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Allotment of Justice: How U.S. Policy in Indian Country Perpetuates the Victimization of American Indians

Elise Helgesen

NOTE

ALLOTMENT OF JUSTICE: HOW U.S. POLICY IN INDIAN COUNTRY PERPETUATES THE VICTIMIZATION OF AMERICAN INDIANS

Elise Helgesen[*]

"Where else do you ask: How bad is the crime, what color are the victims and what color are the defendants? . . . We would not allow this anywhere else except Indian country."[1]

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* Attorney, FairVote. B.A., The College of Williams and Mary; J.D., University of Florida Levin College of Law. I would like to thank the *University of Florida Journal of Law and Public Policy* for publishing my Note.

1. Gary Fields, *Tattered Justice: On U.S. Indian Reservations, Criminals Slip Through Gaps Limited Legal Powers Hobble Tribal Nations, Feds Take Few Cases*, WALL ST. J. (June 12, 2007), http://online.wsj.com/article/SB118161297090532116.html. The preceding quote was

It is shocking, yet true, that American Indian women are three times as likely to be raped or sexually assaulted as women of another ethnicity.[2] In general, American Indians are more likely than any other racial group to be the victims of violent crime.[3] In fact, American Indians are twice as likely as African-Americans to be the victim of violent crime, and two and a half times more likely than any other group to be the victim of violent crime.[4] According to the Bureau of Justice Statistics published by the Department of Justice (DOJ), in 2000, 75% of the offenses investigated in Indian country[5] for that year were violent crimes.[6] The national average for 2000 was only 5%.[7] The primacy of federal jurisdiction over crimes committed in Indian country has led to a proliferation of violent crimes, especially those committed against American Indians by non-Indians. The current tangled web of federal, state, and tribal concurrent jurisdictions and the failure of federal or state prosecutors to effectively charge crimes in Indian country has led to an increase in violent crime rates. The legal void created by a lack of prosecution in Indian country, together with insufficient resources, and a distrust of law enforcement among American Indians has exacerbated the problem. The solution is to give back control to the tribes, by establishing a policy of tribal self-determination, and by creating a justice system that reinforces community values.

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spoken by James Kilbourne, a prosecutor for the Cherokee Tribe.

2. Rebecca A. Hart & M. Alexander Lowther, Comment, *Honoring Tribal Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV.185, 188-89 (2001).

3. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 713 (2006).

4. *Id.*

5. Indian country as defined in 18 U.S.C. § 1151 (1984):

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

6. Bureau of Justice Statistics, U.S. Dep't of Justice, A BJS Statistical Profile, 1992-2002, American Indians and Crime (1994), http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf (last visited Nov. 16, 2010) [hereinafter BJS Report].

7. *Id.*

I. HISTORY OF INDIAN COUNTRY

The U.S. federal government has always taken a strong hand in defining the ownership interests between tribal lands and U.S. lands, both through the courts and through the legislature. Though the United States cannot deny that American Indians were on American soil first, that has never stopped it from proclaiming American Indian land for its own. The relationship between tribal powers and federal government in the area of land ownership underlies the political and cultural domination by the U.S. government over the tribes through the course of American history, and the jurisdictional boundaries which plague the criminal justice system today.

American settlers justified their conquest over American Indian lands through belief that they were racially and morally superior to the native peoples.[8] However, some early colonists even justified their actions by claiming that the native peoples were not, in fact, native to the American soil.[9] When European settlers came to American, they brought new diseases with them.[10] These foreign diseases wreaked havoc on the American Indian population.[11] Acknowledging the suffering of American Indians, some colonists claimed that the American Indians were not well suited to the land, and that they were not indigenous to the land; otherwise they would be capable of defending themselves from diseases.[12] Other American settlers merely embraced the philosophy that it was their God-given right to expand across the continent—a philosophy known as Manifest Destiny.[13] Armed with God's providence and the moral belief that all American land was free for the taking, settlers rapidly began to claim land belonging to American Indians.

In *Johnson v. M'Intosh*,[14] the Supreme Court first articulated the nature of the American settlers' claim over American Indian land. In

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8. Inés Talamantez, *Transforming American Conceptions About Native America: Vine Deloria, Jr., Critic and Coyote*, *in* NATIVE VOICES: AMERICAN INDIAN IDENTITY & RESISTANCE 273, 279 (Richard A. Grounds et al. eds., 2003).

9. Laura Janara, *Brothers and Others: Tocqueville and Beaumont, U.S. Genealogy, Democracy, and Racism*, 32 POL. THEORY 773, 785 (Dec. 2004).

10. Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 616 (2009).

11. *Id.*

12. Janara, *supra* note 9, at 785.

13. In the 1840s, politician John L. O'Sullivan coined the phrase Manifest Destiny by stating that it was Americans' right to "'the fulfillment of our manifest destiny to overspread the continent allotted by Providence for the free development of our yearly multiplying millions.'" REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 219 (1981).

14. Johnson v. M'Intosh, 21 U.S. 543 (1823).

adjudicating a claim regarding the ownership of overlapping tracts of land, the Court first set out the doctrine of discovery.[15] Chief Justice Marshall, speaking for the Court, stated that American Indian tribes had no claim over their own lands, but were merely occupants of the land, to which the settlers laid legal claim through discovery.[16] Marshall stated of the American Indians, "their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[17] The Supreme Court's holding in *Johnson v. M'Intosh* gave the early American settlers legal grounding, in addition to the settlers' already established racial justifications, to pursue a policy of Manifest Destiny and conquest of American Indian lands.[18]

There is new evidence that there was no case and controversy before the Court in *Johnson v. M'Intosh*, but that the justices used undisputed tracts of land to predicate an opinion that created the doctrine of discovery,[19] thus enabling future generations of conquest. Other Supreme Court decisions helped to establish the early relationship between the American Indians and the other Americans—or the Whites. In *Cherokee Nation v. Georgia*, the Supreme Court recognized that the Cherokee tribe and all other Indian tribes had the status of "sovereign and independent states."[20] *Cherokee Nation* set out the tribes' status as quasi-sovereign nations, yet at the same time established the relationship of the tribes to the United States was as a "ward to his guardian."[21] Again in *United States v. Kagama*,[22] the Supreme Court reiterated what became known as the trust relationship between the tribes and the United States. Justice Miller left no room for doubt on the Court's position on the status of American Indian tribes, stating: "These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States, dependent largely for their daily food;

15. *Id.* at 571, 574.

16. *Id.* at 574.

17. *Id.*

18. Robert J. Miller, *The Doctrine of Discovery, Manifest Destiny, and Oregon*, http://www.esd112.org/history/cc/seminars/miller/Doctrine_of_Discovery_Manifest_Destiny_Oregon.pdf (last visited Nov. 13, 2010) ("The [Discovery] Doctrine continues to play a very significant role in American Indian law and policies because it still restricts Indian people and Indian Nations in their property, governmental, and self-determination rights.").

19. Glenn T. Morris, *Vine Deloria, Jr., and the Development of a Decolonizing Critique of Indigenous Peoples and International Relations*, *in* NATIVE VOICES: AMERICAN INDIAN IDENTITY & RESISTANCE 97, 111 (Richard A. Grounds, et al. eds., 2003).

20. 30 U.S. 1, 4 (1831).

21. *Id.* at 2.

22. 118 U.S. 375, 381-82 (1886).

dependent for their political rights."[23]

After hundreds of years of colonizing and marginalizing American Indians through conquest,[24] and reinforced by judicial concepts of discovery and the trust relationship, the U.S. government embarked on its most proactive course of action. In 1830, Congress enacted the Indian Removal Act.[25] Under the Indian Removal Act, the U.S. government had the authority to appropriate from American Indians any land it wanted in exchange for land in the Western part of the country.[26] President Andrew Jackson truly believed that Whites were entitled to any land that they wished, and that American Indians should be moved westward to accommodate Whites.[27] In his second annual address to the House of Representatives, Jackson addressed the proposed forced movement of American Indians westward, saying, "[i]t is, therefore, a duty which this Government owes to the new States to extinguish as soon as possible the Indian title to all lands which Congress themselves have included within their limits."[28] Though Jackson stated that the removal policy was a "source of joy" that "our own [White] people would gladly embrace,"[29] the forced move westward became known in history as the Trail of Tears, after the suffering the American Indians endured.[30]

Jackson's Indian Removal Policy created long-term effects: it established the foundation for the American Indian reservation system; it marginalized American Indians to a greater extent while simultaneously propelling White society to a dominant cultural and political position; and it created distrust of White society. The segregation that occurred as part of the forced migration to Indian country caused not only social isolation, but also economic isolation.[31] According to data taken in 1999, American Indian and Native Alaskan families were below the poverty line at a greater percentage than any

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23. *Id.* at 383-84.

