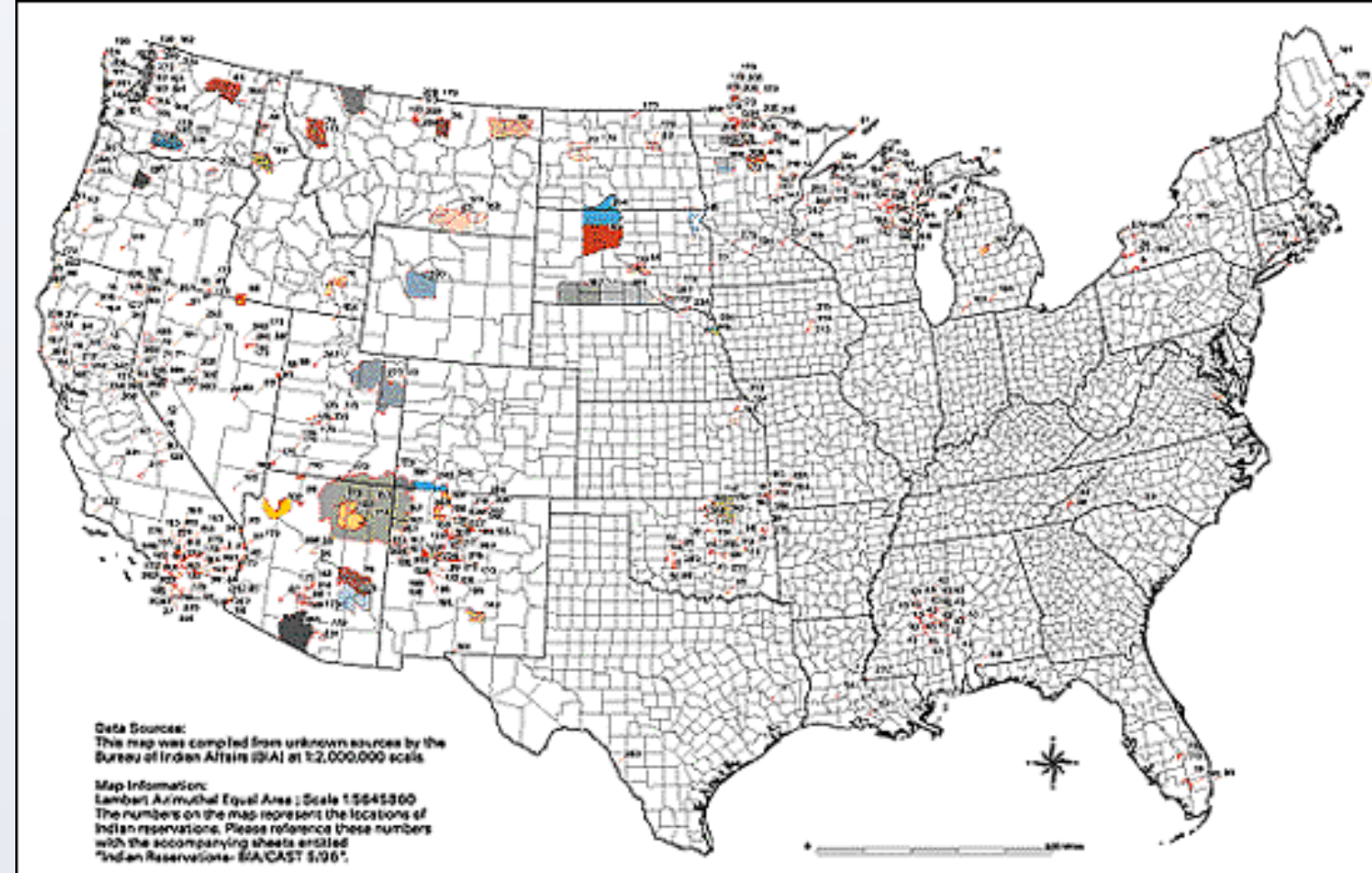


# The Evolution of Judicial Power: How the Supreme Court Effectively Legalized Rape on Indian Reservations

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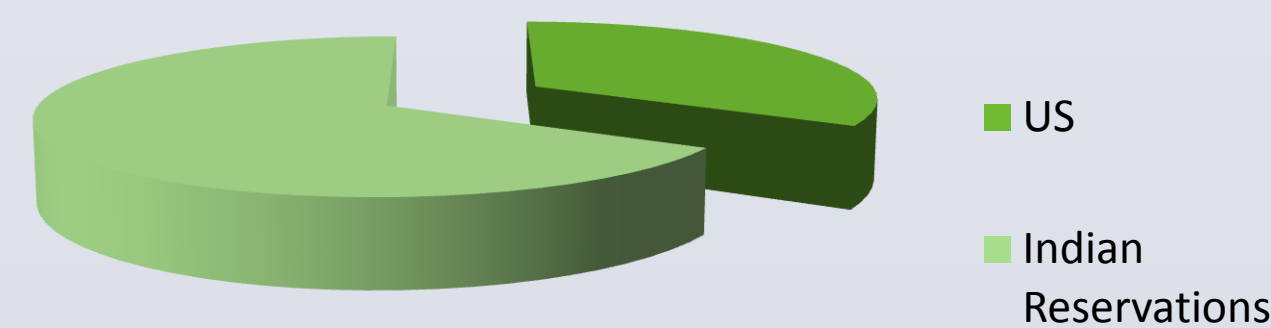
## Indian Reservations in the United States

There are 566 federally-recognized tribes scattered throughout the country.



