justice on Indian reservations is determined by the race of the perpetrator and victim?*<sup>1</sup>

Indian reservations in the United States face a crisis of abuse, compounded by the inability of tribes to effectively prosecute the offenders and protect the victims. Studies published by the Bureau of Justice Statistics (BJS) demonstrate that, in 2004, 86 out of every 1000 American Indian females were victims of violence, a rate nearly two and a half times the national average.<sup>2</sup> Additionally, one study concluded that 34.1% of American Indian and Alaskan Native women would be raped during their lifetime, more than one in three, as compared with the United States as a whole where the rate is less than one in five.<sup>3</sup> Even more troubling is the fact that the offenders in these cases are overwhelmingly non-Indian men whom tribes are powerless to prosecute on their lands.<sup>4</sup> Nearly nine in ten cases of rape or sexual assault involve white or black assailants.<sup>5</sup> In general, the more serious the offense, the higher the percentage of American Indians describing the offender's race as white or black.<sup>6</sup> Due to the racial diversity between the attacker and the victim,

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1. Gavin Clarkson, Op-Ed., *Beyond the Law*, L.A. TIMES, Aug. 3, 2007, at A27.

2. Gavin Clarkson, Trond E. Jacobsen & Archer L. Batcheller, *Information Asymmetry and Information Sharing*, 24 GOV'T INFO. Q. 827, 834 (2007); STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME, A BJS STATISTICAL PROFILE, 1992-2002, at 7 (2004), <http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf>.

3. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 2 (2007), available at <http://www.amnesty.org/en/report/info/AMR51/035/2007>.

4. Important note: throughout the course of this Article, most references to "domestic abuse," "rape," and similar crimes may be phrased with respect to a male offender and female victim. Clearly, this is not always the case, although the majority of such crimes are committed by a male against a female.

A study published in 1998 showed that the rate of victimization of a man by an intimate (described as a spouse, former spouse, boyfriend, girlfriend, or former boyfriend or girlfriend) was about one-fifth that as for a woman. See LAWRENCE A. GREENFIELD ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES 4 (1998), <http://bjs.ojp.usdoj.gov/content/pub/pdf/vi.pdf>.

According to a 2005 survey, the incidence of rape or sexual assault of women was approximately 11.7 times higher than the incidence for men. (The survey includes the note that the survey returned ten or fewer cases of rape or attempted rape of men.) See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2005 STATISTICAL TABLES 2 (2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus05.pdf>.

As a result of the discrepancy in the rates between female and male victims, many studies and much research focus primarily on female victims, as well as male offenders. Domestic abuse, rape, and similar crimes are very serious, regardless of the gender of the individuals involved. Nothing in this Article should be construed to diminish the seriousness of crimes that may not be discussed due to gender differences, and care should be taken not to generalize either domestic abuse or rape as crimes solely against women.

5. PERRY, *supra* note 2, at 9.

6. *Id.* at 10.

however, a disproportionate number of violent crimes are never prosecuted.

Both Congress and the Supreme Court have together created a jurisdictional void on Indian reservations, one where a tribe is wholly unable to defend its members from non-Indian perpetrators and must rely on outside federal authorities to protect them from such crimes. Put another way, this void allows any non-Indian offender to attack an Indian victim on a reservation with a much higher probability of remaining free than anywhere else in the United States.

This gaping void in necessary and essential jurisdiction was created in the wake of the Supreme Court ruling in *Oliphant v. Suquamish Indian Tribe*.<sup>7</sup> The Supreme Court held that tribes could not prosecute any crime committed by a non-Indian offender in Indian Country.<sup>8</sup> As a result, a tribe may only respond to incidents of domestic violence if both the victim and the assailant are Indian. If the alleged assailant is not Indian, the tribe may not prosecute the matter but must defer to the U.S. Attorney's Office, as any such offense falls under the exclusive jurisdiction of the federal government, as per 18 U.S.C. § 1153.<sup>9</sup>

Even though the rate of domestic abuse cases on reservations is significantly higher than in the nation as a whole, U.S. Attorneys decline to prosecute mixed-race domestic abuse cases at an abnormally high rate.<sup>10</sup> The resulting combination of the lack of tribal jurisdiction and the unwillingness of the federal government to prosecute non-Indian offenders has created a wide jurisdictional void.

The problem is not limited solely to domestic partner abuse, however. By exploiting the jurisdictional void, some pedophiles have found employment as teachers in Bureau of Indian Affairs (BIA) schools even after being caught molesting Indian children, and their predation of Indian children has continued with little or no fear of prosecution.<sup>11</sup> Worse, the lack of tribal jurisdiction over non-Indians may actually encourage the perception of reservations as the stereotypical lawless frontier where non-Indians can flaunt their disdain for the law and be openly hostile to Indian people with impunity.<sup>12</sup>

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7. 435 U.S. 191 (1978).

8. 18 U.S.C. § 1151 (2006) defines "Indian Country" as a term of art.

9. Exceptions exist in states affected by Public Law 280, which delegates this jurisdiction to the State. See *infra* Part I.D.

10. See, e.g., PERRY, *supra* note 2, at 19–20.

11. Gavin Clarkson, *Justice Declined: Criminals Prey on the Unprotected*, INDIAN COUNTRY TODAY, Aug. 29, 2007, at A3, available at <http://www.indiancountrytoday.com/archive/28202079.html>.

12. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1108 (2005); see also Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 313–14 (2000) (citing an instance of a mother who fled the tribal jurisdiction to Washington State with her child, in violation of a court order, because the state courts refused to recognize the orders from the tribal court, leaving the father and court powerless to pursue any remedy).

Possibly based on this perception, the jurisdictional loophole has also been exploited by non-Indian drug gangs to set up methamphetamine operations on reservations.<sup>13</sup> Other non-Indian drug traffickers, recognizing the low risk of prosecution, have intentionally married Indian women to establish residency on reservations.<sup>14</sup> According to an Associated Press article, authorities once seized 40,000 marijuana plants on the Yakima Reservation planted by a Mexican drug cartel.<sup>15</sup> Perhaps the most blatant exploitation of the jurisdictional void is the case of Jesus Martin Sagaste-Cruz. According to the Wyoming U.S. Attorney,<sup>16</sup> Mr. Sagaste-Cruz's knowledge of the jurisdictional void was the critical component of a "criminal business plan" to sell methamphetamine on five separate reservations in Wyoming, South Dakota, and Nebraska.<sup>17</sup> In the course of their investigation, federal authorities learned that the business plan was hatched after members of the drug ring read a news article about extremely profitable alcohol sales near an Indian reservation with catastrophic alcoholism rates.<sup>18</sup> Sagaste-Cruz's gang

surmised that if people who were addicted to alcohol could be given free samples of methamphetamine, the alcoholics would quickly switch over to being addicted to the drug. And, the Mexican-national members of this drug ring figured they would not stand out among American Indians. The organization led by Sagaste-Cruz could distribute the methamphetamine via customers who would be forced to become dealers to support their own habits. . . .

To execute the business plan, members of the Sagaste-Cruz organization relocated to communities in close proximity to the affected reservations. The first thing the members did was to develop

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13. Clarkson, *supra* note 11. Elizabeth Kronk has written specifically on the jurisdictional problems posed by methamphetamine operations on reservations:

[E]ffective law enforcement is significantly handicapped in Indian country. By enacting the MCA, ICCA, and ICRA, Congress not only stripped tribes of jurisdiction over most major crimes in Indian country, but further limited effective enforcement by capping the sentences tribal courts may levy. Through its *Oliphant* decision, the Court further compounded the problem by removing tribal criminal jurisdiction over non-Indians. Combined, these developments create a criminal jurisdictional scheme in Indian country that is inadequate to address the emerging meth problem.

Elizabeth Ann Kronk, *The Emerging Problem of Methamphetamine: A Threat Signaling the Need to Reform Criminal Jurisdiction in Indian Country*, 82 N.D. L. REV. 1249, 1257 (2006).

14. Clarkson, *supra* note 11.

15. *Id.*; *Investigators Seize 40,000 Marijuana Plants from Closed-off Part of Washington State Reservation*, SAN DIEGO UNION-TRIB., Aug. 10, 2007, <http://legacy.signonsandiego.com/news/nation/20070810-1311-brf-marijuana-reservation.html>.

16. *United States v. Sagaste-Cruz*, 187 Fed. App'x 804, 806–07 (10th Cir. 2006); *see also Combating Methamphetamine in Indian Country: Statement Before the S. Comm. on Indian Affairs*, 109th Cong. 118, 127 (2006) (statement of Matthew H. Mead, United States Attorney, District of Wyoming) [hereinafter Statement of Matthew H. Mead].

17. Press Release, Drug Enforcement Admin., Drug Trafficker Who Preyed on Native Americans Is Sentenced to Life in Prison (July 7, 2005), available at <http://www.dea.gov/pubs/states/newsrel/denver070705p.html>; *see also* Brodie Farquhar, *Meth Ring Targeted Reservations*, CASPER STAR-TRIBUNE, Aug. 21, 2005, [http://trib.com/news/article\\_bd90d2a4-1fd1-5640-be55-b587522dd811.html](http://trib.com/news/article_bd90d2a4-1fd1-5640-be55-b587522dd811.html); *Meth Dealer Gets Life Sentence*, BILLINGS GAZETTE, July 7, 2005, [http://billingsgazette.com/news/state-and-regional/wyoming/article\\_974f1c88-50ea-5815-9710-8c5d0ef7a2c4.html](http://billingsgazette.com/news/state-and-regional/wyoming/article_974f1c88-50ea-5815-9710-8c5d0ef7a2c4.html).

18. Statement of Matthew H. Mead, *supra* note 16, at 127–28.

romantic relationships with Indian women. Some even had children with these Indian women. The women were introduced to the methamphetamine with free samples. All of the lower-level distributors told investigators that they started as recreational users and all became severely addicted to methamphetamine. To support their habit, customers became dealers and distributors themselves, using free samples to recruit new customers. This model provided for steady growth as customers became dealers/recruiters themselves, and their customers in turn became dealers/recruiters in a pyramid growth scheme.<sup>19</sup>

According to Colorado U.S. Attorney Troy Eid, the written business plan confiscated by authorities “also outlined how non-American Indians should handle the drugs while on the reservation because tribal police couldn’t arrest them.”<sup>20</sup>

While the Sagaste-Cruz case was primarily about drugs, activities that directly harmed Indian women were core elements of implementing the business plan. Had there been only domestic violence by gang members against Indian women, however, there would likely have been no federal response, even though the federal government has established itself, via the Supreme Court’s decision in *Oliphant* and subsequent congressional inaction, as the only means of protection for American Indian women in cases of domestic abuse by non-Indians.<sup>21</sup> Distressingly, every declination by U.S. Attorneys to prosecute a case of domestic violence for whatever reason, breaks the federal promise of protection. This broken promise is not limited just to domestic violence, however, and is particularly troubling since crimes on the reservation are also more violent. Nearly seventy-five percent of suspects investigated in Indian Country were arrested for violent crimes compared with the national total of five percent.<sup>22</sup> In 2007, U.S. Attorneys declined to prosecute an estimated eighty-five percent of felony cases referred by tribal prosecutors.<sup>23</sup> Their hands tied by court rulings, tribes are unable to prosecute these cases themselves, and justice is not served.

A brief jurisprudential history of federal Indian Law litigation sheds light on the evolution of this jurisdictional void. In *Cherokee Nation v. Georgia*, the first Supreme Court opinion involving an American Indian tribe,<sup>24</sup> the Court limited the status of tribes to that of “domestic depen-

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19. *Id.*

20. P. Solomon Banda, *Tribes Try to Navigate Jurisdictional Issues on Law Enforcement*, NEWS FROM INDIAN COUNTRY, Sept. 2007, [http://indiancountrynews.net/index.php?option=com\\_content&task=view&id=1558](http://indiancountrynews.net/index.php?option=com_content&task=view&id=1558).

21. 18 U.S.C. § 1153 (2006).

22. PERRY, *supra* note 2, at 20.

23. *Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 45, 46 (2007) (statement of Joe Garcia, President, National Congress of American Indians).

24. An earlier Supreme Court case, *Johnson v. McIntosh*, dealt with the issue of who could acquire title to land from Indian tribes, but no tribe was a party to the case. 21 U.S. (8 Wheat.) 543 (1823).

dent nations.”<sup>25</sup> Chief Justice Marshall categorized the relationship between the United States and a tribe as “resembl[ing] that of a ward to his guardian.”<sup>26</sup> This notion has been upheld in both the Supreme Court as well as other courts.<sup>27</sup> As a result of this relationship, the federal government “has a fiduciary duty to protect Tribes, but at the same time it preserves unilateral authority to divest Tribal Governments of their sovereign and property rights.”<sup>28</sup> Due to the neglect of the federal government to prosecute offenders, however, the United States is derelict in its position as guardian of the tribes.<sup>29</sup>

Although insufficiently guarded by the United States, tribes are also unable to assert complete jurisdiction over criminal matters on their own lands, leaving them helpless to protect their own members. Because the United States holds sovereign immunity, individual Indians cannot sue to force the United States to prosecute non-Indian offenders, even though tribes cannot prosecute them. Under the doctrine of *parens patriae*, however, a tribe acting on behalf of its members may be able to bring such a suit.

The doctrine of *parens patriae* refers to the public policy power of the state to usurp the rights of the natural parent or legal guardian and to act as the parent of any child or individual who is in need of protection.<sup>30</sup> Literally, *parens patriae* means “parent of his or her country.”<sup>31</sup> The term originates in English common law and refers traditionally to an expres-

25. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

26. *Id.*

27. See Cami Fraser, *Protecting Native Americans: The Tribe as Parens Patriae*, 5 MICH. J. RACE & L. 665, 678 n.71 (2000) (citing *Passamaquoddy v. Morton*, 528 F.2d 370, 375 (1st Cir. 1975) (“The general notion of a ‘trust relationship,’ often called a guardian-ward relationship, has been used to characterize the resulting relationship between the federal government and those tribes.”)). Fraser also notes this in *Seminole Nation v. United States*:

[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the more exacting fiduciary standards.

*Id.* (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942)).

28. *Id.* at 678.

29. One scholar has even characterized this dereliction as a violation of equal protection, arguing that the term “jurisdiction” in the Fourteenth Amendment should be interpreted so as not to undermine the special status of Indian tribes. See Bethany Berger, *Reconciling Equal Protection and Federal Indian Law*, 68 CAL. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1475687>.

30. *Parens patriae* is often defined as either:

1. The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves. . . .
2. A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit. . . .

The state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit.

BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

31. *Id.*

sion of the king's prerogative.<sup>32</sup> The doctrine established the king as protector over those classes who could not protect themselves: infants, idiots, and lunatics.<sup>33</sup> A fundamental attribute of *parens patriae* jurisdiction in this sense, however, is that it confers powers not only to protect the young but also to control them.<sup>34</sup>

In the modern setting, states have used *parens patriae* to sue the federal government to force it to protect state citizens or follow federal law.<sup>35</sup> This Article argues that tribes have the same standing. Therefore, in order to protect women and children, this Article argues that it is appropriate for tribes to use the doctrine of *parens patriae* to demand criminal jurisdiction be granted to tribes to prosecute non-Indian offenders.

Part I of this Article examines the history of the jurisdictional maze in Indian Country, beginning with early American history and continuing to the present. Part II discusses the legacy of *Oliphant* and its lasting effect on the state of law enforcement in Indian Country. Part II also presents data regarding the current epidemic of domestic violence on Indian reservations. Part III discusses the doctrine of *parens patriae*, the duties imposed upon the federal government under the guardian-ward relationship, and the procedure by which the tribes may assert the doctrine for the protection of their members. Part IV examines the impact that an application of the doctrine of *parens patriae* would have on jurisdiction in Indian Country.

#### I. THE JURISDICTIONAL MAZE IN INDIAN COUNTRY

*Leslie Ironroad was 20 years old when she moved from one side of the Standing Rock Sioux Reservation in the Dakotas to the other—the town of McLaughlin, S.D., home to one gas station, one diner, and her friend, Rhea Archambault. . . .*

. . . .

*One night four years ago, Ironroad left the house to go to a party a few miles away. Early the next morning, she called Archambault's brother in tears asking to be picked up.*

*"She said, 'Can [you] go get Rhea to come get me 'cause these guys are going to fight me,'" Archambault said. "And so he said, 'Well where you at?' And she was just crying and hangs up."*

*Leslie never made it home.*

*When Archambault found her friend in a Bismarck, N.D. hospital, she was black and blue.*

32. George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 896 (1976).

33. *Id.*

34. John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 O.J.L.S. 159, 160 (1994).

35. *See infra* Part III.C.



“I said, ‘Leslie, what happened?’ She said, ‘Rhea, is that you? Turn the lights on, I can’t see.’ But the lights in the room were on. She said, ‘Rhea, I was raped,’ and she was just squeezing my hand,” Archambault recalled.

Archambault called the Bureau of Indian Affairs police, a small department in charge of all law enforcement on the reservation. A few days later an officer arrived in the hospital room, and Leslie scratched out a statement on a tablet laid across her stomach.

Ironroad told the officer how she was raped and said that the men locked her in a bathroom, where she swallowed diabetes pills she found in the cabinet, hoping that if she was unconscious the men would leave her alone. The next morning, someone found her on the bathroom floor and called an ambulance.

A week later, Ironroad was dead—and so was the investigation. None of the authorities who could have investigated what happened to Leslie Ironroad did—not the Bureau of Indian Affairs, nor the FBI, nor anybody else.

People who know the men who likely attacked her say they were never even questioned.<sup>36</sup>

Law enforcement in Indian Country has been described as a “jurisdictional crazy-quilt,”<sup>37</sup> a confusing system of statutes and judicial decisions that continues to confound and frustrate victims, defendants, attorneys, judges, and prosecutors involved in criminal matters at all levels of the judicial system.<sup>38</sup> This distressing situation is the result of a combination of Supreme Court decisions and congressional inaction that established the federal government as the only means of protection for American Indian women in cases of domestic abuse by non-Indians. Before addressing the modern context of tribal jurisdiction, however, it is important to review the origins of federal Indian law and policy.

#### A. Tribal Jurisdiction Before 1790

Indian Country is the only location in the United States where the race of both the victim and the offender are relevant for purposes of jurisdiction and prosecution.<sup>39</sup> This legal distinction has not always been the case. Research into the history of federal, state, and tribal government relations from the early 1800s provides insight into the origins of the jurisdictional dilemma as it currently exists. Prior to European colo-

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36. Laura Sullivan, *All Things Considered: Rape Cases on Indian Lands Go Uninvestigated* (National Public Radio broadcast July 25, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=12203114>.

37. Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants’ Rights in Conflict*, 22 U. KAN. L. REV. 387, 387 (1974).

38. DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 476 (5th ed. 2005).

39. Clarkson et al., *supra* note 2, at 835.

nization of the Americas, many tribes had developed systems of law and justice, contrary to myths that no such systems existed. At that time, “[c]ertain tribes, such as the Cheyenne, had a constitutional form of government that they maintained through oral tradition.”<sup>40</sup> Other tribes had written laws as well as more sophisticated constitutional governments. For example, “[t]he Iroquois Confederacy was founded before 1570, and the Choctaw first wrote down their constitution in 1825.”<sup>41</sup>

In early American history, Indian Country was occupied and governed by tribal governments, and several treaties recognized the inherent right of tribes to prosecute non-Indian offenders for crimes against Indians.<sup>42</sup> For example, Article V of the 1785 Treaty of Hopewell between the United States and the Cherokee Nation stated that “[i]f any citizen of the United States, or other person not being an Indian, shall attempt to settle [in the Cherokee Nation], such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please.”<sup>43</sup> Such jurisdictional authority over non-Indians was also negotiated with the Chickasaw Nation and the Choctaw Nation of Oklahoma in 1866.<sup>44</sup> These early examples of tribal jurisprudence conflicted, however, with the underlying legal principles of the European colonists who later impinged upon Indian territories.

#### B. *The Arrival of European Settlers and the Doctrine of Discovery*<sup>45</sup>

European legal principles existing at the time Europeans first made contact with the Indians had their origins in theories developed to justify the Crusades.<sup>46</sup> Later, as competing European nations began to expand their empires, the papacy granted exclusive rights to lands as they were “discovered,” including rights of sovereignty over the indigenous popula-

40. Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 474 (2002).

41. *Id.* at 475 (footnote omitted).

42. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[3] (Nell Jessup Newton ed., 2005) [hereinafter HANDBOOK OF FEDERAL INDIAN LAW].

43. Treaty of Hopewell, U.S.-Cherokees, art. V, Nov. 28, 1785, 7 Stat. 18.

44. Clarkson, *supra* note 40, at 477.

45. Portions of this Section are amplified in several previous articles published by the lead author in the *University of Colorado Law Review*, *Lewis and Clark Law Review*, and *North Carolina Law Review*. See Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285 (2009); Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009 (2007) [hereinafter Clarkson, *Tribal Bonds*]; Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 LEWIS & CLARK L. REV. 943 (2008).

46. See, e.g., Pope Innocent IV, *Commentaria Doctissima in Quinque Libros Decretalium*, reprinted in THE EXPANSION OF EUROPE: THE FIRST PHASE 191–92 (James Muldoon ed., 1977) (“[I]s it licit to invade a land that infidels possess or which belongs to them? . . . [I]t is licit for the pope to [demand allegiance, and] if the infidels do not obey, they ought to be compelled by the secular arm and war may be declared against them by the pope and not by anyone else.”); see also ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 29–41 (1990) (discussing the crusading era origins of the legal doctrines which governed European land claims in the Americas).

tions.<sup>47</sup> Even after England broke away from the authority of Rome, English law still supported the “Doctrine of Discovery,”<sup>48</sup> although the validity of the doctrine was a subject of debate among early colonial settlers.<sup>49</sup> Regardless of conflicting religious interpretations of Indian rights, “practical realities shaped relations between the Indians and colonists.”<sup>50</sup> “The necessity of getting along with powerful”<sup>51</sup> and militarily capable Indian tribes dictated that the settlers seek Indian consent to settle if they wished to live in peace and safety, buying lands that the Indians were willing to sell rather than displacing them by other methods. As a result, the English colonial governments demanded the requisite authority and ultimately acquired most of the lands by purchase from the In-

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47. See, e.g., Bull “Inter Caetera Divinae” of Pope Alexander VI dividing the New Continents and granting America to Spain (May 4, 1493), reprinted in CHURCH AND STATE THROUGH THE CENTURIES 153, 156–57 (Sidney Z. Ehler & John B. Morrall eds. & trans., 1967).

Wherefore, all things considered maturely and, as it becomes Catholic kings and princes . . . you have decided to subdue the said mainlands and islands, and their natives and inhabitants . . . with the proviso, however, that these mainlands and islands found or to be found, discovered or to be discovered . . . be not actually possessed by some other Christian king or prince.

*Id.*; see also WILLIAMS, *supra* note 46, at 15–18 (discussing the “universal right asserted by popes and Christian princes to enforce Christianity’s vision of ‘civilization’” in the conquest of non-European lands); Bull “Romanus Pontifex” of Pope Nicholas V Granting the Territories Discovered in Africa to Portugal (Jan. 8, 1455), reprinted in CHURCH AND STATE THROUGH THE CENTURIES, *supra*, at 144, 146–53 (granting Portugal the exclusive right to colonize the Canary Islands and all other parts of Africa). See generally Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1 (1942) (tracing the influence of Spanish law on the development of Indian law in the United States).

48. See, e.g., Calvin’s Case, (1608) 77 Eng. Rep. 377 (K.B.).

All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace . . . .

And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, . . . he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity . . . .

*Id.* at 397–98. This opinion was authored by Lord Chief Justice Edward Coke, who, coincidentally, co-authored the charter for the Virginia Company in 1606. See WILLIAMS, *supra* note 46, at 201–02.

49. John Winthrop, for example, argued that as “for the Natives in New England they inclose noe land neither have any settled habitation nor any tame cattle to improve the land by, & soe have noe other but a naturall right to those countries.” Cheister E. Eisinger, *The Puritans’ Justification for Taking the Land*, in 84 ESSEX INSTITUTE HISTORICAL COLLECTIONS 131, 135–56 (1948). Roger Williams, on the other hand, argued: “‘I have knowne them make bargaine and sale amongst themselves for a small peece, or quantity of Ground’. . . . And this they do, ‘. . . notwithstanding a sinfull opinion amongst many that Christians have right to *Heathens* Lands.’” *Id.* at 141.

50. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 42, § 1.02[1].

51. *Id.* Despite devastating outbreaks of disease, the Indians would continue to outnumber the European settlers for several decades. See *id.*

dians.<sup>52</sup> During this period, “the Indians were treated as sovereigns possessing full ownership rights to the lands of America.”<sup>53</sup>

At the outbreak of the French and Indian War in 1754, treaty making assumed a new dimension, as each of the competing European powers sought to form alliances with the various tribes.<sup>54</sup> The military importance of treaty alliances would continue throughout the Revolutionary War period as well.<sup>55</sup> After the war, however, a powerful group of tribes that had sided with the British during the war confronted the founding fathers. Those tribes still maintained claims to the territory between the Appalachian Mountains and the Mississippi River. George Washington detailed his proposed policy for dealing with the Indians in a letter to James Duane, the head of the Committee of Indian Affairs of the Continental Congress:

[P]olicy and [economy] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho’ they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expence, and without that bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them.<sup>56</sup>

Although many consider Washington’s letter the founding document of American Indian policy,<sup>57</sup> its notion of Indians as “savages” sits alongside the pragmatic necessity of making treaties with the Indians.<sup>58</sup> As the newly formed United States began its inexorable march westward, the Indian lands usually were not taken by force but were instead ceded by treaty in return for the establishment of a trust relationship,<sup>59</sup>

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52. *Id.*

53. FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 55 (Rennard Strickland et al. eds., 1982) [hereinafter 1982 HANDBOOK].

54. See BENJAMIN FRANKLIN, PENNSYLVANIA, AND THE FIRST NATIONS: THE TREATIES OF 1736-62, at 15 (Susan Kalter ed., 2006).

55. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 23 (1994).

56. Letter from George Washington to James Duane (Sept. 7, 1783), in DOCUMENTS OF UNITED STATES INDIAN POLICY 1-2 (Francis Paul Prucha ed., 3d ed. 2000) (noting that George Washington’s recommendation was adopted by the Continental Congress).

57. See, e.g., ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 44 (2005) (tracing the history of Indian policy).

58. See Letter from George Washington to James Duane, *supra* note 56, at 1-2.

59. The scope of the trust relationship is multi-faceted. “Many treaties explicitly provided for protection by the United States.” HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 42, § 1.03[1]; see, e.g., Treaty with the Kaskaskia, art. 2, Aug. 13, 1803, 7 Stat. 78, reprinted in 2 INDIAN AFFAIRS, LAWS

among other things, often in specific consideration for the Indians' relinquishment of land.<sup>60</sup> It is important to note that these treaties were always entered into as government-to-government relationships between the tribes as collective political entities and the United States.<sup>61</sup> "[F]rom the beginning of its political existence, [therefore, the United States] recognized a measure of autonomy in the Indian bands and tribes. Treaties rested upon a concept of Indian sovereignty . . . and in turn greatly contributed to that concept."<sup>62</sup> Such sovereignty clearly included the right to punish all offenders who committed crimes on tribal land.<sup>63</sup>

For many colonists, treating tribes as governments was clearly more a function of pragmatism than a generally held belief that tribal governments were legitimate sovereigns. Although the Indian tribes regarded treaty obligations as sacred, condescending notions of the inferiority of tribalism prompted many to question whether their provisions were binding on the United States. During this time period, the legal discourse of opposition to tribal sovereignty argued that "tribal Indians, by virtue of their radical divergence from the norms and values of white society regarding use of and entitlement to lands, could make no claims to possession or sovereignty over territories which they had not cultivated and which whites coveted."<sup>64</sup>

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AND TREATIES 67 (Charles J. Kappler ed., 1904) [hereinafter 2 KAPPLER] (providing that the United States would protect the Kaskaskia tribe); Treaty with the Creeks, art. 2, Aug. 7, 1790, 7 Stat. 35, *reprinted in* 2 KAPPLER, *supra*, at 25 (providing that the United States would protect the Creek Nation). Other treaties provided the means for subsistence. *See, e.g.*, Treaty of Fort Laramie, art. 10, Apr. 29, 1868, 15 Stat. 635 [hereinafter Fort Laramie Treaty], *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 112 (Francis Paul Prucha ed., 3d ed. 2000) [hereinafter PRUCHA] (providing for subsistence rations for the Sioux); Treaty with the Western Cherokee, art. 8, May 6, 1828, 7 Stat. 311, *reprinted in* 2 KAPPLER, *supra*, at 288 (providing for twelve months of rations); 1982 HANDBOOK, *supra* note 53, at 81 ("[E]ach Head of a Cherokee family . . . who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and a Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) also, a just compensation for the property he may abandon . . .").

60. *See, e.g.*, Fort Laramie Treaty, *supra* note 59, *reprinted in* PRUCHA, *supra* note 59, at 110 (providing that the Sioux relinquish all claims to lands in the United States); Treaty with the Kaskaskia, *supra* note 59, *reprinted in* 2 KAPPLER, *supra* note 59, at 67 (providing that the Kaskaskia Indians "relinquish and cede to the United States all the lands in the Illinois country"); Treaty with the Creeks, *supra* note 59, *reprinted in* 2 KAPPLER, *supra* note 59, at 26 (providing that the Creek nation "extinguish forever all claims" to specified lands).

