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Unguarded Indians: The Complete Failure of the Post-Oliphant Guardian and the Dual-Edged Nature of Parens Patriae

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

Gavin Clarkson and David Dekorte*

Abstract

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 BIA 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 90% of these cases, the offender is a non-Indian.

In 21st century America, how is it that the race of perpetrator and victim determines the availability of justice on Indian reservations? The fault lies with both Congress and the Supreme Court, who 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 United States 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 restore their inherent sovereignty and finally provide the necessary protection for tribal members.

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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 his 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. The tribal prosecutor 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 21st century America, how is it that the availability of justice on Indian reservations is determined by the race of the perpetrator and victim?1

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 2002, 86 out of every 1000 American Indian females were victims of violence, a rate nearly two and a half times the national average.2 Additionally, 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 that one in five.3 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.4 Nearly nine in ten cases of

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4 Important note: throughout the course of this paper, 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 BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., VIOLENCE BY INTIMATES 13 (1998), available at
rape or sexual assault involve white or black assailants. In general, the more serious the offense, the higher the percentage of American Indians describing the offender’s race as white or black. Due to the racial diversity between the attacker and the victim, 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.* According to the ruling in that case, any crime committed by a non-Indian offender in Indian Country falls under the exclusive jurisdiction of the federal government, as per 18 U.S.C. § 1153. 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.

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. As a result of the combination of the lack of tribal jurisdiction with the unwillingness of the federal government to prosecute non-Indian offenders,


According to a 2005 survey, the incidence of rape or attempted rape of women was approximately 11.7 times higher than the incidence for men. (The survey includes the note that the survey returned 10 or fewer cases of rape or attempted rape of men.) *See Bureau of Just. Statistics, U.S. Dep’t of Just., Criminal Victimization in the United States, 2005 Statistical Tables 2* (2005), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus05.pdf.

As a result of the discrepancy in the rates between female and male victims, many studies and 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 paper 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 Tjaden & Thoennes, *supra* note 3, at 10.


9 Exceptions exist in States affected by Public Law 280, which delegates this jurisdiction to the State.

10 *See, e.g., Perry, supra* note 2, at 20.
a wide jurisdictional void has been created.

The problem is not limited solely to domestic partner abuse, however. By exploiting the jurisdictional void, some pedophiles have found employment as teachers in BIA schools even after being caught molesting Indian children, and their predation of Indian children has continued with little or no fear of prosecution.\footnote{Clarkson, Justice Declined, INDIAN COUNTRY TODAY, Aug. 24, 2007, available at http://www.indiancountrytoday.com/archive/28202079.html.} The loophole has also been exploited by non-Indian drug gangs to set up methamphetamine operations on reservations.\footnote{Id.} Other non-Indian drug traffickers, recognizing the low risk of prosecution, have intentionally married Indian women to establish residency on reservations.\footnote{Id.} According to an Associated Press article, authorities once seized 40,000 marijuana plants on the Yakima reservation planted by a Mexican drug cartel.\footnote{Associated Press, Investigators Seize 40,000 Marijuana Plants from Closed-off part of Wash. State Reservation, SAN DIEGO UNION TRIBUNE, available at http://www.signonsandiego.com/news/nation/20070810-1311-brf-marijuana-reservation.html.} Perhaps the most blatant exploitation of the jurisdictional void is the case of Jesus Martin Sagaste-Cruz. According to the Wyoming US Attorney,\footnote{187 Fed. Appx. 804 (10th Cir. 2006); See also Statement of Matthew H. Mead, United States Attorney for the District Of Wyoming, Senate Committee On Indian Affairs, “Combating Methamphetamine In Indian Country,” April 5,2006.} 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. 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. 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 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.\footnote{Statement of Matthew Mead}

According to Colorado US 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.”\footnote{http://indiancountrynews.net/index.php?option=com_content&task=view&id=1558}

The federal government has established itself, via the Supreme Court 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.\footnote{18 USC § 1153 (2006).} Distressingly, every time U.S. Attorneys choose not to prosecute a case of domestic violence for whatever reason, the federal promise of protection is broken. Just under 75% of suspects investigated in Indian Country were arrested for violent crimes compared with the national total of 5%. In 2000 U.S. Attorneys declined to prosecute 52% of the domestic violence cases investigated.\footnote{PERRY, supra note 2, at 20.} Their hands tied by court rulings, tribes are unable to prosecute these cases themselves, and justice is not served.

A brief history of native American/federal litigation sheds some light on the rationale for this jurisdictional confusion. In *Cherokee Nation v. Georgia*, the first Supreme Court opinion involving an American Indian tribe,\footnote{An earlier Supreme Court case, *Johnson v. M’Intosh*, 21 U.S. 543 (1823), dealt with the issue of who could acquire title to land from Indian tribes, but no tribe was a party to the case. *Id.*, at 543.} the United States Supreme Court limited the status of tribes to that of “domestic dependent nations.”\footnote{Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 26-27 (1831).} Chief Justice Marshall categorized this relationship between the United States and a tribe as “resembl[ing] that of a ward to his guardian.”\footnote{Id. at 27.} This notion has been upheld in both the Supreme...
Court as well as other courts. 24 As a result of this relationship, Fraser notes that “[t]he Federal Government holds a fiduciary duty to protect tribes, while at the same time preserving unilateral authority to divest tribal governments of their property and sovereign rights.” 25 Due to the neglect of the federal government to prosecute offenders, however, the United States is derelict in its position of guardian of the tribes. Tribes are unable to assert complete jurisdiction over criminal matters on their own lands, leaving them helpless to protect their members. Since 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 26 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.” 27 The term originates in English common law and refers traditionally to an expression of the king’s prerogative. 28 The doctrine established the king as protector

24 See Cami Fraser, Protecting Native Americans: The Tribe as Parens Patriae, 5 MICH. J. RACE & L. 665, 678 (2000), which references 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 and those tribes.”); Fraser also notes Seminole Nation v. United States, 316 U.S. 286, 297 (1942):

[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 most exacting fiduciary standards.

25 Fraser, supra note 20, at 678.
26 Parens patriae is often defined as:

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 1144 (8th ed. 2004).

