

CHILD SEXUAL ABUSE IN INDIAN COUNTRY: IS THE GUARDIAN KEEPING IN MIND THE SEVENTH GENERATION?

*Larry EchoHawk**

INTRODUCTION

When European settlers first came to the northeastern shore of America, they encountered the great Iroquois Confederacy. Through this contact, white men were intrigued and influenced by several principles of governance used by the Iroquois.¹ One of these principles is reflected in a phrase that captures the spirit of the Iroquois's view toward children and the future of their people. The Iroquois refer always to the "Seventh Generation":

"In our way of life, in our government, with every decision we make, we always keep in mind the Seventh Generation to come. It's our job to see that the people coming ahead, the generations still unborn, have a world no worse than ours—and hopefully, better. When we walk upon Mother Earth, we always plant our feet carefully because we know the faces of our future generations are looking up at us from beneath the ground. We never forget them."²

* Professor of Law, J. Reuben Clark Law School, Brigham Young University (1995–present). Attorney General of Idaho (1991–95), Prosecuting Attorney of Bannock County, Idaho (including part of Fort Hall Indian Reservation) (1986–90), and Chief General Counsel for the Shoshone-Bannock Tribes (1977–86). Member of the Pawnee Indian Tribe.

The motivation for writing this Article came from the author's experience working as a tribal attorney on Idaho's largest Indian reservation, prosecuting several serious cases of criminal child sexual abuse, defending Indian defendants in Indian Major Crimes Act prosecutions in federal court, and working as Attorney General in Idaho to establish new laws and programs to combat sexual molestation of children.

The author wishes to acknowledge and thank Tessa Meyer Santiago, Julie Adams DeFord, Paul Kohler, Alisa Dahlberg, Mark EchoHawk, Paul EchoHawk, and Giancarlo Pesci for their work on this Article as law student research assistants.

1. SUSAN AVERY & LINDA SKINNER, EXTRAORDINARY AMERICAN INDIANS 15–17 (1992).

2. HARVEY ARDEN & STEVE WALL, WISDOMKEEPERS: MEETINGS WITH NATIVE AMERICAN SPIRITUAL ELDERS 68 (1990) (quoting Oren Lyons, Faithkeeper of the Turtle Clan of the Onondaga Nation and spokesman for the Six Nations Iroquois Confederacy).

The Seventh Generation is an idealistic concept worthy of consideration by all governments. As a practical matter, however, government leaders today face a daunting task in trying to assure a better world for future generations of Native Americans.

Over the past seven generations, Native Americans have been severely impacted by federal laws and policies that have reduced tribal sovereign powers, taken away valuable tribal lands and natural resources, inhibited the exercise of Native American religious practices, and forced changes in traditional tribal ways of life. Because of these laws' devastating impact, Native Americans as a group have become the poorest of the poor in America. Statistically, Native Americans today rank at the bottom of nearly every category used to identify racial and ethnic groups that suffer economic, health, or educational disadvantages.³ Thus, anyone attempting to secure a brighter future for reservation Indians by embracing the concept of the Seventh Generation must grapple today with many legal, economic, and social problems left behind in the wake of "Manifest Destiny" and the federal government's policies of forced assimilation.

For the past quarter of a century, in the fight to advance the interests of Indian people, tribal sovereignty issues, such as the regulation of treaty hunting and fishing rights, taxation, gaming operations, water rights, and land use, have taken priority over issues more directly affecting the lives of young tribal members. Consequently, problems relating to youth gangs, juvenile violence, teen pregnancy, school dropouts, and sexual abuse of children have not received adequate attention from many tribal leaders. In an atmosphere in which tribal governments with limited financial resources are confronted by a wide variety of critical issues, tribal policymakers must ask: What is most important to securing a promising future for generations to come? The answer should be that *children* are a tribe's most valuable resource and that their well-being is of critical importance to achieving a better world in the future. Tribal leaders must continue the fight to protect sovereignty, lands, and natural resources, but nothing is more important than protecting the health, safety, and welfare of their children. Without physically and mentally healthy children, there is no bright future.⁴

3. See generally PROGRAM STATISTICS TEAM, U.S. DEP'T. OF HEALTH & HUMAN SERVS., TRENDS IN INDIAN HEALTH 1998-99 (2001).

4. *Challenges Confronting American Indian Youth: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong. 11 (1995) (statement of Sleepy Eye LaFromboise, at-large representative for the National Indian Education Association).

One of the most destructive problems affecting children in “Indian country”⁵ today is sexual abuse.⁶ Increasing reports of child sexual abuse and the severe impact that this type of crime has on Indian youth and their families have prompted tribal leaders to voice great concern over the detrimental impact of this crime on Indian communities.⁷ Congress, acting in response to concerns expressed by tribal leaders and pursuant to its responsibility as guardian and trustee for Indian tribes, has enacted new laws in the past fifteen years to address child sexual abuse in Indian country.⁸ The question is whether these

5. The term “Indian country” is used to describe the geographic territory in which special federal and tribal laws apply, usually to the exclusion of state law. 18 U.S.C. § 1151 (1994). Section 1151, a criminal jurisdiction statute, defines “Indian country” as follows:

[T]he term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id. Section 1151 “generally applies as well to questions of civil jurisdiction.” *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427 n.2 (1975).

6. BILLIE WRIGHT DZIECH & CHARLES B. SCHUDSON, *ON TRIAL: AMERICA’S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN* (1989). Dziech and Schudson explain:

The National Center on Child Abuse and Neglect defines “child sexual abuse” as “contacts or interactions between a child and an adult when the child is being used for the sexual stimulation of that adult or another person. Sexual abuse may also be committed by a person under the age of 18 when that person is either significantly older than the victim or when the abuser is in a position of power or control over another child.”

Id. at 2

7. *Child Physical and Sexual Abuse in Indian Country: Hearings on S. 1783 Before the Committee on Interior and Insular Affairs*, 101st Cong. 349 (1990) [hereinafter *Child Physical and Sexual Abuse in Indian Country*] (statement by Bernie Teba, Executive Director of Eight Northern Indian Pueblos Council). Mr. Teba emphasized that:

Society views as especially heinous a crime in which the victim is a child. Generally lacking both the physical and psychological strength to resist or defend themselves adequately, children can suffer trauma that leaves physical and mental scars lasting a lifetime. Our response to a crime when a child is the victim is, therefore, a matter of great concern.

Id.

8. *See, e.g.*, Indian Major Crimes Act, 18 U.S.C. § 1153 (1994) (providing explicitly that child sexual abuse in Indian country is federal crime); Indian Law Enforcement Reform Act, 25 U.S.C. § 2802 (1994) (requiring comprehensive reporting of declinations to prosecute federal crimes in Indian country, permitting access to federal investigatory case files, and strengthening BIA law enforcement services); Indian Child Protection and Family Violence Act, 25 U.S.C. § 3201 (1994) (addressing

efforts by the federal government will significantly repress child sexual abuse in Indian country in the immediate future and thus create a better world for the Seventh Generation of Native Americans.

This Article will address the role and responsibility of the federal government as guardian and trustee for Indian tribes in dealing with child sexual abuse in Indian country. To fully appreciate the gravity of the problem of child sexual abuse in Indian country, one must first have a basic understanding of child sexual abuse in America. Comparisons can then be made to the unique circumstances that exist on Indian reservations. Part I discusses child sexual abuse in the United States in general, and Part II follows with a discussion of child sexual abuse in Indian country. Part III addresses the federal government's responsibilities in the fight against child sexual abuse in Indian country and the efforts Congress has made to address this problem. Part IV will discuss what more can be done by the federal trustee to protect Native American children and to bring those who sexually molest Indian children to justice.

I

CHILD SEXUAL ABUSE IN AMERICA

A. *Statistics on Child Sexual Abuse*

The most recent child abuse statistics come from a survey of the fifty states conducted in 1999 by the National Child Abuse and Neglect Data System (NCANDS).⁹ In 1999, an estimated 2,974,000 referrals were made of children being abused or neglected.¹⁰ Of those almost three million referrals, an estimated 826,000 were victims of child abuse and neglect.¹¹ Nationally, about three-fifths (60.4%) of child abuse and neglect reports are investigated.¹² About a third of those investigations (29.2%) show substantiated or indicated child abuse or neglect.¹³ In 11.3% of the substantiated cases, the victims

needs for reporting procedures, central registry of offenders, character investigations, and Indian child abuse treatment and prevention programs).

9. ADMIN. ON CHILDREN, YOUTH, & FAMILIES, U.S. DEP'T. OF HEALTH AND HUMAN SERVS., *CHILD MALTREATMENT 1999* (2001) [hereinafter *CHILD MALTREATMENT 1999*], <http://www.acf.dhhs.gov/programs/cb/publications/cm99/cm99.pdf>.

10. *Id.* at vii.

11. *Id.*

12. *Id.*

13. *Id.*

suffered sexual abuse.¹⁴ Females were four times more likely to be sexual abuse victims than males.¹⁵

The number of actual child victims who suffered sexual abuse in 1999 is approximately 88,238.¹⁶ This compares to 10,000 to 20,000 cases of child sexual abuse cases substantiated and accepted for service by agencies in the 1970s and 1980s. These statistics underscore that child sexual abuse reports and cases have increased substantially in the past twenty years, and that sexual molestation of children is still a major problem in America. Hence, the well-being of America's children continues to be threatened by this horrible crime.

B. *The Devastating Impact*

Child sexual abuse is the murder of innocence. A victim of this terrible crime may thereafter never live a normal, happy, healthy, and secure life because they face an increased risk of suffering an array of devastating short and long-term consequences.¹⁷ The link between sexual abuse and negative consequences for victims has been the subject of several clinical reports and research studies over the past two decades. Frequently reported short-term effects include anger, hostility, low self-esteem, conduct disorders, delinquency, inappropriate sexual behavior, teen pregnancy, truancy, poor performance in school, substance abuse, and running away.¹⁸ Potential long-term impacts include sexual disturbance, depression, suicide, tendencies toward revictimization, alcoholism, drug abuse, chronic unemployment, violence, and sexual abuse of others.¹⁹

Sexually abused children also have a high risk of becoming dysfunctional parents. As adults they may have serious difficulty trusting

14. *Id.*

15. *Id.* (reporting that sexual abuse rate for female children is 1.6 for every 1,000 female children, while for male children, rate is 0.4 children for every 1,000 male children in population.)

16. *Id.* at 20 (Table 2-4).

17. CATHY SPATZ WIDOM, U.S. DEP'T OF JUSTICE, VICTIMS OF CHILDHOOD SEXUAL ABUSE—LATER CRIMINAL CONSEQUENCES 2 (1995), <http://www.ncjrs.org/pdffiles/abuse.pdf>; *see also* ARROW, INC. & NAT'L AM. INDIAN COURT JUDGES ASS'N, CHILD SEXUAL ABUSE IN NATIVE AMERICAN COMMUNITIES 7 (1985) [hereinafter CHILD SEXUAL ABUSE] (discussing various factors that contribute to impact of sexual abuse: "The type of assault, the period of time involved, the child's interpretation of events, what happened when the abuse became known, and the treatment provided all influence the effect on the child.").

18. WIDOM, *supra* note 17, at 2.

19. COMM'N ON BEHAVIORAL & SOC. SCIS. & EDUC., NAT'L RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT, 208–26 (1993) (listing consequences associated with child abuse and statistics regarding higher incidence of these problems in abused children).

others and maintaining long-lasting relationships.²⁰ They also have a tendency to become involved in criminal behavior, including child sexual molestation, when they grow up.²¹ These types of propensities demonstrate how child sexual abuse can perpetuate itself and have a detrimental impact on future generations. A vicious cycle occurs: sexual abuse, domestic violence, and alcoholism—being learned coping systems—are handed down from one generation to the next. Thus, the Seventh Generation is impacted by the abuse of children today.

C. *Difficulties in Investigation and Prosecution*

Child sexual abuse cases are difficult to successfully prosecute because one or more of the following obstacles are usually present in the typical case. Victims are young and have a difficult time giving testimony about sensitive and traumatic incidents in the unfamiliar and intimidating setting of the courtroom. The offender is most likely known to the victim and may have had a close trust relationship with the victim at the time the incident took place.²² Not only might the child victim feel some loyalty to the offender because of a trust relationship, but it is not uncommon for a child's parent to decide to stand by the offender for economic or loyalty reasons. These factors often cause delay in reporting the incident, which in turn may cause failure to preserve physical evidence. Without physical evidence, and in light of the fact that this type of crime is seldom witnessed by other people, the case against an alleged offender often comes down to the child's word against the word of the adult offender. With the child's credibility at issue, a prosecutor must then overcome assumptions commonly held by judges and juries that children are prone to fantasy and are overly curious about sexuality.²³

There are also problems associated with how the case is investigated. Many times a child victim is interviewed repeatedly by teachers, school counselors, parents, child protection workers, and law enforcement officers who do not have adequate training and experience to learn the true facts without improperly influencing the way the child tells what happened. These repeated interviews may also revictimize the child by unnecessarily exposing the child to emotional trauma brought about by the stress of being questioned concerning an

20. See CHILD SEXUAL ABUSE, *supra* note 17, at 7.

21. See WIDOM, *supra* note 17, at 4–7.

22. BEVERLY GOMES-SCHWARTZ ET AL., CHILD SEXUAL ABUSE: THE INITIAL EFFECTS 62–66 (1990).

23. See, e.g., *People v. Scholl*, 37 Cal. Rptr. 475, 478 (Cal. Dist. Ct. App. 1964) (remarking that children may be victims of their own sexual fantasies).

unpleasant occurrence.²⁴ Finally, several factors cause child sexual abuse cases to be plea-bargained down to lesser charges and, consequently, the offender may be out among children within a short time.²⁵ Many people believe that sex offenders should be treated by the mental health system, not the criminal justice system.²⁶ Another barrier exists when parents or caretakers of the victim fear that pursuit of the case in court would cause more harm to the child than necessary.²⁷ In addition, prosecutors may fear that a child victim may not be able to withstand the pressures of a courtroom trial and thus will be unable to provide the testimony necessary to get a conviction.²⁸ Consequently, they opt for a plea bargain or dismissal because they believe resources should be directed to other cases where prosecution is more certain.²⁹

D. Legislative Action to Aggressively Address the Problem

In response to an increasing number of child sexual abuse cases and the special difficulties surrounding these cases, state and federal lawmakers in recent years have been aggressive in enacting legislation to better protect children from sexual molestation and to assist criminal prosecutors and investigators in handling child sexual abuse cases. Among these enactments are statutory laws which mandate the reporting of child abuse,³⁰ criminalize sexual exploitation of children,³¹

24. See Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 (1985); see also OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, OVC BULLETIN: IMPROVING TRIBAL/FEDERAL PROSECUTIONS OF CHILD SEXUAL ABUSE CASES THROUGH AGENCY COOPERATION, <http://www.ojp.usdoj.gov/ovc/publications/infores/pdf/txt/tribalbult.pdf> (last visited Apr. 19, 2001) [hereinafter IMPROVING TRIBAL/FEDERAL PROSECUTIONS].

