Who Should Protect the Native American Child: A Philosophical Debate between the Rights of the Individual Versus the Rights of the Indian Tribe

Michelle Zehnder

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WHO SHOULD PROTECT THE NATIVE AMERICAN
CHILD: A PHILOSOPHICAL DEBATE BETWEEN THE
RIGHTS OF THE INDIVIDUAL VERSES THE RIGHTS
OF THE INDIAN TRIBE

Michelle Zehnder†

Every child without regard to race, color, sex, language, religion, political
or social origin, property, birth or other status shall be entitled:

* To special protection to develop in a healthy and normal manner
  physically, mentally, morally, and socially with freedom and dignity;
* To a name and nationality from birth;
* To adequate nutrition, housing, recreation, and medical services
to grow and develop in health;
* To special treatment, education and care required by a physical
  mental or social handicap;
* To love and understanding and the right to grow and develop in
  an atmosphere of affection and security;
* To be among the first to receive protection and relief;
* To be protected against all forms of neglect, cruelty and exploita-
tion.¹

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children. The first article is A Step Forward: Rule 803(25), A New Approach to Child Hearsay

¹ See ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 59-60 (Clive Parry et
al. eds., 1986) (providing a summary of the Declaration of the Rights of the Child which
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I. INTRODUCTION

Somewhere on the Oglala Sioux Reservation in South Dakota, six-year-old Robert is being hit by his mother. After the beating is over, slight bruises can be seen on his arms and back. The bruises will soon go away, but the emotional trauma will not. For Robert, being hit is a daily occurrence. Tribal authorities fail to intervene and the abuse continues. This crime would have gone unaddressed because no other authority could have intervened and prosecuted Robert’s mother. Then in 1994, Congress gave the federal government jurisdiction over all assaults against children on federal reservations and Robert’s mother could be charged with a violation of federal law. The spirit of the 1994 Amendment was necessary to protect Indian children, but its scope is at serious odds with the original scope and purpose of federal criminal jurisdiction on Indian reservations.

All children deserve to be protected and to have crimes against them stopped. This truism should apply no matter what race the child is or where the child lives. Despite this apparent truism, physically abused Indian children were not always protected equally under the law. A hierarchy of protection on the reservations existed. Physically abused Indian children who are abused by another Indian were at the bottom of this hierarchy. Non-Indian children on the reservations were afforded the greatest legal protection, followed by the Indian child who was abused by a non-Indian. The 1994 Legislature changed this inequity and offered protection to physically abused children no matter what their race. The Legislature amended the laws applicable to child abuse to enable federal prosecution of all assaults, ranging from the most minor of assaults to the most serious. The Amendment, however, failed to protect tribal sovereignty and to take into account the historical theories behind the prosecution of crimes on reservations.
This article compares the past inequities suffered by physically abused children on the reservation with the current status of the law and offers a new statute to balance the rights of the tribe with the rights of all children. Throughout the discussion of these issues, examples are offered to assist the reader in understanding the issues discussed. The first segment of this paper discusses the current status of the law and explores the factors used to determine who has criminal jurisdiction on Indian reservations. Part II then explores the different levels of protection given to physically abused children, both on and off the reservation, before and after the 1994 Amendment. Finally, Part III offers a solution to the problem of protecting physically abused children without ignoring either tribal sovereignty or the historical development of the prosecution of crimes on the reservation. The proposed amendment offers specific child physical abuse definitions that protect Indian children and maintain tribal sovereignty.

II. A BRIEF OVERVIEW OF CRIMINAL JURISDICTION ON INDIAN RESERVATIONS

Criminal jurisdiction over offenses committed by Indians\(^2\) is a complicated issue. A number of questions must be asked and answered to determine the correct prosecuting authority. These questions include: Did the offense occur on or off a reservation? Is the State a Public Law 280 State? Was the perpetrator Indian or non-Indian? Was the victim Indian or non-Indian? What type of offense is alleged? It is only after these questions are answered that prosecution of the offender

\(^2\) The federal code defines “Indian” as:

[A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other person of one-half or more Indian blood.


“Indian” is perhaps an improper and inadequate term to refer to the group of people who inhabited North American long before Anglo-Saxons. The author recognizes the inadequacy of the term Indian. The term shall be used, however, to maintain consistency with case law and commentary on this topic. See generally Allison M. Dussias, Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court’s Changing Vision, 55 U. Pitt. L. Rev. 1, 3 n.6 (1993) (contrasting appropriate terms).
can occur. While only crimes subject to federal prosecution are the subject of this article, a brief overview of the general issue of criminal jurisdiction on reservations is helpful to the reader’s understanding of the inherent problems in the 1994 Amendment. During the following discussion of the substantive law on jurisdiction, the reader may find it helpful to refer to the chart provided in the appendix to this paper.

A. What are Public Law 280 Reservations?

Originally, the federal government had concurrent jurisdiction with the tribes over certain reservation crimes. The states had no criminal jurisdiction on the reservations unless the crime involved a non-Indian defendant and a non-Indian victim. In 1953, this clear separation of jurisdiction ended with the passage of what is commonly referred to as Public Law 280 (PL-280). PL-280 transferred all criminal and civil jurisdiction on certain reservations to the states the reservations were located in and permitted other states to assume jurisdiction from the federal government if they so chose. The passage of PL-280 was


4. Using the chart set forth in the appendix, a person seeking to determine who has jurisdiction should ask the following questions, in the following order:
   1) Where did the crime occur—on a PL-280 reservation or a non-PL-280 reservation?
   2) Is the defendant an Indian as defined under federal law?
   3) What race is the victim? (the race of the victim is irrelevant if the reservation is a PL-280 reservation).
   4) If both the victim and the defendant are Indian, what type of crime is alleged to have occurred?

The significance of these questions and their answers are fully explored in Part I-A to I-C of this paper.


Public Law 280, entitled “State jurisdiction over offenses committed by or against Indians in the Indian country” provides in relevant part:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same
intended to create law and order on reservations,\(^8\) thus giving Indians the same rights and privileges enjoyed by non-Indians.\(^9\) In keeping with this purpose, some reservations were specifically exempted from PL-280 because they already had “reasonably

extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

<table>
<thead>
<tr>
<th>State or Territory of</th>
<th>Indian country affected</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.</td>
</tr>
<tr>
<td>California</td>
<td>All Indian country within the State.</td>
</tr>
<tr>
<td>Minnesota</td>
<td>All Indian country within the State, except the Red Lake Reservation.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>All Indian country within the State.</td>
</tr>
<tr>
<td>Oregon</td>
<td>All Indian country within the State, except the Warm Springs Reservation.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>All Indian country within the State.</td>
</tr>
</tbody>
</table>

\(^8\) See Bryan v. Itasca County, Minn., 426 U.S. 373, 379-80 (1976); COHEN, supra note 5, at 364.

\(^9\) RONALD F. FLOWERS, CRIMINAL JURISDICTION ALLOCATION IN INDIAN COUNTRY 62 (1983) (citations omitted). There is little legislative history regarding the enactment of PL-280 to provide insight into the Congressional intent behind the statute. Bryan, 426 U.S. at 379-80.
satisfactory law-and-order organizations."\textsuperscript{10}

PL-280 gives states the same criminal jurisdiction on reservations that it has over crimes committed off the reservations.\textsuperscript{11} Perhaps the only distinction between a crime committed on a PL-280 reservation and a crime committed elsewhere within the state is that the tribe retains concurrent jurisdiction to prosecute an Indian defendant.\textsuperscript{12} The federal government's jurisdiction is no more and no less than the jurisdiction it has over state lands.\textsuperscript{13}

The original version of PL-280 included five mandatory states, and specific authority for other states, to assume jurisdiction if they chose to do so.\textsuperscript{14} Originally, tribes had no say in the process used to transfer jurisdiction from the federal government to the states.\textsuperscript{15} Once states assumed jurisdiction, tribes experienced either discriminatory practices by law enforcement or no law enforcement at all.\textsuperscript{16} In particular,
tribes criticized state jurisdiction because non-Indian courts were unfamiliar with Indian traditions and customs. The states were also unhappy with PL-280 because they were statutorily mandated to assume jurisdiction without a corresponding financial grant from the federal government to cover the increased burdens on the state's law enforcement, courts, and prison system.

PL-280 now includes six specifically enumerated states, with many other states assuming either partial or total criminal and/or civil jurisdiction on some reservations. In addition, PL-280 now permits tribes to have a voice in the process of determining whether reservation jurisdiction will be transferred from the federal government to the state. The states originally included in PL-280 also have the ability to return jurisdiction back to the federal government.

If a reservation is not included in PL-280, it is usually referred to as a non-Public Law 280 (nonPL-280) reservation. NonPL-280 reservations are the focus of this article. On nonPL-280 reservations, criminal jurisdiction lies in the tribes and the
federal government. It is this dual jurisdiction that allowed the prosecution of physical abuse to fall through the cracks leaving children unprotected for so long.

B. Tribal Court Jurisdiction on Indian Reservations

The Indian tribe is a unique entity within the boundaries of the United States. Indian tribes are considered quasi-sovereign nations. Tribes retain all powers of a sovereign nation unless those powers are specifically abrogated by Congress. One of these inherent powers includes criminal prosecution of certain persons for crimes committed within the reservation boundaries. The tribe has jurisdiction to prosecute any crime committed by an Indian against another person within its reservation boundaries. The tribe has no jurisdiction over crimes committed by non-Indians against Indians or crimes committed by non-Indians against non-Indians.

The tribe's jurisdiction to prosecute crimes is concurrent with the federal government's jurisdiction over certain crimes committed on non-PL-280 reservations. Concurrent jurisdiction between the tribe and the federal government was challenged in United States v. Wheeler. Wheeler was charged in tribal court with disorderly conduct and contributing to the delinquency of a minor. He pled guilty to the charged offenses.
and the tribe imposed a sentence. 30 He was then indicted in federal court for statutory rape. 31 Wheeler argued that the subsequent federal indictment violated the Double Jeopardy Clause of the United States Constitution. 32

The Supreme Court rejected Wheeler's argument asserting a violation of the Double Jeopardy Clause. The Court analogized this situation to the ability of both the state and the federal government to charge a defendant for crimes arising out of a single behavioral incident. 33 Just as the states are sovereigns distinct from the United States, so are tribal governments. 34 Tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." 35 The Court recognized that Congress has never eliminated the tribe's ability to punish its members and has instead "repeatedly recognized that power and declined to disturb it." 36 The Court, therefore, acknowledged that tribes have concurrent jurisdiction with the federal government over crimes committed by Indians within their tribal territories unless and until Congress has specially provides otherwise.

