Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence

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INTRODUCTION

Each year more than 4 million women are the victims of domestic violence1 at the hands of their partners—this is an epidemic from which Native American women are not immune.2 The obstacles to leaving an abusive relationship are numerous: women3 often need medical help, may lack the

2. The National Domestic Violence Hotline defines domestic violence as: [A] pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner. Abuse is physical, sexual, emotional, economic or psychological actions or threats of actions that influence another person. This includes any behaviors that frighten, intimidate, terrorize, manipulate, hurt, humiliate, blame, injure or wound someone. Domestic violence can happen to anyone of any race, age, sexual orientation, religion or gender. It can happen to couples who are married, living together or who are dating. Domestic violence affects people of all socioeconomic backgrounds and education levels.
3. Because of the focus of this Comment, we choose to concentrate on women in heterosexual relationships who are the victims of domestic violence. We do, however, recognize
financial resources to support themselves and their families, and their abuser often lives within the community, creating a constant threat of violent retribution. Fortunately, there are an increasing number of institutions that help women in abusive relationships find support within their communities.

One crucial factor in empowering a woman to leave an abusive relationship is helping her feel safe, often by obtaining a restraining order against or prosecuting her abuser. However, many governmental and non-profit resources aimed at supporting victims of domestic violence are geared towards white women. As a result, the dilemmas faced by battered women of other ethnic and socioeconomic backgrounds are often unexamined and misunderstood.

Native American victims of domestic violence face a particularly bleak situation. The numerous obstacles confronting Native American women—specifically those seeking restraining orders against or criminal prosecution of their abusers—are frequently overlooked and unreported.

This Comment highlights the complicated issues facing Native American women victimized by domestic violence, including the failure of the federal government to uphold its obligation to provide effective assistance to Native American women in abusive relationships. Additionally, we will make policy proposals for federal, state, and tribal governments and law enforcement.

In Part I, we examine how domestic violence negatively impacts tribal communities in ways distinct from other communities. To this end, we consider statistics on domestic violence against Native American women. In Part II, we present an overview of tribal sovereignty and federal Indian law to illustrate how criminal jurisdiction in Indian Country is fractured among state, tribal, and federal law enforcement. Understanding tribal sovereignty is critical to

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4. For an excellent overview of the complex issues facing women when they decided to leave an abusive relationships, see AM. PSYCHOL. ASS'N, ISSUES AND DILEMMAS IN FAMILY VIOLENCE: WHY DON'T BATTERED WOMEN JUST TAKE THEIR CHILDREN AND LEAVE?: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY (1996).


8. We choose to use the term “Native American” to include both Alaska Natives and tribes in what is now the continental United States. In no way to we mean to imply Alaska Natives and Native Americans are culturally homogenous. Further, we recognize that the all encompassing term “Native Americans” does not capture the cultural, political, or legal differences between the over 560 tribes in the United States. Rather, we use the term “Native American” to refer to indigenous people in the United States.

9. The term “Indian Country” is a legal term of art used to describe land within a
comprehending the complicated legal framework in which Native American women find themselves when attempting to seek help from tribal, state, and federal law enforcement or judicial institutions.

Part III analyzes the roles of tribal, state, and the federal governments in preventing and responding to domestic violence in an effort to diagram the jurisdictional puzzle of federal, state, and tribal authority in Indian Country. We analyze the direct impact of this complex legal framework on the prosecution of those accused of domestic violence by exploring the jurisdictional gaps which render obtaining effective legal remedies nearly impossible. Briefly, if a Native American woman is the victim of domestic violence at the hands of another Native American the tribe and the federal government have concurrent jurisdiction over the batterer. However, if a Native American woman is the victim of domestic violence at the hands of a non-Indian, the tribe has no jurisdiction over the crime and the victim is reliant on the federal government, or in a few states, the state government, for arrest and prosecution of the batterer. Whether the perpetrator is Native American or non-Indian, tribes, states, and federal authorities often lack the law enforcement resources and capacity to effectively prosecute the perpetrator. We argue that increased coordination among tribal, state, and federal governments can help solve the problem of domestic violence in Indian Country.

In Part IV, we examine congressional efforts to safeguard victims of domestic violence in Indian Country, focusing on the Violence Against Women Act of 2005. Part V presents policy recommendations which are particularly relevant as the federal government implements the directives in the Violence Against Women Act of 2005. Our recommendations aim to reinforce tribal sovereignty. They include legislative changes to protect Native American victims of domestic violence, changes which would reduce the legal burden on state and federal actors by transferring responsibility to tribes.

reservation. See infra note B.

10. See United States v. Wheeler, 435 U.S. 313, 328 (1978) ("[T]he power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government."); United States v. Lara, 541 U.S. 193, 210 (2004) (in response to a challenge to federal statute granting tribes criminal jurisdiction over non-member Indians, the Court stated that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians.").

11. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.").

I

VIOLENCE IN INDIAN COUNTRY

Statistics regarding violence in Indian Country paint a troubling picture. Native Americans experience violence more than twice as often as any other ethnic group. According to the Bureau of Justice Statistics, "[o]n average, American Indians experience an estimated 1 violent crime for every 10 residents age 12 or older." One hundred and twenty-four of every one thousand Native Americans experience violent crime, a rate two and half times greater than the national average. Some researchers estimate that as many as one-third of all Native Americans have endured physical abuse. Native American women living in Indian Country experience violent crimes 50% more often than do young African American males—a group frequently cited as facing the highest incidence violent victimization. In fact, 39% of Native American women report being the victims of domestic violence. Native American women are three times as likely to be raped or sexually assaulted as women of 13. The term "Indian Country" as defined by 18 U.S.C. § 1151 (2000) is:

[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . 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 [] all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

14. See Steven W. Perry, Bureau of Justice Statistics, U.S. Dep't of Justice, American Indians and Crime: A BJS Statistical Profile, 1992-2002 iv (2004), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf (last visited Aug. 28, 2007) [hereinafter American Indians and Crime 1992-2002]. "The annual average violent crime rate among American Indians was twice as high as that of blacks (50 per 1,000 persons), 2½ times higher than that for whites (41 per 1,000 persons), and 4½ times that for Asians (22 per 1,000 persons)." Id. at 5. "Violence" and "violent victimization" seem to be used interchangeably in this report. Both include simple assault, aggravated assault, robbery, and rape/sexual assault.

15. Id. at iv.


any other race. Over 85% of perpetrators in rape and sexual assault against Native American women are described by their victims as being non-Indian. Complicating the problem, nearly 70% of all violent victimizations committed against Native Americans in Indian Country are committed by non-Indian attackers. This is critical: tribes lack the legal mechanisms to hold non-Indians accountable for violent crimes against tribal members. Because the perpetrators of domestic violence are often non-Indian, the lack of prosecution results in impunity. The enforcement gap and the response of law enforcement to domestic violence will be explored in detail in Part III.

These statistics emphasize the fact that non-Indian perpetrators of violent crimes are responsible for introducing a large percentage of violence into tribal communities. Yet, Native American women face a special threat to their bodily integrity perpetrated by their partners. Incidents of domestic violence comprise a disproportionately large percentage of the overall violence faced by Native Americans. The following section seeks to illuminate the crisis of domestic violence against Native American women using statistics available through the Bureau of Justice Statistics.

A. Domestic Violence Against Native Women:
Using Statistics to Understand the Crisis

In 1999, the Bureau of Justice Statistics published a report on crime in Indian Country, followed by a second report in 2004 which compiled ten years worth of data on crime statistics against Native Americans. These two reports do not exclusively investigate domestic violence in Indian Country, rather they track crime in Indian Country more generally. However, they represent the most comprehensive data currently available regarding domestic violence against Native American women. Accurate statistics on domestic violence are notoriously difficult to collect. This problem is amplified when gathering data about domestic violence against Native American women by distrust toward outsiders common among tribal communities, an unwillingness to discuss domestic violence, and a lack of phone penetration in Native communities making data collection difficult. Despite these shortcomings, the


22. Id. at 9. Non-Indian is a legal term of art to describe people who are not Native American.


25. Supra note 14.

26. Accurate statistics on domestic violence are difficult to collect because of the intimate nature of the crime and the reluctance of victims to disclose details of their relationships. This problem is amplified in Native American communities when researchers unfamiliar with tribal culture ask questions which do not generate accurate responses or reliable data, ask questions in a
reports represent the best statistical data with which to gain insight into domestic violence.

The 1999 report tracks “intimate violence”, defined as violence occurring between current or former spouses, or individuals in a dating relationship. While this category of assault is useful in mapping out domestic violence in Indian Country, it is important to note that the term does not necessarily encompass the full spectrum of acts which constitute domestic violence. Within the parameters of the term, intimate violence accounts for 9% of all reported violent crimes in Indian Country. Native-American victims of intimate violence report that 75% of offenders are of a different race.

The 2004 compendium report found similar domestic violence patterns as those detected in the initial report. The report surveyed a handful of specific tribes to obtain detailed crime statistics. For example, the Zuni Pueblo in New Mexico reported about 30% of those responding had been the victims of domestic partner violence in the last twelve months. That same 30% described the violence as emotional and physical abuse, not only sexual abuse. The Confederated Tribes of the Umatilla Indian Reservation and the Southern Ute Indian tribe reported similar statistics about domestic violence—almost 40% of violent crimes against members were instances of domestic violence.

The offender’s race was described as non-Indian approximately 75% of the time. This is a critical statistic because tribes currently lack the legal mechanisms to hold non-Indians accountable for violent crimes against tribal members. The fact that abusers are often non-Indian creates a jurisdictional gap in the ability of law enforcement to effectively respond to domestic violence which will be explored in detail in Part III.

These reports indicate that Native Americans, and especially Native American women, are at serious risk of violence. Yet these compilations of statistics, though helpful in gauging the prevalence of domestic violence in language in which the victim may not be comfortable, or ask questions that may be perceived as culturally insensitive.

27. See AMERICAN INDIANS AND CRIME 1999, supra note 18, at 8.
28. A statistic which tracks “intimate violence” is often under-inclusive. “Intimate violence” does not include emotional abuse and other non-physical acts of abuse such as stalking.
29. AMERICAN INDIANS AND CRIME 1999, supra note 18, at 8.
30. Id. “Intimate violence” is a descriptive term about the relationship between victim and perpetrator. Intimate violence occurs between family members or someone with whom the victim was intimate. See id. at 8.
32. See id. at 31-41. This report provides statistical information on domestic violence for specific tribes, in addition to providing such information for Indian Country as a whole.
33. Id. at 31.
34. Id.
35. Id. at 34-35.
Indian Country, do not provide an entirely accurate picture. Statistics are based solely on reported incidents and, therefore, overlook the large segment of crimes that go unreported. Incidents of domestic violence "are significantly under-reported at all levels of society" further amplifying the questions about the accuracy of these statistics. Thus, while the Bureau of Justice Statistics reports provide a much needed baseline for assessing the presence of domestic violence in Indian Country, the reality is likely much worse.

**B. Remnants of Colonization: Learning Violence Against Native American Women**

The damage to Native American women who are victims of domestic violence is profound. Domestic violence correlates with undermined self-esteem, adversely impacts physical health, jeopardizes livelihood and continuity of employment, and yet, the deleterious long-term effects have not yet been fully documented. These consequences adversely impact a woman's ability to escape from a violent relationship.

The impact of domestic violence on Native American women does not necessarily correspond with the impact of such violence on women of other ethnicities. The distinct impact of domestic violence on Native American communities is tied to the history of European colonization of tribes. As Michelle Tirado explains, historically, Native American women were seen as "life givers and life sustainers, they were respected. They were considered sacred. In many tribes, women had the power to choose or remove their leaders." Tirado is certainly speaking in broad strokes, but her larger point is important: there was and is no homogeneous "tribe," but there are broad commonalities among tribes that offer insight into the position of women at the time of colonization. This is not to suggest that each tribe treated women

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37. VIOLENCE AND THE FAMILY, supra note 1.

The underreporting of crime on reservations occurs on two levels: between tribal members and their police agencies and between these tribal-level police agencies and federal agencies such as the FBI and the BIA. Underreporting is attributable to cultural and demographic factors characteristic of Indian Country. The extensive research literature on underreporting of crime cites distrust of police, the shame or humiliation associated with certain kinds of crime, and fear of retaliation as strong predictors of underreporting. These factors are unusually common in Native American communities. Id. at 13 (citation omitted).

41. See WAKELING, supra note 38, at 13.
identically, rather that violence against women was not a traditional tribal value.  

Indeed, in many tribes Native American women shared power with men precisely because of the respect that tribal values afforded women. Tirado and others argue that this power structure changed with colonization, likening the colonization process to the pattern of learning violent behavior. To that end, mechanisms that attempt to reinforce traditional tribal values may be an important means of combating domestic violence. Since many argue that this type of violence is learned, the process of "unlearning" violence could begin through reinforcing tribal values through tribal remedies. In renouncing this learned violence—whether through tribal courts, tribal law enforcement, or tribal advocacy—Karen Artichoker, the Team Director of Cangleska Management, a tribally chartered domestic violence intervention agency, describes the task of protecting Native American women as "reclaim[ing] who we are as indigenous people." Tribal remedies not only bolster the sovereignty of tribes, but they aid Native American women in reclaiming self-determination over their bodies.

