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TRIBAL JURISDICTION AND DOMESTIC VIOLENCE: THE NEED FOR NON-INDIAN ACCOUNTABILITY ON THE RESERVATION

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Domestic violence is a severe problem for tribes across the nation, as their female members are victimized at highly disproportionate rates compared to members of dominant society. Many tribes have sophisticated domestic violence codes to combat the problem, but they are powerless to prosecute the majority of those who will abuse Indian women: non-Indian men. In 1978 the Supreme Court stripped tribes of their power to prosecute non-Indians in criminal matters, which not only damaged tribal sovereignty but also meant the difference between a life free from abuse and one with constant fear, intimidation, and pain for Indian women.

The federal government has, since that time, had almost exclusive jurisdiction over non-Indians who commit crimes on the reservation. Federal prosecutors with heavy workloads and limited resources often plead out cases of domestic violence to far lesser crimes or decline to prosecute these offenses at all. Tribes that have the resources and commitment to stop violence against Indian women are forbidden to take action against non-Indian offenders. This lack of accountability on the part of dominant society must stop immediately, and tribes must have the power to prosecute these non-Indian offenders to provide the protection these women deserve.

This Note argues that Congress should restore tribal jurisdiction over non-Indian criminal offenders. The primary purpose of restoring tribal jurisdiction is to protect Indian women from abuse by repeat offenders, and ensure these women receive the justice they deserve. Allowing tribes to assert jurisdiction over non-Indian offenders will also show that the federal government has not forgotten the sovereign status of Indian nations, established almost 200 years ago. As sovereign nations, tribes should be permitted to enforce laws covering their territory and ensure justice for their members by responding to the unique problems facing American Indians. Tribal jurisdiction over non-Indians is essential to accomplishing these goals and must be restored by Congress at once.

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INTRODUCTION

There are men in the United States who can hit, shove, burn, intimidate, threaten, and stalk women without any fear of repercussion. At most, these men may be arrested for the violence they commit against their wives, girlfriends, and daughters, but they certainly will not be prosecuted. After a night at the local jail, or, more likely, ineffective warning by police, the victimizer is free to do as he pleases. He will not hear from law enforcement officials again, until the next time a 911 dispatcher receives a frantic call from a woman who is trying to survive the victimizer's abuse. In too many cases, the woman will not survive.

If you are a victim of domestic violence in the United States, the effectiveness of the protection from violence that you receive from law enforcement depends on which side of the reservation line you live and whether your victimizer is an American Indian. If you are an American Indian woman living on a reservation, and are abused by a non-Indian man, you receive less protection from domestic violence than any other American woman. Additionally, if you are an American Indian woman, you are more likely to be a victim of domestic violence than a non-Indian woman.[1] These alarming circumstances facing American Indian women are not due to any failure on the part of tribal governments to do what is best for its members; nothing could be further from the truth. Many tribes have sophisticated domestic violence codes in place and resources available to help victims cope with abuse.[2] What the tribes lack, however, is the most powerful tool to combat the problem of domestic violence: the power to prosecute these offenders and hold them accountable for their actions. Tribes do not have the power to prosecute non-Indian offenders because the Supreme Court eviscerated tribal jurisdiction over these crimes and designated the federal government, and only a handful of states, as the sole authority responsible for prosecuting these crimes. Tribes are able and eager to protect abused women, but in 1978 the Supreme Court held in *Oliphant v. Suquamish Indian Tribe*[3] that tribes do not have jurisdiction to prosecute non-Indian criminal offenders.

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1. *See* CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 176354, SPECIAL REPORT ON VIOLENT VICTIMIZATION AND RACE 1993–1998 9 (2001) (noting the victimization rate for Native women is 23 per 1,000, as opposed to rates of 2 to 12 per 1,000 for non-Native women).

2. Blackfeet Tribal Law and Order Code, Ordinance 82, Domestic Abuse Law Ordinance (1999), The Cherokee Code, Chapter 50B: Domestic Violence Prevention.

3. 435 U.S. 191 (1978).

Oliphant arose out of two charges against non-Indian residents of the Port Madison Reservation for crimes committed against Indians on reservation lands. The case was brought before the Supreme Court to determine whether the tribe could prosecute non-Indians who committed these crimes against Indians on the tribe's land. The tribe argued that criminal jurisdiction over non-Indians came from "retained inherent powers of government over the Port Madison Indian Reservation."[4] However, the Supreme Court ultimately held that the tribe does not have criminal jurisdiction over non-Indians because such a holding would be inconsistent with Congressional and administrative action that suggests otherwise. Since *Oliphant* was decided in 1978, tribes have not been able to assert general criminal jurisdiction over non-Indians who commit crimes against Indians on reservation land, and absent Congressional action, *Oliphant* will remain good law.

The relevant legislation bearing on the issue of tribal jurisdiction over non-Indians consists of the *General Crimes Act*[5] and *Public Law 280*.[6] The General Crimes Act grants the federal government jurisdiction over non-Indians who commit crimes on the reservation, but it does not speak to concurrent jurisdiction between tribes and the federal government. Public Law 280 allows states to assume such jurisdiction over non-Indians by statute or state constitutional amendment, and extends jurisdiction over reservation land to five states. Subsequent to this legislation and the Supreme Court's holding in *Oliphant*, when tribal police respond to domestic violence calls, they are able to intervene at that moment, but tribal prosecutors cannot file charges to hold non-Indian offenders accountable for their actions. The tribe's only recourse is to refer matters to federal prosecutors, who are far removed from the reservation and its population. With heavy workloads and limited resources, federal prosecutors allow the more serious crimes to take priority over non-felony domestic violence crimes. The result is that crimes against Indian women do not receive adequate attention, and often are not prosecuted at all. This Note argues for Congressional action to reverse the decision in *Oliphant* and grant tribes the power to assert jurisdiction over non-Indians who commit crimes on the reservation. As this Note will show, tribal jurisdiction over non-Indians is especially important to combat the epidemic of domestic violence on

4. *Id.* at 196.
5. 18 U.S.C. § 1152 (1948).
6. Pub. L. No. 280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162).

the reservation, and to ensure criminal justice is not based on the tribal membership of the victim.

Data comparing the number of cases submitted to the Attorney General for prosecution with the number of cases actually prosecuted is not currently available. However, the University of Michigan is collaborating with the Eastern Band of Cherokee Indians ("EBCI") to create a mechanism that will provide the tribe with this data. The Inter-Governmental Tracking System ("IGTS") will allow tribal officials to determine the extent to which these crimes go un-prosecuted, and will illustrate the need for changes in the current system to protect Indian women. Project leaders hypothesize that the research will show that the percentage of cases actually prosecuted for non-Indian domestic violence or sexual abuse against Indian women and children is substantially lower than the prosecution rate for cases with non-Indian victims.[7] This data will prove to Congress that it must take action and give tribes jurisdiction over these crimes against Indian women in order to assure them that domestic violence will no longer be tolerated.

Part I presents the data that is currently available regarding domestic violence committed against Indian women. These statistics will expose the alarming victimization rates of American Indian women as compared to other American women. Included in this data are findings that the vast majority of these victimizers are non-Indian men who tribes are powerless to prosecute. Because federal prosecutors decline to prosecute these crimes, the law provides no deterrent effect; these women will continue to be victimized at alarming rates until the courts can protect them. Current federal treatment of these cases does not provide sufficient protection for Indian women, thus necessitating a change in the status quo.

Part II provides pertinent background information and exposes the Supreme Court's misconceptions as to the nature of tribes as sovereign nations. This Part will describe the history of judicial and congressional action that left tribal courts without jurisdiction to prosecute non-Indian crimes committed on the reservation. Dominant society, represented by courts and the legislature, has actively stripped tribes of their inherent sovereignty since the 1830s, and in the process has created a system that works poorly for all involved. This Part will also discuss why *Oliphant*, the case that expressly denied tribes jurisdiction over non-Indians, was wrongly decided. Justice to Indian women and fairness to tribes as

7. Asst. Professor Gavin Clarkson, Presentation at the University of Michigan School of Information (Nov. 4, 2003).

sovereign nations requires Congressional action to remedy this situation.

Part III examines the various options available to tribes under *Oliphant* that could achieve higher prosecution rates for crimes of domestic violence committed by non-Indians against Indian women. The first option is to encourage more states to assert jurisdiction over crimes committed on the reservation. The second option is to create specialty courts that exclusively handle tribal affairs, or to designate a federal prosecutor whose sole responsibility is to prosecute domestic violence committed against Indian women. This Part will explain why these two options are not in the best interests of tribes and Indian women, even if they can produce increased prosecution rates.

Part IV contends that the tribe itself provides the best protection for Indian women from domestic violence. Tribes like the EBCI have had sophisticated tribal court systems in place for centuries, and either already have the resources, or have access to the resources that would allow them to easily assert jurisdiction over these offenders. One of the major benefits of tribal jurisdiction over non-Indian offenders would be a cohesive response mechanism of prosecutors and police working together as a unit to respond to the needs of Indian women. Additionally, tribal jurisdiction over non-Indian offenders would allow tribes to respond to the unique situations of Indian women, and tailor responses to the problem of domestic violence based on the particular needs of the Indian community. Lastly, this solution would strengthen tribal sovereignty, and restores the status of tribes to that of "domestic dependent" nations, a term coined by Chief Justice Marshall over a century ago.[8] An important facet of this reform is that Indian women would not be forced to choose between tribal sovereignty and freedom from violence. For these reasons, tribal sovereignty over non-Indian offenders is essential to both the protection of Indian women from domestic violence and the restoration of tribal sovereignty.