The process used in tribal criminal justice systems is up to the tribes, but subject to the limitations of the Indian Civil Rights Act 37 (ICRA). Congress enacted the ICRA purportedly to strengthen tribal self-governance. 38 The Act ensures that

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30. *Id.* at 315. His sentence for the charge of disorderly conduct was 15 days in jail or a $30 fine. His sentence for the charge of contributing to the delinquency of a minor was a 60-day jail sentence to be served concurrently with the first sentence, or a $120 fine. *Id.*

31. *Id.*

32. *Id.* at 316. The Double Jeopardy Clause provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . " U.S. CONST. amend. V.


34. *Id.* at 322. The Court specifically rejected Wheeler's argument that tribes "owe their existence and vitality solely to the political department of the federal government." *Id.* at 319.

35. *Id.* at 323 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1974)).

36. *Id.* at 325.


Some commentators note that the ICRA was enacted to stop perceived procedural abuses on the reservations, i.e., deprivation of counsel or jury trial and the right against self-incrimination. Russel Lawrence Barsh & J. Youngblood Henderson, *Tribal Courts, the Model Code, & The Police Idea In American Indian Policy,* 40 LAW & CONTEMP. PROBS.
Indian defendants in the tribal court system are afforded the same procedural due process rights as defendants in the federal court system.\textsuperscript{39} Perhaps the greatest limitation the ICRA places on tribal courts is the ceiling imposed on the amount of fines and periods of incarceration. The ICRA places a one-year ceiling on prison terms and a $5,000 ceiling on fines.\textsuperscript{40} These limitations on the tribe's penal authority severely affect the tribe's ability to impose punishments that accurately reflect the crime committed. Likewise, these limitations are one reason why concurrent jurisdiction over child physical abuse crimes is

\textsuperscript{39} The ICRA provides:

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

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

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

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

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

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

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

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

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


\textsuperscript{40} 25 U.S.C. § 1302(7) (1994). The sentencing ceiling was raised in 1986 from six months to the current one year limitation. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 4217, 100 Stat. 9207-146. Ironically, the change was not an attempt to increase tribal court autonomy, but rather, it was a part of the 1986 Anti-Drug Abuse Act. One purpose of the Act was to enhance the tribe's ability to prevent and penalize drug trafficking. \textit{Id}.
necessary to ensure the imposition of appropriate punishments.

C. When Does the Federal Government Have Criminal Jurisdiction on NonPublic Law 280 Reservations?

On nonPL-280 reservations, the federal government's criminal jurisdiction is dictated by two statutes. The government has jurisdiction if either the General Crimes Act (GCA) or the Major Crimes Act (MCA) applies. This paper focuses on the MCA, but a brief understanding of the GCA is helpful.

The GCA, enacted in 1834, extends general federal jurisdiction to Indian Country. The GCA gives the federal government the same criminal jurisdiction on nonPL-280 reservations as it has on other federal lands. The GCA extends all federal criminal law to Indian Country. Conversely, the MCA provides federal jurisdiction over a limited number of federal crimes.

The GCA contains several limitations that prohibit expansive federal prosecution of child abuse on reservations. The GCA does not apply if the crime committed involves one Indian against another; if the tribe imposed a punishment before

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42. 18 U.S.C. § 1153 (1994) (setting forth the crimes as committed by an Indian which are under the exclusive jurisdiction of the United States).
43. The General Crimes Act provides:
   Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.
   This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Indian country, as used in 18 U.S.C. § 1152, is defined as:

   Except as otherwise provided in sections 1154 and 1156 of this title, the 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.
The MCA does not contain the same exclusions and would appear to provide the federal government with jurisdiction in some cases where the GCA has taken jurisdiction away. The MCA gives the federal government jurisdiction over a limited number of crimes committed on reservations by Indians\textsuperscript{46} against both Indians and non-Indians. The MCA, however, covers only the most violent crimes that cannot be adequately punished in the tribal court system.\textsuperscript{47} The MCA provides:

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

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.\textsuperscript{48}

The MCA is the more specific of the two statutes.\textsuperscript{49} It applies to those crimes excluded from the GCA. For example, the MCA specifically includes Indian versus Indian crimes while

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\textsuperscript{45} 18 U.S.C. § 1152.


\textsuperscript{47} See supra notes 37-40 and accompanying text (discussing ICRA); see also Keeble v. United States, 412 U.S. 205, 211 n.10 (1972) (emphasizing the continuing congressional intent in amending the Act).

\textsuperscript{48} 18 U.S.C. § 1153.

\textsuperscript{49} The MCA can be said to be more specific than the GCA based upon the language of the statutes. The GCA begins "Except as otherwise expressly provided by law . . . ." 18 U.S.C. § 1152. The next statutory provision is the MCA which expressly provides jurisdiction to the federal government that the GCA excludes. See 18 U.S.C. § 1153; see also COHEN, supra note 5, at 301.
the GCA explicitly excludes this class of crimes.\textsuperscript{50} Also, the MCA does not exclude federal prosecution when the tribe has already imposed a punishment. The absence of this language permits concurrent jurisdiction between the federal government and the tribe over the enumerated MCA crimes.\textsuperscript{51} The provisions and limited applicability of the MCA are the focus of this paper.

1. The Development of the Major Crimes Act

The MCA was enacted in response to the United States Supreme Court decision in \textit{Ex parte Crow Dog}.\textsuperscript{52} In Crow Dog,
the Court held that federal courts had no jurisdiction over crimes committed by Indians on reservations. The Court interpreted the treaties between the Sioux Indians and the United States to preserve the tribe's right to self-governance which included the right to exercise criminal jurisdiction. The Court noted that while Congress had the power to extend federal jurisdiction to crimes on reservations, it had not exercised this power. Absent expressed Congressional intent to intrude upon tribal sovereignty, the Court would not grant the federal government criminal jurisdiction on reservations.

In swift and direct response to Crow Dog, Congress passed the MCA in 1885. Congress clearly intended to nullify the decision in Crow Dog. The MCA was proposed as an amendment to an appropriations bill and it passed the same day it was proposed. A congressional perception of "lawlessness" on the reservations and a need to "civilize" Indians were the main forces behind the amendment. Comments during the floor

54. Id. at 567.
55. Id. at 572.
56. See id.; see also COHEN, supra note 5, at 282.
57. See Major Crimes Act, ch. 341, 23 Stat. 385 (1885) (current version at 18 U.S.C. § 1153); see also United States v. Kagama, 118 U.S. 375, 383 (1886) (noting that the law was designed to end the jurisdictional problem and to make a crime by one Indian upon another Indian punishable by the state in which the reservation exists).
58. 16 CONG. REC. 994 (1885). Some congressmen wanted the bill to go to the Committee on Indian Affairs because of the extensive debate occurring on the floor. Id. at 935. This suggestion was rejected because passing the bill to committee would defeat its passage for yet another session. Id. at 935-36. A similar bill was defeated during the prior session because it sought to punish misdemeanor crimes as well as felonies. Id. at 935.
59. One congressman argued that imposing criminal penalties upon the Indians was contrary to the principle that the tribes need protection. Representative Hiscock argued:

[B]ut when we bring in a bill here year after year appropriating many millions of dollars to support and care for these Indians, and treat them as irresponsible persons, it seems to me that policy is not in the policy indicated by this amendment, which proposes to extend to them the harsh provisions of the criminal law.

16 CONG. REC. 936 (1885); see also Crow Dog, 109 U.S. at 571 (noting the inequities of imposing criminal law on Indians).

60. Representative Cutcheon noted, "I do not believe we shall ever succeed in civilizing the Indian race until we teach them regard for law, and show them that they are not only responsible to the law, but amenable to its penalties." 16 CONG. REC. 934 (1885).

During the debates, it was also argued by Representative Budd that:

This provision is as much for the benefit of the Indians as it is for the whites;
debate indicate congressmen were outraged that Indians were committing murder on the reservations and were not being punished in a manner they considered appropriate. According to Congress, tribal punishments were "either nonexistent or incompatible with principles that Congress thought should be controlling." Congress believed that subjecting Indians to federal criminal jurisdiction would speed up Indian "civilization" by teaching them respect for life and property. The MCA because now, as there is no law to punish for Indian depredations, the bordermen take the law into their own hands, which would not be the case if such provision as this was enacted into law.

Id. at 936.

61. Representative Cutcheon argued, with respect to the tribal punishment, that: It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. Under our present law there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that the "blood-avenger"—that is, the next of kin to the person murdered—shall pursue the one who has been guilty of the crime and commit a new murder upon him.

... If, however, an Indian commits a crime against an Indian on an Indian reservation there is now no law to punish the offense except, as I have said, the law of the tribe, which is just no law at all.

16 CONG. REC. 934 (1885).

Some commentators reject the idea that the MCA was enacted simply to ensure Indian perpetrators are punished in an "American" manner. They suggest instead, "Congress' action was more to suppress tribal criminal law than to provide punishment where there had been none." Barsh & Henderson, supra note 38, at 40; see also Cuberley, supra note 38.

62. For examples of tribal punishments see COHEN, supra note 5, at 335. Cohen describes tribal punishments which included ostracism, group disapproval, ridicule, religious controls, and denial of privileges. See also WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION & CONTROL 14-19 (1966).

If the American system of justice had not been imposed on the Indians, the problems addressed in this article may not exist. Prior to the enactment of the MCA, tribal justice was "swift and sure." Peak, supra note 38, at 398. Peak indicates that tribal punishments ranged from ridicule and scorn to flogging and clubbing. Id. While these punishments might be considered archaic by non-Indians, the force of the traditional punishments and the associated shaming effect had a stronger impact of deterrence and punishment than imprisonment could ever hope to have. Cf. id. at 405 (noting that traditional European notions of punishment, particularly incarceration, carry no stigma for Indians); COHEN, supra note 5, at 335.

63. Keeble v. United States, 412 U.S. 205, 210 (1973). The Secretary of the Interior, in his annual report to Congress, clearly did not view Indian punishment as a form of punishment at all when he noted, "If offenses of this character can not be tried in the courts of the United States, there is no tribunal in which the crime of murder can be punished." 16 CONG. REC. 984, 985 (1885).