61. *See, e.g.*, Treaty of Fort Laramie, art. 1, Sept. 17, 1851, 11 Stat. 749, *reprinted in* PRUCHA, *supra* note 59, at 84 (referring to the United States and the Sioux collectively as "the aforesaid nations"); Treaty of Fort McIntosh, Jan. 21, 1785, 7 Stat. 116, *reprinted in* PRUCHA, *supra* note 59, at 5 (describing the treaty as between the United States and the Wiandot, Delaware, Chippewa, and Ottawa nations of Indians); Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15, *reprinted in* PRUCHA, *supra* note 59, at 4–5 (describing the treaty as between the United States and the Six Nations).

62. PRUCHA, *supra* note 59, at 2.

63. *See* Treaty of Hopewell, *supra* note 43.

64. Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 243–44 (1989). Such arguments were made by several prominent individuals, including President John Quincy Adams:

The Indian right of possession itself stands, with regard to the greatest part of the country, upon a questionable foundation . . . [W]hat is the right of a huntsman to the forest of a thousand miles

*C. Assertion of Congressional Authority*

The federal government first began to assert its jurisdiction over criminal matters in Indian Country in which non-Indians committed crimes against Indians.<sup>65</sup> This assertion was followed by the General Crimes Act in 1817, which extended jurisdiction over matters covering crimes by both Indians and non-Indians.<sup>66</sup> The major exception to this increased jurisdiction was Indian-on-Indian crime, over which the tribes retained exclusive jurisdiction.<sup>67</sup>

The Indian Country Crimes Act,<sup>68</sup> together with the Assimilative Crimes Act,<sup>69</sup> establish federal jurisdiction over crimes inside Indian Country that would otherwise fall under state jurisdiction. In some instances, “usually as part of a treaty, the federal jurisdiction over non-Indians was not exclusive, and tribes were able to exercise criminal and civil jurisdiction over Indians and non-Indians alike.”<sup>70</sup>

During this time period various political factions disagreed over whether tribalism could survive contact with white civilization and whether the appropriate course of action was to force the Indians to assimilate into that society or to remove them beyond the reaches of that society.<sup>71</sup> Ultimately, notions of tribal inferiority prevailed, and Congress passed the Indian Removal Act of 1830.<sup>72</sup> Several tribes in the Southeast, however, already had treaties that secured their right to remain on their ancestral homeland. In response, Georgia Governor George Gilmer declared that

treaties were expedients by which ignorant, intractable, and savage people were induced without bloodshed to yield up what civilized peoples had a right to possess by virtue of that command of the Creator delivered to man upon his formation—be fruitful, multiply, and replenish the earth, and subdue it. . . . [The practice of purchas-

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over which he has accidentally ranged in quest of prey? Shall the liberal bounties of Providence to the race of man be monopolized by one of ten thousand for whom they were created? Shall the exuberant bosom of the common mother, amply adequate to the nourishment of millions, be claimed exclusively by a few hundreds of her offspring? Shall the lordly savage not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of a world? . . . No, generous philanthropists! Heaven has not been thus inconsistent in the works of its hands. Heaven has not thus placed at irreconcilable strife, its moral laws with its physical creation.

John Quincy Adams, Oration at Plymouth, Dec. 22, 1802, *reprinted in* DAVID JOSIAH BREWER ET AL., *THE WORLD’S BEST ORATIONS* 65, 74–75 (1901).

65. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 42, § 1.03[1].

66. *Id.* § 9.02[1][a].

67. *Id.*

68. 18 U.S.C. § 1152 (2006) (also referred to as the General Crimes Act).

69. *Id.* § 13.

70. Clarkson, *supra* note 40, at 475.

71. See Letter from Thomas Jefferson, President of the United States, to William Henry Harrison, Governor of Indiana Territory (Feb. 27, 1803), *reprinted in* PRUCHA, *supra* note 59, at 22–23 (“[O]ur settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi.”).

72. Indian Removal Act of 1830, 4 Stat. 411 (codified as amended at 25 U.S.C. § 174).

ing land from the Indians was merely] the substitute which humanity and expediency have imposed, in place of the sword, in arriving at the actual enjoyment of property claimed by the right of discovery, and sanctioned by the natural superiority allowed to the claims of civilized communities over those of savage tribes.<sup>73</sup>

Over the next forty years, however, tribal sovereignty was nonetheless explicitly and repeatedly recognized through treaty making as tribes agreed either to move to the west of the Mississippi or to cede portions of their ancestral homeland in the face of advancing settlement.<sup>74</sup>

In 1832 Chief Justice John Marshall, in upholding the validity of the Cherokee treaties, described the Cherokee Nation as being a “distinct community . . . in which the laws of Georgia can have no force.”<sup>75</sup> In so doing, Justice Marshall described the Cherokees as having a nation with autonomy over its own jurisprudence and thus the ability to enforce its own laws, including those laws necessary to protect women and children from violence and abuse perpetrated on them by non-Indians.<sup>76</sup> In *Cherokee Nation*, Chief Justice Marshall described the relationship of Indian nations to the federal government as one of “domestic dependent nations,”<sup>77</sup> and in *Worcester* he further emphasized that such dependency and protection “does not imply the destruction of the protected.”<sup>78</sup>

Although the formal existence of the United States began at a time when the prevailing policy recognized tribal sovereignty through the treaty-making process, such an orientation was not permanent. Once the removal process was essentially complete, responsibility for Indian affairs moved from the War Department to the Interior Department, along with the authority to negotiate on a government-to-government basis with the tribes.<sup>79</sup> Such treaties still had to be ratified by Congress. In the 1870s, however, Congress ceased making treaties with the Indians<sup>80</sup> and instead developed a policy of allotting tribal lands to individual Indians,<sup>81</sup>

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73. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 196 (1984).

74. See, e.g., Fort Laramie Treaty, *supra* note 59, reprinted in PRUCHA, *supra* note 59, at 109 (signed by the Sioux Nation at the conclusion of the Powder River War, establishing a reservation); Treaty of Dancing Rabbit Creek, U.S.-Choctaw, art. 4, Sept. 27, 1830, 7 Stat. 333, reprinted in 2 KAPPLER, *supra* note 59, at 310 (signed by Choctaw leaders at *bok chukfi ahithac*—“the little creek where the rabbits dance”—providing for the removal from the ancestral homelands in Mississippi and Alabama to land in southeastern Oklahoma).

75. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

76. *Id.* at 562.

77. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

78. *Worcester*, 31 U.S. (6 Pet.) at 552.

79. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 113 (1983).

80. Treaty making with the Indians was ended by Congress in 1871: “[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .” *Future Treaties with Indian Tribes*, 16 Stat. 544, 566 (1871), reprinted in PRUCHA, *supra* note 59, at 135.

81. General Allotment Act of 1887, 24 Stat. 388 (1887). The statute is also known as the Dawes Act after Senator Henry L. Dawes of Massachusetts. While the Dawes Act represented the final, full-

a policy that was characterized as a “mighty pulverizing engine”<sup>82</sup> that would destroy tribalism and force Indians to assimilate into dominant society as individuals.<sup>83</sup> Notions of the inferiority of tribalism again became a catalyst for policy change, but implementation of the policy required recognition of tribal sovereignty. Realization of the Allotment Act required negotiations with tribal governments, and even when dismantling the governance structure of particular tribes, such as the Five Civilized Tribes in Oklahoma, Congress still “continued [the existence of tribes and tribal governments] in full force and effect for all purposes authorized by law.”<sup>84</sup>

The situation further deteriorated in 1883 when Crow Dog, a member of the Brule Sioux band of the Sioux Nation of Indians, brought an original writ of *habeas corpus* following a conviction in federal court for murder and an accompanying death sentence.<sup>85</sup> The victim was another Indian of the same band and nation, and the crime was committed in Indian Country.<sup>86</sup> The Supreme Court held that the district court had neither jurisdiction to try the case, nor authority to convict or sentence the defendant, and that only the laws of the tribe held sway over the lands in question.<sup>87</sup>

After the Supreme Court’s decision in *Ex parte Crow Dog*, Congress passed the Major Crimes Act in 1883.<sup>88</sup> In conjunction with the previous acts, the Major Crimes Act established federal jurisdiction over all major crimes, including murder, regardless of whether either the alleged perpetrator or the victim were Indian, thereby removing jurisdic-

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scale realization of the allotment policy, many treaties made with western tribes from 1865 to 1868 provided for allotment in severalty of tribal lands. See ROBERT WINSTON MARDOCK, *THE REFORMERS AND THE AMERICAN INDIAN* 212 (1971).

82. In an address to Congress in 1901, President Theodore Roosevelt expressed his sense of the assimilation policy:

[T]he time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual.

10 JAMES D. RICHARDSON, *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1907*, at 450 (1908).

83. Gavin Clarkson, *Not Because They Are Brown, But Because of Ea: Why the Good Guys Lost in Rice v. Cayetano, and Why They Didn’t Have to Lose*, 7 MICH. J. RACE & L. 317, 326 (2002).

84. Five Tribes Act, ch. 1876, § 28, 34 Stat. 137, 148 (1906).

That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of the said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

*Id.*

85. *Ex parte Crow Dog*, 109 U.S. 556, 557 (1883).

86. *Id.*

87. *Id.* at 572.

88. 23 Stat. 385 (1885) (codified at 18 U.S.C. §§ 1153, 3242 (2006)).



tion of the tribes, even over their own lands.<sup>89</sup> This statute severely diminished the tribes' role in dispute resolution.

In the same year the Major Crimes Act was passed, the Secretary of the Interior established the Courts of Indian Offenses under the BIA.<sup>90</sup> These courts "administered a code promulgated by the Secretary that was incorporated into volume 25 of the Code of Federal Regulations (CFR)."<sup>91</sup> From the start, there were many who recognized that "there was, at best, a shaky legal foundation for these tribunals. There was no statutory authorization for the establishment of such courts, only the generally acknowledged authority of the Department of the Interior to supervise Indian affairs."<sup>92</sup> Nevertheless, the Commissioner of Indian Affairs subjected a number of tribes to these courts.<sup>93</sup> "These courts were allegedly created for the purpose of providing 'adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the *enforcement of tribal law and custom have broken down* [and] for which no adequate substitute has been provided under Federal or State law."<sup>94</sup> A clear goal of the CFR court system was "to break down traditional tribal government structures."<sup>95</sup> Despite its lack of direct statutory authority and shaky legal foundation, its constitutionality has been upheld.<sup>96</sup> Tribes found themselves unable to prosecute crimes that fell into the scope of the crimes enumerated in the act. Consequently, many tribes began to find ways to circumvent the statute in order to retain jurisdiction over the crimes committed by non-Indians in Indian Country.<sup>97</sup> This round-about action was, of course, not an optimal solution because it restricted tribes from being able to prosecute offenders according to

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89. Clarkson, *supra* note 40, at 477.

90. *Id.*

91. *Id.*

92. Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 51 (1988); see also Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 555 n.272 (1976) ("Authority for these courts could conceivably be found in 25 U.S.C. § 2 (1970), which sets out a general grant of power for the management of all Indian affairs and all matters arising out of Indian relations.");

93. Clarkson, *supra* note 40, at 477 n.26 ("Although 25 C.F.R. § 11.100(a)(12)(ii) (1999) specifically lists the Choctaw Nation of Oklahoma under the jurisdiction of the Courts of Indian Offenses, the Choctaw CFR court is a recent phenomenon. When the CFR courts were first established, they were not applied to the Five Civilized Tribes because they had already 'had recognized tribal governments' with active judiciaries.") (quoting WILLIAM T. HAGAN, *INDIAN POLICE AND JUDGES* 109 (1966)); see also Clinton, *supra* note 92, at 553–54 (examining jurisdictional problems concerning law enforcement on Indian lands).

94. Clarkson, *supra* note 40, at 477–78 (citing 25 C.F.R. § 11.1(b) (1992) (emphasis added)).

95. *Id.* at 478 (citing Clinton, *supra* note 92, at 553).

96. *Id.* at 477; see *Tillett v. Hodel*, 730 F. Supp. 381, 382–83 (W.D. Okla. 1990) (noting Congress' repeated recognition of Courts of Indian Offenses and citing statutes delegating power to the President broad enough to establish these courts); see also *United States v. Clapox*, 35 F. 575, 576 (D. Or. 1888) (citing a treaty in which the Umatilla tribe agrees to observe laws and rules prescribed by the United States); SIDNEY L. HARRING, *CROW DOG'S CASE* 186–87 (Frederick Hoxie & Neal Salisbury eds., 1994) (discussing Courts of Indian Offenses and the *Clapox* case).

97. Clarkson, *supra* note 40, at 477–78.

the laws established for the most serious offenses. Tribes came to be dependent upon the federal government for enforcement of those crimes, a situation that has not always been sufficient.

Although the Major Crimes Act appeared to increase the involvement of the federal government in law enforcement, several subsequent federal studies have verified what tribes already knew to be true: actual federal participation in the practice of law enforcement by the 1970s was minimal.<sup>98</sup> In response to the jurisdictional void created by the federal government's inability or unwillingness to act on Indian lands, many tribes, dissatisfied with the lack of adequate federal law enforcement against non-Indians, began asserting their own jurisdiction over crimes committed by non-Indians within their borders.<sup>99</sup>

#### D. Public Law 280

Over time, Congress and the courts further hampered the ability of tribes to exercise jurisdiction over their own lands. Although a tribe's ability to protect its members from physical, economic, and symbolic attacks by members of the dominant society is essential to the tribe's existence and prosperity,<sup>100</sup> judicial and legislative action in the federal government indicate Washington's indifference to the unique situation of the tribes. One major action by Congress establishing this indifference was Public Law 280, passed in 1953.<sup>101</sup> Public Law 280 eliminates federal jurisdiction over Indian Country, extends state criminal and civil jurisdiction to Indian Country in five (later six) states,<sup>102</sup> and allows any other state the ability to accept such local jurisdiction if it chooses.<sup>103</sup>

Prior to the passage of Public Law 280, "responsibility for law enforcement on the reservations was irrationally fractionated."<sup>104</sup> Jurisdiction depended on the status of the offender and the victim. If a non-Indian were the victim of a crime committed by a non-Indian, or if a

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98. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REP. NO. 96-16, CRIMINAL JUSTICE IN INDIAN COUNTRY AUDIT REPORT (1996), available at <http://www.usdoj.gov/oig/reports/plus/a9616/index.htm> [hereinafter CRIMINAL JUSTICE]; U.S. DEP'T OF JUSTICE, REPORT OF THE TASK FORCE ON INDIAN MATTERS (1975) [hereinafter TASK FORCE].

99. Clarkson, *supra* note 40, at 482 (citing WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 123-24 (3d ed. 1998)).