The systemic violence learned and patterned on colonization is distinct from other forms of violence fueled by racism. Andrea Smith, a prominent anti-violence scholar and advocate for Native American women, states that, as a product of colonization, gender violence teaches Native American women to "internalize self-hatred." The internalization of self-hatred occurs precisely because women's body image "is integrally related to self-esteem." Thus, Smith argues, "when one's body is not respected, one begins to hate oneself." The extreme racialization of this disrespect makes its effects particularly acute. The colonization process taught Native American women to repudiate

44. See id. For an exploration of the role of women in Native American society focusing on specific tribes, see Women and Power in Native North America 4 (Laura F. Kleig & Lillian A. Ackerman eds., 1995) ("The roles of power, influence, and authority that may be obvious in their own societies are exceptional elsewhere. The story of Native North American women as players in their own societies needs to be told to allow a full description of the traditional lifeways of Native peoples that is dictated less by the structure of Euro-American culture... This enterprise also illuminates again the complexity of the damages that colonial mandates of 'civilization' brought.").
45. Tirado, supra note 42, at 10. (paraphrasing Tina Olsen, the founder of Mending the Sacred Hoop a non-profit dedicated to support Native American victims of domestic violence, Tirado states that "the status of Indian women started to deteriorate when the treaties were signed, but the abuse was learned over time through decades of oppression and suppression.").
46. Id. at 12 (quoting Karen Artichoker, Cangleska Management Team Director).
48. Id. at 12.
49. Id.
50. See id. at 12.
traditional tribal values in understanding themselves. In the place of tribal values, it taught them that they were “dirty” and less valuable than men. The internalization of colonially imposed values is part of the process of learning violent behavior that Tirado describes. Smith, a former rape crisis counselor, notes that she was not surprised to hear Native American women “who have survived sexual abuse say that they no longer wish to be Indian.” Smith argues that the colonization process continues today—by depriving Native American women of their desire to be Native American—and can only be halted by anti-violence advocates shifting focus to address the persistent, historically-rooted, perpetration of violence against Native American women. She argues that:

Putting Native women at the center of analysis compels us to look at the role of the state in perpetrating both race-based and gender-based violence. We cannot limit our conception of sexual violence to individual acts of rape—rather it encompasses a wide range of strategies designed not only to destroy peoples, but to destroy their sense of being a people.

Violence against Native American women does not only affect individuals in the usual sense that domestic violence affects its victims, but it also causes harm by stripping them of their identity as Native Americans. This is an integral part of the ongoing process of colonization facilitated by the direct failure of the federal government in depriving many tribes of the criminal jurisdiction necessary to create effective mechanisms for redressing violence against Native American women. Reinforcing or creating tribally-based judicial remedies to combat domestic violence will not only help Native American women find safety from their abusers, it will help strengthen their identities as Native Americans. As Professor Smith explains, making Native American women the focal point of Native American anti-violence efforts strengthens individual safety and buttresses their identity as Native people. This is an integral part of the recovery process, not only do victims need to find physical safety but they need to be given the tools to rebuild themselves emotionally.

Professors Gloria Valencia-Weber and Christine Zuni, in their influential work on domestic violence against Native American women and the tribal legal framework for combating this violence, note that:

Although there are differences among the tribes, respect for the physical integrity of women is not an area where cultural values among tribes differ significantly. Individuals in any society have always attempted to use physical force to control others and American

51. Id.
52. Id.
53. See Tirado, supra note 42, at 10-11.
55. Id. at 3.
Indians are not exempt from what continues to be an unfortunate human behavior. The fact that individual members of tribes, predominantly male, engage in the physical abuse of women does not mean that such behavior satisfies a culturally approved norm.\(^5\)

This is a crucial point—while domestic violence has become an all too common phenomenon in Native American communities, it does not reflect unspoken tribal approval for violence against women. Indeed, the statistic that 75\% of all reported incidents of domestic violence against Native American women occur in relationships in which the offender is non-Indian, a statistic which may underestimate the number of non-Indian perpetrators of domestic violence, bolsters the contention that domestic violence is not a tribal value.\(^5\)

Many tribes have made combating domestic violence and protecting Native American women a priority by seeking to implement legal mechanisms for redress and by enacting comprehensive social service programs.\(^5\) Unfortunately, tribes' ability to respond effectively to domestic violence is severely hampered by substantial jurisdictional gaps in tribal authority and the American legal community's rejection of non-Western mechanisms of tribal redress and jurisdiction.\(^5\) Understanding these two significant barriers requires an overview of the current state of tribal sovereignty.

II

TRIBAL SOVEREIGNTY AND THE PROBLEM OF JURISDICTION

Native American women who are the victims of domestic violence find themselves ensnared in a complicated web of overlapping tribal, state, and federal jurisdiction. The formation of the distinct legal relationship Native nations\(^6\) share with federal and state governments has deep historical roots in the colonial experience. This history is crucial to understanding why relations between the United States and tribes developed in the manner which eventually produced a modern, tangled jurisdictional web and a legal relationship distinct from any other group in the United States. Because contemporary realities of domestic violence in Indian Country have their origins in the colonial experience, any workable solutions aimed at stemming the violence in Indian Country requires a firm grasp on federal, state, and tribal jurisdiction in Indian Country.

\(^5\) See Valencia-Weber \& Zuni, \textit{supra} note 43, at 72 ("[T]ribes seek to protect their female members through codes, customary law, and intervention programs which provide services to victims, abusers, and their families.").
\(^5\) See \textit{id.} at 76 ("Traditional tribal methods of dispute resolution do not fit within the adversarial model, but rather aim to restore harmonious relationships among spouses, domestic partners, family, clan, and community members.").
\(^5\) We use the term "Native nations" when referring to sovereign tribes in what is now the United States.
The historical relationship between Native nations and the federal government illustrates the legal context in which Native Americans currently find themselves and helps establish the background against which Native American women suffering from domestic abuse struggle today. Dominant ethnocentric perceptions of sovereignty continue to shape the legal and, by extension, jurisdictional realities in Indian Country. Specifically, we examine the ramifications of diminished tribal sovereignty on tribal attempts to address domestic violence within Indian Country. United States' courts, the Congress, the Executive, and even the public conceive of sovereignty in Western terms, often deeming tribal sovereignty unworthy of acknowledgement by United States courts. Complete tribal sovereignty has not been recognized by the United States, greatly impacting not only the relationship between federal and tribal authorities, but tribal relationships with their own citizens and state governments. In this Part, we provide a brief history of the concept of sovereignty during colonization, examine the trilogy of early U.S. Supreme Court cases which are the foundation for federal Indian law, and explain the web of federal, state, and tribal jurisdiction over those who commit crimes in Indian Country.

A. Historical Underpinnings of Jurisdiction in Indian Country

Prior to European contact, Native nations were sovereign, just as was any European nation. However, contact with Europeans diminished tribal sovereignty in the eyes of the so-called discovering sovereigns. As western expansion progressed, Europeans viewed the autonomy of Native nations as constrained by "superior" European sovereignty. As western expansion progressed, Europeans viewed the autonomy of Native nations as constrained by "superior" European sovereignty. Any other understanding of

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61. For a definition of Indian Country, see supra note 13.
62. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.").
63. See Philip P. Frickey, (Native) American Exceptionalism in Federal Public Law, 119 HARV. L. REV. 433, 439 (2005); see also Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 568 (1823) ("Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so. A nation that has passed under the dominion of another, is no longer a sovereign state.").
64. Chief Justice Marshall described Native nations in relation to the United States as "domestic dependent nations." This conception of diminished sovereignty as a result of European colonization persists today as the guiding legal principle of Indian law:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

tribal sovereignty—that is, a viewpoint respecting the independence of tribes—would have undercut the process of colonization because European nations would have seen Native nations as equals. If this were the case, diplomacy, rather than subjugation, would have been the tactic implemented by European colonizers. The creation of the United States resulted in the codification of notions of inferior tribal sovereignty.

Tribal conceptions of sovereignty differed significantly from the Western perspective espoused by early U.S. Supreme Court cases which codified the systematic categorization of tribal sovereignty as both inferior and easily disregarded by the other branches. Native nations had numerous individualized social structures and political organizations prior to contact with Europeans. Prominent Native American scholar Vine Deloria, Jr. explains that, "[t]ribal governments of enormous complexity did exist [at contact] but they differed so radically from the forms used by the Europeans that few non-Indian observers could understand them." Europeans viewed tribal governance structures through a monarchical, Western European lens. Early political and legal scholars understood written constitutions and concepts of confederacies and democracies as products solely of European tradition. Thus, Europeans frequently anointed a chief or single leader of a tribe even though the designation may have been unreflective of the realities of the political situation. For example, tribes such as the Shoshone and the Lakota were actually "loose confederations of groups who spoke the same language and ranged over a broad expanse of territory" rather compact European nation-states. Newer scholarship, however, tracks the legacy of such ideas in Native American societies. The Creek Confederacy for example—a complex political organization consisting of several tribes—is a unique form of tribal governance. The failure to acknowledge the Creek Confederacy is one

66. See id.
67. Professor Deloria explains:
The whites' inability to understand the problems and behavior of American Indians is not a new phenomenon. . . . Given the absence of formally structured institutions within the Indian tribes they encountered, it appeared to the earliest settlers that the tribes existed without any forms of government. The Indians were generally viewed as living almost in a state of anarchy and some early political writers, seeking to conceive a "state of nature" upon which they could build the philosophical framework for their natural law—social contract theories of government, frequently referred to Indians as "children of nature" and applauded their apparent ability to live without the confining and complex rules that had been devised within the European systems of government.
Id. at 80-81.
68. See id.
69. Id. at 82. The variations between tribes are amplified when looking at tribes in the present day Southwest where, for example, the Pueblos and the Hopi closely link governing functions with religion, thereby resembling European-style theocracies. The governing structures of the Creek and other Southeastern tribes resemble a confederacy. See id.
70. See Official Site of the Muscogee (Creek) Nation of Oklahoma, History,
example of such ignorance.\textsuperscript{71}

Upon contact, Europeans immediately adopted a perspective that resulted in a diminishment in tribal sovereignty.\textsuperscript{72} Eventually, Europeans disregarded tribal sovereignty\textsuperscript{73} and the United States federal government emerged as the single entity with the authority to engage in any formal relationships with Native nations.\textsuperscript{74} From that point forward, the governing ability of Native nations dwindled (at least in the eyes of the United States) as a result of Supreme Court jurisprudence and congressional legislation aimed at limiting tribal sovereignty.\textsuperscript{75} This federal diminution of tribal sovereignty highlights the degree to which the courts, Congress, the Executive branch and the broader American public legitimize only one form of sovereignty; that which resembles the Western model.

Just as Native Americans are not a homogenous group the same is true of the diverse political systems among Native nations.\textsuperscript{76} This non-essentialist

\textsuperscript{71} See generally DELORIA AND LYTLE, supra note 65.
\textsuperscript{72} In \textit{Worcester v. Georgia}, Chief Justice Marshall explains:
The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.

31 U.S. (6 Pet.) 515, 519 (1832).

\textsuperscript{73} Chief Justice Marshall explained the European notion of dominion over lands and people “conquered” during colonization in \textit{Johnson v. M’Intosh}:
The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.

21 U.S. (8 Wheat.) 543, 592 (1823).

\textsuperscript{74} Marshall’s conception of diminished sovereignty still dominates legal thought today. Marshall opined that once the United States emerged as the dominant continental power—once the United States came into existence—it did so at the expense of tribal sovereignty, stating that “[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.” \textit{Id.} at 588.

\textsuperscript{75} The United States Supreme Court continues to limit tribal self-determination, particularly over nonmembers. In 2001, the Court held in \textit{Nevada v. Hicks} that “[t]he ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is ‘necessary to protect tribal self-government or to control internal relations.’” 533 U.S. 353, 360 (2001).

\textsuperscript{76} The Bureau of Indian Affairs currently recognizes 561 tribes. See Bureau of Indian Affairs, http://www.doi.gov/bureau-indian-affairs.html (last visited Aug. 28, 2007). Federal recognition of a tribe formally establishes a government-to-government relationship between the tribe and the United States. See WILLIAM C. CANBY, JR., \textit{AMERICAN INDIAN LAW IN A NUTSHELL} 4-5 (3d ed. 1998) (“Unequivocal federal recognition may serve to establish tribal status for every purpose . . . . Federal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity. Any of these events . . . then
perspective, however, had not taken root (and, arguably has still not taken root) during the founding of the United States and the formative years of federal Indian Law. Early U.S. treatment of tribal sovereignty was based on an ill-fitting comparison with Western political systems and values. This problematic characterization led the founding fathers to conclude that Native, non-Western systems were inherently less sovereign. For example, in Johnson v. M'Intosh, Chief Justice John Marshall opined:

[Native Americans] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but 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.