24. BARBARA PERRY, SILENT VICTIMS: HATE CRIMES AGAINST NATIVE AMERICANS 24 (2008).

25. ANDREW JACKSON, SECOND ANNUAL MESSAGE, *reprinted in, The Indians Must Be Moved West, in* THE INDIAN RESERVATION SYSTEM 23, 24 (Terry O'Neill ed., 2002). The above statement was taken from the editor's commentary preceding Jackson's Second Annual Message as reprinted in the book.

26. *Id.*

27. *Id.* at 25.

28. *Id.* at 29.

29. *Id.* at 28.

30. PBS, *Historical Documents: The Trail of Tears*, http://www.pbs.org/wgbh/aia/part4/4h1567.html (last visited Nov. 13, 2010). The Cherokee Nation was forced to move from Georgia to present-day Oklahoma under Jackson's Indian Removal Policy. The journey resulted in 4,000 deaths of the 15,000 Cherokee living at the time.

31. PERRY, *supra* note 24, at 66.

other race.[32] However, despite the inherent marginalization felt by American Indians on reservations, it is clear that the reservation is also a key component to American Indians' identities, inextricably intertwined with their shared culture. "[F]or many Native Americans, the reservations do not represent the margin but rather the center. . . . They are at once sites of despair and sites of hope, of oppression and of resistance."[33]

The U.S. policy of allotment left its mark on American Indian land. Indian country today is actually patchwork of American Indian and non-Indian land. Allotment was the process by which American-Indian publicly owned land was appropriated into the hands of individuals.[34] "As a result of allotment, large numbers of non-Indians currently reside upon and own fee land on some reservations."[35] An example of the policy of allotment was the Dawes Act of 1887.[36] The Act broke up communal tribal land into separate parcels of 160 acres for each head of family, or 80 acres for a single person,[37] and allotted the parcels to American Indians by fully alienable title.[38] The excess lands were open to non-Indian settlement.[39] Though the Indian Reorganization Act in 1934[40] attempted to end allotment and reinstate tribal self-governance,[41] the effects of the allotment practices in the nineteenth century and into the twentieth century had already caused their harm. "This practice of allotting Native American land to white settlers would later have significant consequences for Native American unity, and for Indian-white conflict."[42]

The policies of the U.S. government in first removing American Indians to reservations and then breaking up that land by allotment has allowed for an influx of non-Indians in Indian country and created a detrimental situation whereby non-Indian defendants are allowed to commit crimes on Indian Territory and remain largely free from federal

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32. *Id.* at 65. A table displaying poverty levels according to race, represented as a percentage in descending order ranked: American Indian and Native Alaskan (25.7%), Black (24.9%), Hispanic or Latino (22.6%), Native Hawaiian and Other Pacific Islander (17.7%), Asian (12.6%), All Races (12.4%), and White (9.1%). *Id.*

33. *Id.* at 67.

34. *Id.* at 28.

35. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 452 (2005).

36. 25 U.S.C. § 331 (1887) (section repealed in 2000).

37. PERRY, *supra* note 24, at 28.

38. S. James Anaya, *International Law and U.S. Trust Responsibility Toward Native Americans*, *in* NATIVE VOICES: AMERICAN INDIAN IDENTITY & RESISTANCE, 155, 163 (Richard A. Grounds, et al. eds., 2003).

39. *Id.*

40. 25 U.S.C. §§ 461-479 (2001).

41. *Id.* § 461.

42. PERRY, *supra* note 24, at 28.

or tribal prosecution. Over 85% of the perpetrators in sexual assault and rape cases are non-Indian, and almost 70% of violent crimes committed in Indian country are committed by a non-Indian against an Indian.[43] According to the Bureau of Justice Statistics, American Indians are more likely to be the victims of assault or sexual assault where the perpetrator is a stranger rather than a family member or intimate partner.[44] The true victims are the American Indians, and increasingly those victims are the women who suffer acts of sexual violence.[45]

II. CRIME IN INDIAN COUNTRY

The abundance of violent crime in Indian country is the result of a complex mix of social, economic, and political factors. However, most striking is the effect that federal jurisdiction over American Indian crimes has created in the American Indian community. The American Indians' struggle for rights as defined by the federal government both in statute and through the judiciary is illustrative of the way American Indians have constantly been subordinated to other Americans' interests throughout American history. Congress and the U.S. Supreme Court have continually taken power away from the tribes and put power into the hands of the federal or state governments. The result is a loss of tribal sovereignty where it is most warranted. The proliferation of violent crime in Indian country is the result of three factors: a) the complex federal, state, and local jurisdiction over American Indian crimes, which creates a legal void;[46] b) the lack of resources available in Indian country to effectively investigate and prosecute crimes;[47] and c) the shared perspective of American Indians that federal and state law enforcement cannot be trusted.[48]

A. *Legal Void*

1. Federal Jurisdiction

To understand where a potential legal void may be created, it is first important to understand where jurisdiction over crime in Indian country lies. The Major Crimes Act (MCA)[49] was originally enacted in 1885 to

43. Hart & Lowther, *supra* note 2.

44. BJS Report, *supra* note 6.

45. *Id.*

46. *See* Oliphant v. Squamish Indian Tribe, 435 U.S. 191 (1978); Mills & Brown, *infra* note 109.

47. *See* MAZE, *infra* note 82, at 53.

48. *See* Washburn, *supra* note 3.

49. 18 U.S.C. § 1153 (2006).

grant federal jurisdiction over serious, or "major," crimes committed by American Indians on land in Indian country.[50] The MCA was a response to the case, *Ex parte Crow Dog*,[51] which held that federal authorities could not prosecute intra-tribal issues where one tribal member had murdered another.[52] Thus, the MCA was a giant step forward for the U.S. government to exert federal power over inherently tribal matters. The MCA was upheld by the Supreme Court as constitutional in both *United States v. Kagama* and *Cherokee Nation v. Georgia*.[53] These decisions were based on the trustee relationship, which entitles the federal government to act toward the Indian nations as a guardian to its ward.[54] The MCA includes enumerated offenses such as murder, rape, kidnapping, and assault, and applies to "[a]ny Indian who commits [the crimes] against the person or property of another Indian or other person."[55] Thus, the MCA confers federal jurisdiction over major crimes where the defendant is an American Indian, regardless of whether the victim is an American Indian or a non-Indian.

When a perpetrator commits a lesser offense than those listed in the Major Crimes Act, jurisdiction falls under the General Crimes Act (GCA). The GCA provides:

> Except as otherwise expressly provided by law, 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.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[56]

The GCA grants federal jurisdiction over "virtually any conceivable offense, whether misdemeanor or felony."[57] However, the GCA does

50. *Id.*

51. 109 U.S. 556 (1883).

52. Hart & Lowther, *supra* note 2, at 201.

53. United States v. Kagama, 118 U.S. 375, 385 (1886); Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

54. Frickey, *supra* note 35, at 438; *Cherokee Nation*, 30 U.S. at 2. *See also Kagama*, 118 U.S. at 383-84.

55. 18 U.S.C. § 1153 (2006).

56. 18 U.S.C. § 1152 (1948).

57. Washburn, *supra* note 3, at 716.

not allow for federal prosecution in Indian country when there are no American Indians involved—federal prosecution is forbidden where a non-Indian has committed an offense against another non-Indian.[58] Furthermore, federal prosecution against two American Indians is also prohibited under the GCA.[59] Thus, for the federal authorities to have jurisdiction over lesser crimes in Indian country, an American Indian must have committed a crime against a non-Indian.[60] In all other circumstances, the tribe has sole jurisdiction.[61] The GCA "does not preempt tribal jurisdiction when the crime involves a Native American defendant."[62]

The case of *United States v. Wheeler* was important for recognizing that a tribe has concurrent jurisdiction with the federal government for major crimes committed in Indian country where the defendant was an American Indian.[63] At issue in *Wheeler* was whether the Double Jeopardy Clause was violated where the defendant was first tried in tribal court to a lesser included offense and then tried in federal court.[64] The Court found that the Double Jeopardy Clause was not violated, and furthermore, that the tribal court retained sovereignty to try cases consistent with its own inherent sovereignty.[65] An important holding of *Wheeler* was that it extended concurrent jurisdiction over American Indian defendants for federal and tribal authorities consistent with the MCA only, and not with the GCA.[66] Under the GCA, the tribal authorities have jurisdiction unless it is specifically preempted.[67]

In the *Wheeler* decision, the Court decided the question of whether tribal jurisdiction extends to American Indian defendants. The Court in *United States v. Lara*[68] held that tribes had the authority to prosecute nonmember American Indians who committed crimes on their reservations. The Court in *Lara* overturned a prior decision in *Duro v. Reina*,[69] which had held that tribes did not have the power to prosecute nonmembers. The reasoning for the decision in *Lara* stemmed from Congress' enactment of a statute authorizing such prosecutions; the statute was passed following the Court's decision in *Duro*.[70] Also,