27 Id.
28 George B. Curtis, The Checkered Career of Parens Patriae: The State as Parent of
over those classes who could not protect themselves: infants, idiots, and lunatics. However, a fundamental attribute of parens patriae jurisdiction in this sense is that it confers powers not only to protect the young but also to control them.

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. This article argues that tribes have the same standing. Therefore, in order to protect women and children, this article argues that 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 jurisdiction 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. This Part also presents data regarding current 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 how 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. “‘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.


29 Id.

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.  

Law enforcement in Indian Country has been described as a “jurisdictional crazy-quilt,” 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.” 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. 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 colonization of the New World, many Native American 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 was maintained through an oral tradition.” 35 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.” 36

In early American history “Indian Territory was entirely the
province of the tribes, and they had jurisdiction in fact and theory over all
persons and subjects present there.” 37 One such tribe, the Cherokee Nation,
has a well-established history of intergovernmental interaction with the
United States with regard to criminal jurisdiction. Article V of the 1785
Treaty of Hopewell between the United States and the Cherokee Nation
stated that if “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.” 38 Such jurisdictional authority over non-Indians was
also negotiated with the Chickasaw Nation and the Choctaw Nation of
Oklahoma in 1866. 39 However, these early examples of tribal jurisprudence
conflicted with the underlying legal principles of the European colonists
who later impinged upon their territories.

B. The Arrival of European Settlers, and the Doctrine of Discovery

European legal principles that existed at the moment Europeans first
made contact with the Indians had their origins in theories developed to
justify the Crusades. 40 Later, as competing European nations began to
expand their empires, the papacy began to grant exclusive rights to lands as
they were “discovered,” including rights of sovereignty over the indigenous

35 Gavin Clarkson, Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary
36 Id. at 475.
37 WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 133
38 7 STAT. 18 (1785).
39 Clarkson, supra note 35, at ___.
40 See, e.g., Pope Innocent IV, Commentaria Doctissima in Quinque Libros
Decretalium, in THE EXPANSION OF EUROPE: THE FIRST PHASE 191-92 (James Muldoon
ed., 1977) (“[I]t is 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, at 29-41 (discussing the
crusading era origins of the legal doctrines which governed European land claims in the
Americas).
populations.\(^{41}\) Even after England broke away from the authority of Rome, English law still supported the “Doctrine of Discovery,”\(^{42}\) although the validity of the doctrine was a subject of debate among early colonial settlers.\(^{43}\) Regardless of conflicting religious interpretations of Indian rights,

\(^{41}\)See, e.g., Bull “Inter Caetera Divinae” of Pope Alexander VI dividing the New Continents and granting America to Spain, (May 4, 1493) 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.

\(^{42}\)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.

\(^{43}\)Compare Cheister E. Eisinger, The Puritans’ Justification for Taking the Land, in 84 Essex Institute Historical Collections 135-56 (1948) (recounting arguments of John Winthrop 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 135-43 (1948). (recounting arguments of Roger Williams (“‘I have knowne them make bargaine and sale amongst themselves for a small piece, or quantity of Ground.’ And this they do . . . notwithstanding a sinfull opinion amongst many the Christians have right to Heathens Lands.”))
“practical realities shaped legal relations between the Indians and colonists.”\textsuperscript{44} “The necessity of getting along with powerful”\textsuperscript{45} 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 acquired most of the lands by purchase from the Indians.\textsuperscript{46} During this period “the Indians were treated as sovereigns possessing full ownership rights to the lands of America.”\textsuperscript{47}

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. The military importance of treaty alliances would continue throughout the Revolutionary War period as well. 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:

\begin{quote}
Policy 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 expense [sic], and without that bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them ….
\end{quote}

Although many consider Washington’s letter the founding document of American Indian policy,\textsuperscript{49} its notion of Indians as “savages” sits alongside


\textsuperscript{45}Id. Despite devastating outbreaks of disease, the Indians would continue to outnumber the European settlers for several decades. See id.

\textsuperscript{46}Id. The Dutch similarly opted to obtain land via consented purchase rather than more bellicose methods.

\textsuperscript{47}Id.


\textsuperscript{49}See, e.g., Robert A. Williams, Jr., Like a Loaded Weapon: The Rehnquist
the pragmatic necessity of making treaties with the Indians. 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, among other things, often in specific consideration for the Indians’ relinquishment of land. 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. “[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.”


50 See Letter from George Washington to James Duane, supra note 39.

51 The scope of the trust relationship is multi-faceted. “Many treaties explicitly provided for protection by the United States.” See COHEN 2005, supra note 35, at § 1.03[1]. See, e.g., Treaty with the Kaskaskia, art. 2, Aug. 13, 1803, 7 Stat. 78, reprinted in CHARLES J. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES 25 (1904), [hereinafter Treaty with the Kaskaskia] (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 CHARLES J. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES 25 (1904) [hereinafter Treaty with the Creeks] (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, reprinted in FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 112 (1994) [hereinafter Fort Laramie Treaty] (providing for subsistence rations for the Sioux); Treaty with the Western Cherokee, art. 8, May 6, 1828, 7 Stat. 311, reprinted in KAPPLER, supra, at 290 [hereinafter Treaty with the Western Cherokee] (providing for twelve months of rations); FELIX COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 81 (1982) [hereinafter Cohen 1982] (“[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.”).

52 See, e.g., Fort Laramie Treaty, supra note 42, at 110 (providing that the Sioux relinquish all claims to lands in the United States); Treaty with the Kaskaskia, supra note 42, 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 42, at 26 (providing that the Creek nation “extinguish forever all claims” to specified lands).

53 See, e.g., Treaty of Fort Laramie, Sep. 17, 1851, reprinted in PRUCHA, supra note 42, at 84 (referring to the United States and the Sioux collectively as “the aforesaid nations”); Treaty of Fort McIntosh, Jan. 21, 1785, reprinted in PRUCHA, supra note 42, 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, reprinted in PRUCHA, supra note 42, at 4-5 (describing the treaty as between the United States and the Six Nations).