Part V explains why members of dominant society may hesitate to encourage members of Congress to adopt legislation that will address the Supreme Court's holding in *Oliphant*. The concerns of dominant society include: protection of an individual's rights, lack of review of tribal court decisions, and the concern that not all tribes will be able to afford an adequate judiciary. This Part will address each concern, and explain why these concerns should not

8. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

prevent tribes from asserting criminal jurisdiction over non-Indians. Congress should take action to allow tribes the power to protect Indian women by allowing them the ability to prosecute and hold these offenders accountable for their actions.

PART I

Statistics detailing victimization rates reveal that both male and female American Indians face much higher occurrences of domestic violence than non-Indians in the United States.[9] This pattern will continue as long as batterers can commit these acts of violence unpunished, and further abuse their victims without intervention by the authorities. Non-Indians have an increased presence on allotted tribal lands, as well as on those reservations with casinos and other venues that draw non-Indians to the reservation. Because of this presence, Indian women are especially prone to abuse at the hands of non-Indian men. This Part will explore all of these concerns to illustrate the need for action on behalf of these women who are not protected to the same extent as members of dominant society.

The statistics detailing victimization rates among American Indian women are startling. As one author noted, the empirical evidence "cries out" with the need to address the severe problem of domestic violence committed against women on tribal lands.[10] The Bureau of Justice Statistics has compiled information detailing the rates of "intimate violence," defined as "violent crimes . . . committed against persons by their current or former spouses, boyfriends, or girlfriends annually."[11] While this definition, and therefore the study, includes victimized men in its findings, it is important to note that the Bureau found that 87% of the victims of intimate violence studied were female.[12] The Bureau conducted the study between 1993 and 1998, and found that for every 1,000 American Indian females, 23.2 were victims of intimate violence. This rate of victimization was nearly double that of African Americans (11.2 for every 1,000), triple that of whites (8.1 per 1,000) and

9. *See* RENNISON, *supra* note 1.

10. B.J. Jones, *Welcoming Tribal Courts Into the Judicial Fraternity: Emerging Issues In Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 495 (1998).

11. RENNISON, *supra* note 1, at 9.

12. *Id.*

twelve times the victimization rate of Asian Americans (1.9 per 1,000).[13]

What is even more troubling about these statistics is that, unlike members of dominant society, American Indian women may be less likely to come forward if victimized, and therefore less able to receive protection from authorities or support from non-governmental organizations. "Many Indians choose not to call the authorities in cases of rape, severe violence, or murder because such crimes would be handled by the Federal Bureau of Investigation."[14] Activist Maggie Escovita Steele (Chiricahua Apache) explains that federal law enforcement agencies "take forever to come" and the common sentiment among Indian women is that "nothing's going to happen"[15] with their cases anyway. American Indian women are not able to rely on the federal government to provide protection from their victimizers, so it is possible that only a fraction of violent incidents are reported. Because the nature of domestic violence is such that the violent acts are more likely to be repeated than other types of assaults,[16] these victims are vulnerable to frequent and repeated attacks without any protective or intervening force.

In addition to the statistics detailing the rates of American Indian victimization, it is important to understand who the victimizers are. If Indian men were the primary abusers of Indian women, tribes would be able to assert jurisdiction over such crimes, and the remedy to the victimization could be found in tribal government. However, statistics indicate that non-Indian men—men who tribal governments and police are powerless to hold accountable—primarily commit domestic violence against American Indian women.

As the Bureau of Justice Statistics explains, violent crime is "primarily interracial" for American Indian victims.[17] The Bureau found that white offenders committed 58% of crimes against American Indians, and African American offenders committed 10% of crimes against American Indians.[18] Only 25% of American Indians categorized their victimizer as "other," which includes, but

13. *Id.*

14. Rinku Sen, *Between a Rock & a Hard Place: Domestic Violence in Communities of Color*, COLORLINES MAGAZINE, Spring 1999, at 27.

15. *Id.*

16. CATHARINE A. MACKINNON, SEX EQUALITY 716 (2001).

17. RENNISON, *supra* note 1, at 10.

18. *Id.*

it not limited to, American Indian victimizers.[19] Although these statistics are not limited to violence committed against women, the Bureau in an earlier study found that for the specific crimes of rape and sexual assault, the percentage of crimes committed against Native American women by members of dominant society is even more severe. Between 1992–96 "about 9 in 10 American Indian victims of rape or sexual assault were estimated to have had assailants who were white or black".[20] This translates into tribes having the power to prosecute at most only 1 in every 10 offenders who victimize Indian women.

Increased rates of victimization among Indian women may be related to and dependent upon the fact that the victimizers are non-Indian men. First, non-Indian men victimize American Indian women because there is literally nothing stopping them from treating their partners in any manner they choose. In other words, the laws against domestic violence have no deterrent effect when it comes to non-Indian on Indian crimes because these crimes are not prosecuted. As will be explained in Part II, crimes of domestic violence committed against American Indian women by non-Indians must, with a few exceptions, be prosecuted by the Attorney General of the United States through the United States Attorney's office in their district. Scholars on this subject agree that due to heavy caseloads, federal prosecutors simply do not give domestic violence cases the attention they deserve.[21] The most recent data available for all crimes referred to federal prosecutors shows that 27% of cases were declined between 2000 and 2001.[22] Federal prosecutors declined to prosecute 35% of all violent offenses; for the specific crime of assault, federal prosecutors declined to prosecute 42.9% of the cases investigated.[23] Again, these statistics detail prosecution rates for *all* cases referred to the United States Attorneys, and do not break down data to accurately convey prosecution

19. *Id.*

20. LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME, IN BUREAU OF JUSTICE STATISTICS NCJ 173386 (1999).

21. *See generally* Victor Holcomb, *Prosecution of Non-Indians for Non-Serious Offenses Committed Against Indians in Indian Country*, 75 N.D. L. REV. 761 (1999); Geoffrey Heisey, *Oliphant and Tribal Criminal Jurisdiction Over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 IND. L.J. 1051, 1053 (1998); Jones, *supra* note 10, at 513.

22. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 201627, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2001 23 (2003).

23. *Id.* at 24, 28. Violent offenses were defined as threatening, attempting, or actually using physical force against a person, including murder, negligent manslaughter, assault robbery, sexual abuse, kidnapping, and threats against the President; assault was defined as intentionally inflicting or attempting or threatening to inflict bodily injury to another person.

rates for crimes committed on versus off the reservation, or against men versus women. A break down of these statistics will reveal a disproportionate declination of prosecution rate when domestic violence against Indian women is concerned. Domestic violence cases will take the back seat to murder or other felony cases that demand more time and resources from federal prosecutors.

> Funds for prosecution of federal crimes are finite, requiring busy prosecutors to allocate their resources as best they can. As a result, crimes like assaults and [thefts] are simply not prosecuted, which creates grave problems for tribes attempting to police their reservation without the power to exercise criminal jurisdiction over non-Indians.[24]

It is important to remember that, despite their jurisdiction, federal prosecutors are not required to prosecute crimes of domestic violence. Prosecutorial discretion means that the government need not take any action to protect American Indian victims of domestic violence.[25] As will be explained in Part II, this is especially appalling when one considers that the government has established itself as the only means of protection for American Indian women, and then continues to fail to provide that protection.[26] In this sense, the federal government "becomes the means by which the wrongdoers are allowed to operate, and the government is essentially an accessory to the wrongdoing."[27]

An additional problem related to the declination of prosecution of domestic violence cases is the federal prosecutor's tendency to inappropriately plead these cases down to charges that in no way reflect the severity of the violence that occurred. *Mending the Sacred Hoop* ("MSH"), a program funded by the National Institute of Justice working with the Carlton County, Minnesota, Violence Prevention Council, found that due to lack of resources, federal prosecutors are faced with "constant pressure to settle cases" without a hearing.[28] Out of 18 case files studied by MSH, ten were pleaded down to lesser charges. "Seven of the ten were negotiated

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24. Holcomb, *supra* note 21, at 767.

25. "Having the power to prosecute such offenses does not mean the government having the obligation to do so." *Id.* at 763.

26. *Id.* at 768.

27. *Id.*

28. THOMAS PEACOCK, ET AL., COMMUNITY-BASED ANALYSIS OF THE U.S. LEGAL SYSTEM'S INTERVENTION IN DOMESTIC ABUSE CASES INVOLVING INDIGENOUS WOMEN 99 (2003), *available at* http://www.ncjrs.org/pdffiles1/nij/grants/199358.pdf (on file with the University of Michigan Journal of Law Reform).

down to the charge of 'disorderly conduct' . . . [y]et the violence in these cases was quite serious and the injuries sustained by the victims extensive."[29] Pleading these cases down to charges that amount to little more than a slap on the wrist does not protect Indian women from victimization, and sends a message to these women that the severe violence committed against them is not recognized as such. This practice is a sorry excuse for justice, and can no longer be the acceptable government response to cases of domestic violence.