Echoing this sentiment, much of the legislation passed by Congress throughout the nineteenth and early half of the twentieth century sought to create "law" among the "lawless Native American people." This flurry of legislation arose from the ethnocentric perspective that Native American people had not been able to, and were not capable of, adequately governing themselves. For example, the General Allotment Act of 1887 divided tribal

signifies the existence of a special relationship between the federal government and the concerned tribe . . . ."). It is, however, important to note that mere recognition by the United States government does not confer tribal status. For example, the Lumbee Tribe of North Carolina consists of over 40,000 members and is "recognized" by the state of North Carolina but not the federal government. See LumbeeTribe.com, Who Are the Lumbee?, http://www.lumbeetribe.com/lumbee/index.htm (last visited Aug. 28, 2007); LumbeeTribe.com, Lumbee Federal Recognition, http://www.lumbeetribe.com/recognition/index.htm (last visited Aug. 28, 2007). Still, tribes are not dependent on federal or state governments for their identity. Indeed, the notion that tribes must rely on state or federal recognition for legitimacy furthers the paternalistic legal notions first outlined by Chief Justice Marshall in the now famous Marshall trilogy. For an explanation of the federal recognition process, see Rachael Paschal, Comment, The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process, 66 WASH. L. REV. 209 (1991).

77. Chief Justice John Marshall's trilogy of Indian law cases, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), represent three of the most important and still relevant federal Indian law cases decided by the United States Supreme Court. These cases laid the groundwork for federal Indian law as it has come to be understood within the United States legal system.

78. See generally DELORIA & LYTLE, supra note 65.


80. The result of several nineteenth century Supreme Court cases was the "treatment of Indians as subjugated, backward peoples under the unconstrained rule of Congress . . . and had a troubling aftermath—the breakup of many Indian reservations, the disintegration of many tribal governments, and the forced assimilation of many Indians." Philip P. Frickey, Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf, 38 TULSA L. REV. 5, 5 (2002).

81. See, e.g., James Bradley Thayer, A People Without Law, 68 ATLANTIC MONTHLY 540, 676 (1891). Professor Thayer's article about the lawlessness of Native American people had a profound affect on Indian policy. After the Supreme Court decided Ex parte Crow Dog, in which
land into small, privately owned parcels "as a means of reducing tribes' institutional power and helping to assimilate individual Indians into Anglo-American culture."\footnote{Katherine J. Florey, Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts, 55 Am. U. L. Rev. 1627, 1635 (2006).} Theodore Roosevelt explained that allotment was ""a mighty pulverizing machine to break up the tribal mass. It acts directly upon the family and the individual."\footnote{See also id. at 70 ("[T]he Marshall Model of Indian rights] defines the scope and content of the Indian's inferior legal and political rights by reference to the doctrine of discovery and its organizing principle of white racial supremacy over the continent of North America.").} The cultural and legal justifications for the General Allotment Act of 1887, namely that the differences between Native American political traditions and Western traditions rendering Native American sovereignty "inferior," persist to the present day.\footnote{See generally Robert A. Williams, Jr., Like A Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America 33-70 (2005). See also id. at 70 ("[T]he Marshall Model of Indian rights] defines the scope and content of the Indian's inferior legal and political rights by reference to the doctrine of discovery and its organizing principle of white racial supremacy over the continent of North America.").}

\section*{B. The Current Legal Framework of Sovereignty and Jurisdiction}

Chief Justice John Marshall authored a trilogy of cases in the early nineteenth century which outline the fundamental principles of federal Indian law: \emph{Johnson v. M'Intosh}, \emph{Cherokee Nation v. Georgia}, and \emph{Worcester v. Georgia}.\footnote{Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).} In \emph{Johnson}, the Supreme Court held that tribes do not hold legal title to the land on which they reside; rather, they maintain a right of occupancy while legal title passed to the "Discovering European Sovereign" and its successor, the United States.\footnote{See Johnson, 21 U.S. (8 Wheat.) at 573.} In \emph{Cherokee Nation}, the Court held that tribes were not foreign states, but that they did maintain a degree of independence from the United States despite colonial expansion.\footnote{See Cherokee Nation, 30 U.S. (5 Pet.) at 17.} Finally, in \emph{Worcester} the Court held that the state of Georgia could not pass laws that affect citizens of the Cherokee Nation.\footnote{See Worcester, 31 U.S. (6 Pet.) at 561.} This ruling protected tribal authority from encroachment by a Georgia legislature bent on eliminating the Cherokee.\footnote{See id. at 516 ("[T]he extraterritorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent thereto.").}
In *Cherokee Nation v. Georgia*, the Justices examined the legal status of Native nations.\(^9\) In a divided opinion, Chief Justice Marshall held that the Cherokee Nation (and, by extension, every other Native nation) was not a foreign state.\(^9\) However, he stated that the Cherokee did retain some aspects of sovereignty.\(^9\) Marshall created the notion of a "domestic dependent sovereign" to limit the post-contact sovereignty of Native nations.\(^9\) The term "domestic dependent sovereign," however, has no clear definition. It has come to stand for the notion that tribal sovereignty was inferior to the sovereignty of the European colonizers.\(^9\) Therefore, upon contact with European colonizers tribes retained a semblance of sovereignty at the expense of the "superior" sovereignty of the colonizer. Although Marshall held that Native nations were "domestic dependent sovereigns," he opined in *Worcester* that laws passed by the states, including those regulating criminal activity, were inoperative in Indian Country.\(^9\)

The Marshall trilogy resulted in the notion that tribal sovereignty could not be abrogated by the actions of individual states.\(^9\) After the Marshall trilogy, tribal sovereignty was limited in three ways: 1) through the doctrine of discovery, which gave the discovering nation "the exclusive right . . . to appropriate the lands occupied by the Indians;"\(^9\) 2) by tribal treaty cessations; and, 3) by limits imposed unilaterally by Congress through federal statutes.\(^9\)

The cumulative effect of the Court's jurisprudence is the foundation for the "trust relationship" that now exists between the United States and tribes. The federal trust relationship is the fiduciary (and arguably moral) duty owed to tribes by the federal government.\(^9\) The "trust relationship" lacks a clear statutory or judicial origin. In *Cherokee Nation*, Marshall characterizes the relationship between tribes and the federal government as that of a "guardian to a ward."

According to Reid Peyton Chambers, "[t]he fiduciary relationship itself has been variously characterized—as 'resembling' a guardianship, as a

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92. *See id. at 16.
93. *See Id.*
94. These limits included the bifurcation of legal land title between original title as held by the discovering European sovereign and the right to occupancy given to Native American people. The limits also included the inability to make treaties with other foreign nations.
95. *See supra* Part II.A.
96. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 595 (1832). The Georgia legislature passed a law prohibiting non-Indians from residing among the Cherokee without first obtaining a license to do so from the state. Violation of this law resulted in imprisonment. *Id.* at 537-38.
97. *See id.* at 561. For further explanation, see Frickey, (*Native*) American Exceptionalism in Federal Public Law, *supra* note 63, at 437-39.
guardian-ward relationship, as a fiduciary or special relationship, or as a trust responsibility.\textsuperscript{102} While difficult to pinpoint its exact origin, both case law and scholars point to not only \textit{Worcester}\textsuperscript{103} but also several other Supreme Court cases including \textit{Lone Wolf v. Hitchcock}\textsuperscript{104} and \textit{United States v. Sandoval},\textsuperscript{105} as the opinions which best define and establish the federal government’s unique trust obligation to tribes.\textsuperscript{106}

Towards the end of the nineteenth century, Supreme Court decisions outlined the notion of congressional plenary power over tribes, though the origins of the doctrine are not entirely clear. Plenary power gave Congress the ability to abrogate treaties with tribes.\textsuperscript{107} In \textit{Lone Wolf}, the Court held that “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”\textsuperscript{108} An example of a permissible exercise of congressional plenary authority was the passage of the Major Crimes Act of 1885 (MCA).\textsuperscript{109} The Court held in \textit{U.S. v. Kagama} that the MCA was a constitutional exercise of congressional authority to abrogate tribal sovereignty because of the “trust relationship.”\textsuperscript{110} This characterization of the interplay of the trust relationship and congressional plenary power provided the foundation for the congressional authority to enact laws affecting Native Americans. The next section explores the intersection of criminal law and tribal sovereignty.

\textit{C. The Major Crimes Act and its Impact on Tribal Sovereignty}

Congress passed the MCA in response to the outcome of \textit{Ex Parte Crow Dog},\textsuperscript{111} in which the Court held that federal authorities could not prosecute a member of the Brule Sioux tribe who murdered another member of the same tribe on the Brule Sioux reservation because the crime was an intra-tribal issue that had already been adjudicated according to Brule law.\textsuperscript{112} The Department of Justice (DoJ) viewed reservations as “lawless,”\textsuperscript{113} and department officials

\begin{footnotesize}
\begin{enumerate}
\item[102.] Chambers, \textit{supra} note 100, at 1213-14 (citations omitted).
\item[104.] See \textit{Lone Wolf v. Hitchcock}, 187 U.S. 553, 564-65 (1903).
\item[105.] See \textit{United States v. Sandoval}, 231 U.S. 28 (1913).
\item[106.] See generally \textit{Frickey, Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf, supra note 80, at 33 (“\textit{Lone Wolf}, as read against Chief Justice Marshall’s earlier cases developing an interpretive paradigm, allowed Congress to call the shots in federal Indian policy so long as it acted clearly.”).}
\item[107.] See id. at 6.
\item[108.] \textit{Lone Wolf}, 187 U.S. at 565.
\item[111.] See \textit{Canby, supra} note 76, at 135.
\item[112.] \textit{Ex Parte Crow Dog}, 109 U.S. 556, 557, 571 (1883).
\item[113.] See Thayer, \textit{supra} note 81, at 676.
\end{enumerate}
\end{footnotesize}
enlisted the help of Congress to impose law on tribes. The DoJ sought a grant of federal jurisdiction over crimes in Indian Country, resulting in the MCA giving federal authorities the power to prosecute certain enumerated "major crimes" committed in Indian Country.

1. Jurisdictional Structure when the Defendant Is Native American

The MCA grants jurisdiction to the federal government when the crime committed is enumerated in the statute, is committed in Indian Country, and the perpetrator of the "major crime" is Native American. The identity of the victim, non-Indian or Native, does not affect whether the federal government has jurisdiction, nor does it affect the tribes' ability to punish a Native-American defendant. Under Oliphant v. Suquamish Indian Tribe, a tribe has concurrent jurisdiction, regardless of victim’s ethnicity as non-Indian or Native, alongside a federal proceeding if the defendant is Native. If, however, the crime committed is not one of the major enumerated crimes, the tribe retains exclusive jurisdiction under the General Crimes Act (GCA) and the federal authorities are precluded from asserting jurisdiction. The GCA states:

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.

Thus, the GCA does not preempt tribal jurisdiction when the crime involves a Native American defendant. Congress, therefore, has not provided concurrent federal jurisdiction in certain circumstances, thereby leaving the tribe with sole


115. See Major Crimes Act, 18 U.S.C. § 1153 (2006). The Major Crimes Act states: Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Id.

116. See id.


119. Id.
jurisdiction. Furthermore, Congress provided that federal jurisdiction does not extend when a treaty specifies that the tribe has exclusive jurisdiction over offenses committed by Indians.

In *U.S. v. Wheeler*, the Supreme Court upheld the constitutionality of both federal and tribal jurisdiction over "major crimes." The case concerned a major crime committed by a Native American against a Native American victim. The defendant argued that undergoing both federal and tribal proceedings for the same crime violated the double jeopardy clause of the Fifth Amendment. The Court found no Fifth Amendment violation because the case involved adjudication by two separate sovereigns. The tribe, the Court reasoned, prosecuted the crime using its inherent sovereignty rather than a grant of federal power. Therefore, no constitutional violation resulted because two separate sovereigns may prosecute a similar incident without implicating the double jeopardy clause.

2. Jurisdictional Structure when the Defendant Is Non-Indian

The federal government has jurisdiction if the perpetrator is non-Indian and the victim is Native American. Federal jurisdiction originates from the GCA, not the MCA. The GCA states that "the general laws of the United States as to the punishment of offenses . . . shall extend to the Indian country" and it contains exceptions for tribal court jurisdiction, as previously mentioned.

The Supreme Court addressed the issue of tribal authority to assert criminal jurisdiction over a non-Indian in *Oliphant v. Suquamish Indian Tribe*. In *Oliphant*, a non-Indian assaulted a tribal police officer at a tribal celebration on the reservation. The Court held that the exercise of tribal criminal jurisdiction over non-Indians was inconsistent with the domestic dependent status of tribes and instead reified the federal government's ability to exercise jurisdiction in such cases.