54 PRUCHA, supra note 42, at 2.
Such sovereignty clearly included the right to punish all offenders who committed crimes on tribal land.\textsuperscript{55}

For many, 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.”\textsuperscript{56}

\textbf{C. Assertion of Congressional Authority}

The federal government first began to assert its jurisdiction over criminal matters involving matters in Indian Country in which non-Indians committed crimes against Indians.\textsuperscript{57} This assertion was followed by the General Crimes Act in 1817, which extended jurisdiction over matters covering crimes by both Indians and non-Indians.\textsuperscript{58} The major exception to this increased jurisdiction was Indian-on-Indian crime over which the tribes retained exclusive jurisdiction.\textsuperscript{59}

The General Crimes Act, now referred to as the Indian Country

\textsuperscript{55}See Treaty of Hopewell, 7 STAT. 18 (1785).

\textsuperscript{56}Robert A. Williams, Jr., \textit{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 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!


\textsuperscript{57}COHEN 2005, \textit{supra} note 35, at § 1.03[1].

\textsuperscript{58}Id., at § 9.02[1][a].

\textsuperscript{59}Id.
Crimes Act, is now codified as 18 U.S.C. § 1152. Together with the Assimilative Crimes Act, the two acts 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.”

During this time 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. Ultimately, notions of tribal inferiority prevailed, and Congress passed the 1830 Removal Act. 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

[T]reaties 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 purchasing 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.

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

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61 Clarkson, supra note 26, at 475.
62 See Letter from Thomas Jefferson, President of the United States, to William Henry Harrison, Governor of Indiana Territory (Feb. 27, 1803) in DOCUMENTS OF UNITED STATES INDIAN POLICY, supra note 39, 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.”).
65 See e.g. Treaty of Dancing Rabbit Creek (1830), reprinted in 2 Charles J. Kappler, Indian Affairs, Laws and Treaties 310 (1904) (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); Fort Laramie Treaty, April 29, 1868, 15 Stat. 635, reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY, supra note 39, at 109 (signed by the Sioux Nation at the conclusion of the Powder River War, establishing a reservation) [hereinafter “Fort Laramie Treaty”].
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.” 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. In Cherokee Nation, Chief Justice Marshall described the relationship of Indian nations to the federal government as one of “domestic dependant nations,” emphasizing that such dependency and protection “does not imply the destruction of the protected.”

While 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. Such treaties still had to be ratified by Congress. In the 1870s, however, Congress ceased making treaties with the Indians and instead developed a policy of allotting tribal lands to individual Indians that was characterized as a “mighty pulverizing engine” that would destroy

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66 Worcester v. Georgia, 31 U.S. 515, 561 (1832)
67 Cherokee Nation, 30 U.S. 1 at 17.
68 Worcester, 31 U.S. at 552.
70 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 . . . .” Abolition of Treaty Making, 16 Stat. 544, 566 (1871), reprinted in Prucha, supra note 42, at 135.
71 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-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 Indians 212 (1971).
72 In an address to Congress in 1901, President Theodore Roosevelt expressed his sense of the assimilation policy:

[The 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 [acting] directly upon the family and the individual . . . .

tribalism and force Indians to assimilate into dominant society as individuals. Notions of the inferiority of tribalism were again 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.”

The situation further deteriorated in 1883. An Indian of the Brule Sioux band of the Sioux nation of Indians, Crow Dog, brought an original writ of habeas corpus following a conviction in federal court for murder and an accompanying death sentence. The victim was another Indian of the same band and nation, and the crime was committed in Indian Country. The Supreme Court held that the district court had no jurisdiction to try the case, nor to convict or sentence him, and that only the laws of the tribe held sway over the lands in question.

After the Supreme Court’s decision in Ex parte Crow Dog, Congress passed the Major Crimes Act in 1883. 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 was Indian, thereby removing jurisdiction of the tribes, even over their own lands. As a result, the tribes’ role in dispute resolution was greatly diminished.

In the same year the Major Crimes Act was passed, the Secretary of the Interior established the Courts of Indian Offenses under the Bureau of

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73 Id. at 326.
74 Id. at 556, 557 (1883).
75 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.
76 Ex Parte Crow Dog, 109 U.S. 556, 557 (1883).
77 Id.
79 Clarkson, supra note 26, at 477.
80 Canby, supra note 28, at 20.
These courts “administered a code promulgated by the Secretary that was incorporated into volume 25 of the Code of Federal Regulations (CFR).”\textsuperscript{82} From the start, there were many who recognized that “there was, at best, a shaky legal foundation for these tribunals. No statutory authorization for the establishment of such courts existed, only the generally acknowledged authority of the Department of the Interior to supervise Indian affairs.”\textsuperscript{83} Nevertheless, the Commissioner of Indian Affairs subjected a number of tribes to these courts.\textsuperscript{84} 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.”\textsuperscript{85} A clear goal of the CFR court system was “to break down traditional tribal government structures.”\textsuperscript{86} Despite its lack of direct statutory authority and “shaky legal foundation,” its constitutionality has been upheld.\textsuperscript{87} 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. This round-about action was, of course, not an optimal solution since it restricted tribes from being able to prosecute offenders according to the laws established for the most serious offenses. Tribes came to be dependent upon the federal government for

\textsuperscript{81} Clarkson, supra note 26, at 477.

\textsuperscript{82} Id.

\textsuperscript{83} Pommersheim, supra note 1, at 51; 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) (“[A]uthority 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.”).

\textsuperscript{84} Clarkson, supra note 26, at 477. 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 already “had recognized tribal governments” with active judiciaries. WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 109 (1966); see also Clinton, supra note 73, at 553–54 (examining jurisdictional problems concerning law enforcement on Indian lands).


\textsuperscript{86} Clarkson, supra note 26, at 477; Clinton, supra note 73, at 553.

\textsuperscript{87} Clarkson, supra note 26, 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. Ore. 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).
UNGUARDED INDIANS

enforcement of those crimes, a situation which 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. 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 them within their borders.

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 acts in concert with the tribe’s existence and prosperity, 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, which served to eliminate federal jurisdiction, extend state criminal and civil jurisdiction to Indian Country in five (later six) states, and allow any other state the ability to accept such jurisdiction.