One must not underestimate the effect of government deterrence on the crime of domestic violence, and on the victimization that occurs when the government allows these batterers to continually abuse their partners. "The batterer begins and continues his behavior because violence is an effective method for gaining and keeping control over another person," and because "he usually does not suffer negative consequences as a result of his behavior."[30] The nature of domestic violence is such that the offender will continue to repeat his offense until stopped. One of the reasons men abuse is because they can get away with it without consequence. By not prosecuting these crimes, the federal government allows non-Indian men to continue in their pattern of abusive behavior, which may explain the high victimization rates among American Indian women.

In addition to the lack of prosecution of these crimes to provide a deterrent effect, the lack of response by a law enforcement agency also perpetuates the problem of domestic violence. Many tribal police forces have a policy against arresting non-Indians who abuse female tribal members, because the tribes have no authority to prosecute these individuals.[31] The Federal Bureau of Investigation, whose duty it is to arrest these criminals, has a slow reaction time because they are not stationed on the reservation, and in most cases must drive several hours to the victim's home on the reservation. The lack of law enforcement presence to deter men from abusing may contribute to the victimization rates of American Indian women.

The situation becomes even more severe with the increased presence of non-Indians on the reservation. Allotted reservations result in consistent interaction between Indians and non-Indians,

29. *Id.* at 103.

30. *Family Relationships*, DAYA, Inc., *available at* http://www.dayahouston.org/family_drg.htm. (on file with the University of Michigan Journal of Law Reform).

31. The Cherokees allow tribal police to arrest the offender, and then permit him to raise non-Indian jurisdiction as a defense. This is a potential solution to slow reaction time by police forces outside the reservation to domestic violence cases on the reservation.

and even non-allotted tribal lands have recently seen an increase in non-Indian presence due to Indian casinos and other kinds of tourist activities that tribes engage in to revitalize their economies.

> [M]any non-Indians who commit everyday misdemeanor offenses on the reservations are often never prosecuted. The hands of the tribal police are tied, and together with the increasing reliance of tribal economies on tourism, which increases the number of non-Indians visiting reservations, a state of lawlessness and self-help justice has resulted on many reservations.[32]

The fact that these "minor crimes" are not prosecuted or punished also may lead to attitudes toward reservations as territories where crimes can be committed without any sort of redress. This results in an "open season to assault Indians."[33] Non-Indian men are drawn to reservations for various reasons, they meet women who they can dominate and control through force, and they get away with abuse and continue to victimize.

The fact that American Indian women are highly victimized when compared to other American women, coupled with the declination of prosecution of domestic violence cases by the federal government, results in a serious problem. Regardless of the cause of the abuse, the fact that crimes against Indian women are not prosecuted amounts to a gross denial of justice to a segment of the population. The University of Michigan's IGTS project with the EBCI will show the extent to which these crimes are not prosecuted, and will illustrate the need for changes in the current law to protect Indian women. Once tribes have the tools to collect data detailing the miniscule prosecution rates of domestic violence cases, such hard statistics will create a strong empirical case for congressional action to reverse *Oliphant.* Because no such data currently exists, however, and because women are in need of protection by their tribal governments *now,* the remainder of this Note will argue the case for tribal jurisdiction over non-Indian offenders even in the absence of conclusive statistics. Fairness to tribes and the to physical and emotional integrity of Indian women demands a change in the status quo, because what is known is that the current system is incapable of effectively protecting these women from domestic violence.

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32. Heisey, *supra* note 21, at 1078.
33. Holcomb, *supra* note 21, at 767.

PART II

Congressional and judicial action has left tribes powerless to prosecute crimes, such as domestic violence, that are committed by non-Indians on tribal lands. The primary goal of this Note is to address the need for action on behalf of Indian women, and Part IV will present reasons why tribal jurisdiction over crimes of domestic violence is the best solution to the problem. Because tribal jurisdiction over such crimes does not currently exist, it is important in this Part to explain how this state of affairs came to be. Since the 1930s Congress and the courts have taken numerous steps away from allowing tribes the power to enforce their own laws on their land. As one author noted, instead of simply "chipping away" at tribal sovereignty, in the past fifteen years the Supreme Court, in particular, has turned the chisel "into a 'sledgehammer' and the chinks have become 'gaping holes.'"[34] Congress has done little to affect this trend. Supreme Court action and congressional inaction indicates the federal government's indifference to the fact that tribal existence and prosperity depend on the ability to protect tribal members from physical, economic, and symbolic attacks by members of dominant society. This Part will explain the seven Supreme Court cases framing the issues of tribal sovereignty and, more specifically, jurisdiction over non-members. Additionally, this Part will explain measures taken by Congress to supplement the Court's rulings on tribal jurisdiction. This history will provide relevant insights into how domestic violence on reservations has escalated, and how it continues to plague Indian women because of the tribe's inability to protect them. This history also exposes the injustices that occurred each time the Court "chipped away" at tribal sovereignty.

A. Judicial Action

The inquiry into tribal court jurisdiction over non-Indians begins with *Worcester v. Georgia*.[35] Worcester violated a Georgia statute that made it a crime for a white person to reside in the Cherokee nation "without a license or permit from his excellency

34. Heidi McNeil Staudenmaier, *Tribal Sovereign Immunity: Will These Rights Survive Judicial Review?*, 7 GAMING L. REV. 245, 247 (2003); *see also* Heisey, *supra* note 21, at 1052.

35. 31 U.S. 515 (1832).

the governor of said state."[36] Worcester claimed he had the right to reside on Cherokee lands because he was granted permission by the Cherokee nation, and such grant was "in accordance with the humane policy of the government of the United States."[37] He argued that the laws of the Cherokee nation applied to him, not those of the state of Georgia, and any attempt by Georgian government officials to enforce their state laws on Cherokee land was unconstitutional. Worcester supported his claim by presenting evidence of several treaties entered into between the United States and the Cherokee nation that "acknowledge the said Cherokee nation to be a sovereign nation."[38] The issue presented before the Court was whether the treaties entered into between the United States and Cherokee nation provided sufficient evidence for the Court to conclude that the Cherokee nation was sovereign. If so, the laws of Georgia did not apply, and Worcester could live on Cherokee land.

The first treaty the Court examined was the Treaty of Hopewell, signed in 1778.[39] The Court read this treaty to acknowledge that the Cherokee nation was "under the protection of the United States, and of no other power."[40] The Court cited the Ninth Article of the treaty, which stated that the United States "shall have the sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs*, as they think proper" [emphasis added by the Court].[41] The Court thought it was necessary to highlight the fact that this treaty gave *only* the United States the power of management over the Cherokee's affairs. This important language stressed the idea of tribes as domestic dependent nations, dependent on the federal government, not state governments, for support. If Georgia were permitted to simultaneously manage the affairs of the Cherokees, such management would be inconsistent with this article of the treaty. A nation cannot manage its affairs so long as a state imposes its own ideas of the law.

The second treaty the Court examined was the Treaty of Holston, signed in 1791.[42] The Court found this treaty explicitly recognized "the national character of the Cherokees, and their right of self government; thus guaranteeing their lands; assuming the duty of

36. *Id.* at 529.
37. *Id.*
38. *Id.*
39. *Id.* at 554.
40. *Id.* at 552.
41. *Id.* at 553.
42. *Id.* at 554–55.

protection, and of course pleading the faith of the United States for that protection; has been frequently renewed, and is now in full force."[43] This language from the Court is a clear indication that *Worcester* affirmed the sovereign nature of tribes, and the right of tribes to self-govern on tribal lands.

The Supreme Court held that the Cherokee nation is a "distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."[44] An important aspect of this holding is that Justice Marshall specified that the laws of Georgia have no force in the *territory* occupied by the Cherokee nation. This statement indicates that the Cherokee nation has jurisdiction over all people within its territory. Although this is primarily a restriction on the state's power to infringe on tribal territory, Marshall made clear that the federal government should also refrain from infringing on tribal sovereignty because "protection does not imply the destruction of the protected."[45] As domestic dependent nations, Marshall explained that tribes should be able to *depend* on federal government support, and not fear that the federal government will strip them of their inherent sovereignty. However, in the cases that followed, this is exactly what occurred.