100. CANBY, *supra* note 99, at 133.

101. See Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2006), 25 U.S.C. §§ 1321-1322, 28 U.S.C. § 1360).

102. *Id.* Public Law 280 extended state jurisdiction over all lands in California, Minnesota (except the Red Lake Nation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. *Id.* Alaska was also included on this list in 1958, with the exception of certain offenses committed on Annette Islands. *Id.*

103. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 42, § 6.04[3][a]. This delegation of jurisdiction occurred even though the interests of the tribes and the States are not always aligned. As Chief Justice Marshall noted in one decision, "the people of the States where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886).

104. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975).

crime were committed without an apparent victim (such as drunk driving or gambling), state law dictated that only state authorities could prosecute the offender.<sup>105</sup> “But if either the offender or victim were Indian, the federal government had the exclusive jurisdiction to prosecute, applying state law in federal court under the Assimilative Crimes Act.”<sup>106</sup> Finally, if both the offender and the victim were Indians, the federal government had exclusive jurisdiction if the offense were one of the “ten major crimes.”<sup>107</sup> In all other cases, exclusive jurisdiction was granted to the tribal courts.<sup>108</sup> The purpose of Public Law 280 was to address this confusing and fractioned jurisdiction.

Public Law 280 was met with criticism from the time of its passage. States resented the initiative because they were given more responsibilities without additional means by which to finance such measures.<sup>109</sup> Many tribes objected to state jurisdiction imposed on them without their consent.<sup>110</sup> An analysis of the Senate Report of the bill in committee suggests that the foremost concern of Congress was lawlessness on the reservations and the accompanying threat to non-Indians living nearby.<sup>111</sup>

Congress eventually granted the states the advantage of retrocession, allowing the states the right to cede back to the federal government the jurisdiction granted by Public Law 280. One portion of the 1968 Indian Civil Rights Act<sup>112</sup> allowed any state that had previously assumed jurisdiction under Public Law 280 to offer the return of any of that jurisdiction to the federal government by sending a resolution stating such to the Secretary of the Interior, who could then accept or reject the resolution at his discretion.<sup>113</sup> These advantages were not shared by the tribes; Indians could not share in the decision-making process when a state chose to retrocede jurisdiction, although informal channels, while less than ideal, still existed in which they could appeal to the Secretary.<sup>114</sup>

Public Law 280 created a situation in which the states gained control of jurisdiction over crimes, where the tribes did not. As a result, the federal government effectively shifted the guardian-ward relationship in matters of criminal jurisdiction to the state, forcing tribes once again to look to outside means to enforce criminal jurisdiction over non-Indians

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105. *Id.*

106. *Id.*; see also 18 U.S.C. § 1152 (remains the law today in non-Public Law 280 States).

107. As Goldberg notes, “[t]he jurisdiction granted by this section is expressly excluded [in cases] where the state has accepted PL-280 jurisdiction.” Goldberg, *supra* note 104, at 541 n.27; see also 18 U.S.C. § 1153; 18 U.S.C. § 1162(c) (“The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country . . . over which the several States have exclusive jurisdiction.”); 25 U.S.C. § 1321(a) (granting the consent of the United States to States over offenses committed on tribal lands with the tribe’s consent).

108. Goldberg, *supra* note 104, at 541.

109. *Id.* at 544.

110. *Id.* at 538.

111. See S. REP. NO. 83-699, at 5–6 (1953), reprinted in 1953 U.S.C.C.A.N. 2409, 2411–12.

112. 25 U.S.C. § 1323.

113. Goldberg, *supra* note 104, at 558–59 (citing 25 U.S.C. § 1323 (1970)).

114. *Id.*

on their lands. In a way, this requirement of Public Law 280 was more of a concern to the tribes because the states had neither the means nor the will by which to enforce such jurisdiction. As Professor Carole Goldberg notes, “[f]inancial hardship for the states translated into inadequate law enforcement for the reservations. The most notable failure among the mandatory states was Nebraska, where the Omaha and Winnebago reservations were left without any law enforcement at all once federal officers withdrew.”<sup>115</sup> Such circumstances created an untenable situation on many reservations because the tribes were still dependent upon outside assistance to protect their citizens.

The Indian Civil Rights Act<sup>116</sup> also imposed some of the requirements of the Bill of Rights on tribal governments.<sup>117</sup> Historically, “tribes had not been subject to constitutional restraints in their governmental actions, because those restraints are imposed in terms either upon the federal government or, by the 14th Amendment, upon the states.”<sup>118</sup> One provision of the bill placed a severe restriction on the ability of tribes to punish criminals: “No Indian tribe in exercising powers of self-government shall . . . require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both . . . .”<sup>119</sup>

This limitation effectively curtailed the efforts of tribal prosecutors to punish criminals for more serious crimes with longer sentences without federal involvement. Some tribes would creatively charge an offender for several offenses,<sup>120</sup> imposing a maximum sentence on each, in an effort to levy an adequate punishment for more serious crimes.<sup>121</sup> These efforts were, much like earlier ones, a less than optimal solution to the problem of crimes committed on tribal lands.

These problems in jurisdiction were exacerbated by the paradox that still exists within federal law. The same federal government that removed the power over what is inherently a local issue of law enforcement then gave that power over to the domain of federal officials with little incentive to be responsive to the urgency or emotional impact of a

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115. *Id.* at 552.

116. Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)).

117. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 42, § 1.07.

118. CANBY, JR., *supra* note 99, at 29.

119. 25 U.S.C. § 1302(7).

120. An example of this might include separate charges of breaking and entering as well as assault and battery.

121. A number of federal district courts have recently reviewed this strategy, with differing results. *Compare* Bustamante v. Valenzuela, No. CV-09-8192-PCT-ROS, 2010 WL 1338125 (D. Ariz. Apr. 1, 2010), *with* Alvarez v. Tracey, No. CV-08-2226-PHX-DGC (DKD), 2010 WL 965293 (D. Ariz. Mar. 16, 2010). *See also* Miranda v. Nielsen, No. CV-09-8065-PCT-PGR (ECV), 2010 WL 148218, at \*5 (D. Ariz. Jan. 12, 2010); Magistrate Judge’s Proposed Findings and Recommended Disposition, Romero v. Goodrich, No. 1:09-cv-232 RB/DJS (D. N.M. Mar. 9, 2010).

crime and who often have little accountability to the tribal community itself.<sup>122</sup>

Nevertheless, as late as 1978, tribes still had some authority over non-Indian crimes on their lands, but that was soon to change.

*E. The Oliphant in the Room that Congress Refuses to Acknowledge*

In 1978 the Supreme Court heard the case of Mark David Oliphant, a non-Indian resident of the Port Madison Reservation in Washington.<sup>123</sup> After being arrested for assaulting a tribal officer, he petitioned for a writ of *habeas corpus*, arguing that the Suquamish Indian Provisional Court had no jurisdiction over non-Indians.<sup>124</sup> The Court agreed, and held that the non-Indians were entitled to *habeas* relief.<sup>125</sup>

In the ruling, Justice Rehnquist relied on the 1830 Treaty with the Choctaw Nation in which the Choctaws “express[ed] a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations.”<sup>126</sup> Rehnquist concluded that “[s]uch a request for affirmative congressional authority is inconsistent with respondents’ belief that criminal jurisdiction over non-Indians is inherent in tribal sovereignty.”<sup>127</sup>

Justice Rehnquist, however, failed to note the subsequent 1866 Treaty with the Choctaw and Chickasaw,<sup>128</sup> which stated that

[e]very white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw.<sup>129</sup>

The treaty also contains an article clearly stating that “[i]t is further agreed that all treaties and parts of treaties inconsistent herewith be, and the same are hereby, declared null and void.”<sup>130</sup> If Justice Rehnquist were relying on language in an earlier treaty suggesting a wish that Congress “may grant” the right of punishing white men on their lands, no

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122. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 740 (2006).

123. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978).

124. *Id.*

125. *Id.* at 212.

126. *Id.* at 197 (quoting Treaty of Dancing Rabbit Creek, U.S.-Choctaw, art. 4, Sept. 27, 1830, 7 Stat. 333 (1830) (emphasis added by the Court)).

127. *Id.* at 197–98.

128. Treaty with the Choctaw and Chickasaw, Apr. 28, 1866, 14 Stat. 769.

129. *Id.* art. 38.

130. *Id.* art. 51.

such language appeared in the later treaty that contained language superseding the earlier treaty. As a result, Justice Rehnquist was incorrect in relying on the 1830 treaty as support for denying the Suquamish Tribe jurisdiction over the assailant.

Nevertheless, in holding that the tribe had no jurisdiction, the Court invited Congress to address this concern toward the end of the ruling: “[W]e are not unaware of the prevalence of non-Indian crime on today’s reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.”<sup>131</sup> It has been over thirty years and Congress has yet to act, while the legacy of *Oliphant* has been the creation of a clear jurisdictional void in Indian Country and an inability by which the tribes can protect themselves.

A fair reading and understanding of *Oliphant* is that the outcome of the case was not based on Indian consent; the tribe was clearly not choosing to divest itself of its sovereignty in submission to the United States.<sup>132</sup> Rather, the United States involuntarily absorbed the tribes, fabricating plenary authority over them by asserting colonial prerogatives, and demonstrating that the colonization process is still ongoing with respect to the tribes.<sup>133</sup> If this process continues, the uniqueness of Indian law may well evaporate, as tribes may be forced to relinquish every measure of their sovereignty.<sup>134</sup>

## II. THE LEGACY OF *OLIPHANT*: THE GUARDIAN IS NOT GUARDING

*In July 2006 an Alaska Native woman in Fairbanks reported to the police that she had been raped by a non-Native man. She gave a description of the alleged perpetrator and city police officers told her that they were going to look for him. She waited for the police to return and when they failed to do so, she went to the emergency room for treatment. A support worker told Amnesty International that the woman had bruises all over her body and was so traumatized that she was talking very quickly. She said that, although the woman was not drunk, the Sexual Assault Response Team nevertheless “treated her like a drunk Native woman first and a rape victim second.” The support worker described how the woman was given some painkillers and some money to go to a non-Native shelter, which turned her away because they also assumed that she was drunk: “This is why*

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131. *Oliphant*, 435 U.S. at 212 (footnote omitted).

132. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1, 37 (1999).

133. *Id.*

134. *Id.* at 80.

*Native women don't report. It's creating a breeding ground for sexual predators.*"<sup>135</sup>

Of the 127 reservations that exercised criminal jurisdiction in the United States at the time of the *Oliphant* decision, 33 extended jurisdiction to non-Indians.<sup>136</sup> The result of *Oliphant* "was particularly devastating for tribes such as the Makah, Tulalips, and Yakima, 'where the non-Indian population exceeds two-thirds of the total reservation population.'"<sup>137</sup> Because the number of non-Indians on reservation lands was increasing, the distressing statistics on domestic violence in Indian Country are not surprising. It is disturbing, however, that tribal court systems lack any power to prosecute non-Indians, who, statistics have shown, will perpetrate the majority of crimes on nine of the most populous reservations<sup>138</sup> where Indians are vastly outnumbered by non-Indians.

As discussed earlier, the Supreme Court limited the status of tribes as "domestic dependent nations" in *Cherokee Nation v. Georgia*.<sup>139</sup> In so doing, Chief Justice Marshall in effect subordinated the power of tribes under the federal government. As a result, tribes are unable to assert what should be complete jurisdiction over criminal matters on their own lands, leaving them helpless to protect their members.

The fiduciary duty owed to tribes by the federal government, which Marshall characterized as similar to the duty owed by guardians to their wards,<sup>140</sup> has been lacking.<sup>141</sup> Even though the Court has established such a fiduciary duty, coupled with emphasis through congressional legislation and judicial decisions, the federal government refuses to perform the essential duty of protection.

#### A. *Alarming Trends, Disturbing Numbers: Statistical Data*

*Before asking "what happened," police ask: "Was it in our jurisdiction? Was the perpetrator Native American?"*<sup>142</sup>

135. AMNESTY INT'L, *supra* note 3, at 1 (quoting Interview with Alaska Native Support Worker (identity withheld) (July 2006)).

136. Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1292 (2004).

137. *Id.* at 1292–93 (quoting RUDOLPH C. RYSER, WHEN TRIBES AND STATES COLLIDE PART II: A SPECIAL REPORT PREPARED FOR THE INTER-TRIBAL STUDY GROUP ON TRIBAL/STATE RELATIONS (1999), available at <http://www.halcyon.com/pub/FWDP/Americas/collide2.txt> (on file with the University of Michigan Journal of Law Reform)).

138. *Id.* at 1293.

139. 30 U.S. (5 Pet.) 1, 17 (1831).

140. *Id.*

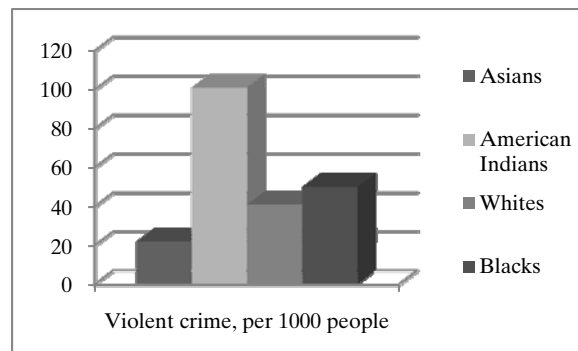
141. See Fraser, *supra* note 27, at 678 ("The Federal Government has a fiduciary duty to protect Tribes, but at the same time it preserves unilateral authority to divest Tribal Governments of their sovereign and property rights.")

142. AMNESTY INT'L, *supra* note 3, at 8, (quoting Support Worker for Native American Survivors of Sexual Violence (May 2005)).

Research compiled by the BJS has consistently found that violent crime involving American Indian victims was “primarily interracial.”<sup>143</sup> 57% of crimes against American Indians were committed by a white offender, while 9% were committed by an African American offender.<sup>144</sup> Only 34% of American Indians categorized their victimizer as “other,” which includes (but is not limited to) American Indian offenders.<sup>145</sup> In cases of rape and sexual assault, however, the percentage of crimes committed against American Indian women by members of the dominant society is even higher. From 1992 to 2002, almost nine out of every ten sexual assault or rape incidents against American Indian victims were perpetrated by non-Indian assailants.<sup>146</sup>

In general, American Indians are victims of violent crimes at a significantly higher rate than other racial or ethnic groups in the United States.<sup>147</sup> A BJS study released in 2004 showed that across all races, 41 out of every 1000 persons aged twelve or older are victims of violent crimes.<sup>148</sup> When examining rates of violent crime among American Indian victims, that number climbs to 101 out of every 1000 persons per year,<sup>149</sup> a rate twice as high as blacks (50 per 1000 persons), two and a half that of whites (41 per 1000 persons), and four and a half that of Asians (22 per 1000 persons).<sup>150</sup>

FIGURE 1  
INCIDENCE OF VIOLENT CRIME BY RACE, 2002



143. LAWRENCE A. GREENFELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME, at vi (1999); PERRY, *supra* note 2, at 9; CALLIE RENNISON, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION, AND RACE, 1993-98, at 10 (2001).