The interplay among the Supreme Court holdings both creates confusion and results in a jurisdictional gap: the state may not exercise its jurisdictional authority over non-Indians in Indian Country because of the holding in *Worcester*, the tribe may not exercise jurisdiction over non-Indians because of *Oliphant*; and if the crime is one of the enumerated major crimes then the federal government may choose to exercise jurisdictional authority over non-Indians but is not required to do so. Thus, Native American victims of so-called

121. See id. at 327.
122. See id.
123. See id. at 328.
126. See id. at 194.
127. See id. at 210.
128. For a discussion of state jurisdiction over Indian Country, see infra Part II.D.
non-major crimes, such as domestic violence, face an enforcement gap if they are assaulted by non-Indians: the federal government has jurisdiction but often does not exercise this jurisdiction for reasons which include lack of federal law enforcement investigation into crimes of domestic violence and the failure to prioritize the prosecution of domestic violence. Further exacerbating the problem is the issue of limited resources; the federal government does not have the financial or personnel resources to effectively manage the high level of criminal activity experienced in Indian Country. This lack of resources, coupled with jurisprudence limiting the federal government’s capacity to assert jurisdiction, results in the systemic failure to prosecute the perpetrators of domestic violence.

3. Jurisdictional Structure when Both Defendant and Victim Are Non-Indian

When a crime occurs in Indian Country where both the accused and the victim are non-Indian, neither the MCA nor the GCA contains provisions that grant the federal government jurisdiction over the crime. Under Oliphant, tribes cannot assert jurisdiction over non-Indian perpetrators in criminal matters.\(^\text{129}\) The result of this scheme is to vest the power of adjudication in the states alone for cases in which only non-Indian individuals are implicated. The state’s ability to act in such cases was upheld by the Supreme Court in United States v. McBratney.\(^\text{130}\) The McBratney Court sustained the authority of state courts to adjudicate crimes occurring in Indian Country between non-Indian victims and non-Indian perpetrators.\(^\text{131}\) This ruling is contrary to the holding of Worcester, which circumscribes state jurisdiction. However, recent cases reinforce the narrower interpretation of Worcester outlined in McBratney.\(^\text{132}\) As the erosion of Worcester continues, McBratney stands for the increasing intrusion of state law on tribal authority in Indian Country under the auspices of prosecuting non-Indian perpetrators for all crimes where the victim is also non-Indian.

D. Public Law 280 and the Transfer of Jurisdiction to Certain States

This picture is further complicated by Public Law 280 (P.L. 280), which forces some, but not all, states to assume the jurisdiction of the federal government. Beginning in 1953, P.L. 280 transferred legal authority over Indian Country from the federal government to certain enumerated mandatory

\(^{129}\) See Oliphant, 435 U.S. at 212.

\(^{130}\) See United States v. McBratney, 104 U.S. 621 (1882).

\(^{131}\) See id. at 624. If Worcester was still infallibly true, then McBratney would, necessarily, have a different outcome. McBratney would have held that the state’s laws and enforcement authority have no place in Indian Country.

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states.\textsuperscript{133} Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.\textsuperscript{134} The goal of P.L. 280 was tribal assimilation, a goal grounded in the paternalistic notion that tribes were incapable of governing themselves.\textsuperscript{135} "Congress expressed three concerns when enacting Public Law 280: lawlessness on reservations, the desire to assimilate Indian tribes into the population at large, and a shrinking federal budget for Indian affairs."\textsuperscript{136}

Originally, P.L. 280 allowed states to opt-in to jurisdiction without the consent of the tribes within the state.\textsuperscript{137} The law was amended in 1968 in two ways: 1) it required consent from the in-state tribe before the state could assert jurisdiction, and 2) it allowed states to retrocede jurisdiction, returning jurisdiction to the federal government.\textsuperscript{138} P.L. 280 substantially redefined criminal jurisdiction in the affected states by giving either mandatory or opt-in states jurisdiction over criminal matters occurring in Indian Country regardless of the perpetrator's identity as Native American or non-Indian. However, P.L. 280 did not strip tribes of jurisdiction over crimes committed between two tribal members in Indian Country, thereby giving tribes and the state concurrent jurisdiction in these limited situations.\textsuperscript{139}

The impact of P.L. 280 is sweeping. "Public Law 280 structures law enforcement and criminal justice for 23\% of the reservation-based tribal population and 52\% of all tribes in the lower forty-eight states, and potentially

\begin{itemize}
\item \textsuperscript{133} See Ada Pecos Melton & Jerry Gardner, American Indian Development Associates, Public Law 280: Issues and Concerns for Victims of Crime in Indian Country (2004), available at http://www.aidainc.net/Publications/pl280.htm (last visited Aug. 30, 2007) ("Public Law 280 was enacted in the 1950's—a period of termination and assimilation in Indian country—and it must be examined and understood within the context of the time period in which it was enacted. Public Law 280 was enacted in 1953 at the height of the post-World War II assimilationist period. . . . Public Law 280, however, differed from earlier grants of jurisdiction to the states in that it allowed every state to assume jurisdiction at their own option at any time in the future. Most previous grants of jurisdiction to the states had been limited to some or all the reservations in a single state. They also had generally followed consultation with the individual state and the affected Indian Nations. Public Law 280 itself began as an attempt to confer jurisdiction only on the state of California. Its scope, however, was substantially broadened in the course of the process which lead [sic] to its adoption by Congress. The Senate Report of the bill indicates that alleged lawlessness on the reservations and the accompanying threat to Anglos living nearby was the foremost concern of Congress when they passed Public Law 280 in . . . 1953.").
\item \textsuperscript{135} See Pecos Melton & Gardner, supra note 133.
\item \textsuperscript{137} 67 Stat. at 588-90.
\item \textsuperscript{139} Carole Goldberg & Duane Champagne, Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last, 38 CONN. L. REV. 697, 701 (2006).
\end{itemize}
affects all 239 Alaska Natives and their tribes or villages. P.L. 280 transfers the task of civil and criminal law enforcement from tribes and the federal government almost entirely to state and local law enforcement. This transfer of jurisdiction creates a complicated matrix of state and tribal law enforcement and prosecutorial capacities, with seismic results. State and local law enforcement agencies in P.L. 280 states often exercise weak and inadequate administration over crimes committed in Indian Country. As a result, tribes must use tribal law enforcement mechanisms to police Indian Country despite the fact that they may not have the jurisdiction to do so. In mandatory P.L. 280 states, tribes seemingly have been stripped of jurisdiction in favor of the state unless there has been a retrocession. Still more complicated are opt-in agreements between tribes and states, which have a wide range of jurisdictional provisions. This highlights the importance of the consultation process between states and tribes: tribes are able to retain some portion of jurisdiction over Indian Country as a result of amendments to P.L. 280. Tellingly, Professor Goldberg explains that “only 21.5% of Public Law 280 tribes in mandatory states outside Alaska have police departments. In contrast, 70% of all remaining tribes in the lower forty-eight states, including those in the optional Public Law 280 states, have tribal police departments.” Professor Goldberg’s groundbreaking study of tribal law enforcement in P.L. 280 states is just beginning to explore the reasons for the disparities in tribal law enforcement. These statistics are of particular importance for Native American victims of domestic violence, the advocates working on their behalf, and tribal communities in Indian Country. There are a dearth of law enforcement agencies available to respond to domestic violence occurring on the reservation in P.L. 280 states, leaving many Native American women with little or no recourse to protect themselves and their families from abuse.

140. Id. at 697.
141. See id. at 702.
142. See id. at 713.
143. Washington State, for example, retroceded partial criminal jurisdiction to the federal government over Tulalip tribes thereby granting the tribe greater law enforcement and judicial power. See Notice, 65 Fed. Reg. 75,948 (Dec. 5, 2000). In the aftermath of P.L. 280 it is not clear if tribes retain criminal jurisdiction as the act itself does not provide guidance on this issue. See CANBY, supra note 76, at 236. The Eighth Circuit recognized the inherent criminal authority of tribes over tribal members despite the tribe’s location in a P.L. 280 state. Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990). However, “implementation of Public Law 280 usually has marked the end of tribal criminal jurisdiction, either because of a lack of need or a lack of resources to maintain a tribal criminal justice system parallel to that of the state.” CANBY, supra note 76, at 221.
145. Goldberg & Champagne, supra note 139, at 705.
III
TRIBAL EXPERIENCES WITH PROSECUTION GAPS AND DOMESTIC VIOLENCE

Closing the prosecution gap requires an examination of the complicated reality of criminal jurisdiction in Indian Country. To help create appropriate solutions, we must understand the everyday reality of tribes. By turning from legal questions of jurisdiction to an examination of existing tribal resources and statistics we can more thoroughly evaluate potential remedies. This includes consideration of tribal law enforcement statistics, tribal jails, actions by federal officials, and interactions between tribes and states, including cross-deputization agreements.

A. The Failures of Federal, State, and Local Police to Aid Native American Victims of Domestic Violence

1. Experiences in States Not Covered by Public Law 280

A key element in evaluating the capacity of tribes to adequately address the problem of domestic violence against Native American women is tribal capacity to train effective and responsive law enforcement. If tribal law enforcement is incapable of responding to domestic violence emergencies, whether or not a tribal court has jurisdiction may be of little consequence to the victim at the moment of her emergency. In non-P.L. 280 states where there are no tribal police forces federal law enforcement, usually the Federal Bureau of Investigation or Bureau of Indian Affairs police force, is responsible for responding to and investigating emergency calls regarding domestic violence against Native American women.146 Indeed, in 1994 Congress expanded the reach of the Assimilative Crimes Act to give the Federal Bureau of Investigation jurisdiction over domestic violence in Indian Country.147 Unsurprisingly, federal law enforcement agencies, saddled with competing priorities and limited resources, are not able to prioritize domestic violence as part of their law enforcement portfolio or respond to every occurrence of domestic violence.148

In non-P.L. 280 states, if there is no tribal police force to respond to domestic violence emergencies and federal law enforcement agencies fail to respond, then state and local law enforcement agencies have no jurisdiction to intervene on behalf of the victim and detain or prosecute the abuser. This under-enforcement disproportionately impacts Native American women who

146. See Wakeling, supra note 38, at 7.
are forced to rely on federal law enforcement during domestic violence crises because state law enforcement has no power to protect them in the absence of tribal law enforcement. If federal law enforcement agencies do not prioritize the arrest and prosecution of non-Indians accused of domestic violence, Native American women have almost no legal recourse to aid them in curbing the violence. Not only do federal law enforcement agencies inadequately fund domestic violence work, but they often have little or no connection with the community in which they are asked to respond. Thus, they lack important cultural touchstones that would make the pursuit of offenders and efforts to resolve the situation much more effective.

2. Experiences in Public Law 280 States

In P.L. 280 states, the reality is worse still for Native American victims of domestic violence. There is often deep-seated hostility between tribes and local populations that adversely impacts the impetus and desire of state and local law enforcement to respond to crimes in Indian Country. P.L. 280 was foisted upon states without a concomitant appropriation of federal funds necessary to enable state and local law enforcement agencies to accommodate the increase in their policing activities. P.L. 280, in effect, reduced criminal law in Indian Country to an unfunded mandate. Therefore, state and local law enforcement agencies often lack the requisite resources and political will to effectively address crime in Indian Country, yet, there is no federal safety net upon which tribes can rely should P.L. 280 states fail to comply with their jurisdictional mandate.

149. See Goldberg & Champagne, supra note 139, at 698-99.

150. See Stephen Cornell & Jonathan Taylor, Sovereignty, Devolution, and the Future of Tribal-State Relations 3, Paper Presented to the National Congress of American Indians (June 26, 2000), available at http://access.minnesota.publicradio.org/civic_j/native_american/tribalstaterelations1.pdf (last visited Aug. 30, 2007) ("Indeed, one of the puzzles of tribal-state relations is why in one state there is little or no cooperation in a given policy area while in a neighboring state, tribe and state are cooperating with success on the same issues. In one state, the governor and legislature may resist cooperation with tribes, relying on the courts or lobbying Congress to limit tribal sovereignty. Right next door, the state and the tribes may view each other as partners, proactively negotiating solutions to mutual challenges . . . Where animosity characterizes tribal-state relations, the core of the conflict may be deep-seated mutual distrust or even racism, built up over decades.").


152. Data is only just beginning to be collected about resource allocation in Public Law 280 states. For a more detailed exploration, see Goldberg & Champagne, supra note 139, at 704-707.

153. See Jiménez & Song, supra note 136, at 1636 ("Even Congress has acknowledged its failure by stating that ‘Public Law 280 . . . has resulted in a breakdown in the administration of justice to such a degree that Indians are being denied due process and equal protection of the
These problems are compounded by state and local law enforcement officials who often have an incomplete understanding of their jurisdictional obligations in Indian Country, thereby hampering the response to ongoing crimes and undermining assistance to victims.\textsuperscript{154} In a study of the effect of P.L. 280 on California tribes, Professor Goldberg explains:

\begin{quote}
[T]he themes of confusion, inadequate or untimely service, and insensitive or discriminatory treatment appear in the responses [to the survey]. All but two of the nineteen tribes, for example, complained of serious gaps in protection from county law enforcement. And one-third of the tribes complained that the county officials fail to respect tribal culture and sovereignty.\textsuperscript{155}
\end{quote}

Native American victims of domestic violence in P.L. 280 states thus receive inadequate attention from state and county law enforcement, yet they cannot utilize federal law enforcement against domestic violence. The problems of law enforcement in P.L. 280 states are amplified when the tribe does not have a police force of its own, an especially common condition in mandatory P.L. 280 states\textsuperscript{156} that leaves the victim without any viable means of redress. That federal, state and local law enforcement agencies are often unable to be a reliable source of protection against domestic violence motivates the policy considerations—such as a retrocession of jurisdiction to tribes in P.L. 280 states and increased resources for state and local law enforcement agencies in P.L. 280 states who decline retrocession—we propose infra Part IV regarding the importance of tribal law enforcement mechanisms.