The next Supreme Court case to define the scope of tribal jurisdiction over non-Indians was *United States v. McBratney*.[46] The issue in *McBratney* was whether the state of Colorado had "jurisdiction of the crime of murder, committed by a white man upon a white man, within the Ute Reservation," which sat within the geographical limits of Colorado.[47] The Court again looked to the existence of a treaty between the United States and the Ute Indian tribe to help resolve this dispute. Similar to the treaties examined in *Worcester*, a treaty signed in 1868 between the federal government and Utes "agreed that a certain district of country . . . should be set apart for the absolute and undisturbed use and occupation" of the Utes.[48] In spite of this treaty, however, the Court found that the Utes did *not* have jurisdiction over crimes that occurred on tribal lands committed by a non-Indian against a non-Indian. This determination hinged upon the Court's examination of when the treaty was signed in relation to the date when Colorado was admitted to the Union. Colorado was admitted to the Union in 1875—seven years

43. *Id.* at 556.
44. *Id.* at 560.
45. *Id.* at 552.
46. 104 U.S. 621 (1881).
47. *Id.*
48. *Id.* at 622.

after the treaty between the Utes and the federal government was signed. The Court explained that because the act admitting Colorado to the Union contained "no exception of the Ute Reservation, or of jurisdiction over it," the act "necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith."[49] The Court found the treaty to be inconsistent with the later act admitting Colorado into the Union because the act did not *expressly* except the Utes from Colorado's jurisdiction. Such limit on a state's jurisdiction, the Court reasoned, must be "done so by express words."[50]

This argument seems counterintuitive. The treaty was effectuated before the state of Colorado was admitted to the Union, so one would think the admission should be consistent with the existing obligations of sovereign nations. Clearly, the Court was beginning to conceptualize tribes as less than sovereign nations, and perhaps less than domestic dependents. *McBratney* communicated the message that tribes could no longer rely on the federal government for protection from the states' infringement on their sovereignty to the extent they could under *Worcester.*

Draper v. United States[51] was the next Supreme Court case to further define the scope of tribal jurisdiction over non-Indians. Draper, a non-Indian, was charged with murder committed on the Crow Indian reservation. The issue in this case was again whether Montana state courts had jurisdiction over Draper's crime, or whether the case should go to federal court because the crime was committed on the land of a domestic dependent. The facts of this case differ from *McBratney* in that Montana's admission act contained language excepting the Crows from state jurisdiction. This was the key requirement that the Utes in *McBratney* lacked. Montana's 1889 admission act stated that "Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States."[52] One would think that under *McBratney* the federal government, rather than Montana, would have jurisdiction over the Crow's tribal lands rather than the state of Montana because the act admitting Montana to the Union "contained provisions taking that state out of the general rule."[53] However, the Court further chipped at tribal sovereignty by holding that even with this provision, the State of Montana still had jurisdiction over Draper. The Court stated, "The mere reserva-

49. *Id.* at 623.
50. *Id.*
51. 164 U.S. 240, 241 (1896).
52. *Id.* at 244.
53. *Draper,* 164 U.S. at 243.

tion of jurisdiction and control by the United States of 'Indians lands' does not of necessity signify a retention of jurisdiction in the United States to punish all offenses committed on such lands by others than Indians or against Indians."[54] The Court concluded that just because the act admitting Montana to the Union reserved to the United States jurisdiction over Indian lands, does not mean that Montana is now deprived of such jurisdiction.[55] While this reasoning seems to defy both *Worcester* and *McBratney*, the final holding was that the Montana state courts, rather than the federal courts, had jurisdiction over Draper's crime.[56] This early history of allowing states to interfere in the affairs of what are supposed to be sovereign nations set the stage for the Court's relatively recent holdings that severely limit a tribe's ability to protect its members.

In 1978, the Supreme Court was confronted directly with the issue of tribal jurisdiction over non-Indian crimes against Indians on the reservation in *Oliphant v. Suquamish Indian Tribe.* The Court's holding, which remains good law , was that "Indian tribes do not have inherent jurisdiction to try and punish non-Indians."[57] It is important to examine the majority's opinion in this case to determine whether the idea of tribal jurisdiction over non-Indian-on-Indian crime should be revisited. As I will now explain, the majority's reasoning in *Oliphant* is flawed and should not constitute the final word on tribal jurisdiction or tribal sovereignty.

Oliphant stated that tribes are "quasi-sovereign" due to the fact that, over the past 150 years, they have "ced[ed] their lands to the United States and announc[ed] their dependence on the Federal Government."[58] Because of this dependence, the Court reasoned, tribes "necessarily g[ave] up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[59] The Court then commenced an inquiry into whether jurisdiction over non-Indians who commit crimes against Indians on the reservation is "acceptable" to Congress.

The Court recognized that Congress never expressly made a determination on this matter, but instead over the years revealed an "unspoken assumption" that tribal jurisdiction over non-Indians does not exist.[60] The first article of evidence the Court used to support its finding of Congress' unspoken assumption was a treaty

54. *Id.* at 245.
55. *Id.* at 247.
56. *Id.*
57. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 212 (1978).
58. *Id.* at 208.
59. *Id.* at 210.
60. *Id.* at 203.

signed in 1830 between the United States and the Choctaws. The Court stated that the Choctaws had "one of the most sophisticated of tribal structures,"[61] yet still included in this treaty a "wish that Congress may grant to the Choctaws" the right to punish non-Indians.[62] The Court reasoned that this "wish" would be unnecessary if the tribe had inherent jurisdiction over non-Indians, because one does not wish for something one already has.

The first problem with this piece of evidence is that the *most* the Court should have read from this treaty was the "Choctaw's assumption regarding the law, not the assumption of Indian tribes in general."[63] In addition to the error in applying the treaty between one tribe and the federal government to *all* tribes, the Court also made the error of disregarding other provisions in the same treaty. The treaty stated that "the tribe is guaranteed 'jurisdiction and government of all the persons and property that may be within their limits.' "[64] If Congress wanted to ensure that tribes would not have the power to try non-Indians, it "could have expressed that intent more clearly than it did in the 1830 treaty."[65] Therefore, one should not read congressional intent against tribal jurisdiction into the 1830 treaty between the United States and Choctaws.

The next article of evidence was a Western District of Arkansas opinion from 1878.[66] This opinion, reaffirmed in 1970 by the Solicitor of the Department of the Interior, established for the Court that tribes do not have the power to try non-Indians who commit crimes against Indians.[67] However, as the Court noted in a footnote, "The 1970 opinion of the Solicitor was withdrawn in 1974."[68] All that is left of this evidentiary finding is the 1878 Western District of Arkansas opinion—hardly evidence of the federal government's intent.

The Court also relied on the *Trade and Intercourse Act of 1790*,[69] and an amendment to it in 1854, as evidence to support its holding.[70] The purpose of this Act, however, was to *protect* Indians

61. *Id.* at 197.

62. *Id.*

63. Peter Maxfield, Oliphant v. Suquamish Indian Tribe: *The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 412 (1993).

64. *Id.* at 412 (quoting A Treaty of Perpetual Friendship, Cession and Limits, Sept. 27, 1830, U.S.-Choctaw Nation, art. IV, 7 Stat. 333, 333–34).

65. *Id.*

66. *Oliphant*, 435 U.S. at 199–201 (citing *Ex parte* Kenyon, 14 F. Cas. 353 (W.D. Ark. 1878).

67. *Id.* at 200–01.

68. *Id.* at 201 n.11.

69. *Id.* at 201.

70. *Id.* at 203.

"from the lawlessness of the frontier inhabitants"[71] and not revoke a tribe's jurisdiction. While this Act asserted federal, rather than tribal jurisdiction over non-Indians, it was most likely that "Congress intended only that some forum be assured."[72]

The *1834 Western Territory Bill* was the next piece of evidence on which the Court relied. The Court stated that in the Bill Congress "was careful not to give the tribes of the territory criminal jurisdiction over United States officials and citizens."[73] Again in a footnote, the Court acknowledged that the bill never passed because "many Congressmen felt that the bill was too radical a shift in United States-Indian relations."[74] A bill that was tabled because members of Congress did not support it cannot be taken as evidence of congressional intent.

Lastly, the Court found that a 1960 Senate Report indicated that Congress never intended for tribal courts to have jurisdiction to try non-Indians.[75] As this report did not cite any authority for the claim that tribal courts cannot try non-Indians, however, "the most that can be said for . . . [this report] is that [it reflects] the opinions of the majority of one Senate committee."[76] Again, one report from one Senate committee cannot be dispositive evidence of congressional intent.

It is clear from the Court's questionable legal foundation that "the 'unspoken assumption' is more than likely a manifestation of a preference of *Oliphant's* author that such conflicts be resolved in favor of federal and state government rather than tribal sovereignty."[77] In sum, "dictum in one federal district court case, two mid-nineteenth century Attorney General opinions, a 1960 statement by a Senate committee, and a 1970 Interior Solicitor's opinion, which was revoked in 1974, substantiate the existence of this shared assumption."[78] Perhaps even more devastating than the misapplications of law that occurred in this case were the destructive effects *Oliphant* had on tribes throughout the nation. When *Oliphant* was decided, 33 of the 127 reservations that exercised criminal jurisdiction in the United States extended such jurisdiction to non-Indians.[79] Additionally, this decision was particularly devastating for tribes such as the Makah, Tulalips, and

71. Maxfield, *supra* note 63, at 418.
72. *Id.* at 419.
73. *Oliphant*, 435 U.S. at 202.
74. *Id.* at 202 n.13.
75. *Id.* at 204.
76. Maxfield, *supra* note 63, at 409.
77. Heisey, *supra* note 21, at 1063–64.
78. Maxfield, *supra* note 63 at 440.
79. *Oliphant*, 435 U.S. at 196.

Yakima, "where the non-Indian population exceeds two-thirds of the total reservation population."[80] Where "non-Indians vastly outnumber Indians" as is the case on "nine of the most populated reservations,"[81] the tribal court systems are powerless to prosecute those who will commit the majority of crimes on tribal lands.