144. PERRY, *supra* note 2, at 9.

145. *Id.*

146. *Id.*

147. *Id.* at 4.

148. *Id.*

149. *Id.*

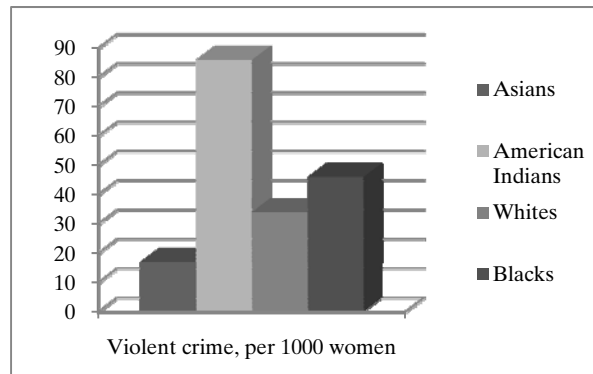
150. *Id.* at 5.



In addition, one study concluded that 34.1% of American Indian and Alaskan Native women—more than one in three—will be raped during their lifetime, as compared with the United States as a whole where the rate is less than one in five.<sup>151</sup>

Similarly, Indian women are victims of all types of domestic abuse at significantly higher rates than the rest of society. Conversely, the perpetrators of these crimes are primarily non-Indians. As Figure 2 illustrates, 86 out of every 1000 American Indian females are victims of violence, a rate two and a half times the national average.<sup>152</sup> Even more distressing is the fact that the offenders in these cases are overwhelmingly non-Indian men. Nearly nine in ten cases of rape or sexual assault involve white or black assailants.<sup>153</sup> In general, as the seriousness of the offense increases, the higher the likelihood of an American Indian victim describing the offender's race as black or white.<sup>154</sup>

FIGURE 2  
INCIDENCE OF VIOLENT CRIME AMONG WOMEN, 2002



The BJS report detailed even more disturbing statistics. According to that study, in 2000 there were 6036 new suspects investigated by U.S. Attorneys for violent crimes. Of these, 1525 (25.3%) were in Indian Country.<sup>155</sup> By contrast, only 677 (18.4%) of the 3688 charges filed in U.S. District Court were in Indian Country.<sup>156</sup> This discrepancy represents a serious contrast in the rate of declination to prosecute in Indian Country as compared with the rest of the nation.

With regard to significant discrepancy in declination, *Oliphant's* legitimacy and impact are called into question. As a direct result of *Oliphant*, the ability of tribes to prosecute offenders who victimize Indian

151. AMNESTY INT'L, *supra* note 3, at 2.

152. PERRY, *supra* note 2, at 7.

153. *Id.* at 9.

154. *Id.* at 10.

155. *Id.* at 18.

156. *Id.* at 20.

women is no more than one in ten.<sup>157</sup> When tribal police are called to a home to investigate reports of domestic violence, they are able to intervene to a degree in the immediate moment. If the offender is non-Indian, however, no arrest can occur, nor can the tribal prosecutor bring charges. As a result of this jurisdictional void, the only recourse available to tribal members in such cases is to refer the matter to the U.S. Attorney, who has the authority to decline prosecution, and frequently does so for a variety of reasons. In 2004, the national average for declination of federal prosecution for all sexual assault cases was over 52%.<sup>158</sup> More troubling is that even in cases of willing federal prosecutors in domestic violence cases, the statutory hurdle is enormous. Even breaking the victim's nose is insufficient grounds to secure a felony assault conviction under the federal definition, which requires serious bodily injury because specific domestic charges do not exist.<sup>159</sup> For these reasons, it is even more vital that victims have legal recourse through appropriate enforcement and jurisdiction.

### B. *Recent Law Enforcement on Reservations*

With regard to justice for domestic violence victims, multiple issues cloud the jurisdictional picture. Although they are subordinate to the federal government, tribal governments are independent sovereigns separate from the states. Recent congressional policies have emphasized self-determination within Indian Country;<sup>160</sup> the Supreme Court rulings discussed earlier,<sup>161</sup> however, have constrained the practical scope of self-determination. In certain areas of law (such as jurisdiction over major crimes), tribes remain wholly dependent on the federal government. It is these regions of dependency that may lead to devastating consequences for tribal members and the tribes themselves.

One potentially devastating consequence centers on the inability of the tribes to prosecute non-Indian offenders. Since many tribes do not currently have the statistical ability to track incidents referred to federal prosecutors and declined, they are therefore unable to accurately measure the rate of declination of prosecution since often little or nothing is known about the final outcome of the case.<sup>162</sup>

This inability to track declination of federal prosecution continues to downplay the significant health and legal problem of Indian women

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157. *Id.* at 8 (“White or black offenders committed 88% of all violent victimizations . . . . Victims identified Asians or American Indians . . . as the offender in 13% of the violent acts.”).

158. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 32 (2006) [hereinafter COMPENDIUM].

159. 18 U.S.C. § 113(a)(6) (2006).

160. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (“An Act . . . to provide for tribal Self-Governance . . .”).

161. *See, e.g.,* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

162. Clarkson et al., *supra* note 2, at 835.

and the stratospheric rates of domestic violence compared to national rates. Legislation passed in the last ten years has been significant for its success in deterring violence against women in the United States, but the impact has not been as significant in Indian Country. One example of such legislation is the Violence Against Women Act (VAWA),<sup>163</sup> which makes it a federal offense to, *inter alia*, cross state lines to stalk, assault, or harass a spouse or intimate partner, or to violate a protection order.<sup>164</sup> VAWA gives victims the right to mandatory restitution and requires states to honor protective orders issued in other states.<sup>165</sup> It also serves to extend the “rape shield law,” which protects victims from abusive inquiries about their private sexual conduct.<sup>166</sup> Amendments to VAWA in 2000 extended travel to and from Indian Country to the interstate stalking offense.<sup>167</sup>

Notwithstanding legislation (such as VAWA) that serves to protect women from violence, the lack of specific domestic violence charges at the federal level greatly obstructs any effect that VAWA could have to offenses committed solely on tribal reservations. Without such specific charges, U.S. Attorneys are often forced to find alternate solutions in order to prosecute incidents of domestic violence under other general criminal statutes, such as 18 U.S.C. § 1153. In order to obtain a felony conviction under that statute, however, the U.S. Attorney must show proof of “serious bodily injury.”<sup>168</sup> The statutory standard defines serious bodily injury as an injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.<sup>169</sup> Unfortunately, sexual assault is not considered to fall under any of these categories.

The physical integrity of Indian women is still violated in a majority of the domestic violence cases, even if the cases do not rise to the magnitude of serious bodily injury; consequently, the incidents are viewed as misdemeanors. While the responsibility of investigating misdemeanors generally falls to tribal law enforcement, the decision in *Oliphant* limits tribal police jurisdiction over non-Indians for domestic violence misdemeanors. The only recourse that many tribal police have is to separate the individuals, escort the perpetrator off the property, and refer the matter to federal authorities.

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163. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified throughout U.S.C.).

164. 18 U.S.C. §§ 2261–2262.

165. *Id.* §§ 2264–2265.

166. Violence Against Women Act of 1994, § 40141 (codified at FED. R. EVID. 412).

167. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (codified throughout U.S.C.).

168. 18 U.S.C. § 1153.

169. *Id.* § 1365(h)(3).

Without specific domestic violence charges on which to rely, U.S. Attorneys are often forced to develop their own local written guidelines that outline the responsibilities of the Federal Bureau of Investigation (FBI), BIA, and tribal police for conducting criminal investigations. *The U.S. Attorneys' Manual* provides very little, if any, direction in establishing such guidelines.<sup>170</sup> Nevertheless, some enterprising U.S. Attorneys have created their own guidelines in an effort to work with and modify the present systemic and legal restrictions to better serve tribal populations.

*C. Cooperation Between Tribes and the U.S. Attorney for the Western District of Michigan*

One such system to handle non-Indian misdemeanants at the federal level has been developed by the U.S. Attorney's Office for the Western District of Michigan.<sup>171</sup> Tribal police departments enter into agreements with the BIA that authorize tribal police to enforce federal laws on their lands. As part of the agreement, tribal officers obtain special deputy commissions that allow them to enforce relevant federal laws against non-Indian perpetrators. In order to avoid a complete jurisdictional void for misdemeanor domestic violence cases, former U.S. Attorney for the Western District of Michigan, Margaret Chiara, developed procedures for handling and prosecuting misdemeanor domestic violence cases. Her jurisdiction was in the vast minority since misdemeanor cases in other federal districts are generally ignored. Only four percent of sexual abuse cases are eventually disposed of by U.S. Magistrates.<sup>172</sup>

In the Western District of Michigan, however, Ms. Chiara created a special non-Indian misdemeanor docket that enables tribal police to cite non-Indians for processing in federal court on misdemeanor violations. Even with this extended federal authority, tribal police arrest authority was still limited by a legal catch-22 because a federal officer's arrest authority is limited to felony crimes or misdemeanors that are actually committed in her presence. Because most domestic violence crimes occur outside the presence of the responding officer by their very nature, this limitation raised a unique problem.

In addition to deputizing tribal authorities, the Western District also provided special training programs for tribal authorities while Ms. Chiara

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170. UNITED STATES ATTORNEYS' MANUAL, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.justice.gov/usao/eousa/foia_reading_room/usam/).

171. The following Section is largely based on my interviews with Jeff Davis, former Tribal Liaison for Western District of Michigan, and Margaret Chiara, former U.S. Attorney for the Western District of Michigan in Lansing, Michigan, during the spring of 2004. It should be noted that after research was conducted into the practices of the U.S. Attorney's Office for the Western District of Michigan for this Article, the U.S. Attorney, Margaret Chiara, was forced to resign in a wave of U.S. Attorney dismissals from 2006 through 2007. Of the eight U.S. Attorneys dismissed in 2006-07, five were very proactive in seeking tribal jurisdiction for domestic violence incidents.

172. COMPENDIUM, *supra* note 158, at 32.

was in charge. As a result, tribal law enforcement was able to perform Lethality Assessments subsequent to incidents of domestic violence. While tribal authorities were fully capable of handling incidents of domestic violence, they were limited in their ability to investigate most cases of domestic violence by the current federal system, lack of specific domestic violence charges, and current jurisprudence.

For illustrations of these solutions, consider the following scenarios: If an Indian commits an offense in Indian Country, tribal police have the authority to arrest that person and remove him from the situation. In a case where two non-Indians are involved in a domestic violence situation on a reservation, an officer of the state can also arrest and remove the perpetrator. But, when a non-Indian assaults an Indian victim, that individual cannot be arrested by either tribal or state law enforcement officers.

In an effort to solve this clear injustice, the Western District of Michigan implemented a process by which tribal officers were encouraged to communicate with an Assistant U.S. Attorney, who collaborated with the tribal officer to find a legal basis for an arrest that could then be based on a probable cause determination that a felony crime had been committed or that a misdemeanor crime was committed in the presence of the tribal officer.

The Western District of Michigan was primarily attempting to remove any perception that non-Indians would be treated differently than Indians in these situations. Once the non-Indian was arrested, an “Information” (i.e., formal charging document) or complaint was filed with a sitting federal magistrate judge. Then, as with other cases, the defendant was brought before the judge for an initial appearance in order to establish bond conditions favorable to the protection of the victim.

These measures were necessary due to the limits on prosecution imposed on tribes by *Oliphant*. The Western District of Michigan specifically created these procedures to arrest non-Indian domestic violence offenders in order to protect Indian victims while still remaining within the established precedent. These procedures are neither simple nor efficient. Rather, the Western District of Michigan’s approach is an example of a creative solution to a difficult situation to ensure equal treatment for both Indian and non-Indians and both offenders and victims. This type of approach has rarely been adopted in other jurisdictions, unfortunately. The simple fact is that most tribes do not have the resources of an openly sympathetic U.S. Attorney’s Office to handle domestic violence cases in such an efficient manner, and it is unlikely that the Western District of Michigan will ever have as strong an Indian Country presence as it did prior to Ms. Chiara’s firing. As she noted in an interview with the *Denver Post*,

I’ve had (assistant U.S. attorneys) look right at me and say, “I did not sign up for this” . . . . They want to do big drug cases, white-

collar crime and conspiracy. And I'll tell you, the vast majority of the judges feel the same way. They will look at these Indian Country cases and say, "What is this doing here? I could have stayed in state court if I wanted this stuff" . . . . It's a terrible indifference, which is dangerous because lives are involved.<sup>173</sup>

Indeed, this pervasive prosecutorial attitude toward cases seen as "lesser" has contributed to the continued strained relationship between the tribes and the federal government itself. Tribes have long memories, through oral traditions, and in many senses the federal prosecutors are seen as the lineal descendents of the "blue-coated, sword-wielding cavalry officer" that epitomized the cruel and violent acts committed against Indians over a sustained period of time.<sup>174</sup> Even prosecutors with the highest and most honorable intentions may find themselves subject to the sins of their predecessors.<sup>175</sup>

Furthermore, even in the best of circumstances, federal officials are generally involved only when the crime is of a serious nature. Because such incursions are relatively rare, prosecutors often have little knowledge or understanding of the communities that fall under their jurisdiction. Even those prosecutors that make extraordinary efforts to learn the intricacies of the culture of the Indian community often have to travel great distances in order to communicate effectively with the community, much less prosecute a crime.<sup>176</sup> Understanding the culture, politics, and even body language can be absolutely crucial to the task of properly serving justice to any community,<sup>177</sup> much less an Indian community located far from the prosecutor's office.

These inherent differences are amplified when a perpetrator is prosecuted and the federal officials leave, as the tribe must then deal with prosecuting the lesser offenses on its own, as well as cleaning up the aftermath of the felony, which may well include repairing the damage done to the community as a whole.<sup>178</sup> These situations make a lasting impression upon tribes in general. As a result, tribes have grown suspicious of federal officials, and these suspicions are exacerbated when the federal government declines to prosecute a crime.

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173. Michael Riley, *Promises, Justice Broken*, DENVER POST, Nov. 11, 2007, at A1.

174. Washburn, *supra* note 122, at 736.

175. *Id.* The lingering effects and distrust are so strong that tribes would rather be held accountable in other tribal courts than in non-tribal courts. During congressional hearings to discuss legislation to change the outcome in *Duro v. Reina*, 495 U.S. 676 (1990) (holding that a tribe had no jurisdiction over a nonmember of that tribe), every tribe that testified unanimously requested and supported such legislation. Alex Tallchief Skibine, *Duro v. Reina and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 768 (1993). In the words of Skibine, himself an Osage citizen, "the fact that most Indian judicial systems are not bound by the Constitution is not half as threatening to most Indians as the racial prejudice they can encounter in non-Indian courts." *Id.* at 769; *see also* Berger, *supra* note 29, at 20.

176. Washburn, *supra* note 122, at 733.

177. *Id.* at 732-33.

178. *Id.* at 737-38.