64. See 16 CONG. REC. 996 (1885); Keeble, 412 U.S. at 211-12; see also Peak, supra note 38, at 402.
passed sixty-eight to two\textsuperscript{65} and extended federal criminal jurisdiction to seven crimes on the reservations.\textsuperscript{66} Over the intervening years, the number of crimes included in the MCA has risen to seventeen.\textsuperscript{67}

2. \textit{The Constitutionality of the Major Crimes Act}

The constitutionality of the MCA was challenged not long after its passage in \textit{United States v. Kagama}.\textsuperscript{68} In \textit{Kagama}, an Indian defendant was indicted in federal court for the murder of another Indian on the Hoopa Valley Indian reservation in California.\textsuperscript{69} On appeal, Kagama argued that criminal jurisdiction on the reservations was outside the authority of the United States.\textsuperscript{70} The United States Supreme Court upheld the indictment, relying upon the established principle that the United States has plenary authority over Indians residing within its territories.\textsuperscript{71} The Court noted that the decision in \textit{Crow Dog} was based only on Congress' failure to specifically provide for federal jurisdiction over reservation crimes, and that the MCA provided the Congressional grant of authority found lacking in \textit{Crow Dog}.\textsuperscript{72} The Court viewed criminal jurisdiction on the reservations as consistent with tribes' status as a "ward," dependent upon the United States for protection and the basic essentials of life.\textsuperscript{73}

The constitutionality of the MCA was again challenged over
a hundred years later in *United States v. Antelope*. Antelope was convicted of felony murder for the death of a non-Indian on the Coeur d'Alene reservation. Antelope appealed his conviction, arguing that but for his race as an Indian he would have been charged in state court where the elements for proving murder are more onerous. He argued that the MCA represented invidious racial discrimination in violation of the Due Process Clause of the United States Constitution.

The Court rejected Antelope's claims on two grounds. First, the Court pointed to constitutional authorization for specific classification of Indians by race in the United States Constitution. Second, the Court noted that criminal jurisdiction over Indians is based, not on race, but upon the Indian defendant's membership in a quasi-sovereign nation. Antelope was subject to federal jurisdiction, not because he was Indian *per se*, but because he was an enrolled member of the Coeur d'Alene Tribe. The Court also rejected Antelope's Equal Protection argument, noting Indian defendants are given the same constitutional protection as other defendants charged in federal courts with the same crime. The MCA is a constitutional and viable source of federal prosecution authority.

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75. *Id.* at 642-43.
76. *Id.* at 644. The defendant was charged with the federal crime of felony murder. The criminal code of Idaho does not contain felony murder, only murder. *Id.* Consequently, the prosecution in state court would have had to prove premeditation and deliberation. *Id.*
77. *Id.*
78. *Id.* at 645. The Court pointed to Article I, § 8 of the United States Constitution which provides, "To regulate Commerce with . . . the Indian Tribes." U.S. CONST. art. I, § 8.
79. Antelope, 430 U.S. at 645-46. The Court derived this conclusion by considering Fischer v. District Court, 424 U.S. 382 (1976), which dealt with a claim of racial discrimination based on the exclusion of Northern Cheyenne Tribe members from Montana state courts in adoption matters, and the reasoning found in Morton v. Mancari, 417 U.S. 535 (1974), which involved a challenge by a non-Indian to the Indian hiring preference of the Bureau of Indian Affairs. In both cases, the charges of discrimination were rejected. See Antelope, 430 U.S. at 645-46.
80. Antelope, 430 U.S. at 646.
81. *Id.* at 647-48. The Court also noted that a mere difference between the elements of federal crimes and state crimes does not amount to a constitutional violation provided the law is applied in an even-handed manner. *Id.* at 649.
III. THE MAJOR CRIMES ACT—PAST AND PRESENT

Tribes do not aggressively prosecute physical abuse against children.82 These crimes need to be stopped for the sake of the child as well as the tribe.83 Crimes against children are of the lowest level because children are absolutely vulnerable. If tribes used their own laws to charge and punish abusers, federal intervention perhaps would be unnecessary.84 Abusers would

82. Discussions with tribal law enforcement officials on one Indian reservation indicate that most physical abuse crimes are not prosecuted. These sources expressed their frustration at investigating child abuse and watching as the tribal authorities take no criminal action. To protect individual identities, their names, locations, and positions will not be revealed.


83. See infra notes 195-98 and accompanying text.

84. Tribal laws often include assault statutes that could be used to prosecute physical child abuse on the reservations. For example, the Red Lake Indian Tribal Code provides:

Subdivision. 1. First Degree Assault. First degree assault is an act done with intent to cause fear in another person of immediate bodily harm or death or the intentional infliction of or attempt to inflict bodily harm upon another without causing any actual bodily harm. First degree assault is a petty misdemeanor.

Subdivision. 2. Second Degree Assault. Any Indian who intentionally causes bodily injury to another or recklessly or negligently causes bodily injury to another or attempts by physical menace to put another in fear of serious bodily harm is guilty of second degree assault. Second degree assault is a misdemeanor.

Subdivision. 3. Third Degree Aggravated Assault. Any Indian who intentionally causes serious bodily injury to another or intentionally causes bodily injury to another with a deadly weapon or recklessly causes serious bodily injury to another under circumstances manifesting indifference to the value of human life is guilty of third degree aggravated assault. Any Indian who commits a first or second degree simple assault with a deadly weapon is guilty of third
learn that physical violence against children is unacceptable behavior, and thus through societal forces, physical abuse would diminish. Federal involvement would then be necessary only when a sentence greater than one year of incarceration was warranted. Unfortunately, these are not the circumstances facing Indian children. The tribes do not prosecute those who commit these crimes, and until recently, the federal government could not adequately protect children because of the limited number of crimes included in the MCA.

In 1994, however, the legislature amended the MCA and included a specific provision for assaults against children. This Amendment was desperately needed in the battle to protect children from abuse. The Amendment was expansive because it gave the federal government authority over minor crimes unlike it had ever had before. Unfortunately, the Amendment’s broad range is in direct conflict with the historical development of the MCA and tribal sovereignty. The circumstances existing before the Amendment as compared to the circumstances after the Amendment must be examined to understand how the 1994 Amendment overextends the purpose of the MCA and the role of federal jurisdiction on the reservation.

A. The Status of Physically Abused Indian Children Before the 1994 Amendment

As mentioned above, the federal government’s ability to prosecute child physical abuse crimes on Indian reservations is limited to the GCA and the MCA. If the crime involved an Indian against a non-Indian child, the government’s prosecution ability was not as severely limited because the GCA could be used to prosecute the perpetrator. The full extent of federal laws and state laws, if necessary, were viable options to prosecute

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degree aggravated assault. Aggravated assault is a gross misdemeanor. RED LAKE BAND OF CHIPPEWA INDIANS, TRIBAL CODE § 502.01.

Even if the tribe prosecuted the crime of physical child abuse, the ICRA would still limit the tribe’s ability to incarcerate the offender. See supra notes 39-40 and accompanying text.

85. See supra notes 37-40 and accompanying text (discussing limitations of the ICRA).

86. See infra notes 134-37 (setting forth the revised statute).

87. See supra notes 41-51 and accompanying text (discussing limitations of the GCA and MCA).
child abuse in cases of Indian against non-Indian abuse.\textsuperscript{88}

The problem arose when the physical abuse was committed by an Indian against an Indian child. In this scenario, the MCA provided the only avenue for federal prosecution.\textsuperscript{89} Only three of the sixteen crimes included in the pre-1994 MCA were viable charging options in cases of nonfatal child abuse.\textsuperscript{90} These options were assault with a dangerous weapon,\textsuperscript{91} assault resulting in serious bodily injury,\textsuperscript{92} and maiming.\textsuperscript{93} Of these three crimes, only the two assault statutes\textsuperscript{94} regularly applied in child

\begin{itemize}
  \item \textsuperscript{89} See infra appendix and notes 199-204.
  \item \textsuperscript{90} Abuse resulting in the death of a child can be prosecuted under the MCA. 18 U.S.C. § 1153(a) (1994) (listing the crimes of murder and manslaughter).
  \item \textsuperscript{91} The Ninth Circuit Jury Instructions provide that Assault with a Dangerous Weapon results when the defendant "intentionally [struck or wounded _______] [or] [used a display of force that reasonably caused ______ to fear immediate bodily harm];" acted with specific intent; and used an instrument. \textit{MANUAL OF MODEL INSTRUCTIONS FOR THE NINTH CIRCUIT} § 8.02D (Comm. on Model Jury Instructions 1995). The instruction goes on to state that the instrument "is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury." \textit{Id.}
  \item \textsuperscript{92} The Ninth Circuit Jury Instructions provide that Assault Resulting in Serious Bodily Injury resulted when "the defendant intentionally [struck] [wounded] _______; and . . . , as a result, ______ suffered serious bodily injury." \textit{MANUAL OF MODEL INSTRUCTIONS FOR THE NINTH CIRCUIT} § 8.02F (Comm. on Model Jury Instructions 1995). The factors the jury should use to determine if the victim suffered serious bodily injury include "whether the victim suffered extreme physical pain, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member, organ, or mental faculty, protracted unconsciousness, and significant or substantial internal damage (such as important broken bones)." United States v. Johnson, 637 F.2d 1224, 1246 (9th Cir. 1980).
  \item \textsuperscript{93} Maiming is defined at Title 18, United States Code § 114 and provides: "Whoever, within the special maritime and territorial jurisdiction of the United States and with intent to maim or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or . . . throws or pours upon another person, any scalding water, corrosive acid, or caustic substance . . . .
  \item \textsuperscript{94} The crime of assault is set out at Title 18, United States Code § 113. It provides in relevant part:
    \begin{itemize}
      \item \textsuperscript{a} Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
        \begin{itemize}
          \item \textsuperscript{3} Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine under this title or imprisonment for not more than ten years, or both.
        \end{itemize}
    \end{itemize}
\end{itemize}
abuse cases. The third, maiming, requires proof of the defendant’s intent to maim which may be difficult to prove in a child abuse case. The definitions of these three crimes were too narrow to apply to most physical abuse crimes. Many cases did not involve a dangerous weapon or bodily harm that rose to the level of serious bodily injury. Consequently, many Indian children were left unprotected as a result of the tribe’s failure to vigorously prosecute the crimes against them and the federal government’s inability to do so.