\subsection*{B. Tribal Law Enforcement}

We now analyze the role that tribal police play in combating domestic violence in Indian Country. Understanding the current state of tribal law enforcement is crucial to understanding whether tribal law enforcement is capable of effectively responding to ongoing domestic violence emergencies. If tribal law enforcement agencies do not have the necessary resources—personnel, budgets, equipment and facilities—their ability to police will be severely limited.

\begin{quote}
\textit{""} (quoting \textit{Senate Comm. on Interior and Insular Affairs, 94th Cong., Background Report on Pub. L. 280}, at 29-30 (Comm. Print 1975)).
\end{quote}

\textsuperscript{154} If accomplished scholars like Professors Carole Goldberg and Duane Champagne are only just beginning to flesh out the extraordinarily complexity of Public Law 280, how can state and local police departments be expected to have a comprehensive understanding of the law? \textit{See generally} Goldberg & Champagne, \textit{ supra} note 139.


\textsuperscript{156} \textit{See} Goldberg \& Champagne, \textit{ supra} note 139, at 705.
A 2001 DoJ study of tribal police found over 200 operational law enforcement agencies among the 561 federally recognized tribes, ranging in size from two to 200 personnel. A report by the Bureau of Justice Statistics focusing exclusively on tribal law enforcement found that in addition to tribal police forces, the Bureau of Indian Affairs (BIA) operated thirty-seven law enforcement agencies in June 2000 composed of nearly 3,500 officers, two-thirds of which were "sworn . . . with general arrest powers." 

Generally, tribal police forces are organized under the BIA, an arm of the Department of the Interior, pursuant to the Indian Self-Determination and Education Assistance Act of 1975. These tribal law enforcement agencies are "administered by tribes under contract with the BIA’s Division of Law Enforcement Services [which] . . . establishes the department’s organizational framework and performance standards and provides basic funding for the police function." The report found that "[d]epartments have limited resources with which to accomplish their mission. This is exemplified by the typical department, which patrols a large land area with a small number of police officers, works with older equipment and facilities, and depends on a relatively small operating budget." The DoJ has identified several obstacles to effective tribal policing, including: a lack of twenty-four hour police availability, gross under-funding, inadequate ratios between police officers and the service population, and differing cultural norms that often hamper non-Indian police officers serving in tribal police departments.

The population served by tribal police departments is nearly 1.1 million, resulting in 2.3 full-time sworn police officers per 1,000 residents, a far lower ratio than analogous state and county figures. The efficacy of the police force is also undermined by geography: the Cheyenne River Tribal Police Department in South Dakota, for example, employs fifty-three full-time sworn-in personnel and polices nearly 4,300 square miles with a population of 10,600 residents. This results in a ratio of one full-time officer per 100 square miles

157. WAKELING, supra note 38, at v.
159. Id. at 1.
160. Id.
161. WAKELING, supra note 38, at vi.
162. Id. (detailing other tribal law enforcement configurations).
163. Id. at 10.
164. Tribal police forces recruit members and non-members, and employ both Native Americans and non-Indians.
165. See WAKELING, supra note 38, at vii ("Existing data suggest that tribes have between 55 and 75 percent of the resource base available to non-Indian communities. But the terms used in this comparison may underestimate the resource needs of Indian Country departments.").
166. TRIBAL LAW ENFORCEMENT, supra note 158, at 1.
167. Id. at 2.
and five full-time officers per 1,000 residents. In terms of territorial jurisdiction, tribal police forces cover a geographic area more akin to county or state law enforcement agencies than city or town law enforcement police departments: the Navajo Nation Department of Law Enforcement polices almost 22,000 square miles in three states while the comparably staffed Reno, Nevada police department covers sixty square miles in total. The number of tribal police officers, to put it simply, is woefully inadequate:

The appropriate police coverage . . . comparison may not be between Indian departments and departments serving communities of similar size, but between Indian departments and communities with similar crime and social problems. Given that the violent crime rate in Indian Country is between double and triple the national average, comparable communities would be large urban areas with high violent crime rates. . . . [which] feature high police-to-citizen ratios, from 3.9 to 6.6 officers per thousand residents. Few, if any, departments in Indian Country have ratios of more than 2 officers per thousand residents.

The DoJ acknowledges that “reservation policing is in crisis” as a result of a plethora of ailments, including:

- poor employee morale and high turnover resulting in a lack of well-qualified and experienced officers;
- Inadequate budgets, fiscal mismanagement, and even corruption creating serious obstacles to the effective delivery of important police services and programs;
- Basic departmental management is flawed;
- Undue political interference in police operations inhibiting the ability of the police to perform their duties in a fair and equitable manner and reducing the credibility of the police in the eyes of the community.

The DoJ’s critique illuminates the structural problems plaguing tribal police departments.

The endemic lack of resources faced by tribal law enforcement is not an indication of incompetence or a fundamental inability to deal with crimes like domestic violence. Rather, it provides a basis from which to analyze what resources tribal law enforcement agencies need to effectively police Indian Country. Indeed, some tribes have been able to marshal resources for their tribal law enforcement agencies and create very effective police forces. The direct training and capabilities of tribal law enforcement agencies have been progressively emphasized and developed in recent years.

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168. Id.
169. Id.
170. WAKELING, supra note 38, at 27.
171. Id. at vii-viii.
172. In 1998, the Oneida Indian Nation in New York became the first tribal police force to be accredited by the Commission on Accreditation for Law Enforcement Agencies (CALEA), the organization that sets professional standards and assesses agency and individual success in fulfilling those criteria. See CALEA Online, http://www.calea.org/ (last visited Aug. 30, 2007).
If tribal police are to grapple successfully with domestic violence, especially if jurisdiction over non-Indian perpetrators is someday returned to tribes, they must have adequate police facilities to house arrestees, defendants, and convicts.\footnote{173} Effective law enforcement requires both the capacity to house perpetrators arrested immediately after a crime is committed and continued housing for those defendants convicted and sentenced to prison terms.\footnote{174} Without a functioning detention system, Native American women who seek help from tribal police during an ongoing emergency are in further physical jeopardy because their safety cannot be guaranteed afterward.

Bureau of Justice Statistics data on jails in Indian Country from 1998 to 2004 indicates that tribes lack the necessary facilities and programs to keep survivors safe.\footnote{175} In 2004, a Bureau of Justice Statistics survey reported that sixty-eight jails existed in Indian Country.\footnote{176} Forty-eight jails were operated by tribes, twenty were operated by the BIA, and one was privately operated.\footnote{177} Thus, less than 8% of tribes operate correctional facilities of any kind,\footnote{178} however "[t]he 10 largest jails held 44% of inmates in Indian country."\footnote{179} Ninety-one percent of jails in Indian Country are considered small jails, capable of housing less than fifty prisoners.\footnote{180} The jails are not only small but...
inadequately staffed; in 1998 Indian Country jails had a ratio of 2.5 inmates per correctional facility staff.\textsuperscript{181} In comparison, the ratio in small U.S. jails (defined as below fifty inmate capacity) was 2.0 inmates per correctional facility staff.\textsuperscript{182} In 2004 thirteen facilities were under court orders or consent decrees mandating certain health standards and maximum capacity rates\textsuperscript{183} because they had failed to maintain constitutionally acceptable conditions, up from eleven in 1998.\textsuperscript{184} Reported problems included nearly universal understaffing, inadequate or nonexistent equipment for special needs populations, and insufficient resources for drug and alcohol treatment programs.\textsuperscript{185}

The functional capabilities of the facilities put Native American women at risk because perpetrators cannot be incarcerated and rehabilitated. Only nine facilities could be used to house inmates being held less than seventy-two hours.\textsuperscript{186} The remaining facilities were built to house inmates convicted of misdemeanor crimes, excepting ten facilities equipped to hold convicted felons.\textsuperscript{187} Only two-thirds of the facilities operated mental health, drug and alcohol counseling programs.\textsuperscript{188} Additionally, twenty-three facilities offered education programs and nine facilities offered employment rehabilitation programs.\textsuperscript{189} "Twenty-two facilities offered domestic violence counseling—9 on-site, 10 off-site and 3 both on and off facility grounds. Two facilities provided sex offender treatment to confined inmates, both off facility grounds.\textsuperscript{190} The 2002 report gathered statistics on the types of crimes committed by inmates housed in Indian Country facilities. The survey found that 39% of the inmates were held for violent crimes and 18% of the total inmate population was incarcerated for domestic violence.\textsuperscript{191} These statistics highlight the profound lack of correctional facilities within Indian Country to house and rehabilitate offenders who commit domestic violence. Without a functioning correctional system perpetrators will not receive the services they need to end domestic violence.

Understanding the shortcomings of correctional facilities in Indian Country is necessary for evaluating tribal capacity not only for policing, but also for safely and efficiently housing criminals. Adequate tribal jails directly impact the safety of Native American women victimized by domestic violence.

\textsuperscript{181} Id. at 5.
\textsuperscript{182} Id.
\textsuperscript{183} Id. at 4.
\textsuperscript{184} JAILS IN INDIAN COUNTRY, 1998 AND 1999, supra note 175, at 5.
\textsuperscript{185} Id. at iv, 6.
\textsuperscript{186} Id. at 3.
\textsuperscript{187} Id.
\textsuperscript{188} JAILS IN INDIAN COUNTRY, 2004, supra note 175, at 5-6.
\textsuperscript{189} Id. at 7.
\textsuperscript{190} Id. at 6.
\textsuperscript{191} Id. at 3.
If tribal jails do not have the capacity to hold offenders, the victim's safety often cannot be guaranteed. Housing individuals arrested by tribal police or those convicted in tribal courts in offsite non-tribal facilities may lessen the financial and human resource burdens faced by many tribes.\footnote{192}

\textbf{C. The Role of Federal Law Enforcement and U.S. Attorneys}

U.S. Attorneys play a critical role in combating domestic violence against Native American women. In non-P.L. 280 states, non-Indian abusers enjoy impunity for violence against Native American victims if U.S. Attorneys decline to prosecute their crimes. Thus, the safety of Native American women is often dependent on the ability, wherewithal and impetus of U.S. Attorneys to investigate and prosecute domestic violence. Despite the crisis of violence in Indian Country, a recent study found that:

Federal prosecutors can intervene in serious cases, but often don't, citing the long distances involved, lack of resources and the cost of hauling witnesses and defendants to federal court. In the past two decades, only 30% of tribal-land crimes referred to U.S. attorneys were prosecuted, according to Justice Department data . . . . That compares with 56% for all other cases. The result: Many criminals go unpunished, or minimally so. And their victims remain largely invisible to the court system. The justice gap is particularly acute in domestic-violence cases . . . Local prosecutors say members of Indian communities have such low expectations about securing a prosecution that they often don't bother filing a report.\footnote{193}

Amplifying the already severe lack of prosecution of violent crimes in Indian Country is the inherent difficulty in prosecuting any domestic violence crime, both because witnesses often recant and because the crime must be severe to be considered a federal felony and confer federal jurisdiction under the Major Crimes Act.\footnote{194} An Assistant U.S. Attorney in Michigan explained that for prosecution of domestic violence to go forward in Indian Country, "'[i]t requires stitches, almost a dead body.'"\footnote{195} Professor Gavin Clarkson noted that "the federal statutory hurdle is so high that a broken nose is insufficient grounds for a felony assault charge. That requires 'serious bodily injury,' defined as 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.'"\footnote{196} Professor Clarkson goes on to note

\footnote{192. Some tribes may reject this idea, expressing a concern that that housing inmates at offsite, non-Indian facilities subverts sovereignty. Other tribes may overlook this concern because of limited resources and the need to deal with prisoners more effectively.}
\footnote{194. \textit{Id.}}
\footnote{195. \textit{Id.}}
"Chickasaw Nation Police Chief Jason O'Neil said predators strut through Indian Country as if they were in 'a lawless community, where they can do whatever they want.'" If U.S. Attorneys do not prosecute domestic violence perpetrated by non-Indians, Native American women suffer the consequences of the resulting lawlessness.

Statistics support these assertions, prosecutions for violent crimes in Indian Country differs in important ways. The 2004 DoJ report on crime in Indian Country found that approximately 75% of federal investigations in Indian Country involved a violent crime. Similarly, approximately 73% of charges filed in U.S. district courts involving Indian Country crimes were for violent crimes "compared to the national total of about 5%".