25. See Peter T. Wendel, *The Case Against Plea Bargaining Child Sexual Abuse Charges: "Deja Vu All Over Again"*, 64 MO. L. REV. 317, 323–26 (1999).

26. G. Russell Nuce, Comment, *Child Sexual Abuse: A New Decade for the Protection of Our Children?*, 39 EMORY L.J. 581, 582 n.5 (1990), (citing Lucy Berliner & Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Abuse*, 40 J. SOC. ISSUES 125, 127 (1984)).

27. See DZIECH & SCHUDSON, *supra* note 6, at 12.

28. *Id.* at 13.

29. See Nuce, *supra* note 26, at 581 & n.4.

30. In 1963, the first reporting law for child abuse was enacted. By 1967, all states had passed similar laws which require medical and other professionals who work with children to report suspected child abuse to either criminal law enforcement or child protection agencies. See NAT'L CTR. ON CHILD ABUSE & NEGLECT, U.S. DEP'T. OF HEALTH, EDUC. & WELFARE, A CURRICULUM ON CHILD ABUSE AND NEGLECT, *reprinted in* NAT'L INDIAN JUSTICE CTR., FOR ALL MY RELATIONS 79 (1992).

31. See, e.g., 18 U.S.C. § 2251 (1994 & Supp. 2000) (imposing criminal penalties on people who use or knowingly permit minor to engage in sexually explicit conduct for purposes of producing any visual depiction of that conduct); see also NAT'L LE-

broaden definitions of sex crimes against children,³² increase criminal penalties for child sex abuse,³³ extend statutes of limitation,³⁴ require speedy prosecution of child sexual abuse cases,³⁵ allow leading questions to be asked of child witnesses,³⁶ permit a child's hearsay statements to be admitted in evidence,³⁷ allow a child's previously videotaped deposition or preliminary hearing testimony to be presented at trial,³⁸ require convicted child molesters to register with local law enforcement agencies,³⁹ and allow public notification when a convicted sex offender is released into a community.⁴⁰ This energetic legislative activity has undoubtedly made it easier to identify and prosecute child sex abuse offenders, but the recent statistics do not show a significant downturn in the number of cases.⁴¹ The cycle of child sexual abuse in the United States has not yet been broken.

GAL RES. CTR. FOR CHILD ADVOCACY & PROT., AM. BAR ASS'N, CHILD SEXUAL EXPLOITATION: BACKGROUND AND LEGAL ANALYSIS (1981).

32. *See, e.g.*, WASH. REV. CODE ANN. § 9A.64.020(3) (West 2000) (including stepchildren and adopted children under age eighteen as "descendents" for purposes of statute criminalizing incest).

33. *See, e.g.*, IDAHO CODE § 18-1506 (Michie 1997) (including penalty of up to fifteen years for sexual abuse after amendment in 1992).

34. *See, e.g.*, WASH. REV. CODE ANN. § 9A.04.080 (West 2000) (setting ten year statute of limitations, and in some cases longer, for rape of minor where rape is reported to law enforcement agency within one year of its commission).

35. *See, e.g.*, IDAHO CODE § 19-110.

36. *See, e.g.*, CAL. EVID. CODE § 767(b) (West Supp. 2001); IDAHO CODE § 18-6101 (explaining in annotation that leading questions may be used when prosecutrix is young, unsophisticated girl).

37. *See, e.g.*, WASH. REV. CODE ANN. § 9A.44.120 (West 2000) (admitting child testimony of sexual abuse not otherwise admissible into evidence where there is sufficient indicia of reliability, as determined by court); *see also* Note, *supra* note 24 (providing more detailed analysis of child testimony vis-à-vis hearsay law).

38. *See* Children's Justice and Assistance Act of 1986, Pub. L. No. 99-401, § 102, 100 Stat. 903 (1985) (creating financial incentives for states to enact laws that reduce additional trauma to child victims in child sex abuse cases); *see also* Note, *supra* note 24, at 813-14 (stating that some states allow for taking of child testimony through two-way television transmission out of presence of judge, jury, and defendant, although child witness is still subject to cross-examination at place of taping).

39. *See, e.g.*, IDAHO CODE § 18-8302; 2001 Idaho Sess. Laws 659 (amending Idaho Code § 18-8310 to make persons convicted of aggravated offense subject to sexual offender registration act); *see also* Robin L. Deems, Comment, *California's Sex Offender Notification Statute: A Constitutional Analysis*, 33 SAN DIEGO L. REV. 1195, 1196-97 n.10 (1996) (describing and citing various state registration statutes).

40. *See* Tracy L. Silva, Comment, *Dial "1-900-PERVERT" and Other Statutory Measures that Provide Public Notification of Sex Offenders*, 48 SMU L. REV. 1961, 1964 (1995).

41. *See* discussion *supra* Part I.A.

II

CHILD SEXUAL ABUSE IN INDIAN COUNTRY

A. *Statistics on Child Sexual Abuse in Indian Country*

Several factors combine to magnify the impact and occurrence of child sexual abuse in Indian country. First, the risk factors that contribute to the incidence of child sexual abuse of children are greater on Indian reservations than in any other kind of community. These factors include poverty, unemployment, familial stresses, and violence,⁴² which occur at a higher rate among Native Americans living on reservations than any other racial group in the Nation.⁴³ Studies also show a higher incidence of child sexual abuse among families that are geographically or socially isolated.⁴⁴ It is readily apparent that many Indian communities are both geographically and socially isolated.

Second, the traditional Indian family structure has been weakened by a history of federal policies that did not understand or recognize the value of tribal culture in the rearing of Indian children. "In Indian tribal cultures the child is highly valued and occupies a central place within the family."⁴⁵ The traditional Indian family ideally in-

42. See RICHARD J. GELLES, *THE BOOK OF DAVID* 167 (1996) (stating that child abuse and neglect are "inextricably linked to the problems of alcohol and drug abuse, unemployment and underemployment, teenage pregnancy, poverty, homelessness, and street violence"); see also Victor I. Vieth, *In My Neighbor's House: A Proposal to Address Child Abuse in Rural America*, 22 *HAMLIN L. REV.* 143, 143 (1998) (discussing connection between child abuse and drug, alcohol, poverty, mental illness, and other social dilemmas in rural America).

43. See Bobby Wright & William G. Tierney, *American Indians in Higher Education: A History of Cultural Conflict*, in *STRUCTURED INEQUALITY IN THE UNITED STATES: CRITICAL DISCUSSIONS ON THE CONTINUING SIGNIFICANCE OF RACE, ETHNICITY AND GENDER* 92, 97 (Adalberto Aguirre, Jr. & David V. Baker eds., 2000) (stating that unemployment rate for American Indians living on reservation is eight percent; percentage of American Indians living in poverty is three times national average, and half of Native American population over thirty years of age has not completed high school); see also *Sexual Molestation of Children in Indian Country: Hearing Before the Senate Committee on the Judiciary*, 99th Cong. 18–19 (1985) (statement of Suzan Shown Harjo, Executive Director, National Congress of American Indians) (establishing that Native American populations experience 451% more alcoholism than non-Native Americans); Rita Ledesma & Paula Starr, *Child Welfare and the American Indian Community*, in *CHILD WELFARE: A MULTICULTURAL FOCUS* 117 (Neil A. Cohen ed., 2d ed. 2000) (finding that experience of Native American children differs from experience of all other minority groups within United States because of poverty rates, unemployment rates, health status, education levels, and mortality rates).

44. See CHILD SEXUAL ABUSE, *supra* note 17, at 4; see also Irl Carter & Lawrence J. Parker, *Intrafamilial Sexual Abuse in American Indian Families*, in *FAMILY SEXUAL ABUSE: FRONTLINE RESEARCH AND EVALUATION* 106, 110 (Michael Quinn Patton ed., 1991).

45. Ronald S. Fischler, *Child Abuse and Neglect in American Indian Communities*, 9 *CHILD ABUSE & NEGLECT: INT'L J.* 95, 95 (1985).

cludes a broad network of grandparents, aunts, and uncles, all of whom participate in the important task of raising a child. When a child cannot be cared for by his or her parents, the family steps in to protect the child.⁴⁶ Currently, in many Native American families, the extended family has broken down and traditional child-rearing practices are no longer operational.⁴⁷

This family breakdown is partially due to the federal government's long-lasting policy of placing Indian children in boarding schools where parental modeling was nonexistent⁴⁸ and was in fact replaced by newly learned dysfunctional behaviors such as sexual abuse and physical punishment.⁴⁹ These were relatively unknown in Native American communities prior to European conquest.⁵⁰ Another program that contributed to the breakdown of the traditional Native American family was the Indian Adoption Project, run by the Bureau of Indian Affairs (BIA).⁵¹ Between this project and other state initiatives, thousands of Native American children were adopted into non-Indian homes.⁵² Surveys in 1969 and 1974 showed that between twenty-five to thirty-five percent of all Indian children had been removed from their families.⁵³ Since the extended family is often not functional, many families have had to turn to the legal and social systems for aid. These institutions, being alien to Native American culture, many times create more conflict instead of solving a problem.⁵⁴ The result is that many Indian families are not able to meet the challenges posed by the pervasive risk factors, which serve as a fertile ground for child abuse to take root and spread.

Not only are risk factors especially challenging to a weakened family structure, but a greater percentage of the Native American population is threatened than any other racial group. The reason for this imbalance is that Native American communities have a higher per-

46. *Id.* at 95–96.

47. *See* CHILD SEXUAL ABUSE, *supra* note 17, at 5.

48. *See* Carter & Parker, *supra* note 44, at 111–12; *see also* CHARLOTTE GOODLUCK & ANGELA A. A. WILLETO, CASEY FAMILY PROGRAMS & NAT'L INDIAN CHILD WELFARE ASS'N, NATIVE AMERICAN KIDS 2000: INDIAN CHILD WELL-BEING INDICATORS 21 (2000), <http://www.nicwa.org/policy/05.Native%20Amer.Kids.pdf>.

49. KATHLEEN A. EARLE, CASEY FAMILY PROGRAMS & NAT'L INDIAN CHILD WELFARE ASS'N, CHILD ABUSE AND NEGLECT: AN EXAMINATION OF AMERICAN INDIAN DATA 16 (2000), <http://www.nicwa.org/policy/02.Child%20Abuse.pdf>.

50. *Id.*

51. *See generally* DAVID FANSHIEL, FAR FROM THE RESERVATION: THE TRANS-RACIAL ADOPTION OF AMERICAN INDIAN CHILDREN (1972).

52. *See* EARLE, *supra* note 49, at 16–17.

53. *Id.* at 17.

54. *See* Fischler, *supra* note 45, at 96.

centage of children. In the period from 1994 to 1996, in the service area of the Indian Health Service, the birth rate for American Indians and Alaska Natives was 24.1 births per 1,000 population, compared to a birth rate of 14.8 births per 1,000 population for the entire United States.⁵⁵ Thirty-three percent of the Indian population was younger than fifteen years old compared to twenty-two percent of the entire U.S. population.⁵⁶ The median age of Indians in the U.S. is 24.2 years compared to 32.9 years for all races in the U.S.⁵⁷

Considering the greater incidence of risk factors, and the partial breakdown of the traditional Indian family structure of child rearing, there is ample reason for concern that child sexual abuse may be a devastating affliction for Indian communities that have a higher than average percentage of children. Unfortunately, we do not even know the true extent of child sexual abuse in Indian country.⁵⁸

Some studies indicate that Native American communities experience child sexual abuse at about the same rate as the non-Indian population.⁵⁹ Other studies suggest that child abuse and neglect may be more frequent in Native American communities.⁶⁰ The fact is that reliable data regarding child sexual abuse in Indian country is scant.⁶¹ Statistical data regarding sexual abuse on Indian reservations has only been compiled for the last few years. The most comprehensive national study on child abuse in Indian country was conducted by the National Indian Justice Center (NIJC). The data was gathered from seventeen states and ten regional Indian Health Service (IHS) service areas. The NIJC found that the greatest proportion of abuse cases reported are neglect (48.9%), sexual abuse (28.1%), and physical abuse (20.8%).⁶² Thirty-four percent of Indian children are at risk of becoming victims of abuse and neglect, however, only one in five reported cases of abuse and neglect are substantiated.⁶³ This is often mislead-

55. PROGRAM STATISTICS TEAM, *supra* note 3, at 6.

56. *Id.* at 5.