58. *Id.*
59. *Id.*
60. *Id.*
61. Hart & Lowther, *supra* note 2, at 202-03.
62. *Id.* at 202.
63. 435 U.S. 313, 330-32 (1978).
64. *Id.* at 314.
65. *Id.* at 319, 323-26.
66. *Id.* at 355.
67. Hart & Lowther, *supra* note 2, at 202.
68. 541 U.S. 193, 210 (2004).
69. 495 U.S. 676, 679 (1990).
70. United States v. Lara, 541 U.S. 193, 197-98 (2004).

similar to the decision in *Wheeler*, the Court in *Lara* determined that it was within the tribe's sovereign authority to prosecute other American Indians.[71]

When, however, the defendant is a non-Indian, the Supreme Court has stepped in to determine that the tribes do not have inherent jurisdiction over non-Indian defendants.[72] In *Oliphant v. Suquamish Indian Tribe*, defendant Oliphant was a non-Indian resident of the Indian reservation arrested for assaulting a tribal officer and resisting arrest.[73] He and another petitioner initiated a habeas corpus proceeding, stating that the tribal court had no criminal jurisdiction over them.[74] The Court held that tribes have no inherent jurisdiction over non-Indian criminal defendants.[75] Speaking for the Court, Justice Rehnquist stated that tribes belonged to the United States as dependents, and therefore were subrogated to its federal jurisdiction; furthermore, the branches of government were in agreement that tribal courts did not have the power to try non-Indians.[76] The Court's holding in *Oliphant* and its extension has been far-reaching. "[T]he U.S. Supreme Court has systematically stripped tribes of the one attribute that is—perhaps above all else—associated with sovereign status: the power to assert control over events that take place on one's own territory."[77]

The enactment of the Indian Civil Rights Act (ICRA)[78] in 1968 created a hierarchical structure in prosecution, the result of which is the primacy of federal law over tribal law in Indian country.[79] Though the ICRA was amended in July 2010 to allow for enhanced sentencing of up to three years imprisonment and fines of $15,000, it has historically limited tribal jurisdiction by allowing for sentencing of only one year imprisonment or a fine of $5000.[80] The effect of this limitation has been that offenses that could potentially be sentenced as felonies can only be sentenced as misdemeanors. Thus, only the federal authorities had the ability to charge more serious felony offenses.[81] "The message sent by this law is that, in practice, tribal justice systems are only equipped to handle less serious crimes."[82] Another shortcoming of the ICRA was

71. *Id.* at 205.

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

73. *Id.* at 194.

74. *Id.*

75. *Id.* at 212.

76. *Id.* at 208-09.

77. Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 597 (2010).

78. 25 U.S.C.A. § 1302 (2010).

79. Washburn, *supra* note 3, at 717.

80. 25 U.S.C.A. § 1302 (2010).

81. Washburn, *supra* note 3, at 717.

82. AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS

that it did not provide a right to counsel.[83]

2. State Jurisdiction

Jurisdiction becomes even more complicated when the states get involved. The famous case of *Worcester v. Georgia*[84] explained the boundaries between state and tribal polities. In *Worcester*, the perpetrator of a crime on Cherokee land was prosecuted under Georgia law.[85] The Court found this to be an improper application of state law and stated that the Cherokee Nation was a "distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."[86] Thus, under the holding of *Worcester*, states may not intervene in Indian affairs. However, in *United States v. McBratney*, the Court held that states have jurisdiction over a crime on Indian Territory which is committed by a non-Indian against another non-Indian.[87]

The enactment of Public Law 280 (PL 280)[88] opened the door to even more jurisdictional problems. Congress enacted PL 280 in 1953 to transfer federal jurisdiction in Indian country to certain states.[89] Thus the crimes which normally would fall under federal jurisdiction in Indian country, in a PL 280 state would fall under that state's jurisdiction instead.[90] The states PL 280 originally granted jurisdiction were: California, Minnesota, Nebraska, Oregon, and Wisconsin.[91] Congress granted Alaska jurisdiction in 1958 after Alaska became a state.[92] States where jurisdiction is automatically transferred to the state (or mandatory states) are called the mandatory states.[93] PL 280 also granted additional optional states the ability to take transfer of PL 280 jurisdiction in whole or in part.[94] Currently, of the optional states, including Arizona, Florida, Idaho, Iowa, Montana, Nevada, North

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WOMEN FROM SEXUAL VIOLENCE IN THE USA 29 (2007) [hereinafter MAZE], *available at* http://www.amnestyusa.org/pdfs/maze-of-injustice.pdf.

83. Rob Capriccioso, *Tribal Law and Order Act to Become Law at Cost to Tribes*, INDIAN COUNTRY TODAY, July 28, 2010, at 1.

84. 31 U.S. 515 (1832).

85. *Id.* at 537-38.

86. *Id.* at 561.

87. 104 U.S. 621, 623-24 (1881).

88. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588-90 (1953) (codified as amended at 18 U.S.C.A. §1360 (2010)).

89. *Id.*

90. *Id.*

91. *Id.*

92. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (1958) (codified as amended at 18 U.S.C.S. § 1162 (2010); 28 U.S.C.S. § 1360 (2010)).

93. *See infra* note 96.

94. 67 Stat. 590.

Dakota, South Dakota, Utah, and Washington, only Florida has full PL 280 jurisdiction.[95] The practical consequences of PL 280 cannot be overstated: PL 280 is essentially an "unfunded mandate."[96] The federal government gives States jurisdiction, but does not give these States the necessary funds to enforce their authority under PL 280.[97] Congress has failed to allocate additional funds for PL 280 states' law enforcement forces on tribal lands.[98] Moreover, when PL 280 shifted jurisdiction from federal to state government, it gave states the power to encroach into tribal sovereignty even further.[99] "The prior federal role has been transferred to the state, but the grant of criminal jurisdiction to the states is even greater than the prior federal role. Consequently, Public Law 280 significantly expanded the realm of non-Indian control over reservation activities."[100]

3. Jurisdictional Gaps

The legal void theory is part of Carole Goldberg-Ambrose's lawlessness theory, in which she states that PL 280 has created a "legal vacuum."[101] Under her theory, Goldberg stated that jurisdictional gaps are created either because there is no government, or because the government exists, but has no institutional support or incentive to exercise its authority.[102] Goldberg says that those jurisdictional gaps are then filled with lawlessness.[103] Similarly, legal gaps emerge where the federal government has created a contradictory scheme of federal and state jurisdiction over tribal matters, dependent on the crime, the location, and the race of the defendant.[104] In those voids, violent crime has flourished.

To reiterate, tribes have concurrent jurisdiction to prosecute crimes committed on their land when the defendant is an American Indian,

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95. MAZE, *supra* note 82, at 29.

96. Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AM. INDIAN DEV. ASSOCS. (2004), http://www.aidainc.net/Publications/pl280.htm (last visited Nov. 7, 2010).

97. *Id.*

98. MAZE, *supra* note 82, at 29.

99. Melton & Gardner, *supra* note 96. *See also* MAZE, *supra* note 82, at 29 (stating that many indigenous people see PL 280 as an affront to tribal sovereignty).

100. Melton & Gardner, *supra* note 96. In non-PL 280 states, the state's criminal only jurisdiction is only over crimes committed by a non-Indian against another non-Indian. However, in PL 280 states, the state has jurisdiction over American Indians subject only to exceptions laid out in the statute. *Id.*

101. Melton & Gardner, *supra* note 96 (citing CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL & PUBLIC LAW 280, at 12 (1997)).

102. *Id.*

103. *Id.*

104. *See id.*

regardless of his tribal membership.[105] However, if the tribe wants to impose a harsh sentence or charge a higher crime than a misdemeanor, that tribe is historically barred from doing so under the ICRA, and thus, jurisdiction is more appropriate for federal authorities.[106] Additionally, tribes do not have authority to prosecute non-Indian perpetrators on their own territory.[107] In PL 280 states, states have concurrent jurisdiction with tribes over all crimes committed within Indian country.[108]

There are obvious legal voids inherent to this structure. The concurrent jurisdictions at issue under the MCA and in the PL 280 states create gaps where there is uncertainty in jurisdiction. As a result, victims are not clear where to turn for law enforcement, and law enforcement may hesitate out of fear of overstepping boundaries or simply out of confusion. Furthermore, the limitations under the ICRA and the Supreme Court's decision in *Oliphant* created a legal void whereby tribes cannot exercise their own sovereignty over non-Indian defendants. This is the major problem faced by American Indian tribes today. The tribal authority over non-Indian defendants has been described essentially as a "citizen's arrest power"—the tribal authorities may detain, but not arrest, non-Indian perpetrators who commit crimes on Indian land while they wait for state or federal authorities to arrive.[109] If the state or federal authorities do not arrive within a specified period of time, the tribal law enforcement must release the defendant or potentially face charges for false imprisonment.[110] It is clear that these legal voids not only encourage offenders to commit crimes where the law may not be enforced, but also serve to further victimize those individuals who cannot rely on adequate law enforcement or prosecution.