The U.S. Attorneys have considerable discretion in the kinds of cases they pursue through the Attorney's General Office. This discretion can lead to uneven enforcement of criminal laws, thus reinforcing the enforcement gap even when there is no lack of federal jurisdiction. Prosecutorial discretion, in turn, is influenced by the availability of resources. The resources available to U.S. Attorneys are pivotal to helping or hindering effective investigation of crimes in Indian Country, an issue compounded by his or her location in a rural setting with limited access to law enforcement. Inadequate resources and limited time to pursue domestic violence prosecutions similarly affect the quality of district court proceedings. The combination of these legal and practical concerns impact the federal government's rate of investigation and prosecution of domestic violence in Indian Country. To be sure, we do not mean to imply that U.S. Attorneys do not care about crime in Indian Country; rather they are overburdened by the volume of cases in their portfolios and a scarcity of resources.

D. The Impact of Tribal Courts in Helping Victims of Domestic Violence

Tribes must balance two distinct, important interests when fashioning a judicial solution to protect Native American women from domestic violence: sovereignty and security of the victim's person. These two interests reflect the historical and pragmatic realities tribes face when drafting culturally

197. Id.
199. Id. at 20.
201. Id.
202. See WAKELING, supra note 38, at 15 ("[M]any Native reservation residents live in rural, isolated areas and the resources and technologies available to effectively police these areas are in short supply.").
203. See Fields, supra note 193, at A1 ("Federal prosecutors have limited resources and focus almost exclusively on the most serious cases."); interview with Anonymous Assistant U.S. Attorney, supra note 200.
appropriate, effective legal structures:

[T]ribes should strive to protect their female members through a system which preserves the cultural values of the tribe. Without culturally appropriate means to lessen the social disruption, tribal societies risk losing their identity as distinct cultures and sovereigns. A commitment to traditional relational values, such as those which stress family and clan honor, should help to alleviate problems associated with the physical and psychological abuse of female tribal members.

A cookie-cutter approach to constructing culturally appropriate legal structures that does not account for variances among tribes will not aid Native American women. No pan-tribal identity exists; therefore one single legal code or court cannot appeal to every tribe’s individual values. Instead, each tribe must craft culturally appropriate domestic violence codes that will work to end abuse. In doing so, tribes will not only work with victims of domestic violence to increase their physical safety, but weaken the colonization process that teaches Native American women to feel shame in their ethnicity.

1. Tribal Codes

Due to the jurisdictional gap in prosecution of non-Indian aggressors in tribal court, we focus on the viability of tribal codes and courts in prosecuting Native American perpetrators. There is an additional legal restriction on a tribal court’s ability to punish Native American defendants: the Indian Civil Rights Act limits the term of imprisonment that a tribal court may impose on a convicted defendant to one year and fines of $5,000. Tribes and tribal courts currently employ a wide range of solutions to aid Native American women in ending abuse within relationships. Tribal codes can be used to buttress sovereignty by ensuring that as many tribal members as possible are reached by the language of the statute, by constructing a culturally relevant and appropriate criminal law, and by allowing the tribe to define and regulate crimes occurring within its territory. Professors Valencia-Weber and Zuni explain the distinctive nature of tribal codes and how they differ from traditional state legal codes:

The contents of tribal domestic abuse codes appear to be grounded in the traditional willingness of tribes to respect women in complementary roles which promote tribal well-being. The protection of the physical security of female tribal members is considered critical for two reasons: it maintains continuity with customary values, and it meets the duties of a government to promote the well-being of all members.

204. Valencia-Weber & Zuni, supra note 43 at 95-96. For an exhaustive study of tribal codes criminalizing domestic violence, see id. at 94-113.
In a survey of tribal codes and courts and the adjudication of domestic violence, Professors Valencia-Weber and Zuni found that tribal codes criminalizing domestic violence were common across tribes and "frequently recurring provisions are those defining domestic violence and identifying the persons protected under the law." Because of its geographic size and large population, the domestic violence code of the Navajo Nation has often been studied. The Navajo Nation code "clearly identifies the protected class and uses the identification to expand the class beyond that of several state family violence protection provisions in the United States." Similarly, the Chickasaw Nation tribal code bolsters sovereignty and protects women by defining domestic abuse as "any act of physical harm, or the threat of imminent physical harm, which is committed by an adult, emancipated minor, or Child age sixteen (16) or seventeen (17) years against another adult, emancipated minor or Child who are Family or Household Members." The code identifies a broad class of people who are protected from domestic abuse, including:

- spouses, ex-spouses, present spouses of ex-spouses, parents, Children, persons otherwise related by blood or marriage, persons living in the same household or who formerly lived in the same household, or persons who are the biological parents of the same Child, regardless of their marital status, or whether they have lived together at any time.
- This shall include the elderly and disabled.

The code further spells out the mechanisms Chickasaw women can use to obtain orders of protection against their abusers and the criteria by which tribal police may intervene and arrest suspected abusers. Chickasaw Nation police officers "shall not discourage a victim of domestic abuse from pressing charges against the assailant of the victim." Emergency ex parte orders may be issued by the tribal court if the court "finds [an ex parte order] necessary to protect the victim from immediate and present danger of Domestic Abuse, Stalking, or Harassment." Importantly, the Chickasaw tribal code mandates that within twenty-four hours of the issuance of a protective or ex parte order the relevant surrounding local and state law enforcement agencies must be notified of its existence. These lines of inter-jurisdictional communication

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208. Id. at 97-98.
209. Id. at 99.
210. The Chickasaw Nation is located in Oklahoma, which is a not a P. L. 280 state. Therefore, enrolled members of the Chickasaw Nation are subject to concurrent tribal and federal jurisdiction over the crime of domestic abuse and not state jurisdiction.
212. Id.
213. See id. at § 5-1201.2, 5-1201.9.
214. Id. at § 5-1201.9.
215. Id. at § 5-1201.3.
216. See id. at § 5-1201.5.
are a vital tool in protecting Native American women because state and local law enforcement agencies are obligated to give full faith and credit to tribal protective orders, thereby reinforcing the safety of Chickasaw women who may leave Indian Country. Finally, the tribal code specifies that the penalty for violating a protection or ex parte order is “a fine of not more than one thousand dollars ($1,000) or by a term of imprisonment of not more than one (1) year, or both.”

2. Peacemaker Courts

As a part of expressing the tribal value of justice, a number of tribes use traditional “peacemaker courts.” These courts are low-cost, non-adversarial mechanisms of dispute resolution that allow tribes to incorporate traditional tribal values in the judicial process. Debate exists as to the effectiveness of such courts in the prevention and resolution of domestic violence cases. Some advocates argue that they are ineffective because the threat of incarceration is necessary to effectuate behavioral change. Others assert that Native American men who behave violently toward Native American women are engaging in non-Native behavior and should not be allowed to participate in traditional tribal resolution.

To use peacemaker courts for domestic violence, tribal law must allow the court to exercise jurisdiction over these disputes. Two issues must be resolved before a peacemaker court may exercise jurisdiction over a non-Indian perpetrator of domestic violence: 1) whether Oliphant (holding that tribal courts have no jurisdiction over non-Indians in criminal matters) applies to tribal peacemakers courts; and 2) whether the tribe wishes to include non-Indians in traditional peacemaker courts. The second point is a key issue, even if it is determined that Oliphant does not control in these situations, the tribe still must determine if it wants to engage non-Indians in this practice.

Many advocates suggest that any sustainable effort to decrease domestic violence rates in tribal communities must focus on the relearning of tribal
values. By re-engaging with traditional values, tribal members, both male and female, may better orient their efforts and actions towards respecting Native American women. In some respects, peacemaker courts embody tribal cultural values because they apply tribal values to the judicial process. As such, they function as both a means and a mode of cultural reconciliation.

There are several advantages to using peacemaker courts, including strengthening conceptions of tribal sovereignty among members and providing immediate protection to Native American women. We will examine two models of peacemaker courts, Navajo and Chickasaw, to shed light on the more general differences between the peacemaker model and the U.S. adversarial model.

The Navajo Nation peacemaker courts are widely studied and provide a clear example of the reaffirmation of cultural values in action. The Navajo Nation frequently uses peacemaker courts to adjudicate domestic violence disputes.

The judges of the Navajo Nation courts established the Peacemaking system in 1982. Peacemakers work with people to help them take care of their problems on their own. Peacemakers are community leaders who employ the traditional Navajo method of "talking things out" to resolve problems. The Peacemakers use traditional methods of mediation and arbitration, but it should be noted that Navajo mediation and arbitration is different from the American "mediation" and "arbitration" models.

In a traditional peacemaker court cultural values guide the consensus reached by the parties. Navajo Judge Robert Yazzie describes Navajo peacemaker courts as seeking horizontal justice with "an end goal of restorative justice which uses equality and the full participation of disputants in a final decision. If we say of law that 'life comes from it,' then where there is hurt, there must be healing." Judge Yazzie explains that peacemaker courts are a "modern legal institution which ties traditional community dispute resolution to a court based on the vertical justice model."

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224. Id. at 113-14. For an overview of Navajo Peacemaker courts, see Yazzie, supra note 216, at 175-76 ("Navajo justice is unique, because it is the product of the experience of the Navajo People. . . . Law, in Anglo definitions and practice, is written rules which are enforced by authority figures. It is man-made. Its essence is power and force. The legislatures, courts, or administrative agencies who make the rules are made up of strangers to the actual problems or conflicts which prompted their development. When the rules are applied to people in conflict, other strangers stand in judgment and police and prisons serve to enforce those judgments. America is a secular society, where law is characterized as rules laid down by human elites for the good of society. . . . Our religious leaders and elders say that man-made law is not true 'law.' Law comes from the Holy People who gave the Navajo people the ceremonies, songs, prayers, and teachings to know it. . . . These contrasts show that while Anglo law is concerned with social control by humans, Navajo law comes from creation.").
226. Id. at 186.
Navajo peacemaker courts are distinct from Western courts in several important ways. Peacemaker courts do not follow traditional rules of evidence or seek the “truth” in a manner consistent with Western legal systems. Unlike American adversarial justice, “Navajo justice is a sophisticated system of egalitarian relationships where group solidarity takes the place of force and coercion.” While recognizing that forms of domestic violence existed within Navajo culture before contact, Judge Yazzie stresses the historical salience of peacemaker courts in reaching holistic resolution, explaining that “Navajos developed successful approaches to addressing [domestic violence]; modern social violence is an alien import.”

In 2003, the Chickasaw Nation passed the Peacemaking Court Act, creating peacemaking courts as a division of the courts of the Chickasaw Nation with a mandate to “operate in accordance with the provisions of the customary and traditional law of the Nation.” Under the Peacemaking Court Act, tribal judges may assign cases from tribal courts, which are constructed on a Western legal model, to a peacemaking court, which is constructed on a traditional model. Such a transfer requires an agreement from both parties to:

[P]rovide a forum for the use of traditional Chickasaw Nation methods of peacemaking to resolve disputes in a fair, informal, and inexpensive manner. Any ambiguity in this Code shall be liberally construed to carry out its purpose of encouraging traditional Chickasaw Nation methods of dispute resolution without formal court proceedings.

The judges of the Chickasaw Nation Supreme Court appoint the Peacemakers. The Peacemakers must meet extensive criteria before selection, including familiarity with Chickasaw traditional law and no prior convictions of any kind.

Chickasaw Peacemakers cannot compel resolution of a conflict if the parties do not willingly and mutually agree to resolution. If resolution of the dispute is impossible, the Peacemaker will refer the case back to the Chickasaw...
district court.\textsuperscript{234} This is an important protection for Chickasaw women; they cannot be compelled to agree to a resolution of domestic abuse if they do not feel sufficiently protected from future abuse.

Peacemaker courts, particularly the Chickasaw court, allow women the flexibility to address domestic violence in a culturally-appropriate manner while giving them the option to choose a different means of redress. Certainly, the key component of any domestic violence judicial proceeding is the ultimate safety of the victim. As such, peacemaker courts should be judged on their ability to provide effective remedies to women through the judicial system.\textsuperscript{235}

It is also important for Western legal systems to remain open to judicial processes that do not resemble the adversarial model, but nevertheless produce just outcomes for victims and offenders. The crucial element in this non-Western approach is that women are given flexibility in choosing their remedial process.

\section*{IV}
\textbf{FEDERAL LEGISLATION TO DECREASE DOMESTIC VIOLENCE IN INDIAN COUNTRY}

Recently, Congress renewed the Violence Against Women Act (VAWA) with amendments specifically tailored to tribes.\textsuperscript{236} Originally passed in 1994, VAWA represented a major step in the struggle to end domestic violence. However, in the eleven years between its passage and its renewal, the failure of VAWA to protect Native American women became woefully apparent. A coalition of groups, including advocates inside and outside of the DoJ, worked to strengthen VAWA's provisions as applied to Native American women. The 2005 VAWA renewal recognized the problem of domestic violence in Indian Country, acknowledging that "Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women; and the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women."\textsuperscript{237}

Congress outlined three goals with the passage of the renewed VAWA: 1) decreasing violence against Native American women; 2)
bolstering tribal sovereignty to enable tribes to better respond to Native American victims of domestic violence; and 3) ensuring perpetrator accountability for violence.238

The legislation allows the DoJ to take three important steps to combat violence against Native American women. First, the legislation authorizes the National Institute of Justice to conduct a national baseline study “to examine violence against Indian women in Indian country... [The study will examine] domestic violence, dating violence, sexual assault, stalking, and murder.”239 This study is a key step; unless the problem is properly diagnosed, implementing effective solutions in Native American communities is severely limited.