57. *Id.*

58. *See* EARLE, *supra* note 49, at 8 (stating that child abuse and/or neglect of Indian children is underreported with only sixty-one percent of child abuse data being reported).

59. CHILD SEXUAL ABUSE, *supra* note 17, at 1.

60. *Cf.* Fischler, *supra* note 45, at 97-99 (stating that current statistics underestimate frequency of child abuse on Indian reservations due to higher incidence of underreporting in Indian communities).

61. EARLE, *supra* note 49, at 11-13.

62. NAT'L INDIAN JUSTICE CTR., PHASE III FINAL REPORT: CHILD ABUSE AND NEGLECT IN AMERICAN INDIAN AND ALASKA NATIVE COMMUNITIES AND THE ROLE OF THE INDIAN HEALTH SERVICE iv (1994) [hereinafter PHASE III FINAL REPORT].

63. *Id.* at ii-iii.

ing, since cases in which professionals strongly suspect child abuse but are unable to obtain independent confirmation are considered unsubstantiated.⁶⁴

When comparing child abuse and neglect suffered by Indian children to that suffered by other race groups, it is apparent that Indian children experience neglect and abuse at a much greater rate. The United States Bureau of Justice reported for the year of 1995 “a per capita rate of one substantiated report of a child victim of abuse or neglect for every 30 American Indian children aged 14 or younger.”⁶⁵ The per capita rate of abuse for all other races drops to one substantiated report for every fifty-eight children.⁶⁶ Additionally, from 1992 to 1995, abuse or neglect rates for children under the age of fifteen increased in only the Native American and Asian population groups.⁶⁷ Through 1998, Native American children experienced 19.8 cases of sexual abuse per 1,000 children (second only to African Americans at 20.7 cases per 1,000 children),⁶⁸ despite the fact that Native American children constitute only one percent of the child population.⁶⁹ This victimization rate of Native American children is more than double the proportion of African American *and* Native American children in the general population combined.⁷⁰ An attorney with the National Indian Justice Center estimated that one out of every four girls and one out of every six boys is molested in Indian country before the age of eighteen.⁷¹

According to the BIA Division of Social Services, in fiscal year 1994, the BIA received 3,418 referrals of child sexual abuse.⁷² In

64. *Id.* at iii.

65. EARLE, *supra* note 49, at 11.

66. *Id.*

67. *Id.*

68. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 1998: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM ch. 4.5, <http://www.acf.dhhs.gov/programs/cb/publications/cm98/cpt4.htm> (last modified Jan. 17, 2001) (on file with the *New York University Journal of Legislation and Public Policy*).

69. EARLE, *supra* note 49, at 11.

70. See CHILD MALTREATMENT 1999, *supra* note 9, at 19, 28.

71. *Indian Child Protective Services and Family Violence Prevention Act: Hearing on S. 2340 Before the Senate Select Committee on Indian Affairs*, 101st Cong. 199 (1990) (letter from Karen Roberts Strong, Sitka Community Association Human Service Director, to Daniel K. Inouye, Chair of Select Committee on Indian Affairs, June 26, 1990).

72. Facsimile from BIA Social Services Department (June 8, 1995) (on file with the *New York University Journal of Legislation and Public Policy*).

1989, 909 referrals were received for sexual abuse.⁷³ It is unclear whether the incidence of child sexual abuse has more than tripled in the five year period between 1989 and 1994, or whether more awareness of the problem has merely increased reporting. In 1993, the BIA's Criminal Investigators Division ranked sexual abuse of a minor as the most frequent offense reported.⁷⁴ In 1994, sexual abuse of a minor dropped to third in the ranking of offenses with a total of 171 reports investigated.⁷⁵

B. *The Devastating Impact of the Indian Child Victim on Indian Tribes*

The impact of child sexual abuse in America is devastating.⁷⁶ The impact of child sexual abuse in Indian country is even worse. It is impossible to accurately measure the trauma suffered by a child who is sexually abused. However, it stands to reason that the sexual abuse of a child who already suffers from being a part of the most disadvantaged ethnic and racial group in America is likely to have a greater cumulative negative impact. Consequently, an Indian child victim of sexual abuse is likely to face a more difficult challenge in being made whole again through counseling and treatment.⁷⁷

Not only is the Indian child victim more likely to suffer more aggravating trauma, the future of the tribe is further jeopardized when a youthful tribal member suffers potential long-term harm.⁷⁸ For the

73. *Id.* A steady increase of child sexual abuse cases has been reported since the statistics were first collected. In 1989, 909 cases were reported; 1990, 1,158 cases; 1991, 1,292 cases; 1992, 1,343 cases; 1993, 4,174 cases; and 1994, 3,418 cases. *Id.*

74. Facsimile from BIA Division of Law Enforcement Services (May 25, 1995) (on file with the *New York University Journal of Legislation and Public Policy*). The Criminal Investigation Division listed 287 cases recommended for investigation in 1993. This number is different from that reported by the BIA Social Services Department because it does not represent every case reported, but only those cases that were substantiated and then investigated. Furthermore, some cases were not documented by the BIA Division of Law Enforcement Services because they were referred to different local, state, or federal agencies for investigation. Nevertheless, the discrepancy raises concern because, in 1993, BIA Law Enforcement investigated only 287 cases, while BIA Social Services received 4,174 reports of sexual abuse. *Compare id.* with Facsimile from BIA Social Services Department, *supra* note 72.

75. Facsimile from BIA Division of Law Enforcement Services, *supra* note 74.

76. *See supra* Part I.B.

77. *See* Marc H. Irwin & Samuel Roll, *The Psychological Impact of Sexual Abuse of Native American Boarding-School Children*, 23 J. AM. ACAD. PSYCHOANALYSIS 461, 472 (1995) (finding that "cultural and sociological forces, in fact, create greater vulnerability in Native American victims").

78. *See id.* ("The close community structure of Native American life may increase the likelihood of victims in turn abusing still another generation."); Martin Van Der Werf, *Child Abuse Worsens on Reservations*, ARIZ. REPUBLIC, Oct. 29, 1993, at A1.

tribe to overcome the detrimental effects of the past seven generations, young members must be nurtured and protected from harm. It is essential that the perpetrators of sexual abuse against Indian children be caught and prosecuted. Furthermore, Indian child victims must not themselves be victimized in the process of prosecution. Rather, Indian child victims must be healed through effective counseling and treatment.

C. Unique Factors that Magnify Difficulty of Prosecution in Indian Country

The task of successfully prosecuting child sexual abuse offenses in Indian country is not easily accomplished. In addition to the enhanced difficulties involved in investigating and prosecuting the typical child sexual abuse case, factors unique to Indian reservations compound the usual problems and make this kind of case even more difficult when the crime occurs in Indian country.

1. Complex Jurisdictional Rules

Jurisdiction over criminal offenses occurring in Indian country is divided among federal, state, and tribal governments.⁷⁹ Factors that determine which governmental entity has jurisdiction include: the nature of the offense,⁸⁰ whether the victim and/or the offender is Indian,⁸¹ the status of the land where the offense occurred,⁸² and whether the state in which the crime occurred has taken jurisdiction of

79. *Duro v. Reina*, 495 U.S. 676, 680–81 n.1 (1990); RONALD B. FLOWERS, *CRIMINAL JURISDICTION ALLOCATION IN INDIAN COUNTRY* 3 (1983).

80. The Indian Major Crimes Act, commonly referred to as the “Major Crimes Act,” provides for federal jurisdiction over certain specified crimes occurring in Indian country when the defendant is an Indian. Indian Major Crimes Act, 18 U.S.C. § 1153 (1994). Originally, only ten major crimes were listed in the Major Crimes Act. Currently, fourteen major crimes are listed. Child sexual abuse was not specifically included until 1986 when Congress amended the Act to include the “felonious sexual molestation of a minor.” Presently, the Major Crimes Act provides for federal jurisdiction over child sexual abuse cases in Indian country when the defendant is an Indian and the crime involved is either incest or any felony under 18 U.S.C. §§ 2241–2245.

81. It is undisputed that Indian tribes have criminal jurisdiction over all of their members. *United States v. Wheeler*, 435 U.S. 313 (1978) (discussing in detail complex jurisdictional issues surrounding Indian tribes). Section 1152 of 18 U.S.C. applies the general laws of the United States to crimes committed in Indian country, but excludes offenses committed by “one Indian against the person or property of another Indian” because exclusive jurisdiction over these offenses may be reserved by the Indian tribes. 18 U.S.C. § 1152 (1994). States can assume jurisdiction over crimes committed by or against Indians in Indian country with the consent of the tribe affected. 18 U.S.C. § 1321 (1983). However, states generally have sole criminal jurisdiction over non-Indian victims and offenders, regardless of where the offense

criminal offenses under Public Law 280.⁸³ This jurisdictional complexity can be a problem because it is not always easy to determine which governmental authority has responsibility to criminally prosecute. It is not uncommon for police investigators to make mistakes about which government has authority to handle a case of child sexual abuse. Occasionally, even experienced prosecutors make mistakes about which government has jurisdiction to prosecute.

“[W]ith conflicting jurisdictions it’s easy for children to fall through the cracks.”⁸⁴ Having federal, tribal, and state governments split criminal jurisdiction over offenses occurring in Indian country often leads to duplication, delay, or complete failure in the investigation and prosecution of child sexual abuse cases in Indian country. This is true because complexity in the rules governing criminal jurisdiction in Indian country causes tribal police, BIA police, the FBI, and county sheriffs to hesitate or refuse to respond to child abuse complaints because they mistakenly believe they do not have authority to act.

In other situations, law enforcement officers know they have authority but fail to act because they know another government law enforcement agency has concurrent jurisdiction to prosecute child sexual

occurred. See *Duro v. Reina*, 495 U.S. 676 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

82. Through Congressional action, “Indian country,” defined in Section 1151 of 18 U.S.C., can actually be diminished or disestablished, as was done in the termination acts of 1950s and the checkerboard homesteading activities of the late 1800s and early 1900s. Cases like *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and *Seymour v. Superintendent of Washington State Penitentiary*, 358 U.S. 361 (1962), discuss jurisdiction over lands that were originally Indian country but have been homesteaded by non-Indians or were given back to the public domain when a tribe was disbanded or failed to maintain federal recognition.

83. Public Law 280 was passed in 1953 and compulsorily transferred to six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) criminal and civil jurisdiction over “offenses committed by or against Indians in the areas of Indian country” listed by the statute for that state. 18 U.S.C. § 1162(a) (1994). Any and all other states were invited to assume Public Law 280 jurisdiction. No tribal consent was initially required. In 1968, Congress added a tribal consent provision, 25 U.S.C. § 1326 (1994), and allowed for acquiring jurisdiction tribe by tribe, and over some activities and not others. See 25 U.S.C. §§ 1321(a) & 1322(a) (1994). No tribe has consented to Public Law 280 jurisdiction since the 1968 provision. Ten states opted to assume some kind of jurisdiction. Montana assumed criminal jurisdiction over one reservation and Florida was the only state to assume full jurisdiction similar to mandatory P.L. 280 states. Several states (Nevada, Nebraska, Wisconsin, and Minnesota) have since ceded jurisdiction.

84. *Child Physical and Sexual Abuse in Indian Country*, *supra* note 7, at 61 (statement of Congressman Jim McDermott).

abuse offenses.⁸⁵ The result may be that delays occur, that no action is taken at all to investigate and prosecute the case because of a lack of communication and coordination between law enforcement agencies, or that the tribal prosecution is an inadequate sanction for the gravity of the crime.⁸⁶ With multiple agencies having responsibility for the investigation and prosecution of child abuse, it is easy to see how a case of child sexual abuse might slip through the cracks. There is no governmental agency clearly responsible for addressing the problem and coordinating all available resources. As a consequence, too many child molesters in Indian country are not brought to justice and the problems associated with child sexual abuse continue to grow.

2. *Cultural Differences*

Indian tribes are culturally distinct from the American mainstream. The white man's law enforcement agencies and courts are alien to Native American culture. These differences create conflict when federal and state authorities attempt to investigate and prosecute criminal offenses in Indian country. Part of the problem is that federal and state officers do not understand and appreciate cultural differences. This is particularly challenging because Indian tribes are not all alike. To be effective, law enforcement officers must have both a basic knowledge of the specific tribal culture and religious beliefs and

85. Concurrent jurisdiction occurs when federal, tribal, or state governments have criminal jurisdiction over Indian offenders at the same time. The federal government has jurisdiction under the Major Crimes Act, and arguably the tribe also has jurisdiction because the Major Crimes Act did not expressly reserve exclusive federal jurisdiction. Whether the Major Crimes Act vests exclusive jurisdiction over the enumerated offenses in the federal government is unclear. *See United States v. John*, 437 U.S. 634, 651 n.21 (1978) ("We do not consider here the more disputed question whether [the Major Crimes Act] also was intended to pre-empt tribal jurisdiction."); *United States v. Torres*, 733 F.2d 449, 459 n.12 (7th Cir. 1984) (stating that "the tribal court may have concurrent jurisdiction if an Indian commits one of the fourteen enumerated crimes of [the Major Crimes Act] against another Indian"); *United States v. Broncheau*, 597 F.2d 1260, 1265 (9th Cir. 1979) ("Tribal courts may have concurrent jurisdiction" with federal courts under the Major Crimes Act), *cert. denied*, 444 U.S. 859 (1979).