When P.L. 280 was passed in 1953, “responsibility for law

89 Canby, supra note 28.
90 Id.
92 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. Alaska was also included on this list in 1958, with the exception of certain offenses committed on Annette Islands.
93 COHEN 2005, supra note 35, at § 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.” 118 U.S. 375, 384 (1886).
enforcement on the reservations was irrationally fractionated.\textsuperscript{94} Jurisdiction depended on the status of the offender and the victim. Goldberg notes that if a non-Indian is the victim of a crime committed by a non-Indian, or if a crime is committed without an apparent victim (such as drunk driving or gambling), state law dictates that only state authorities can prosecute the offender.\textsuperscript{95} However, “if either the victim or offender was Indian, the federal government had the exclusive jurisdiction to prosecute; in such a case, state law was applied in federal court under the Assimilative Crimes Act.”\textsuperscript{96} Finally, if both the offender and the victim were Indians, the federal government had exclusive jurisdiction if the offense was one of the “ten major crimes.”\textsuperscript{97} In all other cases, exclusive jurisdiction was granted to the tribal courts.\textsuperscript{98} The purpose of P.L. 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 since they were given more responsibilities without additional means by which to finance such measures, while many tribes objected to state jurisdiction imposed on them without their consent.\textsuperscript{99} 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.\textsuperscript{100}

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 P.L. 280. As Goldberg notes, one portion of the 1968 Indian Civil Rights Act\textsuperscript{101} “allowed any state which had previously assumed jurisdiction under P.L. 280 to offer the return of any of its jurisdiction to the federal government by sending a resolution to the Secretary of the Interior, who could then accept or reject the retrocession in his discretion.”\textsuperscript{102} These advantages were not shared by the tribes; Indians could not share in the decision-making process when a state chose to

\textsuperscript{95} Id.
\textsuperscript{96} 18 U.S.C. § 1152 (2006), which is still law today in non-PL-280 states. \textit{See id.}
\textsuperscript{98} Goldberg, \textit{supra} note 84.
\textsuperscript{99} \textit{Id.} at 538.
\textsuperscript{102} Goldberg, \textit{supra} note 84, at 558-59.
retrocede jurisdiction, although informal channels, while less than ideal, still existed in which they could appeal to the Secretary.\footnote{Id.}

P.L. 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 on their lands. In a way, this requirement of P. L. 280 was more of a concern to the tribes since the states did not necessarily have the means or the will by which to enforce such jurisdiction. As Goldberg notes, “[s]uch financial hardship translated into inadequate law enforcement on the reservations. The most notable failure among the states with mandatory jurisdiction was Nebraska, where the Omaha and Winnebago reservations were left without any law enforcement at all after federal officers withdrew.”\footnote{Id. at 552.} Such circumstances created an untenable situation on many reservations since the tribes were still dependent upon outside assistance to protect their citizens.

The Indian Civil Rights Act\footnote{82 STAT. 77 (1968), codified as 25 U.S.C. §§ 1301-1303 (2006).} also imposed on tribes most of the requirements of the Bill of Rights.\footnote{Canby, supra note 28, at 29.} Historically, “tribes had not been subject to Constitutional restraints since those restraints are imposed in terms either upon the federal government or, by the 14th Amendment, upon the States.”\footnote{Id.} One provision of the bill placed a severe restriction on the ability of tribes to punish criminals: “[n]o Indian tribe in exercising powers of 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. . . .”\footnote{18 U.S.C. § 1302(7) (2006).}

This limitation effectively curtailed the efforts of tribal prosecutors to punish criminals for more serious crimes with longer sentences without federal involvement. Some tribes creatively would charge an offender for several offenses,\footnote{An example of this might include separate charges of breaking and entering as well as assault and battery.} imposing a maximum sentence on each, in an effort to levy an adequate punishment for more serious crimes. These efforts were, much like earlier ones, a less than optimal solution to the problem of crimes committed on tribal lands. Nevertheless, the tribes had some authority over crimes on their lands, unlike what would happen after the Supreme Court
E. The Oliphant in the Room 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. After being arrested for assaulting a tribal officer, he filed a writ of *habeas corpus*, arguing that the Suquamish Indian Provisional Court had no jurisdiction over non-Indians. The Court agreed, and held that the non-Indians were entitled to *habeas* relief.

In the ruling, Justice Rehnquist relied on the 1830 Treaty with the Choctaw Indian tribe, 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.” 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.”

However, Justice Rehnquist failed to note the later Treaty with the Choctaws and Chickasaw, which stated that

> Every 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.

The treaty also contains an article which states clearly 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.” If Rehnquist was relying on language in an earlier treaty suggesting a wish that Congress “may grant” the right of punishing white men on their lands, no such language appeared in the later treaty that contained language superseding

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111 Id. at 194.
112 Id. at 212.
113 Id. at 197 (emphasis added by the Court); see ART. 4, 7 STAT. 333 (1830).
114 435 U.S. at 197.
115 14 STAT. 769 (1866).
116 ART. 38, 14 STAT. 769 (1866).
117 Art. 51, 14 STAT. 769 (1866).
the earlier treaty. As a result, Rehnquist was incorrect in relying on this 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.”

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.

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 Native women don’t report. It’s creating a breeding ground for sexual predators.”

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. The result of Oliphant “was particularly devastating for tribes such as the Makah, Tulalips, and Yakima, where the population of non-Indian residents often exceeded two-thirds of the total reservation population.” Because the number of non-Indians on reservation lands was

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118 435 U.S. at 212.
increasing, these 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 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. 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 as guardians to their ward tribes, as noted by Marshall, has been lacking. Even though the Court has established such a fiduciary duty, coupled with emphasis through Congressional legislation and judicial decisions, the federal government is refusing 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?'"

Research compiled by the Bureau of Justice Statistics (“BJS”) has consistently found that violent crime involving American Indian victims was “primarily interracial.” Fifty-seven percent of crimes against American Indians were committed by a white offender, while nine percent were committed by an African American offender. Only 34% of American Indians categorized their victimizer as “other,” which includes (but is not limited to) American Indian offenders. However, in cases of rape and sexual assault, the percentage of crimes committed against Native American women by members of the dominant society is even higher. During 1992 and 2002 almost nine out of every ten sexual assault or rape

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122 Radon, supra note 110 at 1275.
124 Id. at 27.
125 Fraser, supra note 20, at 678.
126 Support worker for Native American survivors of sexual violence (May 2005), in Amnesty Int’l, supra note 109, at 8.
128 Perry, supra note 2, at 9.
129 Id.
incidents against American Indian victims were perpetrated by non-Indian assailants.