Additionally unpromising for tribes was the fact that *Oliphant* "laid the groundwork for the abrogation of tribal sovereignty."[82] The Court continued this trend in *Duro v. Reina*,[83] where it held that an Indian tribe could not assert criminal jurisdiction over a defendant who is an Indian, unless the Indian is a member of the tribe who seeks to assert such jurisdiction. According to *Duro*, "the retained sovereignty of the tribes is that need to control their own internal relations, and to reserve their own unique customs and social order."[84] The Court described membership in tribes as having a "voluntary character," and because there exists a "concomitant right of participation in a tribal government," a non-member must consent for a tribe to have jurisdiction.[85] It is clear from this statement that the Court greatly departed from the long-standing recognition of tribes as domestic dependant sovereign nations, and instead perceived the functions of a tribe serving no greater purpose than that of a private club or organization. Much like the Boy Scouts of America, tribes may only enact and enforce rules for members who consent to the rules of the "club."

Another reason the Court believed consent-based jurisdiction over non-members was necessary was because to hold otherwise could result in "an intrusion on personal liberty" by subjecting a non-member to a tribe's "legal methods [that] may depend on 'unspoken practices and norms.' "[86] This important aspect of the Court's reasoning will be addressed in Part III.

Duro caused an "uproar" because "it created a jurisdictional void in which neither tribes, nor states, nor the federal government had the authority to try non-member Indians for misdemeanors

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

81. L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After* Atkinson *and* Hicks, 37 NEW ENG. L. REV. 669, 690 (2003).

82. Maxfield, *supra* note 63, at 396.

83. 495 U.S. 676 (1990).

84. *Id.* at 685–86.

85. *Id.* at 694.

86. *Id.* at 693.

committed on tribal lands."[87] *Duro* left tribes even more vulnerable to crimes committed against their members on tribal lands, and reinforced the perception that reservations are lawless lands where one can commit a crime without the possibility of punishment. For Indian non-members, this was certainly the case.

The most recent attempt by the Supreme Court[88] to diminish tribal sovereignty was *Nevada v. Hicks*.[89] While the facts of this case are not relevant to the issue of tribal criminal jurisdiction,[90] *Hicks* is of great consequence because it further weakened any tribal sovereignty that remained after *Duro*. First, the Court stated that "the Indian's right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border."[91] With this finding, the Court "ignored a principle laid down almost half a century ago—that states cannot regulate the affairs of Indians on the reservations without authority from Congress."[92] In *Duro*, the Court weakened the status of tribes to that of a club, and in *Hicks* it allowed states to interfere with what little tribal sovereignty was left.[93] If there is any doubt that the Court conceptualized tribes as subordinate to states, one need only look to a passage where the Court explained that a state's extension of jurisdiction on to tribal lands "no more impairs the tribe's self government than federal enforcement of federal laws impairs state government."[94] The state-tribal relationship and the federal-state relationship were made equivalent in *Hicks*, thus delineating the Court's understanding of tribal sovereignty as something subordinate to state sovereignty.

Additionally, *Hicks* further damaged the power of tribal courts because the Court held that a person does not need to exhaust claims in tribal court before seeking relief in federal court. The Court stated that such exhaustion " 'would serve no purpose other than delay,' and is therefore unnecessary."[95] The persistent survival of tribal court systems through *Oliphant*, *Duro*, and now *Hicks*

87. Gould, *supra* note 81, at 686. As will be explained later in this Note, *Duro* has been superseded by Congress's "*Duro* Fix," the Criminal Jurisdiction Over Indians Act of 1991, Pub. L. No. 102-137 (1991).

88. One author noted that the Court's holding in *Oliphani* could only be reached "by judicial activism." Maxfield, *supra* note 63, at 396.

89. 533 U.S. 353 (2001).

90. This case concerned the ability of a state to serve process on the reservation.

91. *Hicks*, 533 U.S. at 361.

92. Gould, *supra* note 81, at 671.

93. "Understandably, tribal advocates are concerned how far the Supreme Court may go in further extending this intrusion into tribal affairs by the state and others." McNeil Staudenmaier, *supra* note 34, at 247.

94. *Hicks*, 533 U.S. at 364.

95. *Id.* at 369.

makes it likely that these systems serve countless purposes "other than delay." This holding was yet another example of the appalling ignorance exhibited time and time again through the Supreme Court's treatment of tribal sovereignty.

The treatment of tribal jurisdiction and sovereignty in *Oliphant*, *Duro*, and *Hicks* reveals a vast departure from Justice Marshall's early recognition of tribes as domestic dependant sovereign nations. However, the most recent case decided by the Supreme Court reveals a departure from the Court's "agenda against the sovereignty of the Indians whenever that sovereignty conflicts with the interests of non-Indians."[96] In *United States v. Lara*,[97] the Court stated that *Oliphant* and *Duro* reflected the *Court's* view of tribes' sovereign status, but in no way set forth "constitutional limits prohibiting Congress from taking actions to modify or adjust that status."[98] Rather, the Court held that Congress does possess the power to "relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority."[99] This decision is especially important because the Court acknowledged that *Oliphant* and *Duro* "are not determinative" on the question of tribal sovereignty and jurisdiction, because Congress is the final authority on the status of tribes.[100] Perhaps with the Court's invitation, Congress will take this opportunity to offer a "determinative" answer to the question of tribal jurisdiction over non-Indians. As will be explained below, Congressional action to correct wrongful interpretations of the sovereign status of tribes is not a novel idea. Congress must now take action suggested by the Supreme Court in *Lara* to grant tribes more than residual jurisdiction. Congress must correct the Court's holdings that perpetuate the belief that tribal courts can only be entrusted with cases that do not matter to federal or state officials. These holdings speak volumes about the Court's opinion of tribal courts and the people who appear before them, and as *Lara* noted, Congressional action would "mak[e] all the difference."[101] It is time for Congress to make a difference in the lives of those who suffer violence at the

96. Heisey, *supra* note 21, at 1062.

97. 124 S.Ct. 1628 (2004). *Lara* was decided during the publication of this Note, and due to time constraints, an in-depth analysis of the Court's holding was not possible. However, it is important to mention this case as one that opens the door for a reversal of *Oliphant*.

98. *Id.* at 1630.

99. *Id.* at 1631.

100. *Id.* at 1637.

101. *Lara*, 124 S.Ct. at 1637.

hands of non-Indians on the reservation by granting tribes the ability to protect their members.

B. Congressional Action

While the Supreme Court has been active in diminishing tribal sovereignty and jurisdiction, Congress has taken a number of steps to clarify jurisdiction over crimes committed on the reservation. The first significant step was the 1817 enactment of the *General Crimes Act*, which states:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.[102]

The General Crimes Act established general, catch-all federal jurisdiction over crimes committed on the reservation.

Public Law 280[103] was the next piece of legislation enacted by Congress concerning the scope of tribal jurisdiction. Public Law 280 allows states to assume criminal and civil jurisdiction over crimes committed on the reservation, via state statute or constitutional amendment. However, states have not been eager to assume such jurisdiction. Only five states, California, Nebraska, Wisconsin, and parts of Minnesota and Oregon, became Public Law 280 when the law was first enacted,[104] and since then only Alaska in 1958 signed on to become a Public Law 280 state.[105] That so few states participate is hardly an endorsement of *Public Law 280* as a workable solution to the problem of declination of prosecution for crimes on the reservation. States are not eager to assert jurisdiction over these crimes, most likely due to the fact that "states do not have the authority to tax Indians, and they are not willing to assume criminal jurisdiction over Indian lands if they cannot be reimbursed, through taxation, for the costs of doing so."[106] As discussed later, even if states were willing to assume jurisdiction over

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102. Codified as amended at 18 U.S.C. § 1152 (2004).

103. Pub. L. No. 280, 67 Stat. 588 (1953).

104. *Id.*

105. *See* Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 480 n.45 (2002).

106. Holcomb, *supra* note 21, at 778.

crimes committed on the reservation, this may not be in the best interest of tribes.

The most recent action taken by Congress was its enactment of what has been labeled the "*Duro* Fix." As its name suggests, Congress amended the Indian Civil Rights Act ("ICRA") in response to the Supreme Court's holding in *Duro*. With the *Duro* Fix, Congress acknowledged the "inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[107] While Congress with this legislation restored a tribe's ability to prosecute all Indians, rather than just its own members, Congress did *not* address a tribe's ability to prosecute non-Indians. Perhaps the fact that Congress came back after *Duro* with the "*Duro* Fix," yet did not respond to *Oliphant* means that the Supreme Court was correct in attributing to Congress an "unspoken assumption" that tribes cannot assert criminal jurisdiction over non-Indians. Interpreted in that light, the *Duro* Fix is troubling because it suggests that Congress will not support an effort to restore tribal jurisdiction over non-Indians. "While commentators have advocated overruling *Oliphant*, they have largely ignored the congressional failure to rectify, through legislation, the injustice that the decision created."[108] With the Court and now perhaps Congress in opposition to such jurisdiction, the potential outcome of this endeavor may be unpromising for tribes.