This phenomenon of non-Indian defendants committing crimes on Indian reservations where tribal authorities lack jurisdiction to prosecute

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105. *See* 18 U.S.C. §§ 1152-53 (2006); United States v. Wheeler, 435 U.S. 313, 319-22 (1978).

106. *See* Washburn, *supra* note 3, at 717.

107. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195-97, 212 (1978). *But see* State v. Hart, 2006 Minn. App. Unpub. LEXIS 461, 7-8 (Minn. Ct. App. 2006) (noting that tribal interest in self-governance is confined to members of its own tribe and that a new statute enacted by Congress relaxed restrictions on the bounds of inherent tribal prosecutorial authority).

108. Melton & Gardner, *supra* note 96.

109. Jonathan Mills & Kara Brown, *Law Enforcement in Indian Country: The Struggle for a Solution*, TRIBAL L. & POL'Y INST., TRIBAL COURT CLEARING HOUSE 4, *available at* http://www.uchastings.edu/site_files/indiancountry.pdf. *See also* Deborah Sullivan Brennan, *Tribes Seek More Power for Their Police Forces Security: Coalition is Negotiating with State, U.S. to Give Their Officers Full Law Enforcement Authority*, L.A. TIMES, Dec. 27, 2000, at A-3.

110. *Id.*

them has become common throughout the country.[111] One particular example is illustrative. Chane Coomes, a White resident of the Pine Ridge Reservation in South Dakota, had been suspected of dealing and possibly trafficking methamphetamine for years.[112] In 1998, Coomes assaulted a tribal elder, but tribal authorities lacked the jurisdiction to prosecute him.[113] Finally, when Coomes' estranged wife accused him of making threats against her while off the reservation, state authorities gained jurisdiction to act.[114] The state investigators found stolen property, money, and large amounts of methamphetamine and paraphernalia in his home.[115] Coomes was placed in jail by state authorities.[116] It is well-known that Coomes lived on the Pine Ridge Reservation for years solely as he has stated, "as a sanctuary, knowing he would be free from the attentions of tribal prosecutors."[117]

B. *Lack of Resources*

"The US Departments of Justice and of the Interior have both acknowledged that there is inadequate law enforcement in Indian Country and identified lack of funds as a central cause."[118] It is not merely the lack of funds which has limited the ability of law enforcement in Indian country to be effective. The nature of the federal offices in Indian country, the lack of priority given to Indian crimes in federal offices, and the effect of PL 280 on the structure of law enforcement have also played a part.

Many tribes do not possess the resources necessary to operate their own law enforcement departments. As a result, they must rely on local law enforcement agencies, which can be problematic. Because local authorities are funded through local taxes, which the tribes do not pay, the local law enforcement agencies are forced to extend their services without any additional funding. Furthermore, reservations tend to be large and rural, and local law enforcement face the issue of responding quickly to crimes when they are not located on the reservation itself. Finally, the complex system of jurisdiction in Indian country has created challenges for the local law enforcement agencies over when they may intervene in tribal affairs.[119]

When a federal crime is under investigation there are several key

111. *See generally* Fields, *supra* note 1.
112. *Id.*; Mills & Brown, *supra* note 109, at 4.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. MAZE, *supra* note 82, at 42.
119. Mills & Brown, *supra* note 109, at 2.

federal agencies involved at various levels. The Federal Bureau of Investigation (FBI) is charged with investigating federal crimes pursuant to the MCA. An officer of the Bureau of Indian Affairs (BIA) pursues lesser crimes in Indian country. The practical realities of the local offices of the federal agencies undercut the agencies' effectiveness. In most cases, the federal agent will work out of a resident agency on or near the Indian reservation. These are usually staffed by just two or three agents, who are usually the rookies of the agencies. They are generally understaffed and overworked. Because the agents assigned to a post that is not their first choice, turnover in the resident agencies is high.[120]

If an arrest occurs, the U.S. Attorney's Office becomes involved.[121] However, many times, these federal investigators and prosecutors are somewhat unwilling to get involved in a case in Indian country.[122] According to many federal prosecutors, the long distances they must travel to carry out the investigation, coupled with the distances that defendants and witnesses must travel in coming to federal court is a deterrent to prosecution—in fact, in 2007, only 30% of all cases referred to U.S. Attorneys from Indian country were prosecuted, compared to 56% overall.[123] "The result: Many criminals go unpunished, or minimally so. And their victims remain largely invisible to the court system."[124]

Amnesty International's report, *Maze of Injustice*,[125] uncovered the current issues that many victims of sexual assault on Indian reservations face due to inadequate policing. "In all three locations researched by Amnesty International, there were persistent reports of lengthy delays in responding to reports of sexual violence against indigenous women."[126] The report details that there was a result of insufficiencies in both federal and tribal law enforcement agencies due to a severe lack of resources. The three locations profiled in the report include Alaska, Oklahoma, and the Standing Rock reservation.[127] In Nunam Iqua, Alaska, the residents described waiting more than four hours for state troopers to helicopter into the village following the rape of a minor, because the remote village did not have its own law enforcement agency.[128] In Standing Rock, a reservation stretching across both South

120. Washburn, *supra* note 3, at 719.
121. *Id.* at 721.
122. Fields, *supra* note 1.
123. *Id.*
124. *Id.*
125. MAZE, *supra* note 82, at 41-49.
126. *Id.* at 42.
127. *Id.* at 42-49.
128. *Id.* at 41.

Dakota and North Dakota, there were only six or seven patrol officers on staff to patrol the 2.3 million acres of land.[129] In Oklahoma, the experiences differs across tribes, with some tribal forces comprising fourteen or fifteen officers, and others only two or three.[130]

Further inabilities of tribal police forces hinder their ability to be effective. The DOJ has recognized further restraints on tribal police forces effectiveness to include: severe underfunding, a limited ability to serve 24 hours a day, an inadequate police-to-service ratio, and differing cultural norms for non-Indian members of the tribal police force.[131] The population served by tribal police departments is approximately 2.3 officers per 1000 residents.[132] The ratio would need to be 3.9 to 6.6 officers per 1000 residents to adequately account for the high crime rate in Indian country.[133]

However, despite the practical problems faced by federal and local law enforcement agencies, again it is PL 280 that has further complicated the situation. The effect of PL 280 on law enforcement in PL 280 states has been nothing short of totally destructive. It is devastating to law enforcement efforts that PL 280 is essentially an unfunded mandate, and that states receive no additional funding to enforce their broadened jurisdiction over Indian country.[134] To further compound the problem, the BIA has directed funding away from PL 280 states in lieu of funding Indian tribes more generally, citing PL 280 as making "tribal criminal jurisdiction unnecessary."[135] Thus, not only are states underfunded by Congress, but the BIA is directly diverting funds away from the PL 280 states as well. Furthermore, state and local law enforcement agencies are expected to cover jurisdictions that are generally large and inaccessible, at the expense of their own resources.

C. *Distrust of Outside Law Enforcement*

1. Perceptions of Law Enforcement

Prosecutors say that many American Indians on reservations do not file reports because they think that there is no chance that those crimes will be prosecuted.[136] The importance of the past cannot be understated. The U.S. policy toward American Indians over time has created an us

129. *Id.* at 43.
130. *Id.*
131. Hart & Lowther, *supra* note 2, at 209.
132. *Id.* at 209.
133. *Id.* 209-10.
134. MAZE, *supra* note 82, at 29.
135. Melton & Gardner, *supra* note 96.
136. Fields, *supra* note 1.

versus them mentality,[137] which leads to underreporting of crimes and a general distrust in federal, state, and local law enforcement agencies.

Federal prosecutors claim that there is a higher threshold when prosecuting a case in Indian country, due to their agency's lack of resources, which forces them to prioritize only the most severe cases. Jeff Davis, an Assistant U.S. Attorney in Michigan, and himself a member of the Chippewa tribe, claimed that complexities in jurisdictional issues, coupled with the limited resources of his department, results in a limited number of cases that he can actually prosecute.[138] He noted that for the case to rise to the level of a felony, the injury must be relatively severe.[139] According to Davis: "'It requires stitches, almost a dead body.' . . . 'It is a high standard to meet.'"[140] However, despite these very real challenges to investigations, the hesitation by law enforcement looks very different from the perspective of American Indians who are awaiting government intervention. Accounts of American Indians claim that "the willingness or unwillingness of police to take such a risk signals the relative worth of American Indian lives."[141] Where there is a perception on behalf of the American Indians that law enforcement does not act simply *because* of the race of the American Indians, the result can only be distrust, underreporting of crimes, and further victimization of the American Indian people.