In general, Native Americans are victims of violent crimes at a significantly higher rate than other racial or ethnic groups in the United States. A BJS study released in 2004 shows that across all races, 41 out of every 1000 persons age twelve or older are victims of violent crimes. When examining rates of violent crime among American Indian victims, that number climbs to 101 out of every 1000 persons per year, a rate twice as high as blacks (50 per 1000 persons), 2 ½ times that of whites (41 per 1000 persons), and 4 ½ times that of Asians (22 per 1000 persons). (See Figure 1.)

![Figure 1 – Incidence of violent crime by race, 2002.](image)

In addition, one study concluded that 34.1% of American Indian and Alaska 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.

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. 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. In general, as the seriousness of the offense increases, the higher the likelihood of an American Indian victim describing

130 Perry, supra note 2, at 4.
131 Id.
132 Id.
133 Id. at 5.
134 Tjaden & Thoennes, supra note 3, at 2.
135 Perry, supra note 2, at 7.
136 Perry, supra note 2, at 9.
the offender’s race as black or white.\footnote{Id. at 10.}

![Violent crime, per 1000 women]

\textbf{Figure 2 - Incidence of violent crime among women, 2002.}

Even more disturbing statistics were entailed in the BJS report. According to that study, in 2000 there were 6036 suspects investigated by U.S. Attorneys for violent crimes. Of these, 1525 (25.3\%) were in Indian Country.\footnote{Id. at 18.} By contrast, of the 3688 charges filed in U.S. district court, only 677 (18.4\%) of them were in Indian Country.\footnote{Id. at 20.} 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, the case of \textit{Oliphant}’s legitimacy and impact are called into question. As a direct result of \textit{Oliphant}, the ability of tribes to prosecute offenders who victimize Indian women is no more than one in ten. 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; however, if the offender is non-Indian, 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 was over 52\%.\footnote{Compendium of Federal Justice Statistics, 2004 35 (2006) (hereinafter \textit{Compendium}).} 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 that requires serious bodily injury since specific domestic charges do not exist. For these reasons, it is even more vital that victims have legal recourse.
through appropriate enforcement and jurisdiction.

B. Current 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;\(^{141}\) however, the Supreme Court rulings discussed earlier\(^ {142}\) 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 potentially devastating consequences for tribal members and the tribes themselves.

One of these potentially devastating consequences centers on the inability of the tribes to prosecute. Unfortunately, many tribes do not currently have the statistical ability to track incidents referred to federal prosecutors and declined. Tribes are therefore unable to accurately measure the rate of declination of prosecution since little or nothing is known about the final outcome of the case.\(^ {143}\)

This inability to track declination of federal prosecution continues to downplay the significant health and legal problem of Indian women and the stratospheric rates of domestic violence compared to national rates. Recent legislation passed in the last ten years has been significant for prohibiting violence against women in the U.S, but the impact has not been as significant in Indian Country. One example of such legislation is the Violence Against Women Act (VAWA),\(^ {144}\) which makes it a federal offense to, \textit{inter alia}, cross state lines to stalk, assault, or harass a spouse or intimate partner, or to violate a protection order.\(^ {145}\) VAWA gives victims the right to mandatory restitution, and requires states to honor protective orders issued in other states. It also serves to extend the “rape shield law,” which protects victims from abusive inquiries about their private sexual conduct. Amendments to VAWA in 2000 extended travel to and from Indian Country to the interstate stalking offense.

\(^{143}\)Clarkson et al., \textit{supra} note 2, at 835.
\(^{144}\)103 P.L. 322 §§ 40001-40703 (1994).
federal level greatly obstructs any effect that VAWA could have to offenses committed solely on tribal reservations. Without any 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.”

The statutory standard defines a bodily 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. 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.

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 FBI, Bureau of Indian Affairs (“BIA”), and tribal police for conducting criminal investigations. The U.S. Attorney’s Manual provides very little, if any, direction in establishing such guidelines. 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 the 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. Tribal police departments enter into agreements

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149 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.
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, as such misdemeanor cases are generally ignored. Only 2% of sexual abuse cases are eventually disposed of by U.S. Magistrates.\textsuperscript{150}

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 since a federal officer’s arrest authority is limited to felony crimes or misdemeanors that are actually committed in their 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, while Ms. Chiara was in charge, the Western District also provides special training programs for tribal authorities. As a result, tribal law enforcement was able to perform Lethality Assessments subsequent to incidents of domestic violence. While tribal authorities were be 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 a native person creates 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. However, 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 create a solution to 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

\textsuperscript{150} Compendium, \textit{supra} note 130, at 28.
had been committed or that a misdemeanor crime was committed in the presence of the tribal officer.

The Western District 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” (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 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’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 in order 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 of 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.\(^{151}\)

### D. Declinations of Prosecution

As stated above, in the absence of a sympathetic U.S. Attorney’s Office, a 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 accurately track such referrals; as a result, they cannot measure how often prosecutions are declined. The incidence of declination is an essential statistic to understand, because while the federal government has established itself statutorily as the sole protector of American Indian women against non-Indian domestic

abuse offenders, in every instance that a U.S. Attorney does not prosecute a case of domestic violence, for whatever reason, the essential promise of federal protection is broken.

In the domestic violence context, prosecution rates are especially important since, compared to other types of assaults, the violent acts are more likely to be repeated than other types of assaults. 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.” Shockingly, the high rate of domestic violence prosecution declinations may serve as a core reason why the rates 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,” while the lack of negative consequences as a result of his behavior gives him no reason to desist.