86. *See J. Clifford Wallace, A New Era of Federal-Tribal Court Cooperation*, 79 JUDICATURE 150, 152 (1995).

"[W]hen Indians have committed major crimes but the federal authorities are too distant or too busy to investigate or prosecute, the tribe has resorted to prosecution of the offender for some lesser misdemeanor. . . . [Thus], the tribal court ends up doing the federal court's business, but it cannot do it as thoroughly because its jurisdiction is limited."

Id. (quoting William C. Canby Jr., Statement to Senate Committee on Indian Affairs (Aug. 2, 1995)).

the ability to adapt their investigative techniques and strategies to take account of these differences.⁸⁷

The disparity in cultural understandings leads to another reason for problems with the prosecution of child sexual abuse cases in Indian country: the unusually high level of fear of public authorities. Many Indians distrust the legal and social authorities that could be most helpful to them because of past experiences of unjust treatment.⁸⁸ A parent fears losing custody of the abused child; thus, the "primary concern is likely to be survival of herself, her family, and even the perpetrator, in the face of external threats from white institutions and culture."⁸⁹

3. *Distance and Disinterest*

Problems arise because Indians living on reservations are often geographically isolated. This means that offenses are committed far from the district court with jurisdiction, the United States Attorney's Office, and the FBI office. FBI agents are expected to respond immediately to the most serious cases of violent crimes, but travel time is often three to four hours or more. When witnesses have to travel far to give testimony, they sometimes do not show up. Similarly, when evidence must be transported, it often becomes stale. Communication between prosecutors and witnesses is also hampered by the lack of telephones on some reservations.

The physical distance is just one factor that contributes to perhaps the most frustrating difficulty in the prosecution of child sexual abuse in Indian country, which is the apathy of the federal investigators and prosecutors. The National American Indian Court Judges Association claimed that federal enforcement of Indian Major Crimes Act violations was inadequate.⁹⁰ U.S. Attorneys often decline to pro-

87. See John R. Schafer & Blaine D. McIlwaine, *Investigating Child Sexual Abuse in the American Indian Community*, 16 AM. IND. Q. 157 (1992). Schafer and Blaine are FBI investigators with experience in child sexual abuse in Indian country. They identify several problems regarding cultural differences and solutions for an investigator, including interviewing techniques, posture, non-eye contact versus eye contact, the importance of traditional family organization, and finding a neutral setting. *Id.* at 157-59.

88. CHILD SEXUAL ABUSE, *supra* note 17, at 5.

89. Carter & Parker, *supra* note 44, at 114.

90. NAT'L AM. INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE: REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT 33-35 (David Getches ed., 1978) [hereinafter INDIAN COURTS AND THE FUTURE]. The Major Crimes Act gives the federal courts jurisdiction over the following specified major crimes: murder, manslaughter, kidnapping, maiming, rape (i.e., aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, and abusive sexual contact), incest, assault with

ecute Major Crimes Act cases on the reservation because of a mixture of factual, legal, practical, or logistical problems.⁹¹ These problems might include questions of a suspect's factual guilt, legal sufficiency of the evidence, and likelihood of conviction.⁹² Reservation residents perceive these declinations as a result of prosecutorial disinterest⁹³ or prejudice because the perpetrator and victim are Native American.⁹⁴ This disinterest—whether real or just perceived as real—is exacerbated by the number of cases federal prosecutors decline each year.⁹⁵ Whether the declinations are based upon insufficient evidence, distance, or other technicalities, the effect is to create a federal disinterest

intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and theft. Indian Major Crimes Act, 18 U.S.C. § 1153 (1994).

91. NAT'L INDIAN JUSTICE CTR., TRIBAL/FEDERAL COORDINATION OF CHILD SEXUAL ABUSE CASES: RESOURCE PACKET 5, 60, 63 (1999) [hereinafter RESOURCE PACKET] (report by Tom Hannis, Assistant U.S. Attorney for the District of Arizona).

92. *Id.* at 59–60.

93. *Investigations and Prosecutions of Federal Crimes on Indian Reservations: Hearings Before the House Committee on Interior and Insular Affairs*, 100th Cong. 94 (1988) (statement of Wayne Leo Ducheneaux, Chairman of the Cheyenne River Sioux Tribe of Eagle Butte, South Dakota). Mr. Ducheneaux, in his address to the Committee on Insular Affairs, stated:

There is an extremely high percentage of the cases that are declined federal prosecution because of the internal guidelines and policies governing federal prosecutions, as determined by the United States attorney's office. Therefore, in between the broad powers vested in the federal courts and the limited, clearly defined powers of the tribal courts, there exists a large gap of cases that go virtually unprosecuted. Furthermore, those cases that are accepted by the United States attorney's office for federal prosecution are delayed due to investigations that take anywhere from three to six months and, oftentimes, the federal authorities take up to one year or more to complete their investigations. . . .

. . . .

. . . There appears to be a great [sic] indifference and insensitivity by the United States Attorney's Office and the Federal Bureau of Investigation (FBI), towards the Indian Tribes.

Id.

94. See INDIAN COURTS AND THE FUTURE, *supra* note 90, at 33–35.

95. UNITED STATES COMM'N ON CIVIL RIGHTS, INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 154–55 (1981).

The high rate of declination of prosecution of major crimes offenses by United States attorneys has been a source of dissatisfaction in the Indian community for some time. . . . [I]t appears that in excess of 80 percent of major crimes cases, on the average, presented to United States attorneys are declined for prosecution. Offenses covered by the Major Crimes Act are serious felony offenses. Ordinarily, there is no alternative to Federal prosecution other than referral for prosecution within the tribal system, where the 6-month limitation on sentences that can be imposed is often an inadequate sanction for the seriousness of the offense.

Id.

in litigating tribal cases. This leads to a growing sense of tribal distrust concerning the federal government.

III

FEDERAL EFFORTS TO COMBAT CHILD SEXUAL ABUSE IN INDIAN COUNTRY

A. *The Responsibility of the Federal Government to Protect Indian Children*

In 1831, Chief Justice John Marshall, in *Cherokee Nation v. Georgia*,⁹⁶ compared the federal government's relationship to Indian tribes to that of a guardian to its ward.

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. *Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.*⁹⁷

This guardian-ward description, initially used just as a description of the federal-tribal relationship, gradually developed into the broadest source of federal power over Indian tribes.⁹⁸ In *United States v. Kagama*,⁹⁹ the United States Supreme Court used the guardian-ward relationship to justify federal authority to exercise criminal jurisdiction in Indian country. The Court reasoned as follows:

These Indians tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependant for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal

96. 30 U.S. 1 (1831).

97. *Id.* at 17 (emphasis added).

98. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 207 (1984).

99. 118 U.S. 375 (1886).

Government with them and the treaties in which it has been promised, *there arises the duty of protection, and with it the power.*¹⁰⁰

The guardian-ward relationship through the years has become quite extensive, extending the assertion of federal power over many aspects of the lives of Native Americans.¹⁰¹ At times this wardship power has been used to reduce the governmental authority of Indian tribes.¹⁰² However, the doctrine of trust responsibility also imposes important obligations and responsibilities on the federal government.¹⁰³

In the case of criminal jurisdiction, the trust responsibility has been used by the federal government to justify prosecuting Indian and non-Indians who commit crimes in Indian country.¹⁰⁴ However, when Congress enacted statutes to assert federal criminal jurisdiction on Indian reservations, it also imposed upon itself the obligation to protect Indians living on the reservation from being victimized. Taking responsibility for prosecuting major felonies under the Major Crimes Act and limiting the punishment Indian tribes can impose for criminal offenses requires the federal government to be accountable for provid-

100. *Id.* at 383–84 (third emphasis added).

101. Congress has a compelling duty to protect and preserve tribal resources as reserved in treaties, *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942), and other legislative enactments, *Antoine v. Washington*, 420 U.S. 194, 204 (1975). Trust resources take many forms, such as: Indian school property, *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20, 22 (1999), timber and forestry, *United States v. Mitchell*, 445 U.S. 535, 536–537 (1980), trust fund money from leases of trust lands, *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 15 (D.D.C. 1999), and water rights, *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972). With each trust resource, “the federal government has a substantive duty to protect ‘to the fullest extent possible’ the [tribe’s] treaty rights and the resources on which those rights depend.” *Okanogan Highlands Alliance v. Williams*, No. 97-806-JE, 1998 U.S. Dist. LEXIS 21680, at *46 (D. Or. December 31, 1998) (referencing *Pyramid Lake*, 354 F. Supp. 252).

102. Congress has passed several laws that work to reduce tribal sovereignty. The General Allotment Act of 1887, or Dawes Act, opened up land on Indian reservations to non-Indian settlers and reduced Indian land holdings by eighty percent. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 195-96 (3d ed. 1993). The Termination Acts of 1945–61 stripped Indian tribes of the trust relationship, special federal programs and benefits, and tribal sovereignty. Tribes were then exposed to state legislative and judicial authority, state taxing authority, and disbursement of tribal lands. *Id.* at 235–37. In addition, Public Law 280 extended state jurisdiction over land previously subject only to tribal and federal jurisdiction. *Id.* at 480.

103. The federal government’s trust responsibility has been described as “moral obligations of the highest responsibility and trust.” *Seminole Nation*, 316 U.S. at 297. The government’s conduct “should therefore be judged by the most exacting fiduciary standards.” *Id.* This exacting standard can sometimes be enforceable in judicial proceedings.

104. See *Kagama*, 118 U.S. 375.

ing effective law enforcement of serious criminal offenses committed on Indian reservations, including child sexual abuse.¹⁰⁵

B. Growing Federal Awareness and Concern About Child Sexual Abuse in Indian Country

1. BIA Sexual Abuse Cases

Child sexual abuse is not uncommon in Indian country. However, the problem did not draw the attention of Congress until a string of teachers on the Navajo, Hopi, and Cherokee reservations were charged with the sexual molestation of Indian children in their charge. John W. Boone¹⁰⁶ and J. D. Todd¹⁰⁷ were both BIA teachers. Boone, a non-Indian teacher, molested a large number of Hopi boys. Found in his home was a chart containing the names of 142 Hopi Indian children who attended school on the reservation and whom the defendant was alleged to have sexually molested. The abuse occurred over a period of nine years, and many of Boone's victims were repeatedly molested.¹⁰⁸ Incredibly, the principal of the school where Boone taught had been advised of potential child abuse occurring at various times over a span of five years. He did nothing to investigate the charges except report them to his superior who did nothing to investigate or confirm the allegations.¹⁰⁹ The *Todd* case involved over twelve children on the Navajo Reservation. Todd, a non-Indian, taught on the reservation for twenty-one years. He not only molested the children but showed them pornography as well.¹¹⁰

Other high profile BIA cases include Paul Price, who molested Indian boys in North Carolina from 1971 until 1985 without any in-

105. "When an Indian child is abused, especially in a school or facility maintained by the federal government, it is not only a tragedy but a direct challenge to Congress, the Bureau of Indian Affairs, the Indian Health Service, and tribal governments to meet our responsibilities." *Child Physical and Sexual Abuse in Indian Country*, *supra* note 7, at 3 (statement of Congressman Jim McDermott); *see also* Stephen D. Easton, *Native American Crime Victims Deserve Justice: A Response to Jensen and Rosenquist*, 69 N.D. L. REV. 939 (1993).

106. Boone pled guilty to sexual abuse and was sentenced to life in prison. S. PRT. NO. 101-60, at 97 (1989).

107. *United States v. Todd*, 964 F.2d 925, 926 (9th Cir. 1992).

108. *Investigation and Prosecution of Federal Crimes on Indian Reservations: Hearings on H.R. 498 Before the House Comm. on Interior and Insular Affairs*, 101st Cong. 23-24 (1989) [hereinafter *Investigation and Prosecution of Federal Crimes*] (statement of Stephen M. McNamee, United States Attorney for the District of Arizona).

109. S. PRT. NO. 101-60, at 10.

110. *Investigation and Prosecution of Federal Crimes*, *supra* note 108, at 24 (statement of Stephen M. McNamee, United States Attorney for the District of Arizona).

vestigation by the BIA into several allegations,¹¹¹ and Terry Hester, who coerced Navajo children at the Kaibito Boarding School into performing sexual acts.¹¹² Hester was hired even though he indicated on his employment application that he had previously been arrested for child sexual abuse.¹¹³

2. *Congressional Hearings*

In response to these incidences and spurred by a series of articles by the *Arizona Republic* on the federal government's mismanagement of its trust responsibilities, the Senate Select Committee on Indian Affairs formed a Special Committee on Investigations.¹¹⁴ This Committee's purpose was to investigate "fraud and corruption" within Indian country.¹¹⁵ Chaired by Senators Dennis DeConcini and John McCain, the Special Committee gathered facts, performed a full investigation, and held two full series of public hearings. Three days of the hearings were devoted to testimony on child sexual abuse in BIA schools.¹¹⁶ At the end of that period, the Committee was to prepare a final report with legislative recommendations.¹¹⁷ The Special Committee on Investigations of the Select Committee on Indian Affairs found that the BIA was plagued by mismanagement and had permitted a pattern of child abuse by its teachers to develop in BIA schools nationwide.¹¹⁸ More significantly, the Committee found that for years the BIA had failed to investigate allegations of sexual abuse committed by its own teachers.¹¹⁹

For fifteen years, although child abuse reporting statutes had been adopted by all fifty states, the BIA failed to create any guidelines for its teachers.¹²⁰ The BIA did not require even a minimal background check into potential school employees and did not follow up on allegations of child abuse reported by parents, previous employers, or students. The result was that the BIA employed teachers who actu-

111. S. PRT. NO. 101-60, at 90-94.

112. *Id.* at 98.