In his law review article, Kevin Washburn details an alarming situation that arises because of the distrust of among American Indians of federal prosecutors. He describes the "typical case of sexual abuse of a child" in Indian country. Washburn explains that where a child victim reports the sexual abuse by a member of his or her family, it is common for the family of that child to align themselves not with the child, but with the defendant.[142] This is a type of protectionism, seen as choosing one's own tribe rather than the outside government. The result is a child victim left alone, without the support even of his or her own family.[143]

2. Historical Causes of Distrust

Scholars believe that the American Indians, as a race, have been

137. Berger, *supra* note 10, at 605-06 ("War [between colonists and American Indians] blended with convictions of religious inferiority to generate ideas of innate Indian difference. . . . The resulting violence contributed to the shift in perceptions of the Indian from misled Englishman to untrustworthy Other.")

138. *Id.*

139. *Id.*

140. *Id.*

141. PERRY, *supra* note 24, at 73.

142. Washburn, *supra* note 3, at 736.

143. *Id.* at 736-37.

subjected to marginalization, exploitation, violence, racism, ethnocide, and even genocide.[144] Throughout the colonial period, American Indians were often used as slaves.[145] The dominant American ideology regarding American Indians from the seventeenth century through the nineteenth century was that American progress must prevail over Indian savagism.[146] Americans pursued their ideology with a passion, by foisting upon the American Indians their Christianity,[147] their schools,[148] and eventually their citizenship.[149] The Supreme Court has reinforced that ideology to a certain extent, by continually defining the relationship of the tribes to the U.S. government as "wards of the nation."[150]

The result of that early American policy is that American Indians today remain a largely assimilated group, yet each tribe retains a distinct culture with a strong oral history.[151] Because of this oral tradition,[152] American Indian tribes have not forgotten the atrocities of the past. Thus, when tribes engage with federal prosecutors or investigators, in many ways, those federal agents still represent outsiders. The federal officers symbolize the government that is the "direct lineal descendant of the blue-coated, sword-wielding cavalry officer."[153] The officer is not in Indian country to help the American Indians, but to further the paternalistic agenda of the U.S. government.[154] The federal agents cannot under these circumstances earn the trust of the American

144. PERRY, *supra* note 24, at 24-25. PERRY states that genocidal acts to include:

> Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, or racial or religious group, as such: killing members of the group [,] causing serious bodily or mental harm to members of the group[,] deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part [,] imposing measures intended to prevent births within a group[, and] forcibly transferring children of the group to another group. It will become readily apparent . . . that each of these measures has been invoked against Native American communities – and some continue to be exercised today.

Id.

145. Berger, *supra* note 10, at 611-17.

146. Talamantez, *supra* note 8, at 279.

147. *Id.* at 278.

148. PERRY, *supra* note 24, at 31-32.

149. Indian Citizenship Act of 1924, Pub. L. No. 68-175 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2000)).

150. United States v. Kagama, 118 U.S. 375, 383-84 (1886).

151. *See* PERRY, *supra* note 24, at 17.

152. *Id.* at 21.

153. Washburn, *supra* note 3, at 736.

154. *See id.*

Indians.[155]

3. Alcohol Use

One of the leading factors in American Indian crime rates is the use of alcohol throughout the American Indian community.[156] Crimes resulting from increased alcohol use include: driving under the influence, homicide, child abuse and neglect, intimate partner violence, and sexual assault.[157] The increased use of alcohol in American Indian culture has social and political underpinnings that relate to the distrust of White society. Alcohol use is linked to a sense of powerlessness, a lack of opportunities, low self-esteem, and economic deprivation[158]—all common elements of life on a reservation.[159] Alcohol abuse is especially prevalent in systems of social stratification, where there a dominant group prevails in status and in morality over a conforming group, reinforcing that type of behavior of the conforming group.[160] This is the case in American Indian tribes; the stereotype of the "drunken Indian" is continually reinforced as the morally weaker group, thus resulting in widespread alcohol abuse throughout the community.[161] Thus, the cultural stereotype also weakens relationships between American Indians and outside White society, while reinforcing the perpetuation of high crime rates in Indian country.

III. SEXUAL VIOLENCE IN INDIAN COUNTRY

In looking at types of crime in Indian country and the victimization of American Indians throughout Indian country, attention must be paid to the incidences of sexual violence among American Indian women. Sexual violence in Indian country cannot be ignored. Aside from the prevalence of sexual violence, the issue of sexual violence among American Indian women demonstrates the legal void that exists in

155. *See id.*

156. *See* Malcom D. Holmes & Judith A. Antell, *The Social Construction of American Indian Drinking: Perceptions of American Indian and White Officials*, 42 SOC. Q. 151, 151 (2001).

157. *See id.* at 151, 160.

158. *See id.* at 152.

159. *See* PERRY, *supra* note 24, at 65.

160. *See* Holmes & Antell, *supra* note 156, at 153.

161. Karina L. Walters et al., U.S. Dep't Health & Hum. Servs., *Substance Use Among American Indians and Alaska Natives: Incorporating Culture in an "Indigenist" Stress-Coping Paradigm*, 17 PUB. HEALTH REP. S104-17, 3-4 (Supp. 1, 2003). The prevalence of alcohol abuse in the American Indian community is demonstrated that by 12th grade, 96% of boys and 92% of girls have used alcohol. Furthermore, American Indians are five times more likely to die from an alcohol-related death than non-Indians. *Id.*

Indian country. Furthermore, sexual violence among American Indian women has become notorious in media coverage, propelling the plight of American Indians to the forefront of the American conscience.[162]

A. *Proliferation of Violence Among Women*

American Indian women face a rate of sexual violence that is 2.5 times greater than for women in any other race in the United States.[163] In comparison to other women living in the United States, one in three American Indian women will be raped in her lifetime, versus one in five women living outside of Indian country.[164] A report funded by the DOJ, and the Office of Justice Programs revealed that American Indian women were more likely to be killed by their intimate partners than women of any other race.[165]

While it is difficult to determine exactly why sexual violence occurs at such a high rate in Indian country, there are several contributing factors. It is important to note that substance abuse is not a direct cause of physical or sexual violence in abusers.[166] However, the increased rate of substance abuse in Indian country may still contribute to the proliferation of sexual violence against American Indian women.[167] An important legal factor is the U.S. government's historical preference for sexual violence committed against American Indians, rather than against non-Indians. In *Gray v. United States*, the Ninth Circuit upheld a sentencing scheme that applied different sentences to rapists depending on the race of the victim.[168] The court in *Gray* declared that it was lawful to sentence defendants—in this case, American Indian defendants—to the penalties as outlined under the Major Crimes Act because the rape victim was an American Indian woman.[169] However, the court also stated that if the rape victim had been a non-Indian woman, the defendants would have been sentenced under a different

162. *See* Sheila Regan, *Tribal Law and Order Act's XI Addresses Indian Women Sexual Assault Issues*, CIRCLE (Oct. 11, 2010), http://tloa.ncai.org/news.cfm?view=display&aid=40.

163. MAZE, *supra* note 82, at 2.

164. *Id.* at 2.

165. RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 37 (2008), http://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

166. MINNESOTA CENTER AGAINST VIOLENCE AND ABUSE, DOMESTIC VIOLENCE, SEXUAL ASSAULT & STALKING PREVENTION AND INTERVENTION IN RURAL NATIVE AMERICAN COMMUNITIES, (1998), www.mincava.umn.edu/documents/nativeamerican/nativeamerican.html [hereinafter MCAVA].

167. *See id.*

168. Gray v. United States, 394 F.2d 96, 98-99 (9th Cir. 1967) (noting that it was up to Congress to change the law; the court would continue to enforce the sentencing scheme as pronounced by Congress).