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. However, the BJS has collected nationwide prosecution statistics for broad categories of crime. The most recent data available shows that U.S. Attorneys declined to prosecute 21.5% of all crimes investigated in 2004. 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), U.S. Attorneys declined to prosecute 31.8% of the referred cases. For the specific crime of assault, defined as intentionally inflicting or attempting or threatening to inflict bodily injury to another person, U.S. Attorneys have declined to prosecute 35.3% of the cases investigated. 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. (See Figure 3) These data include prosecution rates for crimes committed both on and off reservations; as a result they do

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152 CATHARINE A. MACKINNON, SEX EQUALITY 716 (Foundation Press 2001).
154 DAYA, FAMILY RELATIONSHIPS (2003).
155 Id.
156 Id., at 119.
157 Id., at 130, at 32.
158 Id., at 32.
159 Id.
not accurately portray prosecution rates for crimes committed solely against Indian women.

![Figure 3 - Rates of U.S. Attorney declination by type of crime](image)

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.” 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. Of a total of eighteen 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’…[y]et the violence in these cases was quite serious and the injuries sustained by the victims extensive.”

E. Further Difficulties in Prosecuting

A lack of financial resources greatly limits domestic violence justice on Indian lands. Based on a study by Tjaden and Thoennes, “[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.” 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 to

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160 Peacock et al., supra note 142, at 70.
161 Id., at 97.
162 Id., at 101.
163 Tjaden & Thoennes, supra note 3, at 42.
comparable non-Native rural communities. 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.

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. 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, continue to fall short of what is needed.

The inability of tribes to obtain sufficient law enforcement resources compounds the difficulty that tribes must confront in combating criminal activity. The number of law enforcement officers per capita outside Indian Country is twice as many as on reservations. The Navajo Nation Police Department, for example, has 321 sworn officers who cover an area of over 22,000 square miles. By comparison, the Reno, Nevada Police Department, with 320 police officers, covers an area of only 57.5 square miles.

Another source of difficulty in seeking justice for domestic violent 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. Although the U.S. Attorney in each district is responsible for developing local written guidelines that outline the responsibilities of BIA, FBI, and tribal police for

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167 Tjaden & Thoennes, supra note 3, at 42.

168 Getches et al., supra note 24, at 481.


170 Getches et al., supra note 24, at 482.

171 Id.
conducting criminal investigations, the division of responsibilities has never been clear.\textsuperscript{172}

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 providing assistance upon request.\textsuperscript{173} The 1975 Department of Justice Task Force Report concluded that law enforcement agencies, including the FBI, have not always provided adequate law enforcement services in Indian Country.\textsuperscript{174}

Not only are there multiple investigators, their reports are held with different import which can further complicate 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 require the FBI to conduct an independent investigation.\textsuperscript{175} Such an arrangement creates a duplication of 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.\textsuperscript{176}

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 Court rulings such as \textit{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 \textit{Duro v. Reina}.\textsuperscript{177} Citing \textit{Oliphant}, the court in \textit{Duro} held that in addition to being unable to assert criminal jurisdiction over a non-Indian, an Indian tribe

\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.}; U.S. DEP’T. OF JUST, REPORT OF THE TASK FORCE ON INDIAN MATTERS (1975).
\textsuperscript{175} Criminal Justice, supra note 78; U.S. DEP’T. OF JUST, REPORT OF THE TASK FORCE ON INDIAN MATTERS (1975).
\textsuperscript{176} Criminal Justice, supra note 78.
\textsuperscript{177} 495 U.S. 676 (1990).
could not assert criminal jurisdiction even over an Indian defendant unless
the Indian is a member of the tribe seeking to assert such jurisdiction.

Since 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 Indian non-members, 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, 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. This act demonstrates that Congress does have the will to act
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, the court asserted that while Oliphant and Duro reflect the
court’s view of tribes’ sovereign status, they in no way imply “constitutional limits prohibiting Congress from taking actions to modify or
adjust that status.” 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.”
This decision is especially important since the 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.

In the face of Congressional unwillingness to correct the still-present
jurisdictional void regarding non-Indians, a different solution is necessary.
This necessity is emphasized by the multiple problems associated with the
current system, such as competing jurisprudence, replicated investigatory

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178 Getches et al., supra note 24, at 481.
181 Id. at 195.
182 Id. at 196.
183 Id.
work, and financial concerns among the tribes. Because of the problems of jurisdiction and the federal government’s reluctance to step in and prosecute non-native offenders, jurisdiction over tribal lands must be returned 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, Native Americans 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.\cite{184}

[Non-Native perpetrators often seek out a reservation place because they know they can inflict violence without much happening to them.\cite{185}]

Through the course of decisions beginning with Oliphant\cite{186} and continuing with Montana v. United States\cite{187} and Rice v. Rehner,\cite{188} the federal government began to discover new inherent limitations on tribal sovereignty. As the Supreme Court has stated on several occasions, the sovereignty of a tribe “exists only at the sufferance of Congress and is subject to complete defeasance.”\cite{189}

As noted Indian law scholar Robert Williams has argued, these cases are an indication of a belief that the federal government holds parens

\begin{footnotesize}
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\item \cite{184} Interview with Dr. David Lisak, Associate Professor of Psychology, University of Massachusetts (29 September 2003), reprinted in Amnesty Int’l, supra note 109, at 61.
\item \cite{185} Interview with Andrea Smith, Assistant Professor of Native Studies, University of Michigan, in Jodi Rave, “South Dakota Tribal City Police Department a National Model for Handling Domestic Abuse,” THE MISSOURIAN (Sept. 24, 2006), reprinted in Amnesty Int’l, supra note 109, at 33
\item \cite{186} Oliphant, 435 U.S. 191.
\item \cite{187} Montana v. United States, 450 U.S. 544 (1981) (holding that, when tribal interested were not shown to be affected, tribes lacked the inherent power to regulate hunting and fishing by non-Indians on non-Indian land with its reservation).
\item \cite{188} Rice v. Rehner, 463 U.S. 713 (1983) (holding that tribes had no preemptive power to regulate liquor sales on their reservations).
\end{itemize}
\end{footnotesize}
patriae authority over Indian affairs.\textsuperscript{190} If Williams is correct in his assertion of the validity of \textit{parens patriae}, then the lack of criminal investigation and indictment with regard to domestic violence is an indication of shirking of federal duty. As a result, the self-appointed guardian is not performing its task of essential function of guarding.