Second, VAWA as renewed created the position of Deputy Director for Tribal Affairs within the Office on Violence Against Women,240 who oversees a grant program for tribes aimed specifically at reducing violence against Native American women, providing technical assistance to tribes to aid in the prosecution of offenders and the implementation of programs to help Native American women, and functioning as a clearinghouse between the federal government, state governments, and tribes to ensure cooperation.241 Finally, as a direct result of VAWA’s new provisions for combating abuse of Native American women, the Office on Violence Against Women began soliciting applications for grants to tribal governments intended to:

(1) Develop and enhance effective governmental strategies to curtail violent crimes against and increase the safety of Indian women consistent with tribal law and custom; (2) increase tribal capacity to respond to domestic violence, dating violence, sexual assault, and stalking crimes against Indian women; (3) strengthen tribal justice interventions including tribal law enforcement, prosecution, courts, probation, correctional facilities; (4) enhance services to Indian women victimized by domestic violence, dating violence, sexual assault, and stalking.242

238. See id. at § 902.
239. Id. at § 904(a)(2).
240. See id. at § 907.
241. See id.
242. Id. at § 906. Section 906 also authorizes grants to:
(5) Work in cooperation with the community to develop education and prevention strategies directed toward issues of domestic violence, dating violence, and stalking programs and to address the needs of children exposed to domestic violence; (6) provide programs for supervised visitation and safe visitation exchange of children in situations involving domestic violence, sexual assault, or stalking committed by one parent against the other with appropriate security measures, policies, and procedures to protect the safety of victims and their children; and (7) provide transitional housing for victims of domestic violence, dating violence, sexual assault, or stalking, including rental or utilities payments assistance and assistance with related expenses such as security deposits and other costs incidental to relocation to transitional housing, and support services to enable a victim of domestic violence, dating violence, sexual assault, or stalking to locate and secure permanent housing and integrate into a
In particular, the Office on Violence Against Women has begun solicitations for four significant grants: 243 1) Rural Domestic Violence and Child Victimization Enforcement Grants, which acknowledge and work to minimize the “unique barriers to receiving assistance and additional challenges rarely encountered in urban areas” faced by Native American women living in rural jurisdictions; 244 2) Grants to Encourage Arrest Policies and Enforcement of Protection Orders, which are aimed at encouraging state, local, and tribal governments and courts “to treat domestic violence, dating violence, sexual assault, and stalking as serious violations of criminal law requiring the coordinated involvement of the entire criminal justice system."; 245 3) The Safe Havens: Supervised Visitation and Safe Exchange Grants, which aid tribes in creating supervised visitation programs for children in families with domestic violence; 246 4) Legal Assistance for Victims Grants, which “increase the availability of civil and criminal legal assistance” to Native American women who are the victims of domestic violence.247

The baseline study, the creation of the Deputy Director of Tribal Affairs position, and the solicitation of grants are ground-breaking reforms that hold great promise in that they allow for better long-term responses to domestic violence in Native American communities from federal, state, and tribal actors. Congressional funding for these initiatives is not only key to reducing violence, but also key to understanding and addressing the causes of and remedies for violence against Native American women in tribal communities. Importantly, Congress specified that 10% of the funding for VAWA grants be set aside for tribes.

VAWA’s new provisions also provide short-term responses to domestic violence against Native American women with regard to the implementation of the Firearms Possession Prohibition. Section 908 amended the federal criminal
code to include under the term “misdemeanor crime of domestic violence” any offense that is a misdemeanor under tribal law.\textsuperscript{248} Therefore, tribal court convictions of domestic violence count as a “strike” against offenders in federal and state judicial systems. Congress included the Firearms Possession Prohibition in the new amendments precisely because statistics indicate a higher rate of domestic violence among the families of police officers or military personnel.\textsuperscript{249} In addition, Section 908 prohibits any person from owning a gun if they have been convicted pursuant to federal criminal code for the misdemeanor crime of domestic violence.

Section 909 functions similarly by recognizing the judgments of tribal courts in federal sentencing:

*Domestic assault by an habitual offender*. . . . Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction.\textsuperscript{250}

Section 909 recognizes tribal sovereignty by triggering federal sentences if a perpetrator is convicted in tribal court. This is an important provision because prohibits tribal courts from imposing punishments greater than one year in prison and fines of up to $5,000.\textsuperscript{251} Subjecting offenders to federal jurisdiction, thereby triggering federal sentences, allows for the crafting of punishments with more flexibility than is permitted under ICRA. This mechanism does not place a further burden on tribes to independently allocate financial or human resources support for Section 909. By writing federal statutes to include tribal court convictions, the sovereignty and credibility of tribal courts is acknowledged and Native American women benefit from the protections of federal and tribal law through the imposition of more serious penalties for repeat offenders. Giving full faith and credit to tribal court decisions bolsters sovereignty and provides for better working relationships between tribal, state, and federal actors.\textsuperscript{252} Counting tribal court decisions as a “strike” against offenders gives weight to tribal court proceedings and provides Native

\begin{itemize}
  \item \textsuperscript{248} VAWA Reauthorization, *supra* note 10, at § 908.
  \item \textsuperscript{249} See National Center for Women and Policing, Police Family Violence Fact Sheet, http://www.womenandpolicing.org/violenceFS.asp (last visited Aug. 30, 2007) ("Two studies have found that at least 40% of police officer families experience domestic violence, in contrast to 10% of families in the general population. . . . A police department that has domestic violence offenders among its ranks will not effectively serve and protect victims in the community.") (emphasis in original).
  \item \textsuperscript{250} VAWA Reauthorization, *supra* note 10, at § 909.
  \item \textsuperscript{252} This provision does not stand for the proposition that incarceration is the most effective method of protecting Native American women or ending domestic violence. Whether or not incarceration deters domestic violence is outside the scope of this Comment. We wish only to emphasize the utility in keeping options for Native American women open.
\end{itemize}
American women with additional avenues for justice.

V

POLICY RECOMMENDATIONS:
IMPROVING TRIBAL MECHANISMS FOR PROTECTING WOMEN

Implicit in every policy recommendation is a calculus that takes stock of the current political context—the plausibility of legislative solutions must be evaluated from political, administrative, and financial viewpoints. This is particularly true when assessing the feasibility of legislative solutions that impact tribes. There is, of course, a certain paradox in the tribal context: tribes seek to reinforce their sovereignty and yet must rely on Congress to buttress the very sovereignty they wish to assert. In making recommendations aimed at ending domestic violence in Indian Country, we are aware that some tribes rely on Congress for both financial and legal resources and that, through inaction and insufficient allocation of resources, Congress has frequently thwarted tribal efforts to assert sovereignty.

Despite this tension, it is difficult to imagine a solution to the epidemic of domestic violence in Indian Country without effective congressional legislative action. Given the current relationship between tribes and the federal government, it is unlikely that bona fide solutions for Native American women exist that will not implicate cooperation between both sovereigns.

A. Congressional Funding of Federal Prosecution for Domestic Violence

The web of jurisdiction over criminal offenses in non-P.L. 280 states within Indian Country is incredibly complicated, which often makes it difficult for victims to obtain legal redress for violent crimes committed against them. If a Native American woman accuses her partner of domestic violence and her partner is an enrolled member of her tribe or any other tribe, the tribe and the federal government have concurrent jurisdiction over the accused.\(^{253}\) However, if a Native American woman accuses her partner of domestic violence and her partner is a non-Indian, the tribe has no jurisdiction over the crime and she is wholly reliant on the federal government for arrest and prosecution of the accused.\(^{254}\) Given that Native American women are frequently subject to

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253. *See* United States v. Wheeler, 435 U.S. 313, 328 (1978) ("[T]he power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government."); United States v. Lara, 541 U.S. 193, 210 (2004) (in response to a challenge to federal statute granting tribes criminal jurisdiction over non-member Indians, the Court stated that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians.").

254. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.").
domestic violence at the hands of non-Indian partners, it is imperative that the federal government exercise its authority in prosecuting non-Indian offenders who commit crimes in Indian Country.255

Domestic violence prosecutions are extremely difficult to undertake and many prosecutors are reluctant to pursue them.256 In many jurisdictions, the U. S. Attorney has a great deal of discretion in deciding whether to prosecute crimes in Indian Country. Moreover, federal law enforcement agencies may be reluctant to investigate allegations of domestic violence, considering such investigations outside their purview. Where the tribe cannot intervene, Native American women are left with no mechanism for arresting or prosecuting their abusers, thereby creating an enforcement void.

Congress must provide the necessary resources to DoJ to allow the department to prioritize the prosecution of domestic violence claims where tribes have no jurisdiction or ability to prosecute. Congress should appropriate the necessary resources to uphold its obligation to Native American victims of domestic violence. We do not propose that resources be taken away from other offices within DoJ, instead, we propose that Congress direct resources toward U.S. Attorneys' offices located in Indian Country that routinely encounter these types of cases. Congress has a responsibility to protect Native American women as part of the federal trust responsibility and DoJ must carry out this mandate. Federal prosecutors and law enforcement agents need to work with tribes to protect victims of domestic violence. A congressional mandate of this type would encourage tribal and federal actors to collaborate and develop positive working relationships.

B. Limited Oliphant Waiver with an Opt-In Provision for Tribes

Perhaps the most controversial and potentially most effective mechanism for ensuring the safety of Native American women who are the victims of domestic violence would be a federal congressional statute waiving the jurisdictional restrictions outlined by the Supreme Court in Oliphant, which held that tribes do not have criminal jurisdiction over non-Indians who commit crimes in Indian Country.257 Under Oliphant, the tribe cannot prosecute a non-Indian who is violent toward his Native American partner. In a non-P.L. 280 state, only the federal government can prosecute the non-Indian.258

256. See Joan S. Meier, Davis/Hammon, DOMESTIC VIOLENCE, and the Supreme Court: The Case for Cautious Optimism, 105 MICH. L. REV. FIRST IMPRESSIONS 22, 23 (2006), http://www.michiganlawreview.org/firstimpressions/vol105/meier.pdf (last visited Aug. 31, 2007) ("Indeed, domestic violence cases are notoriously difficult to prosecute, precisely because the defendant, rather than the State, has functional control over the key witness.") (emphasis in original).
257. See Oliphant, 435 U.S. at 211.
258. In a P.L. 280 state, the state would always have exclusive criminal jurisdiction over the non-Indian offender.
In *U.S. v. Lara*, the Supreme Court held that Congress has the authority to remove restrictions on tribal criminal jurisdiction without violating the Double Jeopardy Clause.\(^{259}\) Accordingly, Congress could pass a statute providing a limited *Oliphant* waiver granting tribes criminal jurisdiction over non-Indians accused of domestic violence. Such a mechanism should include an opt-in provision for tribes. By opting in, tribes would be required to affirmatively assume jurisdiction. Funding programs for police training, building or renovating tribal jails, and technical assistance for tribal courts should accompany such legislation. This application of *Lara* is novel considering the jurisprudence in *Oliphant*. There are no studies on the ramifications of tribal prosecution of non-Indians. Thus, it might be advisable for Congress to initiate this program for a small number of tribes at the outset to gauge its impact.

A limited *Oliphant* waiver would accomplish three important goals. First, it would remedy the enforcement void faced by Native American women who attempt to prosecute their abusers. Second, it would allow tribes to choose whether to accept jurisdiction, thus avoiding problems for those tribes lacking the institutional mechanisms for effective tribal law enforcement and prosecution. Third, it would invigorate tribal sovereignty. Troy Eid, United States Attorney for the District of Colorado recently endorsed the notion of an *Oliphant* waiver in regards to violent crime in Indian Country:

> My idea is that those Indian tribes that so choose, and agree to fully protect criminal defendants’ federal constitutional rights, should be permitted to enforce their criminal laws against all persons regardless of race or ethnicity. The essence of sovereignty for any government is to provide for citizens’ basic public safety needs—regardless of whether the affected community is located on or off an Indian reservation. Indian reservations are too often safe havens for violent crime because of federal neglect, inconsistency and broken promises.\(^ {260} \)

However, it is unlikely that Congress would pass a limited *Oliphant* waiver unless it included a provision giving federal courts appellate review of tribal court decisions concerning non-Indians. In doing so, Congress would respond to concerns about violations of non-Indians’ civil liberties in tribal court. Though we disagree with the notion that tribal courts are in anyway less adequate than federal courts—both Native and non-Indian offenders should be subject to the jurisdiction of tribal courts—the political culture is such that mechanisms for appellate review may be a sacrifice tribes would have to make in order to obtain a limited *Oliphant* waiver. Many tribes would find such a provision an unpalatable infringement on sovereignty. This is a valid criticism.