*D. Declinations of Prosecution*

As stated above, when a non-Indian commits a crime on the reservation against an Indian, the tribe must make referrals to the federal government in order for the local U.S. Attorney's Office to determine if an investigation is needed. To further complicate matters, the tribes are unable to track such referrals; as a result, they cannot measure how often prosecutions are declined.<sup>179</sup> The incidence of declination is an essential statistic to understand. Because the federal government has established itself statutorily as the sole protector of American Indian women against non-Indian domestic abuse offenders, every instance of a declination to prosecute a case of domestic violence, for whatever reason, breaks the essential promise of federal protection.

Because decisions to decline prosecution or underprosecute are nonreviewable and because media coverage of crimes in Indian Country, far from large population centers, is scant, federal prosecutors feel little external pressure to take such cases seriously.<sup>180</sup> As a result, the lack of prosecutorial accountability compounds the problem of non-Indian crime against Indians.

In the domestic violence context, prosecution rates are especially important because those violent acts are more likely to be repeated than other types of assaults.<sup>181</sup> According to one study sponsored by the National Institute of Justice (NIJ), domestic violence "is a pattern of ongoing abuse and threats as opposed to a single incident of violence."<sup>182</sup> Shockingly, the high rate of domestic violence prosecution declinations may serve as a core reason why the rate of abuse by non-Indian offenders is so alarmingly high. Another report points out that the offender "begins and continues his behavior because violence is an effective method for gaining and keeping control over another person,"<sup>183</sup> while the lack of negative consequences as a result of his behavior gives him no reason to desist.<sup>184</sup>

A further complicating and aggravating factor of Indian domestic violence may be that although these crimes are openly present on reservations, statistics are scarce regarding the rates of declination of prosecution of such crimes by U.S. Attorneys. The most recent BJS statistical data available show only broad categories of crime. Even that data is alarming. In 2004, U.S. Attorneys declined to prosecute 21.5% of all

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179. Clarkson et al., *supra* note 2, at 835.

180. *Id.*

181. CATHARINE A. MACKINNON, *SEX EQUALITY: FAMILY LAW* 716 (Foundation Press 2001).

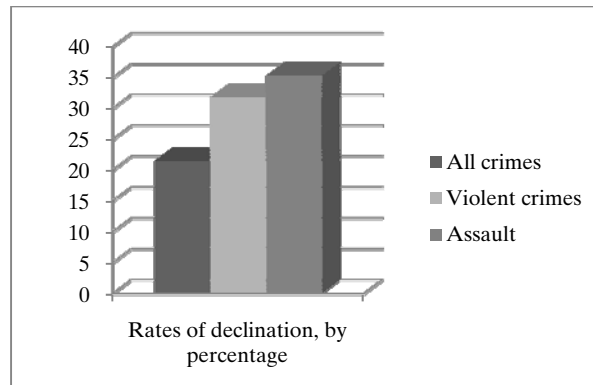
182. THOMAS PEACOCK ET AL., *COMMUNITY-BASED ANALYSIS OF THE U.S. LEGAL SYSTEM'S INTERVENTION IN DOMESTIC ABUSE CASES INVOLVING INDIGENOUS WOMEN* 108 (2002), <http://www.ncjrs.org/pdffiles1/nij/grants/199358.pdf> (citation omitted).

183. JACKIE DAVIS, *CABOT POLICE DEP'T, DOMESTIC ABUSE 5* (n.d.), <http://www.cji.edu/papers/Domestic%20Abuse%20Paper.pdf>.

184. *Id.*

crimes investigated.<sup>185</sup> In all cases of violent offenses (defined as threatening, attempting, or actually using physical force against a person, including murder, negligent manslaughter, assault robbery, child sexual abuse, kidnapping, and threats against the President),<sup>186</sup> U.S. Attorneys declined to prosecute 31.8% of the referred cases.<sup>187</sup> For the specific crime of assault—defined as intentionally inflicting or attempting or threatening to inflict bodily injury to another person—U.S. Attorneys declined to prosecute 35.3% of the cases investigated.<sup>188</sup> Emphatically, these statistics represent prosecution rates for *all* cases referred to the U.S. Attorneys (regardless of location or offender), for *all* violent offenses, and for *all* assaults respectively. These data include prosecution rates for crimes committed both on and off reservations; as a result, they only begin to accurately portray prosecution rates for crimes committed solely against Indian women.

FIGURE 3  
RATES OF U.S. ATTORNEY DECLINATION BY TYPE OF CRIME



Often, defendants in serious cases of domestic violence plead to lesser charges, such as “disorderly conduct,” despite the extensive injuries sustained by the victims and the seriousness of the violence. With funding from NIJ, a study by Mending the Sacred Hoop (MSH) found “a number of recurrent problems in the course of [their] investigation. Most of these . . . problems are barriers to communication and to the transmission of information.”<sup>189</sup> Specifically, MSH found that U.S. Attorneys are confronted with “constant pressure to settle cases” rather than to pursue a hearing, due to lack of resources.<sup>190</sup> Of a total of eigh-

185. COMPENDIUM, *supra* note 158, at 32.

186. *Id.* at 119.

187. *Id.* at 32.

188. *Id.*

189. PEACOCK ET AL., *supra* note 182, at 70.

190. *Id.* at 99.



teen case files studied by MSH, ten ended with defendants pleading to lesser charges. “Seven of the ten were negotiated down to the charge of ‘disorderly conduct.’ Yet the violence in these cases was quite serious and the injuries sustained by the victims extensive.”<sup>191</sup>

### *E. Further Difficulties in Prosecuting*

A lack of financial resources greatly limits domestic violence justice on Indian lands. Based on a study by Patricia Tjaden and Nancy Thoennes for Amnesty International, “[s]tatistics indicate that Federal and State governments provide significantly fewer resources for policing in Indian Country and Alaska Native villages than are provided to comparable non-Native communities.”<sup>192</sup> According to a report published by the U.S. Department of Justice, “data suggest that tribes have between 55 and 75 percent” of the law enforcement resources available comparable to non-Indian rural communities.<sup>193</sup> Frequently, a tribe may have only a small number of officers who have to cover large territories and make difficult choices about how to prioritize initial responses to reports of crime.<sup>194</sup>

The U.S. Departments of Justice and of the Interior have both acknowledged the inadequate law enforcement in Indian Country and identified lack of funds as a core reason for this problem.<sup>195</sup> In recent years, Congress has increased funding for FBI agents working in Indian Country, the BIA Office of Law Enforcement Services, and tribal law enforcement agencies. These initiatives, however, fall short of what is needed.<sup>196</sup>

The inability of tribes to obtain sufficient law enforcement resources compounds the difficulty that tribes must confront in combating criminal activity.<sup>197</sup> The number of law enforcement officers per capita outside Indian Country is, in some instances, twice as many as on reservations.<sup>198</sup> “The Navajo Nation Police Department, for example, has 321 [sworn] police officers who cover an area of over 22,000 square miles,

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191. *Id.* at 103.

192. AMNESTY INT’L, *supra* note 3, at 42.

193. STEWART WAKELING ET AL., NAT’L INST. OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS, at vii (2001), <http://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

194. AMNESTY INT’L, *supra* note 3, at 41; *see also* MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2000, at 2 (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/tle00.pdf>.

195. AMNESTY INT’L, *supra* note 3, at 42; U.S. COMM’N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 76 (2003).

196. AMNESTY INT’L, *supra* note 3, at 42–43.

197. GETCHES ET AL., *supra* note 38, at 481–82.

198. *Id.*; *see also* HICKMAN, *supra* note 194, at 2; BRIAN A. REAVES & MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2000, at 7 (2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslllea00.pdf>.

whereas the . . . Reno, Nevada Police Department, with 320 police officers, covers an area of [only] 57.5 square miles.”<sup>199</sup>

Another source of difficulty in seeking justice for domestic violence acts is the conflicting and confusing patchwork of criminal investigation in Indian Country. Given the scope of federal jurisdiction, the FBI is in part responsible for conducting investigations of felonies and some misdemeanor offenses in Indian Country. Investigating most felony offenses in Indian Country, however, falls within the overlapping jurisdiction of the BIA, the FBI, and tribal investigators.<sup>200</sup> Although “[t]he U.S. Attorney in each district is responsible for developing local written guidelines that outline the responsibilities of BIA, FBI, and tribal police for conducting criminal investigations,” the actual division of responsibilities has never been clear.<sup>201</sup>

These joint investigations add another layer of complexity to domestic violence jurisprudence. The extent of joint investigations varies depending on location and preference of BIA and tribal investigators. For example, on some reservations (such as Warm Springs and Pine Ridge), FBI and tribal representatives work together on most investigations, while in “the Eastern District of Oklahoma, the Cherokee Nation Marshal Service conducts the majority of criminal investigations [with] the FBI provid[ing] assistance upon request.”<sup>202</sup> A 1975 Department of Justice Task Force Report concludes that law enforcement agencies, including the FBI, have not always provided adequate law enforcement services in Indian Country.<sup>203</sup>

Having multiple investigators, whose reports are viewed with different import, further complicates matters, especially with such an emotionally charged and delicate matter as domestic abuse. The Task Force Report found that most U.S. Attorney’s Offices would not base prosecution decisions on investigations conducted solely by BIA or tribal investigators, and the U.S. Attorneys often required the FBI to conduct an independent investigation.<sup>204</sup> Such an arrangement duplicates investigative work and wastes resources. Furthermore, the lack of clear procedures and division of activities has often resulted in delayed criminal investigations because of jurisdictional disputes and wasted resources.<sup>205</sup>

This jurisdictional dispute is further complicated by Supreme Court decisions and tribal self-determination. While Congress exercises plenary authority over Indian tribes, the scope of tribal self-determination is further constrained with respect to criminal justice by adverse Supreme

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199. GETCHES ET AL., *supra* note 38, at 482.

200. CRIMINAL JUSTICE, *supra* note 98.

201. *Id.*

202. *Id.*

203. *Id.*; TASK FORCE, *supra* note 98, at 39–40.

204. See CRIMINAL JUSTICE, *supra* note 98 (citing the FBI as one agency that provides criminal justice services to Native American Tribes); TASK FORCE, *supra* note 98, at 34.

205. See CRIMINAL JUSTICE, *supra* note 98.

Court rulings such as *Oliphant*. Tribes are wholly dependent on federal prosecutors, by design, in cases of non-Indian against Indian crime, and the resulting asymmetries have potentially devastating consequences for both the tribes and tribal members.

One motivating example for an examination of domestic violence enforcement focuses on the response to the Supreme Court decision in *Duro v. Reina*.<sup>206</sup> Citing *Oliphant*, the Court in *Duro* held that in addition to being unable to assert criminal jurisdiction over a non-Indian, an Indian tribe also could not assert criminal jurisdiction over an Indian defendant unless the Indian is a member of the tribe seeking to assert such jurisdiction.<sup>207</sup>

Because the non-member Indians were still Indians, *Duro* created a vast jurisdictional chasm in which neither tribes, nor states, nor the federal government had the authority to try non-member Indians for misdemeanors committed on tribal lands. *Duro* left tribes even more vulnerable to crimes committed against their members on tribal lands and reinforced the perception that reservations are lawless lands where one can commit a crime without the possibility of punishment. For non-member Indians, this perception was certainly the case.

Perceiving a lack of police action or consequence for crimes, as well as finding little availability of data on the presence of non-member Indians living on the reservation,<sup>208</sup> Congress quickly enacted the so-called “*Duro Fix*” by affirming “the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians” in an amendment to the Indian Civil Rights Act.<sup>209</sup> This Act demonstrates that Congress does have the will to act decisively when it is clear that a jurisdictional void has been established with no clear alternative solution.

The Supreme Court has continued to remain active with regard to this issue after the *Duro Fix*. While *Oliphant* concluded with an invitation for congressional action, the most recent case decided by the Supreme Court on Indian Country criminal justice repeated that invitation and provided a basis for congressional reexamination of the issue. In *United States v. Lara*,<sup>210</sup> the Court asserted that while *Oliphant* and *Duro* reflect the Court’s view of tribes’ sovereign status, those decisions in no way imply “constitutional limits prohibiting Congress from taking actions to modify or adjust that status.”<sup>211</sup> Rather, the Supreme Court held that Congress indeed possesses the power to “relax restrictions that the political branches have, over time, placed on the exercise of a tribe’s inherent legal authority.”<sup>212</sup> This decision is especially important because the

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206. 495 U.S. 676 (1990).

207. *Id.* at 677–78.

208. See GETCHES ET AL., *supra* note 38, at 481–82.

209. 25 U.S.C. § 1301(2) (2006).

210. 541 U.S. 193 (2004).

211. *Id.* at 194.

212. *Id.* at 196.

Court acknowledged that *Oliphant* and *Duro* “are not determinative” regarding tribal sovereignty and jurisdiction because Congress is the final authority on the status of tribes.<sup>213</sup>

In the face of congressional unwillingness to correct the still-present jurisdictional void regarding non-Indians, a different solution is necessary. Competing jurisprudence, replicated investigatory work, and financial concerns among the tribes emphasize the multiple problems associated with the current system. Jurisdictional confusion and the federal government’s reluctance to step in and prosecute Indian offenders makes it imperative to return jurisdiction over tribal lands to the tribes.

Unless this situation—with specific regard to the rights and responsibilities of *parens patriae* on behalf of the state, federal, and tribal governments—is addressed, American Indians will continue to be victimized at rates higher than the rest of the United States, with little relief. In response, the tribes must take independent steps to ensure the safety of their members.

### III. THE GUARDIAN-WARD RELATIONSHIP: THE DOCTRINE OF *PARENS PATRIAE*

*To a sexual predator, the failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity.*<sup>214</sup>

*[N]on-Native perpetrators often seek out a reservation place because they know they can inflict violence without much happening to them.*<sup>215</sup>

Through the course of decisions beginning with *Oliphant*<sup>216</sup> and continuing with *Montana v. Unites States*<sup>217</sup> and *Rice v. Rehner*,<sup>218</sup> the federal government began to discover additional inherent limitations on tribal sovereignty. As the Supreme Court stated on several occasions, the sovereignty of a tribe “exists only at the sufferance of Congress and is subject to complete defeasance.”<sup>219</sup>

213. *Id.* at 207.

214. AMNESTY INT’L, *supra* note 3, at 61 (quoting Interview with Dr. David Lisak, Associate Professor of Psychology, University of Massachusetts (Sept. 29, 2003)).

215. *Id.* at 33 (quoting Interview with Andrea Smith, Assistant Professor of Native Studies, University of Michigan (Sept. 24, 2006)).

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

217. 450 U.S. 544, 565–67 (1981) (holding that, when tribal interests were not shown to be affected, a tribe lacked the inherent power to regulate hunting and fishing by non-Indians on non-Indian land within its reservation).

218. 463 U.S. 713, 733–35 (1983) (holding that tribes had no preemptive power to regulate liquor sales on their reservations).