1. Children on NonPL-280 Reservations Were Not Protected Like Other Similarly Situated Children

Prior to the 1994 Amendment, differences in the treatment of physically abused Indian children living on nonPL-280 reservation were evident at multiple levels. The physically abused child received less statutory protection than the sexually abused child. The physically abused child on the reservation was less protected than a child living off the reservation. Even children who were similarly abused within the same reservation were protected differently depending on their race and the race of their abuser. In sum, physically abused Indian children were discriminated against on the grounds of their race and their domicile.

Physically abused children on nonPL-280 reservations had inadequate statutory protection as compared to sexually abused children. Sexually abused children are specifically protected under federal law. In 1986, the legislature amended the MCA

Serious bodily injury is defined as:
[B]odily injury which involves—(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.


to specifically include sex crimes against children. The Amendment arose from a realization that sexual abuse was prevalent on the reservations and federal intervention was necessary to protect the children. Physically abused children, however, needed the same protection, but their needs were ignored.

No justification for the different levels of protection between the types of abuse exists. The differences cannot be based on different degrees of harm. Physically abused children, like sexually abused children, suffer psychological harm from the abuse. The physically abused child is at greater physical risk than the sexually abused child because of the potential for permanent scarring and the possibility of death. Physically abused children should have received the same protection as sexually abused children.

The Indian child beaten by another Indian was also protected differently than the non-Indian child beaten by the same person in the same location. For example, assume Joe, a child beaten by another Indian, and John, a child beaten by a non-Indian in the same location. The Indian child would be prosecuted under different laws than the non-Indian child. This differential treatment is unjustified and creates an unequal standard of protection for children.


99. DANIEL L. KERNs, M.D., THE PEDIATRIC PERSPECTIVE IN FOUNDATIONS OF CHILD ADVOCACY 23 (Donald C. Bross & Laura Freeman Michaels eds., 1987). Dr. Kerns notes:

While physical and sexual abuse are the most blatant [forms of abuse], emotional abuse and the many varied forms of neglect may ultimately be as harmful. Indeed, short of maiming or killing a child, physical abuse takes its developmental and psychological toll through the implicit emotional neglect and abuse accompanying the physical act. With each physical attack comes a message of badness, worthlessness and unlovability.

Id. at 25.

100. See KERNs, supra note 99, at 27-31 (discussing various physical injuries that may result from physical abuse).
member of the Sioux tribe, lives with his non-Indian girlfriend, Sue, on a non-PL-280 reservation. Joe has a child, Billy, from a previous relationship. Sue has a non-Indian child, Becky, from a previous relationship. Joe assaults both children on multiple occasions with a belt that has a large metal buckle. Each child suffers multiple bruises and lacerations. Further, assume that the tribe fails to prosecute Joe.

The federal government must act, if at all, under the GCA or the MCA. In Billy's case, the government could have acted only under the MCA because it was an Indian against Indian crime. The only pre-1994 charging option was assault resulting in serious bodily injury. Thus, the government had to show that the beating caused extreme physical pain or that the beating caused a protracted and obvious disfigurement. While a case built on these facts had some potential for success given the ability to argue extreme physical pain, charging was unlikely given the high burden created by the definition of serious bodily injury. Thus, the crime against Billy would have likely gone unvindicated.

Conversely, in the case of Joe against Becky, the government could have proceeded pursuant to either the GCA or the MCA. The case could have been prosecuted under the general assault statutes of the United States. The prosecutor would also have had the option of looking to state law if he or she did not believe the federal assault statutes provided a proper charging avenue. Unlike the crime against Billy, the crime against Becky could have been successfully prosecuted. Billy was

101. See infra appendix.

102. See infra note 135 for a definition of assault resulting in serious bodily injury.


104. See infra appendix.


106. The ability of the prosecutor to look to state law to charge a defendant with a federal crime is premised on the Assimilated Crimes Act. The Assimilated Crimes Act provides:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

less protected simply by virtue of his Indian race.\footnote{107} It is difficult to justify this very different result given the similar harm suffered by both children.

The inequity of the protection given physically abused children on non-PL-280 reservations can also be seen by comparing the protection afforded non-PL-280 Indian children to that afforded other children, both Indian and non-Indian, who did not live on the reservation.\footnote{108} A fictional example located in Minnesota helps to illustrate this point. Minnesota is a PL-280 state, but the Red Lake Band of Chippewa Indians is excluded from PL-280 classification.\footnote{109} Johnny Smith's father beat him on multiple occasions with a belt that left numerous bruises and lacerations on his back which resulted in lateral scars. The Smiths lived in Island Lake, a small town located just off the Red Lake Reservation. Another child, Suzy Johnson, was beat by her mother on multiple occasions with an electrical cord leaving bruises and lacerations on her thighs and buttocks. Suzy has loop-shaped scars on her back from the beatings. The Johnsons are Indians and live on the Leech Lake Reservation.\footnote{110} Both Smith and Johnson could have been charged under Minnesota's Malicious Punishment of a Child statute.\footnote{111} The crimes against Johnny and Suzy would have been appropriately charged and the offenders properly prosecuted.

Now consider a case involving Timmy Barrett who lived on

\footnotesize
\begin{itemize}
\item \footnote{107} The same argument was used when Congress amended the MCA to include maiming. The federal government's inability to prosecute maiming was viewed as enforcement discrimination against Indian victims who were left to find vindication only in the tribal courts while non-Indians victimized on federal lands could find redress in the federal courts. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Star.) 3182, 3498 n.4.
\item \footnote{109} 18 U.S.C. § 1162(a) (1994) (providing Minnesota with state jurisdiction over "[a]ll Indian Country within the State, except the Red Lake Reservation.").
\item \footnote{110} See GETCHES ET AL., supra note 14, at 2-3 (providing a map of Indian reservations in the United States).
\item \footnote{111} See MINN. STAT. § 609.377 (1994); see, e.g., State v. Williams, 451 N.W.2d 886, 888 (Minn. Ct. App. 1990) (affirming conviction for substantial bodily harm where injuries included horseshoe shaped scars from blows from a belt buckle, loop marks consistent with the child being whipped by a cord, circular scars consistent with cigarette burns and multiple linear scars).
\end{itemize}
the Red Lake Indian Reservation. Timmy's father, Martin, beat him on multiple occasions with a belt which left bruises and lacerations on his legs and back, leaving scars. Timmy and his father were members of the Chippewa Tribe. The tribal prosecutor declined prosecution. The only source of federal jurisdiction was the MCA because this was an Indian versus Indian crime.\footnote{112. See infra appendix.}

The three potential MCA crimes did not fit this fact pattern. Maiming cannot be used here because it was unlikely that any permanent disfigurement would have resulted or that Martin intended to maim or disfigure Timmy.\footnote{113. See supra note 94 for definition of maiming.} Perhaps the belt could have been classified as a deadly weapon when used against a child, but it was unlikely. The only charging option left was assault resulting in serious bodily injury. However, these facts would likely have extended the meaning of "serious bodily injury" to its outer limits.\footnote{114. See infra note 134 for definition of serious bodily injury.} Thus, the prosecutor may not have sought an indictment and Martin would have been free to continue assaulting Timmy.

The only difference between Johnny, Suzy, and Timmy was that Timmy's home was on the Red Lake Reservation. This difference hardly justified the different responses to very similar circumstances. Children of every race, in every location, deserve to be protected from those who prey upon them. The differing levels of protection that existed prior to 1994 did not live up to this truism.

2. The Lack of an Assault of a Child Statute Created the Potential for Charging Abuses by Prosecutors

Charging abuses were possible given the lack of an assault statute to apply to child physical abuse cases in the pre-1994 MCA. Prosecutors may have been tempted to over-charge a defendant because of the potential for a lesser included offense jury instruction.\footnote{115. See Keeble v. United States, 412 U.S. 205, 212-13 (1978) (noting that with a lesser included offense jury instruction, a simple assault instruction could be given if requested).} If a prosecutor wanted to see a defendant charged, she may have been inclined to seek and receive an indictment for a crime listed in the MCA, knowing the defen-
dant may ask for a lesser included assault jury instruction.

Until about twenty years ago, district courts refused to give lesser included offense instructions when the MCA was involved, believing it was the tribe's responsibility to prosecute the lesser included crimes.116 The United States Supreme Court rejected this premise in Keeble v. United States.117 Relying on the language of Title 18, United States Code Section 3242, which states that Indians who commit crimes shall be tried "in the same manner" as all others, the Supreme Court held that Indian defendants are entitled to lesser included offense instructions.118 Although recognizing the MCA's original purpose was to "civilize" Indians, the Court held it was not meant to deprive Indian defendants of the procedural rights afforded to non-Indian defendants.119 The Court concluded that no tribal interest was threatened by affording an Indian defendant the right to a lesser included offense instruction.120

With the possibility of lesser included offense instructions, prosecutors might be tempted to pursue a case knowing one of the MCA crimes could not be proven, but knowing the lesser included offense of simple assault could be proven.121 Although the Supreme Court recognized this as a potential problem, this concern did not alter its decision.122 Prosecutors and law enforcement officials, tired of seeing children repeatedly abused, may have pursued cases simply because something had to be done.

3. The Pre-1994 Major Crimes Act Failed to Include a Penal Title and Punishment That Paralleled the Crime Committed

The thirteen crimes in the pre-1994 MCA did not adequate-

116. Id. at 209.
117. Id. at 212.
118. Id. Title Eighteen, United States Code § 3242 provides:

All Indians committing any offense listed in the first paragraph of and punishable under Section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.

120. Id. at 214.
121. COHEN, supra note 5, at 303.
122. Keeble, 412 U.S. at 214 n.14; see also WEST, supra note 13, at 46 n.30, 48.
ly encompass the crime of physical abuse.\textsuperscript{123} The crime of child abuse involves not only physical harm, but also emotional trauma, a violation of trust and innocence, and the offender's dereliction of his or her obligation to care for and protect children.\textsuperscript{124} Crimes against children are different in nature than crimes against adults, and consequently, should be appropriately labeled to reflect the crime committed.