169. *Id.* at 98 (citing 18 U.S.C. § 1153 (2006)).

statute.[170] The court acknowledged the difference in sanctions between the two statutes.[171] Under 18 U.S.C. § 2031, the court found that defendants would have been sentenced to "'death, or imprisonment for any term of years or for life.'"[172] However, because the victim in *Gray* was an American Indian woman, the Major Crimes Act only demanded a sentence of "imprison[ment] at the discretion of the court."[173] Again, the court justified its decision by stating that American Indians were treated under the law as wards to a guardian, the U.S. government.[174] Even though the defendants challenged the racially-based sentencing scheme as a denial of equal protection, the court refused to hear an equal protection argument because the lesser sentence in *Gray* favored the defendants.[175]

Another contributing factor is that rape and sexual violence against women is a learned behavior.[176] The tribe chairman on Standing Rock Reservation, Ron His Horse Is Thunder, stated that sexual violence against American Indian women is a relatively new phenomenon.[177] He stated, that "'[r]ape amongst our people was one of those unheard of crimes. . . . Not because people didn't talk about it, but at one point in time, it didn't occur.'"[178] In fact, scholars believe that prior to U.S. colonization, women were highly esteemed in their tribes, and many held leadership positions.[179] Again, the answer for why sexual violence suddenly began to occur on American Indian lands can be traced back to the actions of early U.S. settlers.[180] As the White society attempted to carry out acts of genocide upon the American Indian population, sexual violence was among the tactics employed.[181] Acts of sexual assault and other acts of violence targeting women were common as U.S. settlers led American Indians along the Trail of Tears.[182] Even more than overt acts of sexual violence, the White Americans changed the dynamics of tribal society by teaching the American Indians that only males should

170. *Id.* (citing 18 U.S.C. § 2031 (1986)).

171. *Id.*

172. *Id.* (citing 18 U.S.C. § 2031 (1986)).

173. *Id.* (citing 18 U.S.C. § 1153 (2006)).

174. *Id.* (citing United States v. Kagama, 118 U.S. 375 (1886)).

175. *Id.* at 98-99.

176. American Indian Health Council, *Domestic Violence in American Indian Women*, http://aihc1998.tripod.com/violence.html (last visited Apr. 2, 2011).

177. Laura Sullivan, *Rape Cases on Indian Lands Go Uninvestigated*, NPR (July 25, 2007), http://www.npr.org/templates/story/story. php?storyId=12203114.

178. *Id.*

179. MAZE, *supra* note 82, at 16.

180. *Id.*

181. *Id.*

182. *Id.*

hold dominant positions in society.[183] The effects of these learned behaviors forever changed women's roles in society and encouraged sexual violence as a means of demeaning women.[184]

B. *Failure to Prosecute Sexual Violence*

In 2008, over 85% of reported cases of rape or sexual assault against American Indian women, the victims stated that the perpetrator was a non-Indian.[185] Thus, as an extension of the U.S. Supreme Court's holding in *Oliphant*, the vast majority of rape and sexual assault crimes fall under the authority of the federal government. However, reports indicate that between 2004 and 2007, authorities failed to prosecute three quarters of sexual crimes against American Indian women and children.[186] One reason for the lack of prosecution is the distrust of the U.S. government by the American Indians; another reason is the high burden of proof that prosecutors must satisfy to establish a case. Assistant U.S. Attorney Jeff Davis stated that domestic abuse cases are difficult to prosecute because of a lack of evidence.[187]

According to the *Maze of Injustice* Report, "Indigenous women told Amnesty International that officers do not prioritize responding to crimes of sexual violence."[188] As previously discussed, racial boundaries are a hindrance to crime reporting in American Indian communities.[189] Furthermore, law enforcement officials are generally trained to treat "all but the most 'extreme' cases of domestic violence as private disputes"[190]— reinforcing the notion that investigators do not actually prioritize cases of sexual violence against women.

Cultural differences are another cause of underreporting, and therefore, under-prosecution.[191] In one instance where a Native Alaskan woman suffered injuries from an incident of domestic violence, the

183. *Id.*

184. *Id.* at 17.

185. Amnesty Int'l, *A Summary of Amnesty International's Findings*, AMNESTYUSA.ORG, http://www.amnestyusa.org/our-work/issues/women-s-rights/violence-against-women/maze-of-injustice.

186. Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 148 (2011) [hereinafter *A Crisis in Indian Country*].

187. MAZE, *supra* note 82, at 42.

188. *Id.*

189. *See* PERRY, *supra* note 24, at 73.

190. Native American Circle, Ltd., *Domestic Violence, Sexual Assault & Stalking Prevention and Intervention in Rural Native American Communities*, 1, 321 (1998), http://www.mincava.umn.edu/documents/nativeamerican/nativeamerican.pdf.

191. Nat'l Org. for Women, *Native American Women and Violence*, NOW.ORG (Spring 2001), http://www.now.org/nnt/spring-2001/native american.html [hereinafter NOW].

investigating officer from Anchorage told her to examine her injuries.[192] The victim was noncompliant because she feared what the investigator would do to her.[193] "'I was afraid they might lift up my clothing or maybe that they all would rape me . . . ,' the woman said. 'I was just terrified.'"[194] Instead of acknowledging the cultural barrier, the investigator falsely accused the woman of drunkenness.[195] This example of insensitivity is one of the many complications between law enforcement and victims in Indian country.

C. *Legislative Actions*

Congress enacted the Violence Against Women Act (VAWA) in 1994 as an important piece of legislation affecting the rights of women in situations of sexual violence.[196] VAWA provided that all victims of violent crime had the right to remain free from violent crimes specifically motivated by animus toward one's gender.[197] According to Congress, "it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender."[198] This federal legislation applied to the victims of sexual violence all over America, including Indian country. On American Indian lands, the effect of VAWA was to provide awareness of the suffering of victims of domestic violence, dating violence, sexual assault and stalking, as well as to provide a greater array of services for those victims.[199]

However, in the case of *United States v. Morrison*, the U.S. Supreme Court held that VAWA's civil remedies were unconstitutional.[200] The Court stated that the federal civil remedy against gender-motivated crimes was enacted by Congress under an unlawful delegation of power.[201] The Court found that Congress did not have the authority under either Section 5 of the Fourteenth Amendment, or under the Commerce Clause to create such a remedy.[202] Instead, the Court stated

192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. 42 U.S.C. § 13981 (1994).
197. *Id.* § 13981(b).
198. *Id.* § 13981(a).
199. *See* Tribal Law & Policy Inst., *Violence Against Indian Women*, TRIBAL COURT CLEARINGHOUSE, http://www.tribal-institute.org/lists/vaiw.htm (last visited Apr. 3, 2011).
200. United States v. Morrison, 529 U.S. 598, 627 (2000).
201. *Id.* at 602.
202. *Id.* at 627.

that the creation of a civil remedy must issue from the states.[203] Thus, *Morrison* effectively overturned the portions of VAWA granting remedies for victims of gender-motivated violence. Fortunately, the remaining provisions of the VAWA were reauthorized in 2000[204] and again in 2005.[205] The reauthorization in 2005 expanded VAWA's funding to $3.9 billion.[206]

In 2007, a group of individuals brought their concerns before the United Nations.[207] This group demanded a greater acknowledgement of the sexual violence in Indian country than the policies of VAWA provided.[208] The group drafted a report entitled *Report of the Working Group on Indigenous Peoples* for submission to the United Nations.[209] In response in 2008, the U.N. Committee on the Elimination of Racial Discrimination (CERD), issued a report following the International Convention on the Elimination of all Forms of Racial Discrimination that addressed the protection of American Indians from sexual violence.[210] CERD claimed that it was "deeply concerned" about the violence occurring in American Indian communities against women, and made recommendations to remedy the grave situation including: establishing and funding prevention centers and counseling services, providing specialized training to law enforcement, raising awareness in racial minority communities, and calling on prosecutors to effectively investigate all claims of sexual violence.[211]

It is clear that VAWA, while well intentioned, was not substantial enough to curb sexual violence in Indian country.[212] Similarly, the recommendations made by CERD were not effective as domestic law in the United States.[213] Thus, Indian country was poised for a greater

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203. *Id.*

204. Faith Trust Inst., *History of VAWA*, 1, 2, NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE, http://ncdsv.org/images/HistoryofVAWA.pdf (last visited Sept. 24, 2011).

205. Nat'l Ctr. on Poverty Law, *Violence Against Women Act Reauthorized, Nat'l Ctr. on Domestic and Sexual Violence*, 9 WOMAN VIEW (Jan. 31, 2006), http://www.ncdsv.org/images/ViolenceAgainstWomenActReauthorized--Sargent.pdf.

206. *Id.*

207. Indian Law Res. Ctr., *Delegation Asks United Nations to Intervene on Violence Against Native American Women* (Feb. 1, 2008), http://www.indianlaw.org/node/225.

208. *Id.*

209. *Id.*

210. United Nations, Comm. Of the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination, CERD/C/USA/CO/6, at 8 (Feb. 18, 2008), http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-USA-CO-6.pdf.

211. *Id.*

212. *See* United States v. Morrison, 529 U.S. 598, 627 (2000).