\textbf{A. The Tension between “Domestic Dependent Nations” and the Federal Government}\textsuperscript{191}

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 \textit{Cherokee Nation},\textsuperscript{192} Marshall wrote that “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.”\textsuperscript{193} A half century later the Supreme Court would opine that the “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.”\textsuperscript{194} 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.”\textsuperscript{195}

The concept that so confounds both Congress and the courts is that, on one hand, Indian tribes are separate sovereigns, “domestic dependent nations”\textsuperscript{196} that are ensconced as a “third sovereign”\textsuperscript{197} in the federal framework. On the other hand, Congress has plenary authority over Indian tribes.\textsuperscript{198} While the fabrication of this plenary authority has dubious origins,\textsuperscript{199} the continued maintenance of such authority is justified by a

\textsuperscript{190} Robert A. Williams, Jr., Prof. of Law, Univ. of Ariz., Emergence of a National Indian Policy: Parens Patriae and Indian Tribal Sovereignty (Feb. 1989).

\textsuperscript{191} For a more detailed history of tribal law and policy, see Gavin Clarkson, \textit{Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development}, 85 N.C. L. Rev. 1009, 1019-1030 (2007).

\textsuperscript{192} 30 U.S. at 1.

\textsuperscript{193} \textit{Cherokee Nation}, 30 U.S. at 16.

\textsuperscript{194} United States v. Kagama, 118 U.S. 375, 381 (1886).


\textsuperscript{196} \textit{Cherokee Nation}, 30 U.S. at 17.

\textsuperscript{197} 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, \textit{Lessons from the Third Sovereign: Indian Tribal Courts}, 33 TULSA L.J. 1, 2 (1997).

\textsuperscript{198} COHEN 2005, supra note 35, § 4.03[1].

\textsuperscript{199} Arguably, the Supreme Court simply made up the notion of plenary authority. In \textit{Kagama}, the Court stated that
legal discourse whose origins were clearly based on a negative perception of tribalism.\textsuperscript{200}

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, as the “first key to economic development is sovereignty.”\textsuperscript{201}

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 again,\textsuperscript{202} and Congress passed the Indian Reorganization Act of 1934 (“IRA”).\textsuperscript{203} In an effort to reinforce tribal sovereignty, the legislation allowed tribes to adopt

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 protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

\textit{Kamaga}, 118 U.S. at 383–84. Unable to find a source for such plenary authority in the Constitution, the Court held that

There the 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.

\textit{Id.} at 384–85.

\textsuperscript{200} \textit{See, e.g.}, \textit{Worcester v. Georgia, 31 U.S. 515, 588 (1832) (discussing the “humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling”); \textit{Cherokee Nation, 30 U.S. at 1, 17 (1831) (“[Indians] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian . . . .”); \textit{Johnson v. McIntosh, 21 U.S. 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. \textit{See generally Cohen 2005, supra note 35, § 1.03[4][a] (providing history of these three cases).}

\textsuperscript{201} \textit{Stephen Cornell, Sovereignty, Prosperity and Policy in Indian Country Today, 5 Community Reinvestment 5, 5 (1997).}

\textsuperscript{202} \textit{See, e.g.}, \textit{Inst. for Gov’t Research, Studies in Administration, The Problem of Indian Administration (1928) (documenting the failure of federal Indian policy during the allotment period).}

\textsuperscript{203} \textit{25 U.S.C. §461-494 (1994).}
constitutions and to reestablish structures for governance. Post-IRA federal treatment of the tribes was less restrictive, allowing for the popular election of tribal leaders according to tribal laws and constitutions.\footnote{Russel Lawrence Barsh and James Youngblood Henderson, The Road: Indian Tribes and Political Liberty 209 (1980).}


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.\textsuperscript{211}

\textbf{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 \textit{parens patriae}. The doctrine of \textit{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, “\textit{parens patriae}” means “parent of his or her country.”\textsuperscript{212} The term originates in English common law and refers traditionally to an expression of the king’s prerogative.\textsuperscript{213} The doctrine established the king as protector over those classes who could not protect themselves: infants, idiots, and lunatics.\textsuperscript{214} However, a fundamental attribute of \textit{parens patriae} jurisdiction in this sense is that it confers powers not only to protect the young but also to control them.\textsuperscript{215}

In early American history the Nonintercourse 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….\textsuperscript{216} The Act was reenacted by Congress with only minor modifications several times throughout the early 19th century and now is codified as 25 U.S.C. § 177.\textsuperscript{217} 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.”\textsuperscript{218}

The Nonintercourse Act was, in a fundamental way, the Congress’ 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 \textit{Johnson v. M’Intosh}\textsuperscript{219} 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.

\begin{thebibliography}{99}
\bibitem{211} Id.
\bibitem{212} 	extsc{Black’s Law Dictionary} 1144 (8th ed. 2004)
\bibitem{214} Id.
\bibitem{216} Williams, \textit{supra} note 179.
\bibitem{217} Id.
\bibitem{219} Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543 (1823).
\end{thebibliography}
and federal governments. According to 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.” This 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, 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.  

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. Since American Indian tribes were completely divested of any sovereign rights to territory and autonomy they might have claimed at the instant of European discovery, statutes such as the Nonintercourse Act were practically nothing but a mere formality. 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.  

The Doctrine of Discovery helped firmly entrench the belief that the doctrine of parens patriae applied with respect to the tribes, since the tribes held inferior sovereignty to that of the United States. That policy was emphatically reinforced in United States v. Kagama. 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

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221 Williams, supra note 179.
222 City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197, 204 (2005), reh’g denied, 544 U.S. 1057 (2005) (noting that “fee 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”); see also Oneida Indian Nation v. County of Oneida (Oneida II), 414 U.S. 661 (1974).
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.

This “power,” therefore, was supposedly derived from the federal government’s moral duty to act as a guardian in protecting its Indian wards. 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.”

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. As described by Felix 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. This clause empowers Congress “to regulate Commerce with foreign nations, and among the several states, and with the Indian tribes.”

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.” He points to the Supreme Court decision in Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982), as clarifying the law concerning parens patriae standing:

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224 Williams, supra note 179.
225 Kagama, 118 U.S. at 383-84.
226 Williams, supra note 179.
227 Id.
229 COHEN 1982, supra note 42, at § 401(1)(A).
230 U.S. CONST. art. I, § 8, cl. 3.
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.