Specific examples best demonstrate the inadequacy of the pre-1994 MCA. Consider the case of a three-year-old girl whose arms and legs are fractured. She has multiple cigarette burns and bruises over her entire body.\textsuperscript{125} Federal authorities did not prosecute because the "absence of a [federal child neglect] statute create[d] a substantial void in [the federal government's] effort to protect children who reside in reservation communities."\textsuperscript{126} This crime occurred, however, before the assault resulting in serious bodily injury statute was enacted. Today, this statute can be used, and the lack of a specific physical abuse statute will not seriously jeopardize federal prosecution in this type of case.\textsuperscript{127}

In contrast, consider the case of four-year-old Sara whose mother burned her legs with a cigarette at least twelve times.\textsuperscript{128} Tribal authorities refused to prosecute and the case was referred to the United States Attorneys' Office. The defendant was indicted for assault with a deadly weapon and assault resulting in serious bodily injury.\textsuperscript{129} Sara's mother was convicted on both counts. This crime was justly prosecuted. Yet, a question

\textsuperscript{123} This same reasoning was used to amend the MCA to include maiming. Comprehensive Crime Control Act of 1984, Pub. L. No. 99-473, 1984 U.S.C.C.A.N. (98 Stat.) 3182, 3498. The Committee felt that, although the crime could be punished as assault resulting in serious bodily injury, the Amendment would allow prosecution of a more serious and specific offense, rather than just the general crime of assault. \textit{Id.} at 3499; \textit{see supra} note 93 for the definition of maiming.

\textsuperscript{124} \textit{See generally A REPORT TO THE PRESIDENT: PRESIDENT'S CHILD SAFETY PARTNER-} SHIP 7 (1987).

\textsuperscript{125} The facts for this example are drawn from an investigation file and a citation is unavailable.

\textsuperscript{126} An additional factor in the government's decision not to prosecute was the inability to determine which foster parent was the perpetrator.


\textsuperscript{128} The facts for this example are taken from United States v. Barrett, 8 F.3d 1296, 1297-98 (8th Cir. 1993). The conviction in this case was reversed on evidentiary grounds. \textit{Id.} at 1301.

\textsuperscript{129} \textit{Id.}
remained as to whether there was an appropriate fit between the charged crimes and the nature of the offense. The tenuous nature of the fit was particularly evident in the charge of assault with a dangerous weapon. A specific assault against a child statute, or a lesser degree of assault, would have more appropriately addressed the crime committed.

B. Assault Against a Child Statute

An amendment to the MCA in some form was necessary to effectively protect physically abused children. The needed protection arrived in 1994 when the Legislature amended the MCA to include an assault committed against a person under the age of sixteen. The Amendment was a victory for children. It provides Indian children with the expansive protection they have never had before. In giving children this expansive protection, however, the Legislature overlooked the tribe's right to self-governance and the original legislative intent behind the MCA. Hence, the Legislature must now decide if it will focus only on Indian children's best interests or if it will act in conformity with the century old philosophy behind the MCA and limit federal criminal jurisdiction on reservations.

The 1994 Amendment significantly broadened the scope of the federal government's ability to prosecute physical abuse. As set out above, the government's pre-1994 charging options included assault with a dangerous weapon, assault resulting in serious bodily injury, and maiming. The 1994 Amendment, however, permits the government to prosecute any type of assault against a child. According to the United States Code, "assault" includes the following:

1. Assault with intent to commit murder,
2. Assault with intent to commit any felony, except murder or a felony under chapter 109A [sexual assault statutes],
3. Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine under this title or imprisonment for not more than ten years, or

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133. Id.
(4) Assault by striking, beating, or wounding,
(5) Simple assault,
(6) Assault resulting in serious bodily injury,\(^\text{134}\) and
(7) Assault resulting in substantial bodily injury\(^\text{135}\) to an
individual who has not attained the age of sixteen years.\(^\text{136}\)

The Legislature also made substantive changes to the assault statute. Prior to the 1994 Amendment, the assault statute contained set penalties for assaults, regardless of the victim's age. The 1994 Legislature provided an enhanced penalty for the crime of simple assault if the victim was under the age of sixteen.\(^\text{137}\) Furthermore, the Legislature added an "assault resulting in substantial injury to a child under the age of sixteen" provision.\(^\text{138}\) The significant breadth of the statute creates conflict with the tribe's right to self-governance and the original purpose behind the MCA.

1. Problems with the 1994 Amendment

A federal statutory change was necessary to protect children from physical abuse or at least to punish those who abuse them. The 1994 Amendment fulfilled this need. Any person who causes physical harm to an Indian child on a reservation is now subject to federal prosecution. The physical harm can be as minor as a slap or as serious as broken bones or internal injuries. If the focus remained solely on the best interest of the child, further examination of the 1994 Amendment would be unneces-

\(^{134}\) Title Eighteen, United States Code § 1365 defines serious bodily injury as "bodily injury which involves—(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. § 1365 (1994); see also 18 U.S.C. § 113(b)(2) (1994) (stating that "the term 'serious bodily injury' has the meaning given that term in Section 1365 of this title.").

\(^{135}\) Substantial bodily injury is defined as "(A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." 18 U.S.C. § 113 (1994).

\(^{136}\) Id.

\(^{137}\) 18 U.S.C. § 113(a)(5) now provides:

Simple assault, by fine under this title or imprisonment for more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than one year, or both.

\(^{138}\) Id.

The Legislature failed to consider the philosophical issues raised by the Amendment. These issues include the impact this Amendment has upon tribal sovereignty and the extremely broad scope of assault crimes now included in the MCA. After an examination of these issues, the reader should recognize that the federal government must clearly and unequivocally decide whether children will be protected at all costs or whether the 1994 Amendment was in error.

2. The Impact of the 1994 Amendment on Tribal Sovereignty

The 1994 Amendment significantly impacts tribal sovereignty. Assume an Indian commits the crime of simple assault against another Indian on a nonPL-280 reservation. The crime must be punished, if at all, by the tribe because the MCA does not apply.\(^1\)\(^9\) Tribal authorities must decide whether to prosecute. If they decide not to, a governmental decision is made and should be respected.

Some tribal governments decided not to prosecute the crime of physical abuse. The 1994 Amendment, therefore, is a response to this governmental decision and in effect tells tribal governments that their decision is unacceptable. The 1994 Amendment shows little respect for tribal sovereignty and it is a serious deviation from the original intent of the MCA to minimally intrude on tribal sovereignty by supplying the federal government with limited criminal jurisdiction on the reservation.\(^1\)\(^4\)\(^0\)

Efforts to protect tribal sovereignty create a need to strike a balance between a child's right to protection and the tribe's inherent sovereignty to govern its members as it chooses. The need to strike a balance is not new. The United States Supreme Court rejected the argument that an individual's rights should be sacrificed for the sake of tribal sovereignty in *Keeble v. United States.*\(^1\)\(^4\)\(^1\)

*Keeble* raised the issue of whether an Indian defendant is

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189. See 18 U.S.C. § 1153 (1994) (example assumes the simple assault was committed against a person not under 16 years of age).
140. See COHEN, supra note 5, at 290-91.
entitled to an instruction on lesser included offenses. The
government argued "the interests of an individual Indian
defendant in obtaining a jury instruction on a lesser offense
must fall before the congressionally sanctioned interests of the
tribe in preserving its inherent jurisdiction." The Court held
that an individual defendant's rights cannot be sacrificed for the
greater good of the tribe.

The 1994 Amendment raises the question of whether a
child's right to be protected should be sacrificed to preserve
tribal sovereignty. If children are protected by the 1994
Amendment to the MCA, should the impact on tribal sovereignty
be ignored in favor of protecting the child from harm or at least
punishing the person who caused the harm? Regardless of
the answer, Congress failed to address, or perhaps even recog-
nize, this issue.

It can be argued that the true impact of the Amendment on
tribal sovereignty may be de minimis. The new language of the
MCA does not divest the tribe of its ability to also prosecute the
crime. Similar concerns about tribal sovereignty were
addressed when the MCA was amended to include sexual
abuse. The House Judiciary Committee rejected any possible
jurisdictional divestment and specifically noted the amendment
only extended concurrent jurisdiction to the federal govern-
ment. The Committee emphasized that the MCA was never

142. Id.
143. Id. at 209.
144. Id. The Court declared that if "an Indian is prosecuted in tribal court under
the provisions of the Act, this Act does not require that he be deprived of the
protection afforded by an instruction on a lesser included offense." Id. at 213.
According to the Court, "no interest of a tribe [was] jeopardized by this decision." Id.
145. See Edward L. Thompson, Protecting Abused Children: A Judge's Perspective on Public
L. REV. 1, 6 (1980). Thompson argues that where a child's and a parent's rights
conflict, the child's rights must prevail. Id. This argument also could be made when the
child's rights and the interests of the tribe conflict.
146. See supra note 51 (discussing conflict between the legislative history of the MCA
and secondary source commentary on the MCA).
1298. The original amendment used the term "felonious sexual molestation of a
minor." Congress, however, later struck this term and substituted the term "felony
intended to divest tribes of criminal jurisdiction.149

Similarly, the 1994 Amendment to include assault against a person under the age of sixteen does not appear to divest tribal jurisdiction. The 1994 Amendment gives either, or both, sovereigns the ability to invoke criminal jurisdiction and protect children, while leaving the tribe's authority intact.150 Despite continued concurrent jurisdiction, the 1994 Amendment represents an expansive federal intervention into one more area of tribal life and decreases the separation between the tribe and the federal government.

3. The 1994 Amendment Deviated from the Historical Intent and Development of the Major Crimes Act

The 1994 Amendment gives the federal government greater criminal jurisdiction on reservations than it has ever had in the past. The 1994 Amendment does not divest the tribe of jurisdiction to prosecute physical abuse crimes jointly with the federal government.151 It does, however, increase federal involvement by including minor crimes. Prior to the 1994 Amendment, the MCA included only the most serious crimes and left all minor crimes to the tribes.152

The word "major" means "requiring great attention or concern; serious."153 The plain understanding of the statute would require that the MCA include only the most serious crimes.154 Prior MCA amendments were in line with the intended scope of the MCA. The amendment to include sexual abuse was appropriate because any type of sexual contact with a

149. See id. Specifically, the Committee noted that "the Major Crimes Act confers concurrent jurisdiction over certain offenses upon Federal courts. That act does not (nor was that act intended to) divest Indian tribes of their jurisdiction over tribal members who commit offenses listed in the Act." Id.