219. *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *see also Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 n.10 (1985); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787–88 n.30 (1984).

As noted Indian law scholar Robert Williams has argued, these cases are an indication of a belief that the federal government holds *parens patriae* authority over Indian affairs.<sup>220</sup> If Williams is correct in his assertion of the validity of *parens patriae*, then the lack of criminal investigation and indictment with regard to domestic violence can only indicate a shirking of federal duty. As a result, the self-appointed guardian fails to perform its essential function of guarding.

A. *The Tension Between “Domestic Dependent Nations” and the Federal Government*<sup>221</sup>

As stated in Part I, the notions that led to the restrictions of tribal jurisdiction are not new and trace back to the origins of the United States itself. In *Cherokee Nation*,<sup>222</sup> Chief Justice Marshall wrote that “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.”<sup>223</sup> A half century later the Supreme Court would opine that “[t]he relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.”<sup>224</sup> Even today, Supreme Court Justices find that “[f]ederal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases.”<sup>225</sup>

The concept that so confounds both Congress and the courts is that, on the one hand, Indian tribes are separate sovereigns, “domestic dependent nations”<sup>226</sup> that are ensconced as a “third sovereign”<sup>227</sup> in the federal framework. On the other hand, Congress has plenary authority over Indian tribes.<sup>228</sup> While the fabrication of this plenary authority has dubious origins,<sup>229</sup> the continued maintenance of such authority is justified by a

220. Robert A. Williams, Jr., *Emergence of a National Indian Policy: Parens Patriae and Indian Tribal Sovereignty* (n.d.) (on file with author).

221. For a more detailed history of tribal law and policy, see Clarkson, *Tribal Bonds*, *supra* note 45, at 1009, 1019–30.

222. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

223. *Id.* at 2.

224. *United States v. Kagama*, 118 U.S. 375, 381 (1886).

225. *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

226. *Cherokee Nation*, 30 U.S. at 17.

227. In the words of Justice O’Connor, “Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes. Each of the three sovereigns . . . plays an important role . . . in this country.” Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

228. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 42, § 4.03[1].

229. Arguably, the Supreme Court simply made up the notion of plenary authority. In *Kagama*, the Court stated that

These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protec-

legal discourse whose origins were clearly based on a negative perception of tribalism.<sup>230</sup>

The acknowledged existence of tribal sovereignty, however, has served to balance the exercise of that plenary authority. While each tribe has its own separate history, the struggle to maintain a separate sovereign existence is common to most tribes. The economic importance of that struggle cannot be overstated, particularly in the modern context, since the “first key to economic development is sovereignty.”<sup>231</sup>

If the policy objective of the 1887 Allotment Act was to improve the lives of the Indians by coercing them to assimilate into “American” culture, it was a colossal failure. By the 1930s it was clear that the United States needed to change its stance on tribal sovereignty,<sup>232</sup> and Congress passed the Indian Reorganization Act of 1934 (IRA).<sup>233</sup> In an effort to reinforce tribal sovereignty, the legislation allowed tribes to adopt constitutions and to reestablish structures for governance.<sup>234</sup> Post-IRA federal treatment of the tribes was less restrictive, allowing for the popular election of tribal leaders according to tribal laws and constitutions.<sup>235</sup>

That tribal sovereignty was now to be encouraged rather than destroyed represented a complete reversal of congressional policy. Even so, federal Indian policy would oscillate through one more cycle in the next half century<sup>236</sup> before President Nixon issued a landmark statement

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tion, and with it the power. This has always been recognized by the Executive and by Congress, and by this [C]ourt, whenever the question has arisen.

*Kagama*, 118 U.S. at 383–84. Unable to find a source for such plenary authority in the Constitution, the Court held that

[t]he power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

*Id.* at 384–85.

230. See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 588 (1832) (explaining that the “humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling”); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (“[Indians] are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.”); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 590 (1823) (“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness.”). These three cases, often referred to as the “Marshall Trilogy,” form much of the foundation for federal Indian law. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 42, § 1.03[4][a] (providing history of these three cases).

231. Stephen Cornell, *Sovereignty, Prosperity, and Policy in Indian Country Today*, COMMUNITY REINVESTMENT, Apr. 1997, <http://www.kc.frb.org/publicat/commrein/u97pers2.htm>.

232. See, e.g., INST. FOR GOV'T RESEARCH, STUDIES IN ADMIN., THE PROBLEM OF INDIAN ADMINISTRATION (1928) (documenting the failure of federal Indian policy during the allotment period).

233. 25 U.S.C. §§ 461–494 (2006).

234. *Id.* § 476(a).

235. RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 209 (1980).

236. The period between 1945 and 1970 is referred to as the Termination Era, and was characterized by the passage of a number of statutes that “terminated” individual tribes—“these acts distri-

calling for a new federal policy of “self-determination” for Indian nations.<sup>237</sup> By “self-determination,” President Nixon sought “to strengthen the Indian’s sense of autonomy without threatening his sense of community.”<sup>238</sup> Self-determination<sup>239</sup> led to an increase in economic development activity, but access to capital remained an impediment.<sup>240</sup> President Reagan also made an American Indian policy statement on January 24, 1983, stating his support for “self determination.”<sup>241</sup> In attempting to give definition to “self-determination,” he said:

Instead of fostering and encouraging self-government, federal policies have, by and large, inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decision making, thwarted Indian control of Indian resources and promoted dependency rather than self-sufficiency.<sup>242</sup>

### B. *The Doctrine of Parens Patriae*

In many ways, the paternalistic nature of the federal government to the tribes has resembled that of the traditional English common law *parens patriae*. The doctrine of *parens patriae* refers to the public policy power of the state to usurp the rights of the natural parent or legal guardian, and to act as the parent of any child or individual who is in need of protection. Literally, *parens patriae* means “parent of his or her country.”<sup>243</sup> The term originates in English common law and refers traditionally to “an expression of the king’s prerogative.”<sup>244</sup> The doctrine established the king as protector over those classes who could not protect themselves: infants, idiots, and lunatics.<sup>245</sup> A fundamental attribute of *pa-*

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buted the tribes’ assets by analogy to corporate dissolution and afforded the states an opportunity to modify, merge or abolish the tribe’s governmental functions.” *Id.* at 132. As Barsh and Henderson noted, examples of this legislative activity include “Act of August 13, 1954, ch. 732, 68 Stat. 718 (Klamath),” and “Act of August 3, 1956, ch. 909, 70 Stat. 963 (Ottawas).” *Id.* n.97.

237. PRESIDENT RICHARD NIXON, RECOMMENDATIONS FOR INDIAN POLICY, H.R. Doc. No. 91-363, at 3 (July 8, 1970); *see also* Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified throughout U.S.C.). Perhaps the greatest of Nixon’s contributions to Indian tribal sovereignty was Public Law 638, the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, 2203-04 (1975) (codified at 25 U.S.C. §§ 450-450b), which expressly authorized the Secretaries of Interior and Health and Human Services to contract with and make grants to Indian tribes and other Indian organizations for the delivery of federal services.

238. NIXON, *supra* note 237, at 3.

239. The key legislation of this era includes: the Indian Self-Determination and Education Assistance Act; the Indian Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73, 77-78 (codified at 25 U.S.C. §§ 1301-1303); the Indian Financing Act of 1974; and the Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069 (codified throughout U.S.C.). *See* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 42, § 1.07.

240. *See* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 42, § 21.03.

241. PRESIDENTIAL COMM’N ON INDIAN RESERVATION ECONOMIES, EXECUTIVE OFFICE OF THE PRESIDENT, REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES 7 (1984).

242. *Id.*

243. BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

244. Curtis, *supra* note 32, at 896.

245. *Id.*

*rens patriae* jurisdiction in this sense is that it “confers powers not only to protect the young, but also to control them.”<sup>246</sup>

In early American history, the Non-intercourse Act, passed in 1790, declared that absent congressional approval, “no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state.”<sup>247</sup> The Act was reenacted by Congress with only minor modifications several times throughout the early nineteenth century and now is codified as 25 U.S.C. § 177.<sup>248</sup> The current language regulates “purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians.”<sup>249</sup>

The Non-intercourse Act was, in a fundamental way, Congress’s formal declaration of its belief of the Doctrine of Discovery, the accepted English common law principle granting a discovering country, such as the United States, full sovereignty over those of new lands that often were inhabited. In 1823 the Supreme Court held in *Johnson v. McIntosh* that the Doctrine of Discovery was an established legal principle of English and American colonial law that had also become the law of the American state and federal governments.<sup>250</sup> According to Professor Robert Miller, under the Doctrine of Discovery,

[W]hen European, Christian nations first discovered new lands the discovering country automatically gained sovereign and property rights in the lands of the non-Christian, non-European nation even though, obviously, the natives already owned, occupied, and used these lands. The property right was defined as being a future right, a “limited” fee simple ownership right, or an exclusive fee title held by the “discovering” European country but subject to the Indian occupancy right. In addition, the discoverer also gained sovereign governmental rights over the native peoples and their governments which restricted tribal international political relationships and trade. This transfer of political, commercial, and property rights was accomplished without the knowledge nor the consent of the Indian people.<sup>251</sup>

With the firmly held belief in the Doctrine of Discovery, it must have been easy for the early Congress to assert its dominion over the tribes. Because American Indian tribes were completely divested of any sovereign rights to territory and autonomy they might have claimed at the instant of European discovery,<sup>252</sup> statutes such as the Non-intercourse

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246. Seymour, *supra* note 34, at 160.

247. Non-intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (current version at 25 U.S.C. § 177 (2006)).

248. 25 U.S.C. § 177.

249. *Id.* § 177; *see also* South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 500 n.3 (1986).

250. 21 U.S. (8 Wheat.) 543, 574 (1823).

251. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 5 (2005) (footnotes omitted).

252. *Id.*; Williams, *supra* note 64, at 243–44.



Act were a mere formality in practice. Unfortunately, the principles set forth at the moment of discovery are still continued today. As recently as the 2004–2005 term, the Supreme Court decided a case that raised discovery issues regarding past purchases of tribal lands.<sup>253</sup>

The Doctrine of Discovery helped firmly entrench the belief that the doctrine of *parens patriae* applied with respect to the tribes, because the tribes held inferior sovereignty to that of the United States. That policy was emphatically reinforced in *United States v. Kagama*.<sup>254</sup> In *Kagama*, even though the Court conceded that the congressional authority to exercise criminal jurisdiction committed by tribal Indians within their nation's reserved borders could not be grounded in the Constitution or in any applicable treaty provision, the Court nevertheless affirmed congressional authority to enact a criminal code for Indian crimes committed in Indian Country by virtue of the tribal Indian's degraded status as a helpless and dependent ward.<sup>255</sup>

These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.<sup>256</sup>

This “power,” therefore, is supposedly derived from the federal government's moral duty to act as a guardian in protecting its Indian wards.<sup>257</sup> This duty, established by the Doctrine of Discovery and continued through the doctrine of *parens patriae*, “theoretically enabled the federal government to protect its Indian wards from the rapacious, engulfing, hostile propensities of, in the *Kagama* Court's own words, the tribes' ‘deadliest enemies’; the states and their white citizens.”<sup>258</sup>

### C. *Parens Patriae as Standing to Sue*

Within the federal system, three types of sovereigns exist: the federal government, the states, and the Indian tribes.<sup>259</sup> As described by Felix

253. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203 n.1 (2005), *reh'g denied*, 544 U.S. 1057 (2005) (“[F]ee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States.”) (quoting *Oneida Indian Nation v. County of Oneida (Oneida I)*, 414 U.S. 661, 667 (1974)).

254. 118 U.S. 375, 381 (1886).

255. *Id.* at 382–84.

256. *Id.* at 383–84.

257. *See id.* at 384.

258. Williams, *supra* note 220 (quoting *Kagama*, 118 U.S. at 384).

259. O'Connor, *supra* note 227, at 1.

Cohen, the Indian commerce clause recognizes tribes as sovereigns along with foreign nations and the several states, while granting the federal government exclusive power over Indian affairs.<sup>260</sup> This clause empowers Congress “[t]o regulate Commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>261</sup>

In his treatise, *Federal Jurisdiction*, Erwin Chemerinsky comments that “[i]n order for a state to assert *parens patriae* standing, it must allege both a harm to its citizens and that the matter involved is the type that the state is likely to address through its lawmaking process.”<sup>262</sup> He points to the Supreme Court decision in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*,<sup>263</sup> as clarifying the law concerning *parens patriae* standing:

The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development . . . certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.<sup>264</sup>

For the first category, Chemerinsky notes that *parens patriae* standing was allowed to enable the states, on behalf of their citizens, to enforce federal antitrust law<sup>265</sup> and pollution.<sup>266</sup> “The Court in *Snapp* stressed that the government entity must show both an injury to its citizens and that it is the type of harm ‘that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.’”<sup>267</sup>

For the second category, the Court stated “that *parens patriae* standing exists to ensure that ‘the State and its residents are not excluded from the benefits that are to flow from participation in the federal system.’”<sup>268</sup> As a result, the Court held that Puerto Rico had standing on behalf of its citizens to bring suit alleging discrimination in interstate commerce.<sup>269</sup> Several federal courts have accepted various tribes’ assertion of the doctrine of *parens patriae* in litigation, although no analysis has been provided with respect to the doctrine.<sup>270</sup>

260. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 42, § 4.01(1)(A).

261. U.S. CONST. art. I, § 8, cl. 3.

262. ERWIN CHERMERINSKY, FEDERAL JURISDICTION 114 (5th ed. 2007).

263. 458 U.S. 592 (1982).

264. *Id.* at 607.

265. CHERMERINSKY, *supra* note 262, at 115 (citing *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981)); *see also* *Georgia v. Pa. R.R.*, 324 U.S. 439, 446–52 (1945).

266. *Id.* (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901)).

267. *Id.* (quoting *Snapp*, 458 U.S. at 607).

268. *Id.* (quoting *Snapp*, 458 U.S. at 608).

269. *Id.* (citing *Snapp*, 458 U.S. at 609).

270. Fraser presents a significant number of cases in which federal courts, including the Eighth, Ninth, and Tenth Circuits and various Federal District Courts have recognized tribes’ standing under *parens patriae*:

Chemerinsky notes that “[o]ne important limit on *parens patriae* standing . . . is that [states] may not sue the federal government in this capacity, though they may sue the federal government to protect their own sovereign or proprietary interests.”<sup>271</sup> For one example, he points to *Massachusetts v. Mellon*, in which the Court stated that “[i]t cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof.”<sup>272</sup> On the other hand, Chemerinsky argues that the limitation of governments from suing the federal government may itself be limited.<sup>273</sup> “Allowing states to sue the federal government on behalf of its citizens might provide essential protection, just as such suits are often important against private parties.”<sup>274</sup> Such a situation may arise in dealing with the federal government’s unwillingness to enforce the Major Crimes Act,<sup>275</sup> even though the federal government has exclusive jurisdiction under that statute.