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and may result in some tribes declining to opt in despite having the resources to do so. Tribes will be forced to balance sovereignty against an increased ability to prosecute those accused of domestic violence.

C. Amend the Indian Civil Rights Act to Give Tribal Courts Greater Flexibility

Currently ICRA prevents tribal courts from imposing punishments greater than one year in prison and fines of up to $5,000. To give tribal courts more freedom in crafting remedies to fit the needs and ensure the safety of Native American women victimized by domestic violence, Congress should amend ICRA to allow for greater flexibility in sentencing perpetrators of domestic violence. To that end, Congress could create a waiver of ICRA when the defendant is convicted of domestic violence. This is an especially important recommendation should a limited Oliphant waiver come to fruition.

D. Retrocession of Jurisdiction in Public Law 280 States

As described in Part II, if a Native American woman is the victim of domestic violence in Indian Country in a P.L. 280 state, she must turn to state law enforcement for help. Unfortunately, state and county law enforcement agencies often lack the necessary financial resources, manpower, legal understanding of their responsibilities in Indian Country, and political will to respond to domestic violence complaints from Native American women. Furthermore, mutual distrust and hostility between tribes and state and county law enforcement has lead to reluctance to request assistance or intervention. This leaves Native American women with no effective legal recourse; they can obtain neither protection nor prosecution of their abusers from the state. The inability of federal, state and local law enforcement agencies to serve as a reliable means of protection against domestic violence in Indian Country underscores the need for competent tribal law enforcement with the authority to respond to and intervene in ongoing crimes in Indian Country.

P.L. 280 permits the retrocession of jurisdiction to tribes should the state so desire. Some states may be reluctant to cede jurisdiction to tribes, yet these fears can be allayed through bolstering of tribal judicial mechanisms, including ensuring the ability of the tribe to fund and maintain its own police force, the creation and continued maintenance of tribal courts, and limited jurisdictional retrocession.

States and tribes can create retrocession statutes that grant tribes

262. We do not presume to know what the appropriate penalties are for those convicted of domestic violence. Rather, we assert that tribal courts should have the flexibility to determine the punishment for violent offenders.
263. See WAKELING, supra note 38, at 13.
jurisdiction over domestic violence crimes. This would take the form of a partial retrocession that may be coupled with state or federal funding and training to ensure that adequate tribal judicial structures are in place. Limited retrocession may be a politically palatable solution for states with constituencies reluctant to allocate funds for state and local law enforcement agencies with jurisdiction over Indian Country, because tribes would assume responsibility for increased policing. Retrocession not only benefits Native American women by giving them a police force capable of responding to ongoing emergencies, but it also gives Native American women the ability to obtain legal relief through tribal courts. Moreover, tribal police forces will be able to respond in a culturally-appropriate manner resulting in increased trust of law enforcement by victims, an outcome that would likely aid in crime reporting. Furthermore, retrocession serves to reassert tribal sovereignty.

In states that agree to retrocession, Congress must provide the necessary funds to bolster tribal law enforcement. Prior to any discussion of retrocession, Congress should mandate that DoJ or BIA work with tribes to create and maintain effective tribal law enforcement and tribal courts.

E. Increased Resources for State and Local Law Enforcement Agencies in Public Law 280 States

One of the most significant obstacles to responding to domestic violence in Indian Country is resource allocation. In granting jurisdiction to P.L. 280 states, Congress did nothing to increase funding for state and county law enforcement agencies with increased policing portfolios as a result of P.L. 280. As part of its federal trust responsibility, Congress should allocate federal funds to increase the ability of state and local law enforcement agencies to adequately respond to crime in Indian Country. The measure of state and local responsiveness should include: 1) increased law enforcement manpower commensurate with crime levels in Indian Country; 2) training on jurisdictional issues to ensure that state and county law enforcement understand their legal obligations in Indian Country; 3) training on tribe-specific, culturally appropriate methods of policing and responding to domestic violence in Indian Country; and 4) training for prosecutors to aid them in pursuing claims against abusers.

These federal funds must mandate cooperation between tribes and state

264. The creation of tribal courts in P.L. 280 states has long been a hurdle to asserting tribal sovereignty. The BIA has refused to support the establishment of tribal courts in P.L. 280 states claiming that tribal courts are unnecessary because states have jurisdiction. See Carole Goldberg-Ambrose, Planting Tail Feathers: Tribal Survival and Public Law 280, 8-12 (1997). Retroceding jurisdiction to tribes for domestic violence would serve the dual purpose of aiding Native American women in ending violent relationships and buttressing tribal courts. This recommendation is, of course, dependent on adequate support from the BIA in permitting the formation of tribal courts.
and local law enforcement agencies to develop strategies unique to each tribe. This will allow police to develop trust with and become a resource for Native American women. The tense relationship between tribes and law enforcement necessitates improving communication and cooperation between tribes. Communication is imperative to developing effective strategies that provide relief to Native American women. Congressional funds for the creation of tribal liaisons, functioning at either the state or county level, to communicate between state and county law enforcement and tribes are necessary to ensure that the needs of tribes and Native American crime victims are met. Without the creation of a tribal liaison position, this solution simply throws money at a problem with no end in sight. A solution that works for just states is not a solution for Native American women.

**F. Increased Resources for Tribal Police Forces and Jails**

Coupled with retrocession in P.L. 280 states and cross-deputation agreements, tribes must have greater access to resources for their police forces and tribal jails. Tribal law enforcement agencies that are uniquely positioned to respond to domestic violence in a culturally appropriate manner will help enable Native American women who seek to leave abusive relationships. As described in Part III, tribal police forces have inadequate funding, facilities, and staffing due largely to limited tribal resources. Funding initiatives that allow tribes to build adequate facilities and staff their police forces with an appropriate number of law enforcement officers will greatly aid tribal police forces in responding to domestic violence. Federal funds could be earmarked to create domestic violence units within tribal police departments.

**G. Culturally Appropriate Training for Law Enforcement**

Tribal police forces are not always comprised of members of the tribe. Just as state and federal law enforcement officers need training in culturally appropriate law enforcement, so too do tribal law enforcement officers. Law enforcement agencies must understand the cultural practices that impact the communities they police. Compliance with cultural norms "confers

265. See Wakeling, supra note 38, at 27 ("[E]xisting data suggest that tribes have between 55 and 80 percent of the resource base available to non-Indian communities. . . . [W]e believe the terms used in this comparison may underestimate the actual budgetary needs of police departments in Indian Country.").

266. Increased resource allocation to tribal police forces will not only benefit the victims of domestic violence, it will also benefit the general tribal population by giving police greater capacity to respond to all types of ongoing emergencies. This, in turn, may result in decreased domestic violence within the community. For example, there may be a correlation between domestic violence and substance abuse. If police can reduce substance abuse in Indian Country (decreasing the distribution and usage of methamphetamines, for example) a corresponding decrease in domestic violence may occur.

267. See Wakeling, supra note 38, at ix.
legitimacy” on tribal law enforcement agencies, allowing police to better serve the tribal community. Failing to recognize the problems confronting tribal law enforcement agencies means that developing strategies to aid victims will be unsuccessful.

H. Tribal-State Cross-Deputization Agreements

In both P.L. 280 states and non-P.L. 280 states, law enforcement officers often face complicated jurisdictional issues when attempting to respond to an ongoing domestic emergency. For instance, police may not know if they are arresting a Native American or a non-Indian, if they are in Indian Country or state land, or if the victim is Native American or non-Indian. It is imperative that police not refuse to intervene in emergencies because they are unclear about their obligations. As such, cross-deputization agreements pursuant to the Indian Law Enforcement Reform Act would allow federal, state, and tribal law enforcement to arrest and detain suspected offenders, including men suspected of domestic violence against Native American women, until the determination can be made regarding which law enforcement agency has jurisdiction. Once such a determination is made, the accused would be delivered to the appropriate agency. Optimally, an agreement would include a provision requiring prosecutors to determine which agency has jurisdiction within forty-eight hours of the suspect’s detention. Recent DoJ data reveals that of 561 tribes in the United States, 163 tribal law enforcement agencies have cross-deputization agreements, 84 of which are with “non-tribal authorities.” Tribal, state, and federal authorities should work together to increase the number of cross-deputization agreements, thereby providing greater law enforcement resources for Native American women during domestic violence emergencies. To ensure that cross-deputization agreements are implemented, Congress should allocate funds designed to aid law enforcement in complying

268. Id. (“The police officer at Tohono O’odham who aggressively confronts a suspect will have offended longstanding tribal norms and will have failed to draw on them in the service of obtaining the suspect’s compliance. By contrast, the police officer at Turtle Mountain or one of the Lakota tribes who fails to confront a suspect is guilty of the same error.”).

269. It is important to remember that many non-Indians live within Indian Country and, when they are the victims of crime, should be afforded protection from violent crime.


271. See Cross-Deputization Agreement Between the City of Marlow, Okla., and the Bureau of Indian Affairs 3 (Dec. 8, 1993), available at http://www.ncai.org/ncai/resource/agreements/ok_law_cross-deputization_agreement_between_bureau_of_indian_affairs_chickasaw_nation_and_city_of_marlow_december_1993.pdf (last visited Aug. 31, 2007) (“It is the expressed desire and intent of all parties to this Agreement to allow law enforcement officers to react immediately to observed violations of the law and other emergency situations without regard to whether they occur on or off Indian lands.”).

with the agreements.

I. Data Collection

The tribal provisions in the Violence Against Women Act of 2005 call for a national baseline study of violence against Native American women.\(^{273}\) Obtaining accurate data about domestic violence in Indian Country including data about offenders, the response of law enforcement, and the rate of federal, state, and tribal arrests and prosecutions is crucial to formulating effective responses to domestic violence in Indian Country. An integral aspect of this study is culturally-appropriate data collection. Native American women may be reluctant to discuss the intimate details of their relationships with outsiders who may be unfamiliar with the tribe or who may not speak the language in which the woman feels most comfortable communicating. The DoJ must work in conjunction with tribes to create a study that obtains accurate and useful data. Without tribal cooperation and consultation, the data collected may be of little value in evaluating solutions to end domestic violence in Indian Country.

J. Supporting Advocates and Non-profit Organizations

Outside of traditional law enforcement, there are other organizations that positively impact the lives of Native American women who are victims of domestic violence. These organizations are also central to any efforts to decrease domestic violence in Indian Country. Advocacy organizations are critical in helping Native American women and tribes respond to the epidemic of domestic violence.\(^{274}\) Non-profits provide invaluable services in the fight against domestic violence. Their nuanced approaches recognize that domestic violence affects tribal communities differently than other communities. Funding advocates and non-profit organizations working to aid Native American victims of domestic violence should be a priority for the federal government and foundations capable of supporting community-based organizations.

\(^{273}\) VAWA Reauthorization, supra note 10, at § 904.

\(^{274}\) Two major non-profit organizations work with tribes to combat violence: The Sacred Circle National Resource Center to End Violence Against Native Women (www.sacred-circle.com) and Mending the Sacred Hoop (www.msh-ta.org). These sister organizations provide education and technical assistance to tribes and tribal law enforcement in an effort to prevent and remedy domestic violence. Sacred Circle, funded by the U.S. Department of Health and Human Services, is based in South Dakota. Its mandate is to “provide training and technical assistance to Native American Nations and tribal organizations seeking to end violence against Native American women.” Sacred Heart Circle, “About Us”, http://www.sacred-circle.com/2007ABOUTUSPg.html. Mending the Sacred Hoop is based in Minnesota and is part of a larger non-profit dedicated to helping all victims of domestic violence. The group works to “restore safety and integrity to Native women by assisting Native Sovereign Nations in strengthening their response [to] domestic violence and sexual assault.” Mending the Sacred Hoop, http://www.msh-ta.org/
CONCLUSION

Despite the federal government’s trust responsibility to tribes and the states’ federally-prescribed statutory obligation to tribes, neither the states nor the federal government have fulfilled their responsibilities to Native American women who are the victims of domestic violence. It is likely that a Native American woman will endure domestic violence in her lifetime. If she lives in Indian Country, it is also very possible that her plight will slip between the jurisdictional gaps currently plaguing tribes. If tribes are not allowed to exercise their inherent sovereignty, then Native American women will continue to suffer from disproportionate rates of domestic violence with no viable recourse. As Professor Kevin Washburn eloquently explained to the Senate Committee on Indian Affairs, “[b]oth tribal self-governance and public safety are better served when tribes exercise a central role in providing public safety and criminal justice on Indian reservations.”

Congress can provide meaningful avenues through which federal, state, and tribal governments can act together to curtail domestic violence in Indian Country. Integral to any congressional enactments aimed at combating domestic violence is respect for tribal legal traditions, tribal criminal jurisdiction, and culturally-appropriate law enforcement. Congress has the capacity to compel federal and state governments to cooperate with tribes in the protection of Native American women. Capacity must be turned to action, as congressional intervention is the only way to ensure the implementation of effective remedies for Native American women.

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