151. See supra note 51 (discussing the issue of whether the MCA divests the tribes of concurrent jurisdiction to prosecute the crime as well).

152. 16 CONG. REC. 934, 935 (1885) (noting the first attempt to pass the MCA was defeated because it included both misdemeanors and felonies).


154. See generally Dussias, supra note 2, at 21 n.81 (discussing tribal versus federal criminal jurisdiction on nonPL-280 reservations in terms of "major" and "minor" crimes); Cubberley, supra note 51, at 226.
child is a serious crime.\textsuperscript{155} Similarly, the crimes of kidnapping,\textsuperscript{156} assault with intent to commit rape,\textsuperscript{157} maiming,\textsuperscript{158} and assault resulting in serious bodily injury\textsuperscript{159} are all grave crimes. The need to include these crimes was even more appropriate in light of the ICRA limitations on sentencing. Until 1994, all the crimes included in the MCA deserved the description "major".

Most would agree that it is unacceptable for any child to suffer physical harm. From an emotional viewpoint, most would also agree that physical abuse is a serious crime deserving serious consequences. Yet, most individuals would concur in the statement that the nondisciplinary slapping of a child should not be classified as a felony or major crime. However, this is precisely what the 1994 Amendment did—it included the crime of simple assault or the slapping of a child. The level of harm caused by slapping a child cannot compare with the harm caused by the other crimes included in the MCA—such as assault with a dangerous weapon, maiming, manslaughter or murder. Thus, the 1994 Amendment conflicts with the intended meaning of the MCA.

The 1994 Amendment would not be as troublesome if the legislative history reflected an intent to declare all physical child abuse, regardless of form and severity, a major crime deserving federal prosecution and penalties. The legislative history, however, is silent on this issue.\textsuperscript{160} In the absence of such intent, the 1994 Amendment remains an anomaly in the MCA.

Again, a specific example is useful to understand the concern about the Amendment. Joanne, an Indian on a nonPL-280 reservation, hits her daughter, Sherri, with an open hand, twice in a single incident. Joanne was not disciplining Sherri at

\textsuperscript{155} See infra note 192 and accompanying text (discussing tribal support for the inclusion of sex crimes in the MCA).


the time. In all respects, this appears to be an isolated incident. The MCA makes this act a federal crime and Joanne can be prosecuted at the federal level. While the sentence she receives would likely be minimal if she is convicted, the prosecution will occur far from the reservation and far from Indian customs and practices. More importantly, since there are few federal women's prisons in the United States, Joanne, and other female defendants, would be incarcerated far from their families. In contrast, if federal intervention was not possible and the tribe alone addressed the incident, Joanne would remain in the community and possibly receive community support and services. In sum, prosecuting Joanne in the federal system is difficult to justify when the source of authority is the Major Crimes Act.

4. The 1994 Amendment Represents an Example of Minimal Legislative Insight Into the Ultimate Effect of the Statute

The minimal legislative history available on the MCA is at odds with the actual statute enacted. The history reflects that the 1994 Amendment was intended to fill the statutory void between simple assault and assault resulting in serious bodily injury statute. The Legislature stated that it intended to fill this

161. See Dussias, supra note 2, at 39.

The United States Supreme Court recognizes that tribal traditions and values play a strong role in tribal punishments. United States v. Wheeler, 435 U.S. 313, 331-32 (1978). Cf. Native Village of Venetie IRA Counsel v. Alaska, 918 F.2d 797, 803 (9th Cir. 1990) (noting that the Indian Child Welfare Act includes an express finding that when states exercise jurisdiction "over Indian child custody proceedings ... [they] have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.") (citations omitted).

162. The lack of a women's prison in all states decreases the chances of family reunification because the inmate will not be able to easily keep in contact with her children and family.

163. The tribe may be the best government authority to address child abuse. The child's best interest are better determined by those in the child's own community. The Indian Child Welfare Act is an example of a Congressional determination that tribes are better suited than non-Indian courts to determine the best interests of Indian children in adoption and termination of parental rights cases. See Thompson, supra note 146, at 11. The Indian Child Welfare Act was an attempt by Congress to end the alarming number of Indian children who were being removed from their homes on the reservations to be placed in non-Indian homes. If an ethnic community resolves its societal problems, the community's values, traditions, and customs will be considered and utilized to find a solution.
gap with the newly enacted statute “assault resulting in substantial bodily injury.” 164

If Congress had simply enacted the statute—assault resulting in serious bodily injury—and amended the MCA to include it, the problems addressed in this article would not exist. The Legislature, however, did not stop with that amendment. It included within the MCA the language “an assault against an individual who has not attained the age of sixteen years.” 165 This Amendment went well beyond fulfilling a need for a moderate severity assault statute and included the full range of assault. The final result of the “Assault Against a Child Statute” far surpassed the stated legislative objective. The ability to federally prosecute all ranges of assaults against children under the age of sixteen occurred without apparent consideration for the consequences of this action.

The Congressional Budget Office’s financial impact opinion demonstrates Congress’ lack of awareness of this Amendment’s impact. This opinion indicates the Amendment will have no net impact on the federal budget. 166 This conclusion demonstrates that Congress was unaware that the statute significantly increased the jurisdiction of the federal government on the reservations. If the statute is fully used, it brings with it increased budgets for the United States Attorneys’ Offices, public defenders’ offices, the court system, and the penal system. It also is likely to increase social service costs, as these types of prosecutions would bring the family to the attention of social services. Furthermore, the financial impact opinion contains a naive statement that any additional costs to the federal government will be recouped by an increased fines basis. However, most people living on Indian reservations and those who perpetrate physical abuse are unlikely sources of a secured base for the collection of imposed fines. 167

Congressional ignorance of the true nature of the statute it enacted is also seen in the statement: “Most of these crimes [assaults] are prosecuted by state authorities rather than federal authorities, regardless of the age of the victim.” 168 This state-

167. See infra notes 188-89 and accompanying text (discussing tribal poverty).
ment demonstrates true ignorance of the federal government's sole jurisdiction over certain crimes occurring on nonPL-280 reservations. Given the tribe's failure to prosecute physical abuse against children and the federal government's authority to do so under the 1994 Amendment, federal authorities will be prosecuting significant numbers of abuse cases on the reservation. The 1994 Amendment has a significant potential impact on both the number of physical abuse prosecutions in the federal system and the strain on the federal budget. Hence, the consequences of the 1994 Amendment were not fully explored before Congress passed it.

IV. AN ALTERNATIVE TO THE 1994 AMENDMENT: CHAPTER 113A—A STATUTE SPECIFICALLY TAILORED TO THE CRIME OF PHYSICAL ABUSE AND RESPECTFUL OF TRIBAL SOVEREIGNTY

Before the 1994 Amendment, children on nonPL-280 reservations were not adequately protected. Tribes were not prosecuting the crime of child physical abuse, and even if they did, tribes could not adequately punish the perpetrator under the limitations of the ICRA. The federal government also could not adequately protect children on the reservations because the applicable laws did not contain workable definitions that fit the crime committed. The 1994 Amendment completely addressed these problems. The question remains, however, whether the 1994 Amendment was the best solution to the problem. The Amendment addressed the practical problem of protecting children, but it left unresolved philosophical issues created by the scope of the Amendment.

The Legislature must specifically enunciate whether its goal is to protect children, without regard to tribal sovereignty or the historical development of the MCA, or whether it erred and should now modify the scope of the Amendment. The Legislature could accomplish both goals, however, by adopting a statute that more accurately reflects the crime committed; offers

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169. See 141 CONG. REC. S2840, S2840-41 (daily ed. Feb. 16, 1995) (statement of Sen. McCain). Senator McCain noted during senate discussions on the Indian Child Protection and Family Violence Prevention Act that Indian reservations acted as a magnet for child abusers. He reflected, "[c]hild abuse perpetrators were aware that the conditions of detecting, reporting, investigating, and preventing crimes upon children were in such a sorry state that there [sic] crimes would rarely be detected." Id. at S2841.
sufficient protection to Indian children; fits the characterization of a "major" crime; and minimizes the intrusion on tribal sovereignty. A specific substantive child physical abuse statute coupled with a corresponding amendment to the MCA would accomplish this goal.


The most significant problems with the 1994 Amendment are its over-breath and the intrusion into tribal decision-making. A narrowly tailored assault statute, which specifically addresses the crime of physical abuse but leaves minor assaults to tribal jurisdiction, would minimize these issues. As previously discussed, the assault of a child is not the same crime as an assault against an adult. A statute should accordingly be enacted that specifically encompasses the crime committed.

The crime of physical abuse against a child should be included in the federal code as follows:

CHAPTER 113A: ASSAULT OF A PERSON UNDER THE AGE OF EIGHTEEN
(a) Whoever, by intentional acts or a series of intentional acts, within the special maritime and territorial jurisdiction of the United States commits the following shall be guilty of the crime of Assault of a Person Under the Ages of Eighteen and shall be punished according to subdivision (b):

(1) Assault causing physical injury, which includes but is not limited to: failure to thrive; first and second degree burns caused by immersion, objects including but limited to, cigarettes, curling irons, and stove tops, chemicals, electricity, or friction; severe bruising; blows causing a subdural hematoma; and a major avulsion, laceration, or penetration of the skin.

(2) Assault resulting in substantial bodily injury, which includes but is not limited to: injuries causing nonfacial disfigurement likely to disappear as the victim matures, and temporary but substantial loss of any bodily member not resulting in a breakage of that member.
(3) **Assault resulting in serious bodily injury**, which includes but is not limited to: third degree burns; internal injuries; broken bones; permanent disfigurement; temporary or permanent disfigurement of the facial area; or an injury creating substantial risk of death.

(4) **Engages in a pattern of assaultive behavior over a period of time.** A pattern of abusive behavior includes behavior that results in injuries to the child which do not amount to an assault under (a)(1), (a)(2), or (a)(3). The behavior includes, but is not limited to: the repeated striking of a child for nondisciplinary purposes; using inanimate objects to inflict punishment over a period of time where such striking results in marks on the child; repeated blows leaving skin bruising or resulting in soft tissue swelling.

(b) A person convicted of Assault Against a Person Under the Age of Eighteen shall be punished as follows:

(1) If convicted of assault causing physical injury to a sentence of not more than two (2) years imprisonment, and/or a fine of $5,000.

(2) If convicted of assault resulting in substantial bodily injury to a sentence of not more than five (5) years imprisonment, and/or a fine of $10,000.