113. *Id.*

114. *Id.* at 225.

115. *Id.* at 226.

116. *Id.* at 232.

117. *Id.* at 228.

118. *Id.* at 8-9.

119. *Id.* at 100.

120. *Id.* at 9. This delinquency was created in part by the failure of Congress to include federal lands under the scope of the Child Abuse Prevention and Treatment Act, which required states to establish minimum child abuse laws or else forfeit federal funding. Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5105 (1994 & Supp. 2000).

ally admitted past child molestation offenses, including one teacher who explicitly listed a prior criminal offense for child abuse on his employment form.¹²¹ In North Carolina, the BIA employed a confessed child molester after his previous principal, who had fired him, warned the BIA that the teacher was a confessed pedophile.¹²² Indian children across the country now bear the burden of the BIA's mistakes and suffer additionally because mental health treatment and counseling are often unavailable.¹²³

The final report of the Committee revealed a pattern within the BIA of "callously ignoring known problems, defending and promoting incompetent staff, and ostracizing the few capable employees who dared to speak out against the institutional incompetence that surrounded them."¹²⁴ The final report also indicated that, as of 1989, no federal reporting law existed that applied to federal schools on Indian lands. Prior to the Paul Price case in 1985, the BIA had taken no action of its own to request a mandatory statute or to create its own institutional guidelines.¹²⁵ In 1987, the BIA created an official policy on reporting child abuse and performing background checks on BIA teachers.¹²⁶ However, the Committee found these measures to be inadequate, as there were no criminal penalties for non-reporting and no protection from slander suits for those who attempted to report child abuse.¹²⁷

The final report also found that facilities to treat victims of child sexual abuse and to effectively prosecute sexual abuse crimes were almost nonexistent on the reservations.¹²⁸ There was a paucity of licensed medical specialists on the reservations and the federal funding to increase such services was not forthcoming.¹²⁹ The necessary multidisciplinary teams needed to treat victims of child sexual abuse and prosecute their perpetrators were rare. Mental health specialists, so vital to an effective recovery, were hard to find.

121. S. PRT. NO. 101-60, at 9.

122. *Id.* For a complete description of the Paul Price and John Boone cases and the BIA's reluctance to investigate child abuse allegations, see *id.* at 89-98. For descriptions of other cases, see *Child Physical and Sexual Abuse in Indian Country*, *supra* note 7, at 66-71.

123. S. PRT. 101-60, at 89, 100. For example, the therapists who treated the victims traumatized by Boone on the Hopi Reservation had to travel more than three hundred miles to see their patients and were only available for four days out of each month.

124. *Id.* at 10.

125. *Id.* at 99.

126. *Id.*

127. *Id.*

128. *Id.* at 100.

129. *Id.*

In sum, the special investigation revealed a pattern of callous disregard for the safety of Indian children in BIA schools. This pattern included refusing to report credible allegations against employees, defending accused employees, threatening suits of slander against those who spoke out, and refusing to create any kind of a history in the employment files of those accused of molestation.¹³⁰ Despite failing in these areas, BIA supervisors were never once disciplined by their superiors.¹³¹ As a solution to the abuses found in the BIA system, the Special Committee recommended the passage of a newly created piece of legislation, S. 1783, “The Indian Child Abuse Prevention and Treatment Act.”¹³² The Act would institute mandatory child abuse reporting laws for the BIA, the Indian Health Service, and other tribal and federal employees in Indian country. It would also impose criminal penalties for non-reporting, require background checks on federal employees, provide immunity from slander suits, provide funding for improved mental health treatment of abuse victims in Indian country,¹³³ and establish a reliable data base for child abuse statistics.¹³⁴

C. Federal Action to Protect Indian Children from Sexual Abuse

1. General Legislation

The Indian Child Welfare Act¹³⁵ asserts Congress’s recognition that it has “assumed the responsibility for the protection and preservation of Indian tribes and their resources.”¹³⁶ In particular, Congress recognized its direct interest in protecting Indian children,¹³⁷ and admitted that most Indian children were not being protected in the way that they should. Many children were removed from their families by non-tribal public and private agencies, and those removals turned into long-term adoptive arrangements with non-Indian homes and institu-

130. *Id.*

131. *Id.* at 100–01.

132. *Id.* at 216.

133. *Id.* at 216–17. This would be done by amending the Victims of Crimes Act of 1984, 42 U.S.C. § 10601 (1994 & Supp. 2000), to provide ten million dollars earmarked for treatment of Indian children who have been abused.

134. *Id.* at 217.

135. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (1994). This Act clarified jurisdiction over adoption and custody of Indian children. The Act grants exclusive tribal jurisdiction over custody and adoption proceedings of Indian children who were domiciled on or resided on their reservation or who are wards of the tribe. *Id.* § 1911. The Act is an attempt to recognize tribal sovereignty over the tribe’s most precious resources—their own children.

136. *Id.* § 1901(2).

137. *Id.* § 1901(3).

tions.¹³⁸ Additionally, states ignored tribal customs and traditions in making child custody determinations.¹³⁹ The Indian Child Welfare Act does not specifically mention child sexual abuse. However, it is one of the first official acts which recognizes the federal government's tremendous responsibility for Indian children. It also clarifies the importance of tribal jurisdiction in making decisions concerning the welfare of Indian children.

The Major Crimes Act did not include sexual abuse when it was first passed in 1885. It was not until 1986 that Congress amended the Act to include "felonious sexual molestation of a minor."¹⁴⁰ The Major Crimes Act was subsequently amended to refer to specific child sexual abuse provisions in other sections of the United States Code. These sections, called Chapter 109A felonies, delineate the following crimes: aggravated sexual abuse with children,¹⁴¹ sexual abuse,¹⁴² sexual abuse of a minor or ward,¹⁴³ and abusive sexual contact.¹⁴⁴ If the defendant is an Indian and the crime is incest or a Chapter 109A felony, then the Major Crimes Act provides for federal jurisdiction over these cases. However, this does not mean that the tribes have no jurisdiction. The BIA made a conscious decision to approve tribal ordinances that assert concurrent jurisdiction over offenses listed in the Major Crimes Act because of the inadequacy of federal prosecution.¹⁴⁵ To add an additional deterrent effect to tribal court punishments, Congress increased the penalty authority of the tribes from six months imprisonment and a five hundred dollar fine to one year im-

138. *Id.* § 1901(4).

139. *Id.* § 1901(5).

140. 18 U.S.C. § 1152 (1994); *see also Sexual Abuse of Indian Children: Hearing on H.R. 3826 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong. 1–2 (1986).

141. 18 U.S.C. § 2241(c) (Supp. 2000) (defining aggravated child sexual abuse as any sexual act with child under age of twelve years; maximum sentence is life imprisonment).

142. *Id.* § 2242 (1994) (defining sexual abuse as causing another person to engage in sexual act by threatening that person, or by engaging in sexual act with person that is either incapable of appraising conduct, or physically incapable of declining to participate in sexual act).

143. *Id.* § 2243 (Supp. 2000) (defining sexual abuse of minor as any sexual act where victim is at least twelve years old but younger than sixteen, and perpetrator is at least four years older than victim; maximum sentence is fifteen years).

144. *Id.* § 2244 (1994 & Supp. 2000) (addressing acts such as fondling and other sexual touchings that do not rise to level of "sexual act;" if accompanied by force, maximum sentence is ten years; if no force is used, and victim is between twelve and fifteen years old, maximum sentence is two years).

145. RESOURCE PACKET, *supra* note 91, at 33–34. (Letter from Ross O. Swimmer, Assistant Secretary of Indian Affairs, to Peter J. Sferrazza (Apr. 1987)).

prisonment and a five thousand dollar fine.¹⁴⁶ Congress also responded to the Supreme Court decision in *Duro v. Reina*¹⁴⁷ by enacting legislation affirming a tribe's criminal jurisdiction over non-member Indians who commit offenses while on the reservation of that tribe.¹⁴⁸

2. *Specific Child Sexual Abuse Programs and Legislation*

The program that has been perhaps the most beneficial to the Indian nations was established in 1984 through the Victims of Crimes Act (VOCA).¹⁴⁹ The Act expanded crime victim assistance and compensation programs by establishing funding for diverse programs that benefit victims of crime. The majority of funding for this office comes from the Crime Victims Fund, established by VOCA. Monies from criminal fines, forfeited bail bonds, and penalty fees support crime victim programs throughout the country. In 1998, \$324,038,486 was collected for crime victim services.¹⁵⁰ Victim services include crisis intervention, counseling, emergency shelter, criminal justice advocacy, and emergency transportation.¹⁵¹

In 1987, the Office for Victims of Crime (OVC) declared service to Native Americans a top priority.¹⁵² The OVC recognized that "on reservation" assistance did not exist for Native American crime victims.¹⁵³ As a result of this recognition, programs have been developed for Native American victims, including: (1) an emergency fund available to U.S. Attorneys for services to victims in Federal prosecutions, (2) a grant program to fund victim assistance programs in remote areas of Indian reservations, (3) the Children's Justice Act Program for Native Americans to improve investigation and prosecution of child sex-

146. 25 U.S.C. § 1302(7) (1994).

147. 495 U.S. 676 (1990) (holding that tribes have powers of internal self-governance, and consequently retain jurisdiction only over member Indians who commit misdemeanor crimes, but not over nonmember Indians).

148. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646.

149. Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2170.

150. See OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, OVC FACT SHEET: VICTIMS OF CRIME ACT CRIME VICTIMS FUND, at <http://www.ojp.usdoj.gov/ovc/publications/factsheets/cvfvca.htm> (last visited Nov. 16, 2001) (on file with the *New York University Journal of Legislation and Public Policy*).

151. *Id.*

152. OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, OVC BULLETIN: VICTIM PROGRAMS TO SERVE NATIVE AMERICANS, at <http://www.ncjrs.org/txfiles/nata.txt> (last visited Nov. 16, 2001) (on file with the *New York University Journal of Legislation and Public Policy*).

153. *Id.*

ual abuse cases, and (4) training opportunities for victim assistance providers.¹⁵⁴

OVC also administers two Indian country discretionary grant programs, The Children's Justice Act Partnerships for Indian Communities (CJA) Grant Program and the Victim Assistance in Indian Country (VAIC) Grant Program.¹⁵⁵ The VAIC program provides grant awards directly to Indian tribes for the purpose of establishing reservation-based victim assistance programs in remote Indian country areas.¹⁵⁶ OVC also awards Children's Justice Act Discretionary Grant Program monies directly to tribes. The CJA program for Native Americans was established in 1989 and is administered by the Department of Health and Human Services.¹⁵⁷ The CJA program is the only source of federal funding to tribes that focuses on improving the investigation, prosecution, and handling of child abuse cases.¹⁵⁸ Less than one million dollars is available annually for the CJA program.¹⁵⁹ Through CJA, grants are made directly to tribes to assist in the development and operation of programs to improve the handling of child abuse cases in Indian country.¹⁶⁰

154. *Id.*

155. OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, OVC GRANTS AND FUNDING, at <http://www.ojp.usdoj.gov/ovc/fund/welcome.html> (last modified Oct. 16, 2001) (on file with the *New York University Journal of Legislation and Public Policy*).

156. *Id.*

157. The Federal Crime Victims Division (FCVD) is one of three divisions within the Office for Victims of Crime. The FCVD is responsible for implementing the Children's Justice Act Program for Native Americans. See Children's Justice Act Partnerships for Indian Communities, 65 Fed. Reg. 61,189 (Oct. 16, 2000).

158. OFF. FOR VICTIMS OF CRIME, *supra* note 155. The OVC describes the purpose of the CJA as follows:

CJA funds are used to help Indian tribes develop, establish, and operate programs to improve the investigation, prosecution, and handling of child abuse cases, particularly cases of child sexual abuse, in a manner that limits additional trauma to child victims. The program focuses on developing strategies and resources to handle child abuse cases, from initial disclosure through investigation and prosecution, to case resolution, in an effective and timely manner.

Id.

159. In 2000, \$860,000 in CJA funds was distributed to nine tribal programs throughout the forty-eight continental states and Alaska. See OFF. OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS FISCAL YEAR 2000 PROGRAM PLAN: RESOURCES FOR THE FIELD 153 (2000), <http://www.ojp.usdoj.gov/00progplan/00prog.pdf>.

160. See OVC FACT SHEET: VICTIMS OF CRIME ACT CRIME VICTIMS FUND, *supra* note 150. The CJA projects have supported the following:

- (1) establishment, expansion and training for multi disciplinary teams;
- (2) revisions of tribal codes and procedures to address child sexual abuse;
- (3) development of protocols for reporting, investigating and prosecuting

Several acts passed in 1990 broadened the power of the federal government to protect Indian children. The Indian Child Protection and Family Violence Prevention Act¹⁶¹ was Congress's first real attempt to address the issue of child sexual abuse on Indian reservations. Several hearings were held across the country at which representatives from Indian tribes, U.S. Attorney's Offices, the FBI, and private organizations provided testimony and possible solutions to the problem. The purpose of the Act is to require the reporting of abused Indian children,¹⁶² ensure that effective preventative measures are taken to prevent abuse,¹⁶³ and provide training for the investigation of child abuse cases and treatment for the victims of family violence.¹⁶⁴ The Act also establishes tribal programs to protect Indian children and to reduce the family violence occurring in Indian country.¹⁶⁵

In evaluating the problem of child abuse in Indian country, Congress recognized that child abuse was often perpetrated by federal em-

child sexual abuse cases; (4) specialized training for prosecutors, judges, investigators and other professionals who handle child sexual abuse cases; (5) development of procedures for establishing and managing child-centered interview rooms; and (6) establishment of special prosecution units.

OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, OVC FACT SHEET: VICTIMS OF CRIME: ISSUES IN INDIAN COUNTRY, at <http://www.ojp.usdoj.gov/ovc/publications/in-fores/na/article.htm> (last updated Apr. 19, 2001) (on file with the *New York University Journal of Legislation and Public Policy*).

161. Indian Child Protection and Family Violence Prevention Act, Pub. L. 101-630, 104 Stat. 4544 (1990) (codified as amended at 25 U.S.C. §§ 3201-3211 (1994 & Supp. 2000)).

162. 25 U.S.C. § 3201(b)(1) (1994). Section 1169 of 18 U.S.C. requires that certain people immediately report any incident or suspected incident of child abuse. Those who must report suspected child abuse include medical professionals (physicians, surgeons, dentists, nurses, dental hygienists, optometrists, medical examiners, emergency medical technicians, paramedics, and other health care providers), educational professionals (teachers, school counselors, instructional aides, teachers' aides, teaching assistants, bus drivers, administrative officers, supervisors of child welfare and attendance, truancy officers, and any persons employed by any tribal, federal, public, or private school), and other public officers (child day care workers, headstart teachers, social workers, psychiatrists, psychologists, law enforcement officers, family or marriage therapists, probation officers, juvenile rehabilitation or retention officers, and any public agency staff who are responsible for enforcing statutes and judicial orders). 18 U.S.C. § 1169 (1994).

163. 25 U.S.C. § 3201(b)(4) (1994).

164. *Id.* § 3201(b)(6).

165. *Id.* § 3201(b)(8); see also BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, CHILD PROTECTION HANDBOOK: PROTECTING AMERICAN INDIAN/ALASKA NATIVE CHILDREN 1 (1998) [hereinafter CHILD PROTECTION HANDBOOK] (on file with the author); George B. Stevenson, *Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 WILLAMETTE L. REV. 847, 869-71 (1997).

ployees.¹⁶⁶ As a result, mandatory background checks on all federal employees in Indian country were instituted.¹⁶⁷ The Act also allows a report of child abuse to be filed with local law enforcement or with the BIA National Child Abuse Prevention Hotline.¹⁶⁸ If the report involves either an Indian child or an alleged Indian abuser, then the local agency is required to report immediately to the FBI.¹⁶⁹ Failure to immediately report can result in a \$5,000 fine and/or six months imprisonment. The Act requires that a database be kept of all reported incidents of abuse and points toward the need for a central registry for reported incidents of abuse.¹⁷⁰ The Act also authorizes the creation of the Indian Child Protection and Family Violence Prevention Program, which funds on-reservation treatment and prevention programs for child abuse, neglect, and family violence.¹⁷¹ The program can include services such as purchasing equipment for investigations and treatment programs, training and employing investigative staff, providing shelters for battered women and abused children, establishing multidisciplinary teams, and developing tribal child protection codes.¹⁷²

The Indian Law Enforcement Reform Act¹⁷³ created within the BIA a law enforcement division responsible for carrying out federal law enforcement responsibilities within Indian country.¹⁷⁴ This law enforcement division did not alter any standing jurisdiction of the tribes, states, or federal government.¹⁷⁵ It did require that any federal agency that declines to prosecute a violation of federal law in Indian country (FBI, BIA, or U.S. Attorney's Office) must report "with particularity" to the affected Indian tribe the reasons why the prosecution was declined.¹⁷⁶ This particularized reporting is a change from previous approaches which did not require reports or letters detailing reasons for declining to prosecute.

In 1990, Congress also passed the Crime Control Act.¹⁷⁷ Part of the Act mandated that professionals report child abuse that happens on

166. See 25 U.S.C. § 3201(a)(1)(C).

167. See Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, 104 Stat. 4808 (codified as amended at 42 U.S.C. § 13041 (1994)).

168. See CHILD PROTECTION HANDBOOK, *supra* note 165, at 7.

169. 25 U.S.C. § 3203(b)(2).

170. *Id.* § 3201(b)(2).

171. *Id.* § 3210(a).

172. Stevenson, *supra* note 165, at 848 n.153.

173. 25 U.S.C. §§ 2801-2809.

174. *Id.* § 2802(b).

175. *Id.* § 2806.

176. *Id.* § 2809(a)-(b).

177. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified in scattered sections of 18 U.S.C. (1994)).

federal land, such as reservations, or in federal facilities.¹⁷⁸ Congress also authorized the creation of special technical training grants to be given to organizations that have the capacity to reach a broad sector of the population and have experience in providing training.¹⁷⁹ Grants can also be made to juvenile and family courts to improve the judicial system's handling of child abuse cases.¹⁸⁰ To improve the effective litigation of cases, U.S. Magistrate courts have been set up on the reservation. This reduces the distance victims, witnesses, and investigators have to travel to prosecute the cases.

Much of the change in the way the law protects Indian children came under the Clinton Administration. In particular, Attorney General Janet Reno served as a force for change.¹⁸¹ She implemented the use of special prosecutors, expanded the Department of Justice Child Exploitation and Obscenity Section (CEOS) to Indian country, and began the Tribal Courts Project. She also instituted the Office of Tribal Justice to coordinate all the Department of Justice programs in Indian country. In 1992, the Criminal Division of the U.S. Department of Justice expanded the role of CEOS to provide aggressive prosecution of child sexual abuse in Indian country and on federal lands.¹⁸² The CEOS is devoted to the prosecution of sex crimes against children. The department provides specialized expertise, supervises the enforcement of federal criminal statutes, and provides both direct and indirect support to United States Attorneys. The CEOS attorneys participate either as trial teams or in advisory roles, and also maintain litigation support services.¹⁸³

178. 42 U.S.C. § 13031(a) (1994). The statute reads:

A person who, while engaged in a professional capacity or activity described in subsection (b) of this section on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d) of this section.

Id.

179. *Id.* § 13023(a).

180. *Id.* § 13023(b).

181. See Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 114 (1995) (“[T]ribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities. . . . Fulfilling the federal government’s trust responsibility to Indian nations means not only adequate federal law enforcement in Indian country, but enhancement of tribal justice systems as well.”).

182. RESOURCE PACKET, *supra* note 91, at 64. The Department of Justice shortly thereafter added seven criminal lawyers with expertise in child sexual abuse in Indian country to the Child Exploitation and Obscenity Division. See IMPROVING TRIBAL/FEDERAL PROSECUTIONS, *supra* note 24, at 5.

183. RESOURCE PACKET, *supra* note 91, at 64.

In conjunction with former President Clinton's April 1994 Executive Memorandum on Government-to-Government Relations with Native American Tribal Governments, the Office of Tribal Justice was established within the Department of Justice.¹⁸⁴ Out of this office, various tribal court initiatives were developed, including the Tribal Courts Project, to assist Indian tribes in developing and strengthening their justice systems and obtaining needed funds. The Tribal Courts Project is a valiant effort at increasing tribal self-governance.¹⁸⁵ It does not need Congressional funding, only Congressional approval (which it has received), as it is funded directly through the Justice Department. The Tribal Courts Project focuses on creating incentives for both Indians and non-Indians to use the tribal courts. This includes improving the caliber of judges, increasing resources available to tribal governments, and strengthening the tribal court system.¹⁸⁶ In an effort to implement the project, a United States magistrate's court has been created on the Warm Springs Reservation.¹⁸⁷ The tribe provides the facility, and the federal government provides the magistrate and U.S. Attorney.¹⁸⁸ A federal district has also turned one federal judge into a full time magistrate to handle non-Indian offenses committed in Indian country.¹⁸⁹ This will allow non-Indians to bring cases and be prosecuted in Indian country and will solve the law enforcement dilemma presented by the tribes having no jurisdiction over non-Indians.

Janet Reno, during her term in office, stated that "[s]ome of the most important contributions the Department of Justice can make to tribal self-governance are to support the development and strengthening of viable tribal justice systems."¹⁹⁰ In December of 2000, former

184. See *Government-to-Government Relations With Native American Tribal Governments*, 59 Fed. Reg. 22,951 (May 4, 1999); Remarks to American Indian and Alaskan Native Tribal Leaders, 30 WEEKLY COMP. PRES. DOC. 941 (Apr. 29, 1994); OFF. OF TRIBAL JUSTICE, U.S. DEP'T OF JUSTICE, DEP'T OF JUSTICE POLICY ON INDIAN SOVEREIGNTY AND GOVERNMENT-TO-GOVERNMENT RELATIONS WITH INDIAN TRIBES, <http://www.usdoj.gov/otj/sovtrb.htm> (last visited Nov. 16, 2001) (on file with the *New York University Journal of Legislation and Public Policy*).

185. See OFFICE OF INSPECTOR GEN., DEP'T OF JUSTICE, *CRIMINAL JUSTICE IN INDIAN COUNTRY: OIG AUDIT REP.* (Sept. 1996), <http://www.usdoj.gov/oig/au9616/9616toc.htm> (describing goals and initial results of Tribal Courts Project).

186. *Id.*

187. Wallace, *supra* note 86, at 153.

188. See Kristine Olson & Tim Simmons, *Overview of the U.S. Attorney's Role in Tribal Courts*, TRIBAL CT. REC. (Nat'l Indian Justice Ctr., Petaluma, Cal.), Spring/Summer 1996, at 18, 19-20.

189. See 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, 513 (1998).

190. Reno, *supra* note 181, at 113.

President Clinton signed into effect Public Law 106-559, the Indian Tribal Justice and Legal Assistance Act of 2000.¹⁹¹ This Act is designed to strengthen and enhance tribal justice systems.¹⁹² However, the challenge remains to convince Congress and the Bush administration to actually provide the funding for these tribal court initiatives.¹⁹³

191. Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. 106-559, 114 Stat. 2778 (2000). Some of the findings made by Congress include:

- (3) the rate of violent crime committed in Indian country is approximately twice the rate of violent crime committed in the United States as a whole;
- (4) in any community, a high rate of violent crime is a major obstacle to investment, job creation and economic growth;
- (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments;
- (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands;
- (7) enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency;
- (8) there is both inadequate funding and an inadequate coordinating mechanism to meet the technical and legal assistance needs of tribal justice systems and this lack of adequate technical and legal assistance funding impairs their operation;
- (9) tribal court membership organizations have served a critical role in providing training and technical assistance for development and enhancement of tribal justice systems;
-
- (11) the provision of adequate technical assistance to tribal courts and legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court.

Id. § 2.

192. *Recently Passed "Indian Tribal Justice Technical and Legal Assistance Act" Expected to Strengthen and Improve Tribal Justice System*, NARF LEGAL REVIEW (Native Am. Rights Fund, Boulder, Colo.), Winter/Spring 2001, at 1 [hereinafter *Recently Passed Act*]. Under the Act, the U.S. Attorney General is authorized to award grants and technical assistance to Indian tribes wishing to develop and upgrade the operation of tribal courts. These grants include tribal justice training and technical assistance grants, tribal civil legal and criminal assistance grants, and grants to tribal courts to develop, enhance, and continue operating tribal justice systems. *Id.* at 1-2.

193. *Id.*

IV
WHAT MORE SHOULD BE DONE BY THE FEDERAL
TRUSTEE TO PROTECT INDIAN CHILDREN
FROM SEXUAL ABUSE?

A. *Fully Implement the Indian Child Protection and Family
Violence Prevention Act*

The Indian Child Protection and Family Violence Prevention Act made reporting mandatory for federal employees. However, neither the IHS nor the BIA have adopted regulations or procedures, or requested funding as provided for in the Act. The National Indian Justice Center found in its extensive survey that many federal employees were reluctant to report abuse. The survey found that “[t]he most commonly cited causes for failure to report were fear of reprisal for reporting the case, the belief that nothing would come of the report, and a lack of training concerning where to report suspected cases.”¹⁹⁴ Training must be given to federal employees covered by the reporting directive. The training must include administrative leadership and reporting procedures, including whom to notify and the proper steps to be taken, as well as establishing a means to protect the employee making the report. Considering recent publications by the BIA and the Department of Justice, clear guidelines have been established outlining tribal, federal, and employee responsibilities under the Child Protection and Family Violence Prevention Act.¹⁹⁵

Likewise, the background checks mandated by the Act have not been put into effect. In testimony before a Senate committee, the BIA stated that the Law Enforcement Division does not have enough funding to assist tribes in conducting background checks. The BIA estimates that a character investigation costs between seventy-two dollars and three thousand dollars per individual.¹⁹⁶ The report further stated that employees who have contact with children receive cursory background checks because of the lack of funding, and that many employees with access to children are left unchecked.¹⁹⁷ Adequate funding is vital for ensuring that mandatory background checks on all federal employees in Indian country become a reality.

Finally, the federal government needs to implement the central registry of all sex offenders who commit crimes on reservations or

194. See PHASE III FINAL REPORT, *supra* note 62, at 8.

195. See, e.g., CHILD PROTECTION HANDBOOK, *supra* note 165.

196. S. REP. NO. 103-394, at 5 (1994).

197. *Id.*

who move to reservations after having committed crimes.¹⁹⁸ Accurate record keeping of these offenders is a vital part of the trust responsibility to keep Indian children safe. While each tribe could maintain a separate sex offender registry for their own reservation, such a measure would not effectively alert tribal authorities to offenders who move from one reservation to another.¹⁹⁹ Only a central registry accomplishes the task of alerting tribal officials, BIA hiring agents, and tribal communities to those with abusive histories who desire to live and work amongst them.²⁰⁰ Federal legislation addressing the problem of child sexual abuse in Indian country is meaningless if it is not adequately implemented and enforced by the federal government.