213. The United States declared it was ratifying CERD as not self-executing; thus, CERD does not have the force and effect of domestic law in the United States. United Nations, Int'l Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/351/Add.1, at

enactment of federal law to protect victims of sexual violence. In 2010, the American Indian community received the legislation it had been anticipating.[214]

IV. THE FUTURE OF INDIAN COUNTRY

The future of Indian country looks brighter than ever. Policies regarding American Indians' right to self-determination are constantly evolving. A renewed sense of responsibility for the crimes committed on American Indian lands has affected actions by both Congress and the executive branch. Congress's power to regulate American Indian affairs is broad;[215] thus the burden of most change in Indian country will come as a direct result of Congress's actions. Though the courts have yet to follow suit, U.S. government policy toward American Indians is changing for the better.

A. *Forward Toward Self-Determination*

Tribal self-determination was a movement that became popular in the 1970s under President Nixon's Administration.[216] The policy of self-determination represented a shift from the earlier assimilation tactics of the 1950s and was a concentrated effort to give tribes more independence.[217] The period of Nixon's Administration was also marked by great political unrest, protest, and controversies, including the American Indian invasion of Alcatraz[218] and the infamous standoff at Wounded Knee.[219] Though earlier periods in history were characterized by militant action, granting tribal self-determination to the American Indian community today would not lead to such drastic results. The earlier movement occurred in the 1970s, amid the context of the Civil Rights Movement.[220] The leaders of the political group, the American Indian Movement, AIM, had modeled themselves off of the

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43 (Oct. 10, 2000), http://www.state.gov/documents/organization/100294.pdf.

214. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 21261 (codified as amended at scattered sections of 25 U.S.C.); *see also* Larry Cox, *President Obama Signs Tribal Law and Order Act*, AMNESTY INT'L (Aug. 2, 2010 at 12:55PM), http://blog.amnestyusa.org/women/president-obama-signs-tribal-law-and-order-act/.

215. United States v. Cavanaugh, 680 F.Supp.2d 1062, 1065 (D.N.D. 2009) (stating "the Indian Commerce Clause permits Congress to broadly regulate in the field of Indian affairs . . . ."), *rev'd on other grounds*, 643 F.3d 592 (8th Cir. 2011).

216. Frickey, *supra* note 35, at 444.

217. *Id.*

218. Dean J. Kotlowski, *Alcatraz, Wounded Knee, and Beyond: The Nixon and Ford Administration Respond to Native American Protest*, 72 PAC. HIST. REV. 201, 207 (2003).

219. *Id.* at 213.

220. *Id.* at 205.

Black Panthers, another militant organization.[221] Becoming familiar with the history of the self-determination movement is imperative, as it points to the conclusion that all members of the American Indian community must feel included in talks of reform, lest marginalized and extremist groups again become politically motivated.[222]

Aside from President Nixon, other presidential administrations have encouraged a policy of self-determination. Janet Reno, acting as attorney general during the Clinton Administration, expressed President Clinton's commitment to tribal autonomy.[223] Reno stated that "Indian tribal sovereignty is subject to the plenary power of Congress to regulate Indian affairs. This exceptional power is guided by the federal government's trust responsibility to Indian tribes to protect them and their property."[224] However, the DOJ would partner with tribal courts to strengthen those tribal courts through training and technical assistance through the creation of Tribal Court-DOJ Partnership Projects.[225] Recently, the Obama Administration has taken more serious actions to lead the way toward a policy of tribal self-determination with its passage of the Tribal Law and Order Act (TLOA).[226]

B. *Government Intervention*

In 2009, after convening a summit where 386 federally-recognized American Indian tribes were gathered, President Obama told the tribes: "'you will not be forgotten as long as I'm in this White House.'"[227] Thus far, the president has remained true to his word. The Obama Administration has taken great strides in 2010 to address the issue of violent crimes in Indian country, especially the victimization of sexually abused American Indian women. On July 29, 2010, President Obama signed into law the TLOA.[228] The TLOA discusses reducing crime in Indian country through increased cooperation between federal and tribal law enforcement agencies.[229] The Act includes, among other provisions, language creating liaisons between tribes and the local U.S. Attorney's Offices, creating more Indian country offices for federal agencies,

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221. *Id.*

222. *See id.* at 205-08.

223. Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 113 (1995), *available at* http://www.tribal-institute.org/articles/reno.htm.

224. *Id.*

225. *Id.* at 114.

226. Regan, *supra* note 162.

227. Yunji de Nies & Sunlen Miller, *Obama to Native Americans: 'No Lip Service . . . I'm on Your Side,'* ABC NEWS (Nov. 5, 2009), http://blogs.abcnews.com/politicalpunch/2009/11/obama-to-native-americans-no-lip-serviceim-on-your-side.html.

228. Tribal Law & Order Act of 2010, Pub. L. No. 111-211, S. 797 (2010).

229. *Id.*

developing better training for domestic and sexual assault offenses, and standardizing sexual assault protocol on tribal land.[230] Many familiar with the plight of the American Indian community praise the TLOA as the greatest administrative action to date to directly address the issue of sexual violence among American Indian women.[231]

Another significant provision of the TLOA is its commitment to enforce prosecution of crimes in Indian country. Under the TLOA, failures to prosecute must be well-documented.[232] A federal agent who declines to prosecute a crime, or who terminates a prosecution, must coordinate with local tribal law enforcement to ensure the case may be brought before a tribal court.[233] Moreover, U.S. Attorney's offices must submit their declination reports to a Native American Issues Coordinator.[234] The declination reports are turned over to the Attorney General, who must submit the reports to Congress for analysis.[235] Thus, under the TLOA, congressional scrutiny of prosecution statistics may serve to hold federal agents accountable for their actions.

Though some praise the TLOA as a giant step forward, especially for the many victims of sexual violence in Indian country, others say that the TLOA may come at a cost to the tribes who cannot afford it.[236] Another significant provision of the Act is that it allows for an enhanced sentencing authority, giving greater power to tribes than previously authorized under the ICRA.[237] Tribes under the TLOA now have the authority to sentence defendants to penalties of up to three years or $15,000.[238] However, critics say that this power is undermined by the fact that the tribal attorneys and judges must receive the requisite federal, state, or tribal certification in order to effectuate the upgraded sentencing power, thus incurring costs upon the tribe.[239] Therefore, certifications may stand in the way of some tribal attorneys utilizing the enhanced sentencing authority. However, in response to critiques, the potential problem of tribal attorney and judge certifications could be solved through additional funds allocated by the government for such purposes.

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230. *Id.*

231. *See* Indian Law Resource Center, *Tribal Law and Order Act to Help Curb Epidemic of Violence*, http://www.indianlaw.org/content/tribal-law-and-order-act-help-curb-epidemic-violence (last visited Sept. 25, 2011).

232. *A Crisis in Indian Country*, *supra* note 186, at 167.

233. *Id.*

234. *Id.*

235. *Id.*

236. Capriccioso, *supra* note 83.

237. Protection of Indian Arts & Crafts, Pub. L. No. 111-211, § 234, 124 Stat. 2258 (2010).

238. *Id.* § 1302(a)(7)(C).

239. Capriccioso, *supra* note 83.

The TLOA's recognition of the limitations under the ICRA is a step in the right direction: the power of tribes to enact greater sentences is a change that will allow tribes to rely on their own authority, rather than the authority of the federal government. The TLOA has positive implications for increased tribal self-determination in the near future. The Obama Administration has taken other proactive steps in 2010. In September 2010, the DOJ apportioned $127 million to American Indian communities "to enhance law enforcement, bolster justice systems, prevent youth substance abuse, serve sexual assault and elder victims, and support other efforts to combat crime."[240] Additionally, in compliance with the TLOA, President Obama established the Office of Tribal Justice as a distinct component of the Department of Justice.[241] Other symbolic acts representing the Obama Administration's commitment toward the American Indian community include celebrating Native American Heritage Month in November 2010 with the Assistant Attorney General's presence at the National Congress of American Indians Annual Congress in Albuquerque, New Mexico and the support for the U.N. Declaration on the Rights of Indigenous Peoples.[242]

On December 16, 2010, President Obama hosted the White House Tribal Nations Conference as an opportunity for one representative for each of the 565 federally-recognized tribes to meet with the Obama Administration and discuss pressing tribal issues.[243] At the Tribal Nations Conference, the President announced that the United States would support the U.N. Declaration on the Rights of Indigenous Peoples.[244] The U.S. support for the U.N. Declaration is an encouraging step toward mending the gap between the U.S. government and tribal relations. When the U.N. Declaration was drafted in 2007, the United States, along with Canada, New Zealand, and Australia, voted to oppose

240. *Justice Department Awards $127 Million to Improve Tribal Public Safety and Criminal Justice*, DEP'T OF JUSTICE, OFF. OF PUB. AFF. (Sept. 15, 2010), http://www.justice.gov/opa/pr/2010/September/10-opa-1029.html.