This does not mean that the effort to protect Indian women from violence by non-Indian men should be abandoned, or that Congress will never overturn *Oliphant*. The IGTS project proposed by the University of Michigan to track the disposition of cases of domestic violence referred to federal prosecutors will provide the EBCI with indisputable statistics that Indian women's cases are not being prosecuted by federal authorities. Members of Congress not moved by the erosion of historical rights may respond to statistics detailing the forgotten victims of domestic violence on the reservation. These statistics will prove that "[i]t is time for Congress to exercise its plenary power over Indian affairs vested in it by the Constitution and confirmed by Chief Justice Marshall over a century and a half ago."[109] In the meantime, it is necessary to inform members of dominant society about the congressional and judicial action that has created the current situation. It is also necessary to advocate for a solution that will be the best for Indian women, not

107. Criminal Jurisdiction Over Indians Act of 1991, Pub. L. No. 102-137 (1991).
108. Heisey, *supra* note 21, at 1052.
109. *Id.*

one that will simply increase prosecution rates to the level of prosecutions for members of dominant society. The remainder of this Note will analyze the ways in which Congress should exercise its plenary power to respond to the issues presented thus far, including the alarming victimization rates of Indian women and the dishonorable treatment of tribes by the Court. With these issues in mind, Congress will have no choice but to restore tribal sovereignty and jurisdiction to where it was before the Court interfered.

PART III

There are two proposed solutions to the problem of decreased prosecution of domestic violence crimes committed against American Indian women. These solutions are currently being implemented, and are consistent with the Supreme Court's holding in *Oliphant.* The first solution is to encourage states to assume jurisdiction over non-Indian crimes committed on the reservation; the second is to create more specialized courts and prosecution offices to respond to the unique needs of Indian communities. This Part will analyze each solution, and suggest that both should be abandoned because they are not in the best interests of Indian women. Again, the goal should not be to simply increase prosecution rates but to provide a better system of protection to Indian women on every level. The first potential solution to address the problem of domestic violence on the reservation is to encourage states to assume criminal jurisdiction over these non-Indian offenders. As explained in Part II, states are allowed to assume this jurisdiction by statute or constitutional amendment under Public Law 280. This could be an attractive solution because it would achieve "a uniform application of laws and ensure consistency state wide, securing all the state's citizens, Indians and non-Indians alike, a similar brand of justice."[110]

The first concern with this solution is that, although it allows for "uniformity" that could perhaps lead to consistent state-wide justice, that "uniformity" would implement the state's ideas about how to best govern its citizens, rather than the tribe's. In order to best serve members who reside on the reservation, a tribe needs to be able to adopt its own set of laws and procedures, suited to the needs of its particular constituency. This is why our country adheres to the idea of federalism, where each of the fifty states is

110. Jones, *supra* note 10, at 485.

allowed to enact laws that best represent the particular and distinct communities present in each state. If tribes are subordinate to the state, rather than to the federal government, they cannot tailor law enforcement responses to their community with the same flexibility as state governments. It is the tribal members who suffer from this lack of flexibility to set up experimental legal systems that might better serve their unique needs.

Another concern with state jurisdiction over these crimes is that there is no guarantee that the needs of battered women will be better addressed. State law enforcement agencies and prosecutor's offices, like their federal counterparts, may be located several hours away from the reservation. There is no guarantee that women will feel more inclined to call state police than they would the FBI, or that they would travel to testify at their state court any more frequently than they would travel to their nearest federal district court. While members of dominant society can be assured that the city or county in which they reside will provide a cohesive system of prosecutors and police *present in their community* to protect them from victimization, there is no such assurance for Indian women if they are forced to rely on state law enforcement agencies. It is time that Indian women receive the same immediate and responsive protection from domestic violence depended on by women who live off the reservation.

Additionally, the solution of state jurisdiction over crimes of domestic violence on the reservation does nothing to address the injustice of the *Oliphant* decision. Part II explained how tribes were stripped of their ability to prosecute non-Indians who commit offenses on the reservation. While the primary purpose of State jurisdiction over crimes of domestic violence also necessarily impedes tribal sovereignty:

> One of the clearest powers of any sovereign is the right to assert legal jurisdiction. The jurisdiction of a nation defines the legal and political powers that a government possesses to rule its people and territory, including the power to make and enforce laws, as well as the power to make final legal interpretations when there are disagreements among the people.[111]

Further, state jurisdiction should not be adopted as a solution to domestic violence because of the dilemma it creates for Indian women. Tribal sovereignty is important to Indian men and women

111. Ryser, *supra* note 80.

alike, and these men and women will not welcome anything that further diminishes tribal sovereignty. Even if state jurisdiction could provide greater protection for Indian women, tribes will still not embrace it; many will see it as "an attack on tribal sovereignty rights."[112] The result is that Indian women are faced with the impossible decision of choosing between tribal sovereignty and protection from domestic violence: one must come at the expense of the other. There is no reason to place the need for tribal sovereignty and the problem of domestic violence at odds with one another, or to force women to choose between loyalty to their tribe and a life free from abuse. State jurisdiction over non-Indian crimes of domestic violence compels women to choose between two aspects of their identity: their tribe and their well-being. Such a solution is unfair, and should be abandoned. Tribal jurisdiction is the only way to simultaneously respond to domestic violence and restore sovereignty to the tribes, without sending the message to women that the two goals are incompatible.

The second solution to the problems presented in this Note is to invest more resources in the federal system, making it more localized and more specialized. The federal government, working together with the Warm Springs tribe, recently tested a version of this solution:

> The federal courts in the Ninth Circuit, in cooperation with the Department of Justice, as well as the tribal council of the Warm Springs tribe in Oregon, have developed a project [where a] new part-time U.S. magistrate judge has been appointed in Bend, Oregon, and holds court regularly at the Warm Springs reservation. Non-Indian misdemeanor cases that slipped through the cracks previously and went un-prosecuted (leaving the reservation an easy mark for non-Indian petty crime), will now be heard by the federal magistrate judge when he convenes federal court on the reservation. The Department of Justice also has been working to cross-designate a Warm Springs tribal prosecutor as a special assistant U.S. attorney to bring these cases before the magistrate judge. In addition, the U.S. attorney for the District of Arizona has already designated several tribal prosecutors as special assistants to help fill jurisdictional gaps.[113]

112. McNeil Staudenmaier, *supra* note 34, at 246.

113. J. Clifford Wallace, *A New Era of Federal Tribal Court Cooperation*, JUDICATURE, Nov.–Dec. 1995, at 150, 152–53.

A solution like the one implemented at the Warm Springs reservation may result in greater rates of prosecution for domestic violence cases. Again, however, this solution does not address the injustice of *Oliphant*, and will not promote the existence or creation of the tribal judiciaries that are so important to tribal sovereignty. Many tribes may welcome this solution: a solution like the Warm Springs plan may be beneficial for tribes that lack a judicial system and that can effectively engage in a cooperative effort with federal authorities to do what is best for tribal members. However, tribes like the Navajo and Cherokee, who already have very sophisticated judicial systems in place and who possess the ability to assert jurisdiction over crimes committed against their people, should not be forced into a Warm Springs-type system. The problem with this modified system, then, is that it still takes away from tribes the ability to choose whether they will build and sustain their own judiciaries, or look to the federal government for assistance. When *Oliphant* took this choice from tribes like the Navajo and Cherokee, it sent a blanket statement to all tribes that their complex judicial systems that have been in place for hundreds of years are unworthy to try non-Indian men. Tribes are eager and capable of protecting Indian women from victimization, and it is time for Congress to allow them to do so.

PART IV

Domestic violence is a crime that will continue to kill, injure, and traumatize Indian women as long as the federal government is permitted to ignore these crimes. Counseling programs, shelters, immediate police response to emergency calls, and the ability to prevent repeated victimizations are all necessary measures in the fight against domestic violence. Most importantly, a woman must know that she matters: she warrants the protection of her government and will not be left for dead. It is unacceptable to tell a woman who cries out for help that her case is not important enough to make the docket, and her victimizer is free to do as he chooses. It is unacceptable to tell a woman that we will not allow her community to protect her because the man who burned, punched, or stalked her was not an Indian.

The best solution to the problem of domestic violence committed by non-Indian men against Indian women committed is to allow tribes the ability to assert criminal jurisdiction over these

crimes. Tribal police and tribal prosecutors should be permitted to function as a cohesive unit to provide these women with efficient protection that responds to the needs of each individual victim from the moment she calls the police until her attacker is punished for his crimes. This solution will also facilitate the long overdue recognition by the federal government that tribes are domestic dependant sovereign nations. A woman will not feel forced into choosing between this recognition and a life free from abuse; the two can co-exist. Additionally, tribal law enforcement agencies, like their county and municipal counterparts, will be able to tailor their responses to domestic violence to the particular victims they are responsible for protecting. This solution will ensure that someone *will* respond when a woman calls for help, and her case *will* be a priority to a prosecutor whose job it is to protect *her*.