B. *Tribal Convictions and Enhanced Penalties*

The unique trust relationship between the federal government and Indian tribes mandates a practical realization of this situation. However, the relationship is often not acknowledged in practice. Federal courts do not recognize tribal court sentences when calculating and determining federal sentences. This practice sends the message that tribal court punishment is not handed down from a legitimate court system. This assumption is misleading. Upon declination by the U.S. Attorney, a tribal prosecution takes place which results in a prosecution for a lesser offense. If the offender is apprehended again on another or similar crime and is convicted, the tribal prosecution should be recognized as part of that offender's criminal history. By recognizing tribal court decisions, offenders will not only be getting the enhanced punishment they deserve, but the tribal courts will also be getting the recognition they deserve as legitimate justice authorities.

In addition, the position that federal employees who work in close proximity to Indian children occupy requires that they be held to a standard of conduct of the highest moral character. Their positions necessarily involve the highest levels of trust and responsibility. Teachers, scout leaders, clergy, and any worker employed by the federal government should be exposed to enhanced penalties should they commit child sexual abuse on Indian children. Enhanced penalties be-

198. The Indian Child Protection and Family Violence Prevention Act already found the need for a central registry. See 25 U.S.C. § 3201(b)(2) (1994).

199. Had a central sex offender registry existed in the late seventies and early eighties, it is highly improbable that Paul Price, the North Carolina BIA teacher, could have moved from one school to another to continue his sexual predation on Indian children. See *supra* text accompanying note 122.

200. Congress has already recommended that any central registry created by the BIA must link to preexisting tribal, state, and federal central registries. See S. REP. NO. 103-394, at 9 (1994).

cause of status are not uncommon. Congress has imposed an enhanced prison term on deported aliens returning to the United States when their previous conviction was for an aggravated felony.²⁰¹ Recent hate crime legislation imposes enhanced penalties because of the offender's posture toward the victim—i.e. animus or hatred.²⁰² Although challenged, courts have found these enhanced penalties to be constitutional.²⁰³ The enhanced penalty is not regarded as part of the offense to be proven beyond a reasonable doubt. Instead, it is a part of the sentencing factors to be considered by the individual judge.²⁰⁴ In a manner similar to hate crime legislation that imposes penalties upon the offender because of his posture towards the victim, those in trust positions should be considered candidates for enhanced penalties because of their violation of both an employment position and a federal trust responsibility.²⁰⁵

C. *Internal Reorganization of Federal Agencies, Administrative Cooperation, and Prioritization*

The complexities involved in the administration and implementation of legislation relating to Indian tribes requires a reorganization and redistribution of responsibilities among the various federal and tribal agencies. Taking such steps would practically improve the enforcement of existing legislation. For example, because law enforcement is not a priority in the BIA, several people have suggested transferring all funding for tribal court systems and tribal law enforcement to the Department of Justice.²⁰⁶ It makes sense to have the Department of Justice take control of the money for two reasons. First, it has shown previous interest in tribal law enforcement and judicial re-

201. See Joshua S. Bratspies, Note, *Beyond a Reasonable Doubt: Limiting the Ability of States to Define Elements of an Offense in the Context of Hate Crime Legislation*, 30 SETON HALL L. REV. 893, 906 n.87 (2000) (citing 8 U.S.C. § 1326 (1994)).

202. See *id.* at 895.

203. *Id.* at 896, 906 (discussing *State v. Apprendi*, 731 A.2d 485 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

204. *Id.* at 906. One year later, the U.S. Supreme Court stated in *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999), that “any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” Such a requirement would not be a challenge for prosecutors.

205. Whether included as a sentencing factor or as a fact to be proven at trial, the enhanced penalty trust position would still allow for the imposition of an enhanced penalty.

206. See Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 JUDICATURE 147, 149 (1995).

sources. Second, it has the ability to support and develop that interest.²⁰⁷

Another option is to cross-deputize prosecutors and investigators. Neither the states nor the tribal courts can prosecute crimes committed by non-Indians against Indians. As a result of the ruling in *Oliphant*,²⁰⁸ only the federal government can prosecute interracial crime. However, federal prosecutors are so overburdened that many non-Indian-on-Indian crimes are never prosecuted.²⁰⁹ The U.S. Attorney for the District of Arizona has appointed several tribal prosecutors as special assistants to help fill in “jurisdictional gaps.”²¹⁰ Cross-deputization agreements exist in many contexts where multijurisdictions exist, e.g. crimes committed by civilians on military enclaves, offenders who flee one jurisdiction for another after committing a crime, and where it is more efficient for two systems to work together rather than independently.²¹¹ This cross-deputization²¹² is an approach well-suited to the complicated dynamics of prosecuting crime in Indian country.

Under a cross-deputization plan, law enforcement agencies would work cooperatively to ensure that all crime is prosecuted in Indian country, especially those crimes that have traditionally not been prosecuted because of a lack of resources. Under this deputization agreement, the U.S. Attorneys would select as their assistants Indian

207. BIA finances have historically been so out of control that barely twenty cents on every dollar actually reaches the reservation. The remaining eighty cents on every dollar of a \$1.8 billion budget is consumed in administrative costs for the 13,000 employees of the federal government's largest agency. In 1993, an independent audit attempt could not audit \$3.2 billion out of \$4.4 billion in BIA assets because financial records and procedures were in complete disarray. See Michael Satchell & David Bowermaster, *The Worst Federal Agency*, U.S. NEWS & WORLD REP., Nov. 28, 1994, at 61, 62–63.

208. 435 U.S. 191 (1978).

209. Janet Reno has stated that federal prosecutors:

[T]end to focus their energies on more serious crimes and often lack the resources to arrest and prosecute misdemeanor offenses committed by non-Indians in Indian country. Since federal courts are often located far from Indian reservations, active prosecution of non-felony domestic violence, child abuse, weapons offenses, vehicle violations, substance abuse, and theft is limited.

Reno, *supra* note 181, at 115.

210. Wallace, *supra* note 86, at 153.

211. See Larry Cunningham, Note, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2206–08 (2000) (discussing various uses of deputization).

212. Deputization is the substitution of a person appointed to act for an officer of the law. BLACK'S LAW DICTIONARY 442 (6th ed. 1990).

lawyers under statutory authority granted by 28 U.S.C. 542.²¹³ The U.S. Department of Justice would then provide training for Indian lawyers on the operations of the federal courts.²¹⁴ These special assistants to the U.S. Attorney would prosecute crimes either before district courts or magistrate judges.

The arrangement works well for all parties involved: The victim (generally Indian) feels vindicated having a tribal attorney prosecute her case; the offender feels they will get a fair shake in a federal court as opposed to a tribal court;²¹⁵ the tribe's push for self-government is strengthened as it spends time and resources prosecuting crime that affects its members; and the federal government's burden is alleviated.²¹⁶

A third alternative for reorganization is to establish protocols and Memorandums of Understanding (MOUs). Protocols prevent cases from slipping through the cracks when several jurisdictions and agencies have overlapping and separate responsibilities in a single case. These jurisdictional issues can result in turf wars where the child victim is lost amid a fight over territory. Interagency protocols identify which agency will perform particular tasks in the investigation of child sexual abuse allegations.²¹⁷ Written protocols allow for cases to be investigated, prosecuted, and the victims and offenders treated in a consistent manner.²¹⁸ Protocols also encourage agency accountability: when tasks are clearly allocated, it is difficult to claim a lack of knowledge or understanding.²¹⁹ The protocols would cover issues such as reporting, referrals (who makes them, how they are made, who accepts them), investigations, prosecution, and postconviction services

213. See Cunningham, *supra* note 211, at 2208–09.

214. *Id.* at 2209.

215. If the offender were Indian, he or she would most probably feel more unfairly treated in federal court. However, at least seventy percent of Indian victims affected by violent crime are part of an interracial incident, with the perpetrator being of another race. In comparison, only twenty percent of black victims and approximately twenty-eight percent of white victims are part of an interracial crime episode. See LAWRENCE A. GREENFELD & STEVEN K. SMITH, U.S. DEP'T. OF JUSTICE, AMERICAN INDIANS AND CRIME vi (1999), <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf>. Thus the possibility of an Indian victim and non-Indian perpetrator is high and federal court is the most likely venue.

216. See Cunningham, *supra* note 211, at 2210.

217. NAT'L INDIAN JUSTICE CTR., CHILD SEXUAL ABUSE PROTOCOL DEVELOPMENT GUIDE 1 (undated) (on file with author).

218. See *id.* at 2.

219. *Id.*

to victims and offenders.²²⁰ At the very least, a protocol would be tailored to the particular needs of a community and the incidents they most often encounter.

Such cooperation between federal departments and Indian tribes has already been used successfully. For example, an MOU was recently signed by the United States Attorney's Offices for the Northern and Eastern Districts of Oklahoma, the FBI, the Oklahoma Department of Human Services, the BIA, the IHS, and sixteen Indian tribes. The MOU consists of guidelines for the investigation of child abuse or neglect in Indian country. The Agreement calls for investigation to be undertaken by a multidisciplinary team when possible, including personnel with backgrounds in law enforcement, child protection services, juvenile counseling and adolescent mental health, and domestic violence.²²¹

Finally, the creation of multidisciplinary and multijurisdictional teams to combat child sexual abuse would combine the relevant expertise of a variety of agencies in order to comprehensively address all of the issues that arise in the unique setting of Indian country. The Victims of Child Abuse Act calls for the use of multidisciplinary child abuse teams (MDTs) when feasible.²²² The Children's Justice Act of 1986 provides funding for state and local governments to improve the handling of child abuse cases through the use of MDTs.²²³ The role of the MDT is "to provide for a child services that the members of the team in their professional roles are capable of providing."²²⁴ To be

220. *Id.* at 5–6. For sample protocols from four different tribes (Crow Creek Sioux Tribe, Washoe Tribe, Eight Northern Pueblos, and Gila River Pima-Maricopa Indian Community), see *id.* at appendix.

221. Memorandum of Understanding by and between U.S. Attorney's Offices for the Northern and Eastern Districts of Oklahoma, Federal Bureau of Investigation, Oklahoma Department of Human Services, Bureau of Indian Affairs, Indian Health Services, the Cherokee Nation, the Muscogee (Creek) Nation, the Osage Nation, the Pawnee Tribe, the Miami Agency, the Chickasaw Nation of Oklahoma, the Choctaw Nation of Oklahoma, the Seminole Nation of Oklahoma, and the Thlopthlocco Tribal Town 2 (Aug. 29, 1994) (on file with the *New York University Journal of Legislation and Public Policy*).

222. 18 U.S.C. § 3509(g) (1994).

223. IMPROVING TRIBAL/FEDERAL PROSECUTIONS, *supra* note 24, at 1.

224. 18 U.S.C. § 3509(g)(2). These services include:

- (A) medical diagnoses and evaluation services, including provision or interpretation of x-rays, laboratory tests, and related services, as needed, and documentation of findings;
- (B) telephone consultation services in emergencies and in other situations;
- (C) medical evaluations related to abuse or neglect;
- (D) psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, or other

really effective, all relevant agencies must participate in the team, ranging from child protective services to police investigations to prosecutors to medical, social, and welfare services.²²⁵ A tribal representative needs to be on all regional and county MDTs. Conversely, federal prosecutors and investigators need to be represented on tribal MDTs.²²⁶

Both the IHS and the BIA have a mandate to develop and participate in multidisciplinary child protection teams. Research on MDTs shows that clearly written policies and procedures, mission statements, and interagency agreements are important to operation and effectiveness.²²⁷ MDTs also allow for communication on prosecutorial action and venue where jurisdictions overlap.²²⁸ This preplanning protects vulnerable child victims who otherwise may be made to tell their story repeatedly to investigators from different jurisdictions.²²⁹

The federal government has a well-established pattern of joining with local and state officials to create multijurisdictional task forces. The FBI, DEA, and ATF have established programs with local and state officials to target gang violence, drug-trafficking, and violent fugitives.²³⁰ The local units provide street contacts and local intelli-

caregivers, or any other individual involved in a child victim or child witness case;

- (E) expert medical, psychological, and related professional testimony;
- (F) case service coordination and assistance, including the location of services available from public and private agencies in the community; and
- (G) training services for judges, litigators, court officers, and others that are involved in child victim and child witness cases, in handling child victim and child witnesses.

Id.

225. IMPROVING TRIBAL/FEDERAL PROSECUTIONS, *supra* note 24, at 5.

226. Participation in MDTs is mandated for federal agencies under the Indian Child Protection and Family Violence Prevention Act, Pub. L. No. 101-630, 104 Stat. 4,531, 4,554, § 3210(d), which states that, "Funds provided pursuant to this section may be used for . . . the development and implementation of a multidisciplinary child abuse investigation and prosecution program . . ."

227. See PHASE III FINAL REPORT, *supra* note 62, at 10-11.

228. See IMPROVING TRIBAL/FEDERAL PROSECUTIONS, *supra* note 24, at 5.

229. *Id.* at 4-5.