(3) If convicted of assault resulting in serious bodily injury to a sentence of not more than ten (10) years imprisonment, and/or a fine of $20,000.

(4) If convicted of engaging in a pattern of assaultive behavior to a sentence of not more than two (2) years imprisonment, and/or a fine of $5,000.

Nothing herein shall be interpreted as precluding a charge of any other violation within this title. 170

The 1994 amended language of Title 18, United States Code

170. The examples used in Chapter 113A were drawn from the following state laws: **ARIZ. REV. STAT. ANN. § 13-3629(A)(2) (1989); COLO. REV. STAT. § 19-3-303(1)(a)(I) (1990); HAW. REV. STAT. § 707-700 (1994); UTAH CODE ANN. § 77-35-15.5 (1988) (repealed 1989).**
Section 113 should then be deleted from the statute.

Chapter 113A addresses the need to protect victims of child physical abuse and the tribe’s inability to give children this protection. It also recognizes that the federal government’s criminal jurisdiction on the reservations should not be overly intrusive. It excludes the cases of slapping, like that described earlier involving Joanne, but would still permit prosecution of the abuse suffered by Sara and Timmy. The 1994 Amendment recognized only the need to protect children without a corresponding recognition of tribal sovereignty. Chapter 113A takes into account both issues.

Simply adopting Chapter 113A as set forth above would be insufficient to protect Indian children living on non-PL-280 reservations. Enabling language would also have to be added to the MCA to permit federal prosecution of Indian versus Indian crimes. The language of the 1994 Amendment, “assault of a person under the age of sixteen” should be deleted and replaced with, “assault against a person under the age of eighteen as defined in Chapter 113A.” The MCA would then read:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following

171. Chapter 113A provides a mechanism for federal prosecution of physical abuse. This proposed statute and this comment do not address the issue of the increased costs of prosecuting child physical abuse. The United States Attorneys’ Office is most likely unequipped to deal with the increased case load this amendment, or even the 1994 Amendment, could generate. See Dussias, supra note 2, at 38-39 (discussing problems associated with relying on the United States Attorneys’ Office to prosecute crimes on the reservation); cf. 140 CONG. REC. S5189, S5191 (daily ed. May 4, 1994). This comment also does not address the need to increase social services on the reservations. See 141 CONG. REC. S2840, S2841 (daily ed. Feb. 16, 1995) (noting increased education about child abuse brings with it the need for additional funds to address cases prompted by the education). Discussion concerning the financial impact of either the 1994 Amendment or Chapter 113A are beyond the scope of this comment.

The best solution for ending physical abuse is not to simply prosecute and lock up all abusers. The preferable solution would be a combination of education and the provision of services to families at risk. More significantly, child victims need counseling and services to help them deal with and resolve the psychological issues created by the abuse. The 1994 Amendment failed to address these issues at all. At present, Indian Social Services are unable to adequately assist all persons needing help. See generally 140 CONG. REC. S13,539, S13,545-46 (daily ed. Sept. 28, 1994); 141 CONG. REC. H5737 (daily ed. June 8, 1995) (providing increased funds for Indian Child Protection and Family Violence Prevention Act); 141 CONG. REC. S2840, S2840-41 (daily ed. Feb. 16, 1995) (statement of Sen. McCain) (also dealing with increased funds for Indian Child Protection and Family Violence Prevention Act).

172. See supra part II.A.1.
offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against a person under the age of eighteen as defined in Chapter 113A, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

1. A Practical Application of Title Eighteen, United States Code Chapter 113A

The assault on Timmy Barrett by his father was used earlier to illustrate the different protection afforded non-Indian children and that withheld from Indian children. The behavior of hitting Timmy with a belt illustrates how a single type of behavior may warrant different types of charging and how Chapter 113A enables this. If Martin Barrett hit Timmy only on one occasion and used only one strike, leaving red welts that shortly disappeared, Chapter 113A would not apply. This would be a simple assault. However repulsive this type of behavior, many parents may use it as a form of discipline.

Even if Martin was not disciplining Timmy, it does not warrant federal prosecution because it is a minor assault and should be left to the tribe.

Another scenario involving the same behavior would include Martin hitting Timmy frequently with a belt for nondisciplinary reasons. The marks left by the beatings do not result in injuries severe enough to justify an assault causing physical injury charge. Yet, this frequent behavior is more serious than an isolated beating. The psychological impact of the repeated beatings is probably not very different from a single beating that results in a broken arm or rib. The charge—engaging in a pattern of assaultive behavior—would permit federal prosecution in this case.

173. See supra part II.A.1.
174. Some state statutes exclude from prosecution reasonable force against a child when used for disciplinary purposes. See, e.g., MINN. STAT. § 609.379, subd. 1. (1994) (stating "[r]easonable force may be used upon or toward the person of a child without the child's consent when . . . used by a parent."). Indian parents should be afforded the same latitude.
type of case where the perpetrator repeatedly inflicts physical injury to a child over an extended period of time, but the injury is not so severe as to warrant charges under the other subdivisions of Chapter 113A. 175

If Martin's behavior escalates and Timmy is left with severe bruising that remains for several days, Martin could be charged under Title Eighteen, United States Code Chapter 113A(a)(1)—assault resulting in bodily injury. Similarly, Martin could be charged under Title Eighteen, United States Code Chapter 113A(a)(2) if he caused lacerations on Timmy's back which leave scars (or disfigurement) that are likely to fade as Timmy grows older. Chapter 113A is preferable to the 1994 Amendment because it specifically addresses the crime committed, while at the same time protects tribal sovereignty by limiting the types of cases to which it would apply.

B. The Advantages of Title Eighteen, United States Code Chapter 113A

1. Chapter 113A is a Separate and Distinct Statute Emphasizing the Special Nature of the Crime

Physical abuse of a child is a crime entirely separate from assaulting an adult. The crime involves a violation of the complete trust a child has in his or her caretaker. Children are absolutely vulnerable and likely to be totally dependent upon the person abusing them. This element does not exist in other assault crimes. The 1994 Amendment recognized this distinction to some extent, but it did not go far enough. A separate statute for child abuse is more appropriate than trying to fit the crime into the general assault statute. 176

The Legislature recognizes the unique circumstance that arises when children are involved in the criminal justice system. 177 For example, many statutes specifically deal with the

175. The assault involving Robert used in this article's introduction could also be charged under Title 18, United States Code Chapter 113A(a)(4)—engaging in a pattern of assaultive behavior. See supra part II.B.4.

176. The final clause of Chapter 113A, "Nothing herein shall be interpreted to preclude charging an individual with another crime within this title," still permits charging a person under any of the other assault statues if they more accurately describe the crime committed. See supra part II.B.4.

177. The unique role of children in the system was adeptly summarized when one attorney noted, "[c]hild victims of crime are specially handicapped. First, the criminal
issues raised by child witnesses. These statutes specifically provide that children are competent to testify and that the defendant has the burden of establishing that they are not.178 Other statutes provide alternative means for children to testify if a special need is shown.179 Furthermore, other criminal statutes recognize that children are more vulnerable and the crimes committed against them more heinous.180 Chapter 113A, therefore, simply carries this recognition one step further.

Chapter 113A also recognizes the form physical abuse takes. While some physical abuse cases involve slapping or stomping, other cases exist which involve forms of abuse not contemplated when the assault statutes were developed. Physical abuse can take the form of burns inflicted in an horrific number of ways or beatings with any inanimate object imaginable. Chapter 113A takes these forms of abuse into account and attempts to place them on some type of severity scale. It contains examples of physical abuse which leaves no question that this statute was intended to apply to these crimes, while clearly leaving the field open to permit the prosecution of any form of abuse created in the abuser's sadistic mind.

The 1994 Amendment to the assault statute did not contain sufficient definitions or a proper punishment grading scale. Under this statute, prosecutors were left to wonder whether the crime they were attempting to charge properly fit into the available options. The inadequacy of sufficient definitions is demonstrated by an example used earlier. An Indian mother burns her Indian child multiple times with cigarettes.181 Without Chapter 113A, the prosecutor's options are assault resulting in substantial bodily injury, assault resulting in serious bodily injury, assault with a deadly weapon, or simple assault.

To prove substantial bodily injury, the prosecutor must show

justice system distrusts them and puts special barriers in the path of prosecuting their claims to justice. Second, the criminal justice system seems indifferent to the legitimate special needs that arise from their participation.” DEBRA WHITCOMB, U.S. DEP'T OF JUSTICE, WHEN THE VICTIM IS A CHILD 15 (2d ed. 1992) (quoting D. LLOYD, PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, Final Report 51 (Dec. 1982)).

179. Id. § 3509(b)(1) (B). A child may testify by two-way closed circuit television or have their deposition taped. Id.
a "temporary but substantial disfigurement." As a result, the following questions arise: Do cigarette burns cause disfigurement? More importantly, how can an injury that causes a "substantial disfigurement" be temporary?

Serious bodily injury presents the same problems. The relevant definition of serious bodily injury requires extreme physical pain or protracted and obvious disfigurement. Does a cigarette burn constitute extreme physical pain? Does a cigarette burn result in a protracted and obvious disfigurement when, for example, the burns are located on the child's feet, hands, or stomach? Arguably, a cigarette burn causes extreme physical pain to a child. While a charge of serious bodily injury is a more viable option than a charge of assault resulting in substantial bodily injury, it is still tenuous.

The two remaining crimes, simple assault and assault with a deadly weapon, similarly are not adequate options. A cigarette is an unlikely deadly weapon at least when only its burning ability is considered. Similarly, simple assault is an inadequate charge. Burning a child multiple times should never be characterized as minor or a misdemeanor. Therefore, this is not the type of behavior that should be characterized as a simple assault.

Although a prosecutor may have no doubt that this case should be charged, problems arise since the 1994 version of the assault statute contains the only charging options, and they did not adequately fit the behavior involved. Chapter 113A, however, eliminates all definition based hurdles and the inadequate fit between the crime charged and the crime committed.