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, and pollution. “As the Court in *Snapp* emphasized, the state must show both an injury and that ‘the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.’”

For the second category, the Court stated “that *parens patriae* standing exists to show that ‘the State and its residents are not excluded from the benefits that are to flow from participation in the federal system.’” As a result, the Court held that Puerto Rico had standing on behalf of its citizens to bring suit alleging discrimination in interstate commerce.

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.

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232 *Id.* (citing Maryland v. Louisiana, 451 U.S. 725, 737 (1981); Georgia v. Pa. R.R., 324 U.S. 439, 446-452 (1945)).

233 *Id.*, at 115 (citing Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 180 U.S. 208 (1901)).

234 *Id.* (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982)).

235 *Id.* (quoting 458 U.S. at 608).

236 *Id.*

237 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*. 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) (“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.”) (Fletcher, J., dissenting); *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.
Chemerinsky notes that “one important limit on parens patriae standing is that states may not sue the federal government in this capacity, although they may sue the federal government to protect their own sovereign or proprietary interests.” 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.” However, Chemerinsky argues that the limitation of governments from suing the federal government may itself be limited. “Allowing states to sue the federal government might provide essential protection, just as suits are often important against private parties.” Such a situation may arise in dealing with the federal government’s unwillingness to enforce the Major Crimes Act, even though the federal government has exclusive jurisdiction under that statute.

Several courts 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, the court recognized that difference.

Unlike 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 been broadened to recognize that an injury may be suffered by a state when the statutory provisions of a federal

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Supra note 20, at 667 n.12.
Chemerinsky, supra note 221, at 115.
Chemerinsky, supra note 221, at 115.
Id. Even in light of this argument, the Supreme Court has not agreed. Fraser, supra note 20, 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.” Snapp, 458 U.S. at 610 n.16, quoted in Fraser, supra note 20, at 693 n.193.
Hayden, 748 F. Supp. 797.
act are violated.\textsuperscript{245}

Similarly, the court in \textit{New York v. Heckler}, while acknowledging \textit{Mellon}, notes that the plaintiffs are not challenging a federal statute but enforcing a federal statute.\textsuperscript{246} As a result, the court held that \textit{Mellon} did not apply. Since 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 \textit{parens patriae}.

\section*{IV. \textit{Parens Patriae} as Sword and Shield}

\textit{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.}\textsuperscript{247}

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 its own members.

As described in Part III, the doctrine of \textit{parens patriae}\textsuperscript{248} 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, to create 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 \textit{parens patriae} authority over the tribes, the tribes may be able to sue the federal government under its own \textit{parens patriae} standing in order to protect its citizens from the inaction of the federal government.

Once a tribe’s right to assert its \textit{parens patriae} status in order to protect its citizens is established, a question still remains on how the tribe should proceed. This procedure will be different depending on whether the tribe is

\begin{itemize}
  \item \textsuperscript{245} \textit{Id.} at 802.
  \item \textsuperscript{246} \textit{Heckler}, 578 F. Supp. at 1122.
  \item \textsuperscript{247} \textit{Janet Reno, A Federal Commitment to Tribal Justice System, Judicature}, 113, 114 (1995).
  \item \textsuperscript{248} \textit{Black’s Law Dictionary}, \textit{supra} note 201.
\end{itemize}
in a state governed by P. L. 280 or not.

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, 249 “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. 250 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 with 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 on 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. However, absent Congressional authority to the contrary, such assumption cannot be the case.

As a result, tribes are faced with 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

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250 *Id.*
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 likewise applied in reverse, to allow the tribes standing to force the federal government to enforce every crime on 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 the acts of Congress 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 already, this situation would strain those resources even further. In fact, this situation could become utterly untenable to the U.S. Attorneys in the various districts in the country.

The clear alternative to this situation would be a Congressional reversal of Oliphant, as suggested by the Court both within that decision, as well as in Lara. Such a situation would likely benefit all sides in that jurisdiction could return to tribes, as it was under previous legislation, and the U.S. Attorneys’ Offices would be free to pursue other matters.

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 that 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

251 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 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.


252 Lara, 541 U.S. at 195.
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, however, the courts uphold the parenthood status of the federal government over the tribes, 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.

B. Tribes in Public Law 280 States

In states governed by P.L. 280, the federal government has delegated jurisdiction to the state in question. 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.253

In Hawaii, for example, under the Hawaiian Statehood Act,254 “Congress delegated to the State of Hawaii the trust responsibility owed to the Native Hawaiians,”255 creating a precedent that Congress is willing to delegate such a relationship to the states. Congress demonstrated the belief that the natives were inferior in delegating the jurisdiction to the states rather than to the tribes. In effect, the Native Hawaiians were thrust into a guardian-ward relationship with the State of Hawaii, which assumed the responsibility. Other 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 parenthood status on behalf of their members. As discussed in Part III, a tribe’s assertion of parenthood 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’ parenthood 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 parenthood standing be upheld, then the federal government would be delinquent in its duties to protect the inferior ward, and so the federal government would need to

253 Perry, supra note 2, at 20.
increase its jurisdiction. 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*

Conversely, 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*, although this likelihood is slim based on *dicta* in the decision in which the Court stated its preference for legislative rather than judicial action.\[^{256}\]

A major injustice has been caused by the decision handed down in *Oliphant*, 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.\[^{257}\] Data presented earlier in this paper demonstrate that if anything, non-Indian on 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 superceding treaty.\[^{258}\] 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. Congress, however, also has the power to remedy this situation, as outlined below:

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

\[^{256}\] 435 U.S. at 212.
\[^{257}\] *Id.*
\[^{258}\] 14 STAT. 769 (1866).
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.259

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.260

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.”261

The Supreme Court decision in Oliphant severely limited the tribes’ ability to police their own lands, through a complex jurisdictional maze that limited their ability to enforce their laws against non-Indian offenders on their tribal lands. While federal jurisdiction does exist, resources are often stretched tightly, and in many cases federal prosecutors simply decline 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

259 435 US 211-12
260 25 USC 1301 (2) would then read
“powers 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 power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all persons (emphasis added).

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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