230. The FBI has established Safe Streets task forces which, by 1995, were operating in over 119 cities to target street gangs and drug-related violence. The DEA established the REDRUM (murder spelled backwards) program, which pairs DEA agents with local detectives to solve drug-related murders. REDRUM operates in over twenty-one cities. The DEA also created mobile strike forces that can respond to emergency calls from besieged cities unable to fund an adequate response to drug problems on their own. The ATF's Achilles Task Force combines ATF agents with state and local police to combat street gangs. See Gordon Witkin, *Enlisting the Feds in the War on Gangs*, U.S. NEWS & WORLD REP., Mar. 6, 1995, at 38.

gence while the federal officers provide technical expertise in areas such as wiretapping, access to grand jury proceedings, and familiarity with federal laws like the Racketeer Influenced and Corrupt Organizations Act (RICO) that otherwise might not be available to local forces.²³¹ Such a sharing of resources creates an efficient and blanket response to drugs and drug-related crimes. Multijurisdictional task forces have also been successfully used in the apprehension of fugitives and investigation of crimes.²³² This multijurisdictional approach would work efficiently and well to investigate child sexual abuse on the reservation. Federal agents would provide expertise in the investigation, interrogation, and prosecution of child sexual abusers, while tribal law enforcement and court officers provide cultural and local expertise in dealing with victims, offenders, and affected families. Additionally, local counties and cities could be included to provide access to superior services and facilities that would ease the investigation of what is always a painful crime.²³³

An example of an effective multijurisdictional task force on the reservation was implemented in the State of Arizona. Federal officials and the Navajo Nation agreed to assign a special task force to fight violent crime on the Navajo reservation. The agreement is called Operation Safe Trails.²³⁴ The task force is made up of four FBI agents, twelve Navajo criminal investigators, and a representative from the U.S. Attorney's Office.²³⁵ Under the agreement, Navajo investigators will receive training at the FBI academy in homicide, child sex abuse, and crime scene investigations. The agreement combines the exper-

231. *Id.*

232. To apprehend the "Railway Killer," federal agents combined with local and state crime investigators to create a task force thousands of officers strong that blanketed the southern border posts of the United States. Still using traditional investigative measures, the sheer size of the force brought such pressure to bear on Rafael Reséndez-Ramírez that he walked across the border from Mexico and surrendered at a post near El Paso. See David Jackson, *Pressure Led to Surrender, Official Says*, DALLAS MORNING NEWS, July 14, 1999, at 16A.

233. For example, Bannock County, Idaho, has a state-of-the-art investigation room specially set up to interview child victims of sexual abuse. A multijurisdictional response to child sexual abuse would make this room available to the Shoshone-Bannock investigators who work from the neighboring Fort Hall Reservation in southeastern Idaho. This state response is particularly necessary when the reservation is a P.L. 280 reservation with responsibility for child welfare, health, and safety entrusted under P.L. 280 to the state in the stead of the federal government.

234. See *Indian Child Protection and Family Violence Protection Act: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong. 45 (1996) [hereinafter *Hearing*] (statement of Janet Napolitano, United States Attorney, District of Arizona).

235. See Chris Moeser, *Feds, Navajos Sign Agreement to Fight Reservation Crime*, PHOENIX GAZETTE, Mar. 5, 1994, at B2.

tise of the FBI with the Navajo officers' knowledge of local customs, language, and geography.

D. Actually Securing All the Funding that Has Been Approved by Congress

As the past has demonstrated, authorizing the appropriation of money does not mean implementing the necessary programs provided for in the Act. The failure to promulgate regulations and the lack of funds to implement programs approved by Congress has prevented Indian tribes from addressing the growing problems of child abuse and family violence. While significant work has been accomplished through general funds distributed by the Office for Victims of Crime,²³⁶ when it comes to appropriating monies specifically through line item legislation, Congress has been reluctant to fund federal-tribal programs.

Federal commitment to the programs outlined in the Indian Child Protection and Family Violence Protection Act was questionable from the beginning. Between 1992 and 1995, none of the provisions of the Act were implemented.²³⁷ A reappropriations bill extending funding through 1997 was passed by the House and the Senate in June 1995.²³⁸ Funding was, however, not forthcoming.²³⁹ A significant

236. In 1997, discretionary grants for Victim Assistance in Indian Country were funded to \$775,000. CJA discretionary grants rose in funding from \$597,606 in 1995 to \$1.5 million in 1997. See OFF. OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS PARTNERSHIP INITIATIVES IN INDIAN COUNTRY 19–20 (1997), <http://www.ojp.usdoj.gov/americanative/pubs/piic.pdf>. Various other programs were funded in 2000 by the OVC, including \$50,000 to establish children's advocacy centers (CACs) in Indian country, and \$25,000 for Indian country child protection team (CPT) training. See OFF. OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS FISCAL YEAR 2000 PROGRAM PLAN: RESOURCES FOR THE FIELD 154 (2000), <http://www.ojp.usdoj.gov/00progplan/00prog.pdf>.

237. By 1995, all the BIA had produced under the Act was two informational videos, a telephone hot line, and it had begun a feasibility study for a central registry. These activities consumed five million of the forty million dollars earmarked for Indian programs and services. See Michael Stachall & David Bowermaster, *The Worst Federal Agency*, U.S. NEWS & WORLD REP., Nov. 28, 1994, at 61, 63.

238. In June 1995, a bill to reauthorize appropriations for certain programs under the Act was passed by both the House and the Senate. Sections 3208(e), 3209(h), and 3210(i) were amended by striking "and 1995" and inserting "1995, 1996, and 1997." See 25 U.S.C. §§ 3208(e), 3209(h), 3210(i) (Supp. 2000).

239. See *Hearing, supra* note 234, at 1 (statement of Hon. John McCain, Chairman, Comm. on Indian Affairs)

It has been 6 years since Congress enacted a law protecting Indian children from physical and sexual abuse. Since its enactment, we have yet to see the Federal Government provide the resources necessary to develop adequate prevention and treatment programs for the young victims of physical and sexual abuse on Indian reservations.

part of the problem was the BIA's refusal to begin drafting regulations without first receiving appropriations even though Congress had specifically stated that a plan would be needed before funding was released.²⁴⁰

Congress did recognize that tribal justice systems were underfunded and that this lack of funding severely affected tribal governments' abilities to keep an orderly society. As a result, it passed the Indian Tribal Justice Act²⁴¹ and provided funding from 1994 to 2000 for assessing and strengthening tribal justice systems. Although the Indian Tribal Justice Act appropriated \$58.4 million annually for strengthening tribal court systems,²⁴² by 1998 the BIA had only requested \$500,000 in funding to perform the comprehensive survey of tribal judicial systems as requested by Congress. No other funding had been appropriated to actually implement programs.²⁴³ As of Spring 2001, no funding has been approved.²⁴⁴

The Indian Tribal Justice Act and the December 2000 Indian Tribal Justice Technical and Legal Assistance Act both remain unfunded. Already \$58.4 million per year over the past six years should have been requested by the BIA to improve tribal justice systems.²⁴⁵ Instead, all tribal justice systems (254 Indian court systems in all) exist on \$12 to \$14 million annually.²⁴⁶ That amounts to \$48,000 per court

Id.

240. See S. REP. NO. 103-394, at 6 (1994).

241. Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601-3602, 3611-3614, 3621, 3631 (1994)).

242. See Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1699 n.408 (1998). Jiménez & Song summarize the NAICJA legislation's authorizations as:

1. \$50 Million for base funding for Tribal Courts;
2. \$7 Million for training, enhancement of tribal justices, technical assistance, etc.;
3. \$500,000 for administrative expenses for Tribal Judicial Conferences;
4. \$500,000 for administrative expense [sic] for the Office [Section 3611 of the Act establishes within the BIA the "Office of Tribal Justice Support"];
5. \$400,000 for survey (one time only). [Section 3612 of the Act authorizes the Secretary of Interior to contract with a non-federal body to conduct surveys of tribal justice systems].

Id. (alterations in original); see also Myers & Coochise, *supra* note 206, at 148-49.

243. See, e.g., David Cannella, *Tribes Plead for U.S. Aid to Stem Ills*, ARIZONA REPUBLIC, Dec. 17, 1996, at B1.

244. See *Recently Passed Act*, *supra* note 192, at 1.

245. See Myers & Coochise, *supra* note 206, at 148-49.

246. *Id.* at 148.

system—far short of what it takes to run an effective state court system.²⁴⁷

E. Amending the Major Crimes Act to Give Tribes More Authority and Control

The Major Crimes Act is an anachronism that does not accurately reflect the changed status of the tribes, tribal government, law enforcement systems, and tribal court systems. In keeping with the stress on self-determination, tribes should be given more authority to prosecute crimes committed under the Major Crimes Act and to penalize those crimes to an extent equal to other state tribunals. The Major Crimes Act relies on the tribe's dependant status for its jurisdictional authority. This status has changed significantly since the *Kagama* case, over 110 years ago. Tribes are now organized into semiautonomous, self-governing units. Most tribes have their own political offices, tribal court systems, and law enforcement systems. Consequently, they are not dependent upon the federal government to protect them from the commission of major crimes on the reservation, either by members or nonmembers.

Given the slow response time and the burden under which most federal prosecutors operate, tribes are better equipped to prosecute major crimes in their own systems by both members and nonmembers.²⁴⁸ Tribal investigators are familiar with the culture and context of the victim and the offender.²⁴⁹ Tribal investigators and prosecutors are geographically closer than federal prosecutors and understand the crime context more clearly than federal investigators. Tribal courts are also capable of trying major crimes cases: They are largely based on state court models; they have appellate level tribunals; and the defendant's rights are protected by the Indian Civil Rights Act.²⁵⁰ Tribal law enforcement, investigators, and court systems are more than capable of maintaining law and order in Indian country through the prosecution of major crimes.

The 1990 increase in penalty authority to one year imprisonment and five thousand dollars in fines does encourage the tribes to exercise their concurrent jurisdiction. However, the tribes can still exercise

247. *Id.* at 149.

248. See Warren Stapleton, Comment, *Indian County, Federal Justice: Is the Exercise of Federal Jurisdiction Under the Major Crimes Act Constitutional?*, 29 ARIZ. ST. L.J. 337, 342 (1997).

249. See *id.*

250. See *id.*

only misdemeanor prosecution and not felony prosecution.²⁵¹ When a major crime has occurred, the interests of the Native American community are not served by a tribal misdemeanor prosecution.²⁵² The tribe feels powerless and the offender feels unexpectedly free.²⁵³ In order for justice to be served, the United States must consistently exercise federal jurisdiction and seek felony prosecution. Because the United States has frequently declined such prosecutions, it is logical to suggest an increase in the tribe's ability to penalize and incarcerate offenders tried in tribal courts.

Of course, the prevention of child sexual abuse in Indian country is always the most ideal solution. However, no prevention programs currently exist to fill this role. Studies show that the most effective means of stopping abuse that happens within the family system includes educating parents on parenting.²⁵⁴ Elements essential for an effective prevention program include "home visitor services, the promotion of healthy child growth and development, and a series of key program elements."²⁵⁵ To be effective, these programs must include prenatal care, health promotion and primary health care, parenting competency, quality child care, and home visitor services with access to social service agencies.²⁵⁶

CONCLUSION

The guardians entrusted to care for Indian children have not been as attentive as they might, and, as a result, child sexual abuse among Indian children remains a serious problem in Indian country. Indian children are victims of sexual abuse in numbers that continue to increase by rates greater than those of child sexual abuse in other racial groups. Despite commendable efforts by Janet Reno and the Depart-

251. See *Hearing*, *supra* note 234, at 4 (statement of Janet Napolitano, United States Attorney, District of Arizona) ("[T]he tribal courts only have limited jurisdiction in terms of sentencing. They cannot impose a felony sentence.").

252. See *Easton*, *supra* note 105, at 956-57 ("[O]nly a felony conviction with the possibility of a significant prison sentence serves the often stated purposes of criminal prosecution and punishment: deterrence, incapacitation, just punishment, and rehabilitation. Misdemeanor prosecutions do not meet these goals when a serious crime has been committed." (citations omitted)).

253. See NAT'L AM. INDIAN COURT JUDGES ASS'N, FEDERAL PROSECUTION OF CRIMES COMMITTED ON INDIAN RESERVATIONS 28 (1974) ("A guilty defendant whose case is not accepted for federal prosecution feels he has gotten away with something. In close-knit communities such as Indian reservations, this can easily foster further antisocial behavior.").

254. See PHASE III FINAL REPORT, *supra* note 62, at vii.

255. *Id.*

256. *Id.*

ment of Justice to implement programs that directly address this problem, much work still needs to be done by those who have legislative and administrative authority. Congress has shown some concern and has attempted to address the issue through legislative acts. However, most of those legislative acts remain unfunded. Congress seems reluctant to actually fund the programs mandated by its own legislation. General fund appropriations rarely follow legislation intended to remedy child sexual abuse in Indian country. The BIA also drags its feet in both requesting appropriations for programs required by the Indian Child Protection and Family Violence Prevention Act, such as central sex offender registries, and in implementing policies and guidelines that will accomplish the purpose of the various legislative acts.

Only a firm commitment to the Seventh Generation of Indian children, as indicated by a willingness to take action to fully implement existing legislation, to fund the various programs, treatments, and preventative measures, to cooperate with Indian tribal agencies and employees, and to recognize the sovereignty and authority of tribal courts will halt the increase in this most heinous crime. History has seen the Indian tribes suffer at the hands of a "Manifest Destiny" indifferent to or ignorant of their struggle to survive. While Congress claims to recognize these struggles, that recognition is tempered by a lack of confidence in the Indian tribes' ability to adequately address the issues which threaten their existence and a reluctance to commit the funds necessary for the enforcement of legislative actions.

The preservation of the Seventh Generation is crucial to the continued vitality of the Indian nations in the United States. However, this can only be accomplished when the guardian fulfills its responsibilities to the people whose welfare the guardian has been charged to protect. What still remains to be seen is whether the Bush administration will continue the same half-hearted approach to funding Indian programs that has plagued the implementation of positive legislation, or whether it will accept responsibility for the Seventh Generation and take the steps necessary to ensure its survival.