Tribal prosecutors are eager to protect victims in their community by taking action against men who feel they can abuse without consequence. Once tribes are permitted to assert jurisdiction over the criminal acts of these abusers, the much-needed deterrent effect of the law will be realized, women will be protected from repeat abuse, and women will know that they are not alone in their struggle for physical and emotional integrity. As explained in Part I, many tribal police forces have a policy against arresting non-Indians because the tribes have no authority to prosecute these individuals. Any arrest would be futile, because the attacker will be free to abuse again and the tribe will be unable to stop him. Once tribes are allowed to assert criminal jurisdiction over these offenders and prosecute them for crimes committed against Indian women, tribal police will be able to work with tribal prosecutors to ensure justice for these women.

One should not underestimate the power of a law enforcement agency that functions as a cohesive unit, with tribal prosecutors and police working together to best serve the needs of their community. The criminal justice system cannot function when its two main components—police and prosecutors—work in isolation. What is needed is a cohesive unit of prosecutors and police working as a team to hold victimizers accountable for their abuse.

This cohesive unit works to the benefit of Indian women because, first, cases will not be lost or forgotten about in the process of transferring information between tribes and federal prosecutors. Prosecutors are dependant upon police officers for pertinent information to build their cases; police need the guarantee from prosecutors that when they put their lives on the line by responding to a domestic violence call, their efforts will not be fruitless

because the victimizer they arrest will be held accountable. A team of prosecutors and police working together is the only way to ensure Indian women's cases are not forgotten or ignored.

Additionally, allowing tribes to assert jurisdiction over non-Indian criminal offenders is the best solution to the problem of violence against Indian women because it recognizes the injustice in *Oliphant* on two levels. First, it responds to the Supreme Court's historical tendency to diminish tribal sovereignty. Members of a tribe are not forced into the impossible decision of choosing between the tribal sovereignty they deserve, and protecting victims of domestic violence: this solution addresses both concerns. By asserting criminal jurisdiction over non-Indians, tribes can better protect their members from victimization, while at the same time building and sustaining the judicial system necessary to any sovereign. This solution works to benefit not only Indian women, who are the main concern of this Note, but to all who believe that a change in the federal government's ill treatment of tribes is desperately needed. Tribes will finally have the authority to protect their members in a manner consistent with their status as domestic dependant sovereign nations. Again, tribes are eager to have this opportunity, as is evident from the National Congress of American Indians' resolution to make efforts to "[i]ncreas[e] criminal authority to Indian tribes to prosecute non-Indian rapists and batterers"[114] a priority. Criminal jurisdiction over *all* who enter the reservation, regardless of tribal registration or lack thereof, restores a great deal of the sovereignty the Supreme Court has stripped from tribes in the last part of the 20th century.

In spite of the Supreme Court's action and Congress's inaction, many tribal criminal justice systems remain strong. This is the second way in which restoring tribal jurisdiction over non-Indian offenders responds to the ignorance of the current system: it recognizes that tribal criminal justice systems are not inferior, and many are much more complex and sophisticated than systems serving members of dominant society. "Despite [tribes'] dependant status, they have retained the power to manage their internal affairs, and criminal jurisdiction over non-Indians is essential to managing those affairs."[115]

For instance, tribes such as the EBCI have stringent domestic violence codes, and have been successful in enforcing those codes

114. National Congress of American Indians, *Support for the 2005 Reauthorization of the Violence Against Women Act Including Enhancements for American Indian and Alaska Native Women*, Res. PHX—03-034, at 2 (2003).

115. Heisey, *supra* note 21, at 1070.

against non-Indian offenders. The EBCI has been very creative in making sure Cherokee women are protected from domestic violence. The Domestic Violence chapter of the Cherokee Code[116] requires all persons arrested for domestic violence to be brought before the Court.[117] Only after the accused appears can he raise an affirmative defense of lack of jurisdiction. This solution has allowed the EBCI the ability to arrest and prosecute many non-Indian offenders who would otherwise go entirely without punishment. Another tactic the tribe employs to protect Cherokee women is utilizing the power of exclusion. Chapter 2 of the Cherokee Code allows Tribal Counsel "the power to exclude other persons from Cherokee trust lands when necessary to protect the integrity and law and order on Tribal lands and territory or the welfare of its members."[118] If non-Indians will not respect the laws the EBCI has adopted to best govern the people who reside on tribal lands, then the EBCI will remove the offender from the reservation and away from the woman he victimized.

Although often useful, the creative solutions employed by tribes like the EBCI are not lasting solutions. Rather, they demonstrate the resilience of the tribal criminal justice systems. Even though few sovereign governments could withstand a prohibition against prosecuting those who will commit the majority of crimes on that sovereign's territory, tribal criminal justice systems have survived. Protecting Indian women is so important to tribes like the EBCI that they have dedicated limitless effort to finding gaps in the Supreme Court's holdings that will allow them to protect female tribal members. The solutions are creative, but more importantly they are a signal to all that these cases are too important to be ignored. It is a travesty that tribes have to look for "loopholes" in the Supreme Court's rulings to be able to protect their members. They should be permitted to assert jurisdiction over *all* non-Indian offenders, not just those abusers who lack access to fancy lawyers specializing in Indian law. Tribes are willing and able to assert criminal jurisdiction over *all* non-Indian offenders. Just because the Supreme Court has not recognized the sophisticated tribal criminal justice systems serving many tribes across the nation does not mean they do not exist, and it is time for these systems to receive the recognition they deserve.

Tribal jurisdiction is also the best solution to the problem of domestic violence: it is the only one that allows tribes to tailor

116. The Cherokee Code, Ch. 50B: Domestic Violence Prevention.
117. The Cherokee Code, Ch. 50B-4: Enforcement of Orders.
118. The Cherokee Code Ch. 2: Exclusion Power of the Tribe, § 2-1. Power to Exclude.

responses to domestic violence to best serve the interests of the Indian women. As previously mentioned, our country was founded on principles of federalism because we believe state and local governments can in many ways better serve their distinct populations than the federal government. Tribes similarly have unique ways of responding to domestic violence, and they should be permitted to implement their responsive solutions to the problem to the fullest extent. The EBCI's unique responses to domestic violence are just one example. The Navajo have also formulated distinctive responses to domestic violence. The Navajo Peacemaker Court was created in 1982 to "formally institutionalize the customary mediation techniques of dispute resolution that were common among the Navajo before and after the federal government established courts on the reservation."[119] The Peacemaker Court handles a wide variety of cases, including criminal actions and child custody, and uses "non-adversary methods of community participation in achieving conflict resolution." These non-adversarial methods include "talking out" the problem, involving family and friends in the dispute resolution, and issuing judgments requiring the offender to apologize or pay restitution to the victim.[120] Community service is also a form of restitution that Peacemaker Courts require from those who appear before them.[121] Tribes like the Navajo should be granted the flexibility to enact laws and regulations, and implement specialized courts, that can most effectively respond to the unique needs of the people they serve. Restoring tribal criminal jurisdiction is the final, and perhaps most important step in ensuring that tribal members reap the same benefits from our federalist system as members of dominant society receive from city and state governments.

Tribal criminal jurisdiction over non-Indians is the best solution to the problem of domestic violence on the reservation because police and prosecutors can function as a cohesive unit, the status of tribes as domestic dependent sovereign nations will be recognized, and Indian women will benefit from government responses tailored to their needs. This solution is necessary to ensure Indian women receive the same quality of protection from domestic violence that members of dominant society receive. Currently, the protection Indian women receive is impermissibly inadequate, as

119. Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 597 (2000).

120. *Id.* at 597-98.

121. *Id.* at 597.

federal prosecutors do not work with federal law enforcement to ensure protection, and tribes are not permitted to enforce sentences unique to the particular circumstances of the domestic violence victims and offenders. This solution is the only one that can address these inadequacies while at the same time recognizing that women need not choose between tribal sovereignty and physical and emotional integrity. It is unfair for a woman to feel as if she is the cause of federal and state government infringement on tribal sovereignty, or that she doesn't merit the same protection from domestic violence as members of dominant society. Congress must take action to solve all of these problems, and the only way it can do so is by redressing the Supreme Court's holding in *Oliphant* by restoring tribal criminal jurisdiction over non-Indians.

PART V

No matter how beneficial the effects of tribal jurisdiction over non-Indians will be for Indian victims of domestic violence and tribal sovereignty in general, dominant society will not allow such jurisdiction if its concerns are not addressed. These concerns include: protection of individual rights; review of tribal court decisions; and the possibility that not all tribes can afford to develop an adequate judiciary. This Part will analyze each of these concerns, and demonstrate why they should not prevent tribes from asserting criminal jurisdiction over non-Indians.

The first concern is that tribal courts will not protect an individual defendant's rights and liberties. The Indian Civil Rights Act (ICRA)[122] imposes "most of the provisions of the Bill of Rights on tribal governments,"[123] as evident below:

> No Indian tribe in exercising powers of self-government shall:
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against

122. 25 U.S.C.A. § 1302 (West 2001).