183. 18 U.S.C. § 113(b)(2) (1994) (stating the definition of "serious bodily injury" has the meaning given that term in 18 U.S.C. § 1365(g)(3)(B) (1994)).
185. See 18 U.S.C. § 113(a)(5) (1994) (providing a punishment for not more than one year if the victim is under the age of 16).
186. One physician notes, "[t]he burning of children with cigarettes, especially on the palms and soles, is a frequent finding. This is a particularly sadistic form of abuse that may indicate a severe psychiatric disturbance in the parent." KERNS, supra note 99, at 29.
2. Chapter 113A Expands the Class of Children to Whom the Assault Statute Would Apply

The 1994 Amendment created an arbitrary line between those children it will and will not protect. The current law permits prosecution under the MCA only if the victim is under age sixteen. This limitation leaves children aged sixteen and older with no more protection than they had before the Amendment. Physical abuse does not end simply because a child reaches the magical age of sixteen. In most contexts, children cannot easily leave home until the age of eighteen. Before this age, the child is trapped in his or her home and subject to physical violence. Chapter 113A would eliminate this arbitrary limitation and recognize that the adverse psychological and physical effects of abuse do not end simply because the child is sixteen.

3. Chapter 113A is More Narrowly Tailored Than the 1994 Amendment

The 1994 Amendment permitted federal prosecution when a parent slapped a child. This inclusion goes well beyond the intent behind the MCA. Chapter 113A represents a balance between the tribe's right to be free of federal intrusion and a child's right to be protected regardless of race. It leaves to the tribes those crimes that can be adequately punished within the one year incarceration limitation of the ICRA. While providing a line between those crimes that should be left to the tribe and those that warrant federal prosecution, it offers sufficient flexibility in its definitions and its inclusion of a pattern of physical abuse to ensure that children are still protected. Chapter 113A, unlike the 1994 Amendment, reflects the original intent behind the MCA to deal only with the most serious of crimes.

4. Chapter 113A Offers Protection to Indian Children in Recognition of the Tribe's Financial Inability to do so

Tribal failure to prosecute physical abuse has never been heralded as a tribal endorsement for the physical abuse of

187. See, e.g., State v. Soukup, 376 N.W.2d 498, 499 (Minn. Ct. App. 1985) (reviewing cases where child has been physically abused at age 16 and older).
children. The tribes' failure to react to physical abuse may instead be a simple product of economics. Most tribes lack the resources necessary to prosecute crimes and to impose an appropriate punishment. 188 Most tribes do not have the financial resources to maintain a court system, a jail, and a probation system. 189

Arguably, the tribes' lack of resources may change with the increase of gaming. 190 Even if gaming continues to be successful, it is unlikely that building a criminal justice system will be the tribes' first priority. More likely, the tribe will use the money to provide the basic essentials for its members and to build a solid tribal infrastructure. Continued concurrent jurisdiction under Chapter 113A between the tribe and the federal government protects children while allowing the tribe to build a solid infrastructure so it could assume primary responsibility for prosecuting and punishing crimes on the reservation. 191

The narrow scope of Chapter 113A should not be as offensive to the tribes as the 1994 Amendment. This assumption is based upon tribal support for including sexual abuse in the MCA. Tribes supported this amendment because they realized they could not adequately protect the children. The National Congress of American Indians submitted a resolution in support of the amendment which read, "[I]t is necessary and crucial to effective law enforcement on Indian reservations and to protect the mental health and physical well-being of Indians that [f]ederal law be amended to permit [f]ederal prosecution of

188. See Russel Lawrence Barsh, Kennedy's Criminal Code Reform Bill and What It Doesn't Do For the Tribes, 6 AM. INDIAN J., Mar. 1980, at 11 (blaming the federal government's award of limited funds to tribes as a cause of the tribe's inability to police themselves); see also 159 CONG. REC. H10,259, H10,262 (daily ed. Nov. 19, 1993) (Rep. George Miller noting that the federal government failed to provide adequate funds to tribes for court systems for the past 20 years).

189. A tribe's lack of resources contributes heavily to the tribe's inability to prosecute tribal members. Peak, supra note 38, at 401; see also Goldberg, supra note 7, at 542 (noting the lack of federal funding for tribal courts contributed to the enactment of PL-280); 159 CONG. REC. H10,259 (daily ed. Nov. 19, 1993).

The 1980 census revealed that the per capita income on the Navajo Reservation was $2,400.00. Karen Lee Swaney, Waiver of Indian Tribal Sovereign Immunity in the Context of Economic Development, 91 ARIZ. L. REV. 869, 403 (1989); see also 140 CONG. REC. S5189 (daily ed. May 4, 1994) (noting that tribes should receive additional funding to develop an effective judicial system).

190. Gaming refers to the tribe's gambling activities which are becoming a significant source of income for tribes.

191. Cf. COHEN, supra note 5, at 337.
serious child sexual abuse offenses."192 The tribes' similar inability to address physical abuse should ensure that the narrow scope of Chapter 113A would not be as objectionable to the tribes as the 1994 Amendment.

Permitting federal prosecution of child physical abuse crimes may in fact be in the tribes' long-term best interests. If child abuse continues unabated on reservations, the ability of tribes to achieve total independence could be jeopardized. Children are the tribes' single most important resource.193 Yet, victims of child abuse are less likely to develop into healthy adults. Moreover, child abuse may be a product of the reservations' social problems of alcoholism, unemployment, and poverty.194 These social problems all contribute to stress which in turn can lead to child abuse.195 Furthermore, child abuse

193. 25 U.S.C. § 1901(3) (1994) (providing that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."); see also 139 CONG. REC. S15,688, S15,645 (daily ed. Nov. 10, 1993) (noting children are this country's most valuable resource but they are also the most vulnerable).

Representative Schroeder made the following statement during House debates about a bill that would permit child abuse victims to garnish former federal employees' retirement benefits to collect civil damage awards for damages arising from sexual abuse: "[P]rotecting our children from child abuse in the first case is of vital importance, but we must be equally attentive to those children that we failed to protect. A nation that does not protect its children is a nation without a future." 140 CONG. REC. H9176 (daily ed. Sept. 19, 1994). While she was speaking about all child abuse victims, her comments are particularly relevant to the Indian culture that is dependent upon the passage of customs and traditions for its very existence.

194. The Native American population leads other racial groups in unemployment, child mortality, violent death and alcoholism. Peak, supra note 58, at 486; see also 141 CONG. REC. S11,971 (daily ed. July 10, 1995) (noting per capita income of Indians is $4,500); 140 CONG. REC. S9160 (daily ed. July 18, 1994) (Senator Dorgan notes that poverty on the reservations and its associated problems contribute to the number of child abuse cases on the reservations); Ken Peak and Jack Spender, Crime in Indian Country: Another "Trail of Tears", 15 J. OF CRIM. JUST. 485, 486 (1987); GETCHES ET AL., supra note 14, at 9-11; Help the Indians Solve Their Problems, U.S.A TODAY, Feb. 9, 1989, at 8A (noting the following statistics about Indians living on reservations: 58% are unemployed; 41% live below the poverty level; 21% have no indoor toilets; 56% have no telephone; and 16% have no electricity); Daniel Golden, The Most Desolate Place, THE BOSTON GLOBE, Nov. 19, 1989, at 18 (stating that 80% of potential workers on the Pine Ridge Reservation are unemployed and half of all crimes by adults on the reservation are linked to alcohol).

195. See KERNS, supra note 99, at 81 (noting "chronic stress of unemployment, health problems, substance abuse and marital disharmony may bring marginal parents to their wit's end."); KATHY DAVIS GRAVES & CATHERINE SHREVES, LEAGUE OF WOMEN VOTERS OF MINNEAPOLIS, BREAKING THE CYCLE OF VIOLENCE: A FOCUS ON PRIMARY PREVENTION
is a learned behavior that often results in a cycle of victimization. Abused children are more likely to either enter into abusive relationships or to become an abuser. Unchecked abuse results in multiple generations of victims and perpetrators. Therefore, the tribes’ future, through the protection of its children, may best be served by permitting continued concurrent criminal jurisdiction under the narrowly tailored provisions of Chapter 113A. Punishing those who abuse children will break the cycle of abuse, allowing Indian children to grow up free of dysfunction and become strong tribal leaders.

V. CONCLUSION

The truism “No child deserves to be beaten” applies no matter what race the child is or where that child calls home. Working toward this truism is difficult when a nation’s sovereignty and values are involved. The 1994 Amendment worked toward the truism without apparent consideration and respect for tribal sovereignty or the history of the MCA. Its benefits could be called into question because of its broad scope and the conflict between its stated legislative intent and its practical applications. Chapter 113A would protect this truism, tribal sovereignty, and the history behind the MCA. Its provisions offer guidance to prosecutors and definitions that fit the targeted crime. In sum, the Legislature must resolve the questions raised by the 1994 Amendment by repealing the 1994 language and replacing it with language that incorporates and adopts Chapter 113A.

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## VI. APPENDIX

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<sup>1</sup>Jurisdiction in non-Indian verses non-Indian crimes committed on reservations lies with the state government based upon the decisions of the United States Supreme Court and not based upon legislative decisions. See New York *ex rel.* Ray v. Martin, 326 U.S. 496, 501 (1946); Draper v. United States, 164 U.S. 240, 247 (1896); United States v. McBraney, 104 U.S. 621, 624 (1881).


<sup>3</sup>The United States Supreme Court originally held that tribes did not have jurisdiction to prosecute Indians who were not members of the tribe seeking prosecution. Duro v. Reina, 495 U.S. 676 (1990) (holding was superseded by legislation amending the ICRA, 25 U.S.C. § 1301 (2) and (3)); see also Dussias, *supra* note 2, at 18. The tribe's lack of jurisdiction was premised upon the fact that the non-member Indian is not a member of the political entity seeking prosecution. *Id.* The non-member Indian defendant had "'not given the consent of the governed that provides a fundamental basis for power within our constitutional system; his status as an Indian says little about his consent to the exercise of authority over him by a particular tribe.'" *Id.* at 34 (quoting Duro v. Reina, 495 U.S. 676, 694-95 (1990)). Congress changed this judicial absurdity by specifically extending tribal jurisdiction to all Indians whether or not they are members of the tribe seeking prosecution. 25 U.S.C. § 1301 (1994). See Dussias, *supra* note 2, at 36 n.155, 57 n.156 (discussing the chaotic consequences of the *Duro* decision).

<sup>4</sup>Dussias, *supra* note 2, at 20 n.80; Cubberley, *supra* note 51, at 232.


<sup>6</sup>See Dussias, *supra* note 2, at 20 n.80; Cubberley, *supra* note 51, at 232.