Several courts<sup>276</sup> have noted that the *Mellon* prohibition serves to bar a state from suing the federal government under *parens patriae* only to protect its citizens from statutes; it does not address cases in which the state is suing to enforce federal statutes. In *Kansas ex rel. Hayden v. United States*,<sup>277</sup> the district court recognized that difference:

[U]nlike the plaintiffs in *Mellon*, the plaintiff in this case is not challenging the validity of the federal statutes. Instead, plaintiff is seeking to enforce the provisions of the Disaster Relief Act. Under the modern-day doctrine of *parens patriae*, the concept of standing has

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*See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351 (9th Cir. 1996) (litigating on behalf of tribal members); *In re Blue Lake Forest Products, Inc.*, 30 F.3d 1138 (9th Cir. 1994); *Navajo Nation v. Dist. Court for Utah County, Fourth Judicial Dist.*, 831 F.2d 929 (10th Cir. 1987) (litigating on behalf of an “Indian child” under the Indian Child Welfare Act); *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n.16 (9th Cir. 1984) (Fletcher, J., dissenting) (“Similarly, the Tribe could have brought an action challenging Arizona’s vehicle taxes as a representative of or as *parens patriae* for its individual members, in order to vindicate their individual rights.”); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1137 (8th Cir. 1974) (litigating on behalf of members to recover state taxes illegally collected from its members); *Red Lake Band of Chippewa Indians v. United States*, 861 F. Supp. 841, 842 (D. Minn. 1994) (litigating on behalf of tribal members to collect improperly collected state taxes); *Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502, 1503 (D.S.D. 1989) (litigating on behalf of members); *Apache County v. United States*, 256 F. Supp. 903, 906 (D.D.C. 1966).

Fraser, *supra* note 27, at 667–68 n.12.

271. CHEMERINSKY, *supra* note 262, at 115 (emphasis added).

272. *Id.* (quoting 262 U.S. 447, 485 (1923)).

273. *Id.*

274. *Id.* Even in light of this argument, the Supreme Court has not agreed. Fraser, *supra* note 27, at 693 n.193. The Court specifically stated as much in *Snapp*: “a State does not have standing as *parens patriae* to bring an action against the Federal Government.” *Id.* (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 610 n.16 (1982)).

275. 18 U.S.C. § 1153 (2006).

276. *See Kansas ex rel. Hayden v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990), *dismissed on other grounds on reconsideration*, 751 F. Supp. 1495, 1499 (D. Kan. 1990); *Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984); *New York v. Heckler*, 578 F. Supp. 1109, 1122 (E.D.N.Y. 1984).

277. *Hayden*, 748 F. Supp. at 797.

been broadened to recognize that an injury may be suffered by a state when the statutory provisions of a federal act are violated.<sup>278</sup>

Similarly, the court in *New York v. Heckler*, while acknowledging *Mellon*, noted that the plaintiffs were not challenging a federal statute but enforcing a federal statute.<sup>279</sup> As a result, the court held that *Mellon* did not apply.<sup>280</sup> Because tribes would be suing the federal government in order to enforce the federal protection that is implicit in the guardian-ward relationship, it is appropriate for the tribes to bring suit under *parens patriae*.

#### IV. PARENS PATRIAE AS SWORD AND SHIELD

*While the federal government has a significant responsibility for law enforcement in much of Indian country, tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities. They are local institutions, closest to the people they serve. With adequate resources and training, they are most capable of crime prevention and peace keeping. Fulfilling the federal government's trust responsibility to Indian nations means not only adequate federal law enforcement in Indian country, but enhancement of tribal justice systems as well.*<sup>281</sup>

If the federal government, in its self-appointed role as guardian, cannot adequately protect its ward and has left open significant jurisdictional concerns, the tribes must act in order to protect their own members.

As described in Part III, the doctrine of *parens patriae* refers to the public policy power of the state to usurp the rights of the natural parent or legal guardian, and to act as the parent of any child or individual who is in need of protection, thus creating the guardian-ward relationship. It also refers to the power that may be invoked by the state to create its standing to sue when declaring itself to be suing on behalf of its people. Rather than allowing the federal government to continue to assert its *parens patriae* authority over the tribes, the tribes may be able to sue the federal government under its own *parens patriae* standing in order to protect its citizens from the inaction of the federal government.

Once a tribe's right to assert its *parens patriae* status in order to protect its citizens is established, a question occurs on how the tribe should proceed. The procedure will be different depending on whether the tribe is or is not in a state governed by Public Law 280.

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278. *Id.* at 802.

279. *Heckler*, 578 F. Supp. at 1122.

280. *Id.* at 1122–23.

281. Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 114 (1995) (footnotes omitted).

A. *Tribes that Are Not in Public Law 280 States*

In states governed exclusively by federal jurisdiction, the tribe may sue the federal government under *parens patriae* to enforce the protection of the guardian-ward relationship. In these cases, the tribes should demand the same level of protection that a county or local prosecutor would give in cases within their local jurisdictions.

Under the Indian Country Crimes Act,<sup>282</sup> “the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country” unless expressly provided by another statute.<sup>283</sup> Therefore, it is the responsibility of the federal government, through the U.S. Attorney’s Office, to prosecute any offenses committed in Indian Country where no other entity may exercise jurisdiction, namely those offenses that Congress has explicitly stated are within the exclusive jurisdiction of the federal government. As discussed earlier, this jurisdiction extends to crimes by non-Indians against Indian victims, which, by *Oliphant*, may only be prosecuted by the federal government.

These offenses may range from the serious (murder) to the relatively obscure; nevertheless, all offenses fall under the purview of the U.S. Attorney’s Office. Under 28 U.S.C. § 547(1), “each United States attorney, within his district, shall—(1) prosecute for all offenses against the United States . . . .” This responsibility and jurisdiction, as with all prosecutorial situations, whether in Indian Country or not, is mitigated by prosecutorial discretion, as it is patently obvious that the U.S. Attorney’s Office cannot prosecute every single crime that may occur within the district in question. Nevertheless, the statute is clear on this point.

In the absence of *Oliphant*, tribal authorities could in fact assume the backlog of complaints, in order to ensure a safety net for those cases where resources do not allow the U.S. Attorney’s Office to prosecute. As indicated, many tribes would accept such responsibility willingly. Absent congressional authority to the contrary, however, tribes cannot assume such cases.

Such a dilemma forces tribes into an untenable position. If they choose to do nothing, the situation will not improve. Financial situations coupled with political decisions have and will continue to create a situation by which non-Indians can continue to perpetrate crimes against Indian victims in Indian Country with impunity. It is under this scenario that the tribe needs to be more proactive in order to protect the welfare of its citizens. Bringing a suit against the United States under the doctrine of *parens patriae*, generally considered to extend from the federal government as an extension of the guardian-ward relationship, may be

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282. 18 U.S.C. § 1152 (2006).

283. *Id.*

likewise applied in reverse, to allow the tribes standing to force the federal government to prosecute every crime in Indian Country.

This recourse is an imperfect solution. Tribes do not want to involve the U.S. Attorneys in Indian Country matters any more than is necessary, but congressional acts and Supreme Court decisions have left no alternative. The ramifications of such a suit would be far reaching; it is quite conceivable that the U.S. Attorney would be forced to issue rules as mundane as parking tickets on reservations, loitering, and solicitation. As the U.S. Attorneys' Office's resources are often stretched thin already, this situation would strain those resources even further.<sup>284</sup> In fact, this situation could become utterly untenable to the U.S. Attorneys in the various districts in the country.

Absent a congressional reversal of *Oliphant*, the tribes will be forced to take such measures to hold the federal government liable for its fiduciary duty in the guardian-ward relationship. The suit could proceed in two ways. First, the tribe would be found not to have *parens patriae* status, even though it is representing all of its members as potential victims who must be protected. In this scenario, a judicial decision stating that the tribes cannot assert *parens patriae* would be a tacit implication that tribes are, in effect, not as inferior as they have been held to be throughout their relationship with the federal government. This result would be the most advantageous to the tribes, as they would be able to exercise their own jurisdiction over all who are on their lands, a right that the states, identified as sovereigns, currently enjoy.

Should the courts uphold the *parens patriae* status of the federal government over the tribes, however, this decision would reinforce the guardian-ward relationship and clarify the fiduciary duty incumbent upon the federal government. As a result the federal government could not continue to shirk its responsibilities to protect tribal members from violence at rates higher than the national population. It is inconceivable that the United States would allow this disparity to be true of any other population in the United States, whether along racial, gender, or other minority status.

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284. According to one study, in Alaska, with its vast lands requiring many days to traverse, the situation is much worse. As a Public Law 280 state, state authorities have been delegated jurisdiction over Indian Country. Nevertheless, getting help is often an insurmountable task. According to one case,

Those who stay in their villages after reporting a crime must wait for Alaska State Troopers to catch a plane or helicopter from the nearest large community, a trip that can take hours or even days in blizzards and fog. The lengthy response times often result in victims recanting their calls for help. Delays can also allow tell-tale wounds to heal or perpetrators to destroy crucial evidence.

AMNESTY INT'L, *supra* note 3, at 44 (quoting Jeanette J. Lee, *Fleeing Violence Can be Difficult in Bush*, ASSOCIATED PRESS (2005)).

*B. Tribes in Public Law 280 States*

In states governed by Public Law 280, the federal government has delegated criminal jurisdiction to the states. As a result, the tribes' focus for the suit is not the federal government but the state government. Nevertheless, the focus is the same: offenders who attack tribal members are underrepresented in the schema of federal prosecution.<sup>285</sup>

In Hawaii, for example, under the Hawaiian Statehood Act,<sup>286</sup> "Congress delegated to the State of Hawaii the trust responsibility owed to the Native Hawaiians,"<sup>287</sup> creating a precedent that Congress is willing to delegate such a relationship to the states. Congress demonstrated the belief that the Native Hawaiians were inferior in delegating the jurisdiction to the states rather than to a Native Hawaiian governmental entity. In effect, the Native Hawaiians were thrust into a guardian-ward relationship with the State of Hawaii, which assumed the responsibility. Indian tribes in other locations can be viewed similarly.

As a result, the states may also be targeted as potential defendants in suits brought by the tribes asserting *parens patriae* status on behalf of their members. As discussed in Part III, a tribe's assertion of *parens patriae* in order to effect the guardian's role in the guardian-ward relationship may be upheld, trumping the state's sovereign immunity. The results would therefore be comparable to a suit brought against the federal government.

Should the tribes' *parens patriae* status be rejected, this decision would lead to the assumption that the tribes are not inferior and should enjoy full jurisdiction over their lands, including over all persons who commit crimes on those lands. Should the *parens patriae* standing be upheld, then the state government would be delinquent in its duties to protect the inferior ward and would need to increase its enforcement activities. Such a scenario lends credence to a reversal of *Oliphant*, as the resources required for sufficient law enforcement would again be spread thin.

*C. Court Reversal of Oliphant*

Returning to the non-Public Law 280 jurisdictions, should the courts be unwilling to force the federal government to pursue the myriad of lesser crimes committed in Indian Country, another possibility rests with the judicial reversal of *Oliphant*. This likelihood is slim, however, based on dicta in the *Oliphant* decision in which the Court stated its preference for legislative rather than judicial action.<sup>288</sup>

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285. PERRY, *supra* note 2, at 20.

286. Hawaiian Statehood Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

287. Clarkson, *supra* note 83, at 331.

288. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

A major injustice has been caused by the *Oliphant* decision, one which has not been lost on the Supreme Court in either *Lara* or *Oliphant* itself. In *Oliphant*, the Court clearly recognized the prevalence of non-Indian crime on reservations, yet decided to leave any action to Congress.<sup>289</sup> The data presented in this Article demonstrate that if anything, non-Indian against Indian crime has increased over the past thirty years, while Congress has not assumed the responsibility that the Court laid at its feet. In a scenario that has little chance of happening, the Court could reexamine the issues underlying *Oliphant*. In reaching the conclusion in *Oliphant*, one such issue could be the Court's reliance on outdated treaty language rather than that of a superseding treaty.<sup>290</sup> A reversal would be a drastic measure but would do much to help reestablish a sense of justice on reservations that has been lacking for over a generation.

#### D. Congressional Reversal of *Oliphant*

Although one can hope for a moment of intellectual honesty by the Supreme Court, the chances of the current Court ever reversing itself on *Oliphant* and subjecting non-Indians to tribal criminal prosecution are either slim or none.<sup>291</sup> Congress, however, also has the power to remedy this situation, as outlined below by the Court in *Oliphant*:

We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.<sup>292</sup>

Congressional inaction in the thirty years since *Oliphant* is all the more inexcusable given how quickly Congress enacted the *Duro* Fix. A congressional solution to this problem is actually quite simple, however, as it would require only replacing "Indians" with "persons" in one sentence of the Indian Civil Rights Act.<sup>293</sup> This simple change would thereby

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289. *Id.*

290. See *supra* notes 127–31 and accompanying text.

291. And Slim has left town.

292. 435 U.S. at 211–12; see also *United States v. Lara*, 541 U.S. 193, 205–07 (2004) (discussing Congressional authority to modify tribal criminal jurisdiction).

293. 25 U.S.C. § 1301(2) would then read:

"[P]owers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent



give Indian tribes the power to exercise criminal jurisdiction over all offenders on tribal lands.

#### CONCLUSION

*It's only about a mile from town to the bridge. Once they cross the bridge [to the Standing Rock Sioux Reservation], there's not much we can do. . . We've had people actually stop after they've crossed and laugh at us. We couldn't do anything.*<sup>294</sup>

The Supreme Court decision in *Oliphant* severely limits the tribes' ability to police their own lands, through a complex jurisdictional maze that limits their ability to enforce their laws against non-Indian offenders on their tribal lands. Although federal jurisdiction does exist, resources are often stretched tightly, and in many cases federal prosecutors simply decline to prosecute a great many of the cases. This scenario has fostered a culture of violence, especially by non-Indian offenders against Indian women and children.

This tacit acceptance of violence by inaction on the part of the federal government cannot be sustained in a just society. Congress has had the opportunity to act on the jurisdictional void created by *Oliphant* for thirty years without a reversal of this situation that affects every aspect of tribal life throughout Indian Country. Were this the situation in any other part of the United States or affecting any other racial group in the country, it is unlikely that Congress would allow such an inequity to continue.

As a result of Congress' inaction, it is both essential and prudent for the tribes to bring suits under *parens patriae* standing in order to assert their claims that the guardian-ward relationship, established by Chief Justice Marshall in 1831, must either be upheld, requiring more consistent prosecution of crimes on Indian lands, or allowed to exist without their current inferior status.

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power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all [persons].

25 U.S.C. § 1301(2) (2006).

294. AMNESTY INT'L, *supra* note 3, at 39 (quoting Interview with Walworth County Sheriff Duane Mohr, RAPID CITY J. (December 21, 2005)).