123. Clarkson, *supra* note 105, at 481.

unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

While one cannot help but notice the striking similarities between ICRA and the United States Bill of Rights, the Supreme Court has on numerous occasions expressed concerns that ICRA does not provide enough protection, meaning the *same* protection that a non-Indian would receive in dominant society's courts. *Oliphant* certainly took into consideration this concern: while "defendants are entitled to many of the due process protections accorded to many defendants in federal or state criminal proceedings . . . the guarantees are not identical. Non-Indians, for example, are excluded from Suquamish tribal court juries."[124] *Duro*

124. *Oliphant*, 435 U.S. at 194.

raised similar concerns when the Court noted that ICRA "guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer."[125]

This concern is not an insurmountable roadblock to tribal criminal jurisdiction over non-Indians. First, it should be noted that some tribes, such as the EBCI, provide even *greater* protections to defendants appearing in tribal courts. For instance, every defendant in a Cherokee court has the right to a jury trial, no matter how minor the crime. Again, it is ignorance on the part of dominant society to assume that *different* equals *inferior*. Sophisticated tribal court systems like the one employed by the EBCI demonstrate that this is not the case, yet the effect of the current jurisdictional scheme reflects dominant society's opinion of these courts as inferior. Note the asymmetry:

> If an Indian leave the boundary of Indian country and by doing so places herself outside the limit of tribal authority, the tribe loses jurisdiction over her and the state gains jurisdiction. If she then commits a crime, the state exerts it authority and prosecutes her in state court. Likewise, there is no reason to believe that a non-Indian who leaves the confines of the state, enters Indian country, puts herself within the boundary of tribal authority, and commits a crime there should not be subject to the jurisdiction of the tribe.[126]

When the federal government endorses this asymmetry, it sends the message to American Indians that the courts serving them are not as valid as those serving members of dominant society, and that they are far too inferior to try a member of dominant society. These courts are not inferior, but designating a portion of the population as immune from these courts based on tribal membership sends that message. It also sends a message to the people who depend on these courts to adjudicate the crimes committed against them that they are receiving an inferior brand of justice, and one that is inadequate for members of dominant society.

Additionally, it is ignorant for dominant society to assume that all tribal courts are the same. As mentioned before, the EBCI offers protections to defendants that far surpass those mandated by ICRA and those found in dominant society's courts. Some tribal courts may not offer this degree of protection to individual defendants.

125. *Duro*, 495 U.S. at 693.

126. Heisey, *supra* note 21, at 1070.

For the Supreme Court to make a sweeping generalization that these courts do not offer sufficient protection to defendants without taking into account specifics of the wide variety of systems tribal courts have implemented is reprehensible. If it is the case that some tribal courts are found to offer insufficient protections to individual defendants, this should not be a roadblock to *all* tribes being permitted to assert criminal jurisdiction over non-Indians. Rather, those tribes could be required to adopt certain safeguards to ease the minds of non-Indians. Tribes could "be required to employ federal rules of evidence and procedure, to adopt codes of judicial and attorney conduct, to ensure separation of governmental powers, to apply federal appellate precedents, to permit removal, and to extend the right to appointed counsel."[127]

Additionally, Congress could perhaps do away with ICRA and require tribes to adopt the United States Bill of Rights so that the same protections courts in dominant society provide are offered by tribal courts. Even with these safeguards, there still exists flexibility for tribal court systems to adjudicate in manners best suited to the needs of those who appear before them and those who depend on them for justice. To some degree, imposing federal procedures on tribal courts would "Westernize" these courts, but this may be a compromise tribes will have to make in order to assert criminal jurisdiction over non-Indians. While this compromise does nothing to address the ignorance dominant society expresses when it equates *different* tribal criminal justice systems with *inferior* systems, it forces dominant society to abandon one of its most adamant objections to tribal criminal jurisdiction. Without this objection, tribes will be one step closer to asserting criminal jurisdiction over non-Indians, and therefore one step closer to being able to provide Indian women protection from domestic violence.

Another potential concern for dominant society is whether there will be sufficient review of tribal court decisions. Dominant society will resist allowing non-Indians to be subject to tribal courts without the possibility of review by federal courts. A tension arises, however, because if federal court review is allowed, there is the possibility that "tribal courts will become inferior courts in the eyes of non-Indian litigants who will perceive tribal courts as forums to 'dry-run' litigation, thus hindering the development of tribal law."[128]

127. Gould, *supra* note 81, at 691.
128. Jones, *supra* note 10, at 503–04.

Again, this concern should not deter tribal jurisdiction over non-Indians. Perhaps instead of review by federal district courts, a "Court of Indian Affairs" that would be more knowledgeable about tribal law, and solely responsible for acting as the reviewing authority for tribal courts, could review these decisions. This is not a novel idea:

> In 1934, part of the original Wheeler-Howard bill, now known as the Indian Reorganization Act, contained an additional provision that was never adopted. This provision established a Court of Indian Affairs. This was a court of review that was to take the place of federal district courts in matters arising from Indian affairs.[129]

Tribal courts and the federal government should be able to find a method of review acceptable to both. There is a "necessity for tribal-federal court dialogue regarding how the tribal court record will be treated by the federal judiciary, and how the federal courts can avoid the replication of effort in developing a factual record in order to dispense justice to litigants in a more expedient manner."[130] This is an opportunity to embark on a new level of cooperation to evaluate an approach to justice that, although may not have the benefit of foolproof experimentation behind it, may benefit many people. For the sake of protecting Indian women and strengthening tribal sovereignty, tribes should be encouraged, or at least permitted to build and sustain vibrant judiciaries. The federal government must work with tribes, not against them, to ensure this occurs.

The last concern that dominant society raises when claiming that tribes should not have jurisdiction over non-Indians is that not all tribes will be able to afford to support a tribal judicial system. Indeed, it is the case that some tribes may not even *want* to assert such jurisdiction. "During the [Choctaw's] 1983 constitutional referendum, tribal members were asked to decide whether 'the tribal court's jurisdiction should be extended to include general civil, criminal and probate matters?' The tribal members voted 'no' by a margin of more than two to one."[131] The fact that some tribes may not want to take on this responsibility, or cannot afford to do so, does not mean that all tribes should be denied this right. "Just because it would be impractical for the tribes to assert

129. Heisey, *supra* note 21, at 1075.
130. Jones, *supra* note 10, at 463.
131. Clarkson, *supra* note 105, at 488.

jurisdiction over these crimes due to the aforementioned limitations does not mean that such jurisdiction cannot exist."[132] Some tribes are currently unable to afford to build judiciaries, but this does not mean they will be unable to do so in the future.[133] Other tribes, like the Cherokee and Navajo, have sophisticated and time-honored judicial systems already in place so that it would require almost no adjustment at all to assume jurisdiction over non-Indians.

Ultimately, the discussion is about the choice to do what is best for the citizens of a particular community and the members of a tribe. Tribes do not presently have that choice, and this is a travesty. While "[t]ribes not wishing to participate in broader jurisdiction should have the right to opt out,"[134] those who are willing and able to assert such jurisdiction should have the right to do so. Tribes that currently do not have a judiciary in place can benefit from various funding programs through the federal government that are available especially for the purpose of enhancing a tribe's ability to develop or enrich a criminal justice system that will best serve the needs of tribal members. An increase in prosecution rates of domestic violence cases may lead to higher costs for tribal court systems, but these costs are necessary. Cost-saving methods undertaken by prosecutors of domestic violence should not be implemented at the expense of the physical and emotional integrity of Indian women. Any increase in cost related to the protection of Indian women is necessary to ensure a segment of the population is not denied justice on account of where she lives or the tribal membership of her attacker.

State and federal jurisdiction over crimes of domestic violence on the reservation does not constitute a workable solution for Indian women. Tribal sovereignty and protection from domestic violence are both important concerns to Indian women, and both are addressed when tribes are permitted jurisdiction over non-Indian offenders. Those tribes with complex judicial and law enforcement systems in place should be allowed to put them to use to protect Indian women, and those who do not have such systems should be permitted to explore this idea in the future. It is in the best interest of Indian women that Congress grants tribal prosecutors the power to stop non-Indian men from abusing without consequence.

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132. Heisey, *supra* note 21, at 1065.

133. "The fact that tribes have not exercised this authority does not mean that they do not possess the authority." Maxfield, *supra* note 63, at 403.

134. Gould, *supra* note 81, at 691.

CONCLUSION

This Note has explained the necessity of Congressional action to restore the power of tribes to prosecute non-Indians who commit crimes against Indians on tribal lands. Part I explained the alarming victimization rates that Indian women face, and speculated that the prosecution rates for crimes against these women will turn out to be even more startling. Federal prosecutors cannot offer Indian women the protection they deserve, and the numbers show that these women are targeted by non-Indian men because there will be no consequences. Congress must act now before another life on the reservation is lost.

Congress must also act to undo the Supreme Court's diminution of tribal sovereignty over the years, which has resulted in tribes retaining a level of sovereignty hardly above that of a private club or social organization. *Oliphant* reflected the ignorant notions of tribal government that members of the Court share, and cases since have only perpetuated this trend. *Oliphant* was wrongly decided, and fairness requires Congress to take action to return tribes to the status of "domestic dependents" described by Marshall in the 1830s.

The solution is clear: Congress must make an unambiguous statement to the Supreme Court and exercise its plenary power over Indian nations by allowing tribes to assert criminal jurisdiction over those members of dominant society who victimize Indians every day. Tribes need to be able to do this for their members, and for their existence. It is time for Congress to begin an era of responsible cooperation between the federal government and Indian nations.