241. Office of Tribal Justice, 75 Fed. Reg. 70122, 70122-70124 (Nov. 17, 2010) (to be codified at 28 C.F.R. pt. 0), *available at* http://www.federalregister.gov/articles/2010/11/17/2010-28947/office-of-tribal-justice.

242. *Assistant Attorney General Tony West Speaks at the National Congress of American Indians Annual Conference*, DEP'T OF JUSTICE, http://www.justice.gov/civil/opa/pr/speeches/2010/civ-speech-101115.html [hereinafter *Tony West Speech*]; Valerie Richardson, *Obama Adopts U.N. Manifesto on Rights of Indigenous Peoples*, WASH. TIMES, Dec. 16, 2010.

243. Greg Guedel, *White House Announces Next Tribal Nations Conference 16 December 2010*, NATIVE AM. LEGAL UPDATE (Nov. 15, 2010), http://www.nativelegalupdate.com/2010/11/articles/white-house-announces-next-tribal-nations-conference-16-december-2010/.

244. *Id.* The United States had been the only country in the United Nations not to support the U.N. Declaration on the Rights of Indigenous Peoples up until President Obama's address announcing support. *Id.*

it.[245] However, though the other countries in opposition to the declaration eventually changed their votes to support the document, the United States continued to oppose it.[246] Thus, the President's announcement was a major shift in the U.S. mentality toward American Indian policy. Though the U.N. Declaration on the Rights of Indigenous Peoples is nonbinding on its signatories,[247] it is symbolic that the United States has agreed to its terms. Provisions of the declaration include recognizing that indigenous peoples must be free from discrimination and that indigenous peoples have the right to self-determination.[248] Article 4 of the declaration states: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs . . . ."[249] If honored by the U.S. government, the U.N. declaration would bolster support for tribal autonomy and self-determination for tribal leaders within their own lands.

Both the U.S. commitment to the U.N. Declaration on the Rights of Indigenous Peoples, and the passage of the TLOA, are landmark changes in U.S. policy toward the American Indian community. The TLOA is especially important, in terms of providing tribes more autonomy over tribes' own affairs. Yet, the effectiveness of the TLOA remains to be seen. The TLOA addresses major deficiencies in federal-tribal relations, especially the primacy of federal law created by tribal sentencing limitations under the ICRA. However, there is more work to be done to transform a system where American Indians are continually victimized. The major gaps in the jurisdictional structure in Indian country remain.

Congressional action is essential. Changes to the policy of tribal self-determination fall under Congress's plenary power.[250] The U.S. Supreme Court has repeatedly stated that Congress maintains broad powers under the Indian Commerce Clause to regulate American Indian affairs.[251] The Court stated that under the Indian Interstate Commerce Clause, Congress has the "plenary power to legislate in the field of Indian affairs."[252] In fact, the Court also stated that the Indian Commerce Clause "accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce

245. Richardson, *supra* note 242.

246. *Id.*

247. *Id.*

248. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, ¶¶ 2-3, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/en/drip.html.

249. *Id.* ¶ 4.

250. United States v. Lara, 541 U.S. 193, 200 (2004).

251. *See, e.g.*, *Lara*, 541 U.S. at 200; Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

252. *Cotton Petroleum*, 490 U.S. at 192.

Clause"[253] Therefore, under the Supreme Court's reasoning, it is up to Congress, and not the courts, to change the course of affairs in Indian country.

V. CONCLUSION

Tribal self-determination is the most long-term solution for effective law enforcement in Indian country because it puts the authority into the hands of those who actually reside on tribal land. Furthermore, tribal self-determination is the logical outgrowth of the Supreme Court's decision in *Cherokee Nation v. Georgia*.[254] If tribes are their own independent sovereigns, then it follows that they should each have sovereignty over their own territory. Regardless of the Supreme Court's finding that these sovereigns are dependent on the United States as a ward to a guardian,[255] the tribes should still have a right to govern themselves within their own spheres of sovereignty. This is also compatible with the Supreme Court's decision in *United States v. Lara*, where the Court determined that tribes have jurisdiction over nonmember American Indians.[256] Because the Supreme Court has legitimized tribal sovereignty over all American Indians regardless of membership, it stands to reason that tribal sovereignty should extend to any person who commits a crime on Indian land. For this reason, the Court's restriction on tribes' abilities to try non-Indian defendants in *Oliphant* must be overturned.

Oliphant is the largest hurdle to criminal justice in Indian country. While *Oliphant* remains in effect, tribes remain unable to enforce laws against non-Indian defendants, and American Indians continue to be victimized with no recourse under tribal law. In *Oliphant*, the Court stated: "Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians."[257] However, the Court's unwillingness to act, even when it was aware of the legal void facing tribal authorities in Indian country suggests that it is Congress's duty to enact a solution. Where the U.S. Supreme Court has stepped in, it has created a nonsensical jurisdictional maze—sometimes acknowledging tribes' inherent sovereignty, and other times finding the tribes inherently sovereign[258] only to the extent that the defendant is a non-Indian.[259] The

253. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996).
254. 30 U.S. 1, 4 (1831).
255. *Id.* at 2.
256. *Lara*, 541 U.S. 210 (2004).
257. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).
258. United States v. Wheeler, 435 U.S. 313, 319 (1978).

Court's jurisprudence has resulted in gaps of enforcement where crime has flourished and victims have suffered.

The answer to the Court's ineffectualness is for Congress to enact laws clarifying the jurisdictional structure. The TLOA is, at most, a short-term remedy;[260] Congress must alleviate the burden of federal prosecutors in tribal lands by devolving power to the tribes. Congress must give tribes jurisdiction over all crimes committed in tribal lands, and create legislation to overturn *Oliphant*. Once a person consents to live on tribal land, that person should be under the authority that tribe's governance and laws. This solution would logically flow from all of the Supreme Court's decisions, which declared that tribes have inherent sovereignty over their own matters.[261] Congress should continue to allow federal jurisdiction over tribes only for appeals from tribal courts.

Even if Congress overturns *Oliphant,* it is not enough. Additionally, Congress must repeal PL 280. PL 280 has effectively created further state jurisdictional complications, as well as drained funding for state and local law enforcement in PL 280 states. Furthermore, Congress should increase funding to ensure each tribal community can sustain its own law enforcement agency. As a result, tribes would no longer have to rely on local law enforcement agencies that are located outside of the tribe's land. This funding must also include establishing local shelters and counseling programs on American Indian reservations for victims of sexual abuse and domestic violence.[262] Finally, Congress must enact these laws with the input of tribal leaders, first and foremost considering the communities involved.

Though the Obama Administration has recently set aside $127 million for tribal law enforcement and crime issues,[263] that money must be put into the hands of community tribal leaders if it is to be effective. One of the main problems with the criminal justice system in Indian country is that it has continually been investigated, prosecuted, and adjudicated on the outside, and without meaningful input from the tribes themselves. The federal or state prosecutors are not representative of the communities they serve. There are physical, cultural, and sometimes language barriers between the prosecutors and the tribes. Under these circumstances, it is unlikely that the federal or state prosecutors can adequately serve the community's goals or even understand what those goals are. If law enforcement and prosecution in Indian country is to ever be effective, tribes must be granted full self-determination,

259. *Oliphant*, 435 U.S. at 212.

260. *A Crisis in Indian Country*, *supra* note 186, at 139.

261. *See, e.g.*, United States v. Lara, 541 U.S. 193, 205 (2004); *Wheeler*, 435 U.S. at 322; Cherokee Nation v. Georgia, 30 U.S. 1, 4 (1831).

262. NOW, *supra* note 191.

263. *Tony West Speech*, *supra* note 242.

meaning that law enforcement and prosecution would come from within the tribes themselves. The tribes must be empowered internally with more resources, education, and training. The change must be systemic, and the change must be long-term, meaning that the government must commit to granting tribal self-determination. "As the reservation community expands, it is increasingly clear that tribal government is the only government that can create and maintain the social, political, economic, and legal environment necessary to meet the needs of this growing community."[264]

There is no doubt that American Indians were victimized as a result of U.S. policy throughout history, and continue to be victimized by U.S. federal law today. A policy of tribal self-determination is essential to breaking the cycle of victimization that occurs in the gaps between federal, state, and tribal governances. The renewal of tribes' own sovereignty and the ability to charge crimes that occur within their own territories gives each tribe the power to publicly condemn the defendants who are committing crimes against their own people. This is the goal of the criminal justice system after all—the community must have the ability to express its judgment about crimes committed in that community.[265] In doing so, this will also give a voice to the American Indian victims who have been silenced for far too long.

264. Douglas B.L. Enderson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142, 146 (1995), *available at* http://www.tribal-institute.org/articles/enderson1.htm.

265. Washburn, *supra* note 3, at 763.