## Elevated Rates of Sexual Violence

According to the Department of Justice, 1 in 3 American Indian women have been raped or have experienced an attempted rape. (Centers for Disease Control and Prevention suggests that findings about American Indian women, “are likely to underestimate the prevalence of sexual violence, stalking, and intimate partner violence”). The 2010 National Intimate Partner and Sexual Violence Survey reports that 1 in 5 women in the United States has experienced sexual violence.



For a young American Indian woman living on a remote tribal reservation, the threat of being raped or experiencing an attempted rape is twice as high. American Indians are 2.5 times more likely to experience sexual assault crimes compared to all other races in the United States.

## The Primary Assailants are Non-Indian Males

The primary assailants are males who are not members of tribal communities. According to reports from the Department of Justice, 57 percent of rape and sexual assault crimes are committed by non-Indian males. Recent US Census Bureau (2010) data indicates that about 3.5 million (76%) of the 4.6 million people living on reservations were non-Indian.

## Legal Constraints of Prosecution

Tribal courts do not have the authority to prosecute non-Indian crimes. The rape and sexual violence on crimes must be prosecuted by the District Attorney's Office in each state. However, in 2010, District Attorney Offices failed to prosecute 65 percent of rape cases reported on reservations.

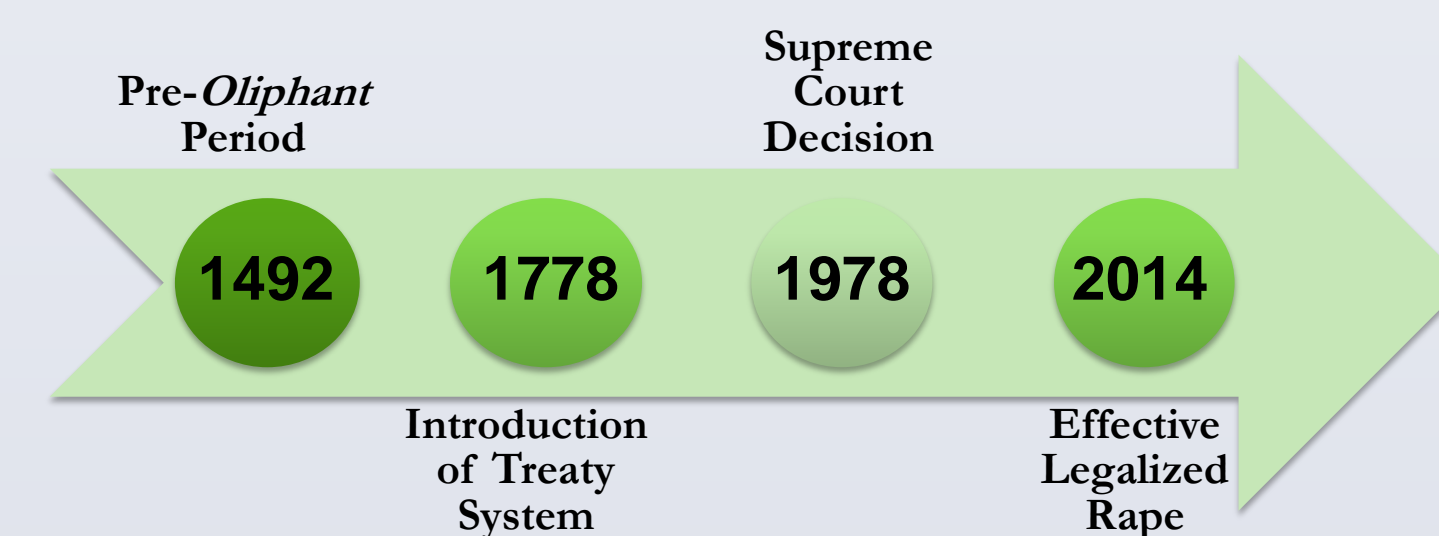
## Methodology

This study traces the origins of judicial power, within the U.S. legal system, and explores the unresolved issues with tribal judicial systems versus federal and state criminal jurisdictional authority. Thus, the analytical narrative method is employed to investigate the evolution of legal space over the course of time. A path dependence argument emphasizes the Supreme Court case, *Oliphant v. Suquamish Indian Tribe* (1978). The historical intuitional evolution of the effective legalization of rape on reservations draws from textual analysis. The broader frame analysis provides new insights toward the impact of *Oliphant* on the lives of American Indian and Alaska Native women.

## Research Questions

- 1) Why has rape become effectively legalized on reservations?
- 2) What explains tribal courts' limited legal capacity to prosecute rape?
- 3) Why are non-Indian males engaging in heinous criminal behaviors?

## Timeline of Events



## The Supreme Court

In earlier treaties, the jurisdictional authority of tribal courts over non-Indian criminals was never made clear. The *Oliphant* decision defined the scope of tribal judicial systems, and fundamentally denied courts the ability to prosecute non-Indians. This Court case marks a critical point in the evolution of judicial power. The ruling explicitly states the superseding authority of judicial power over criminal affairs that deal with non-Indian offenders.

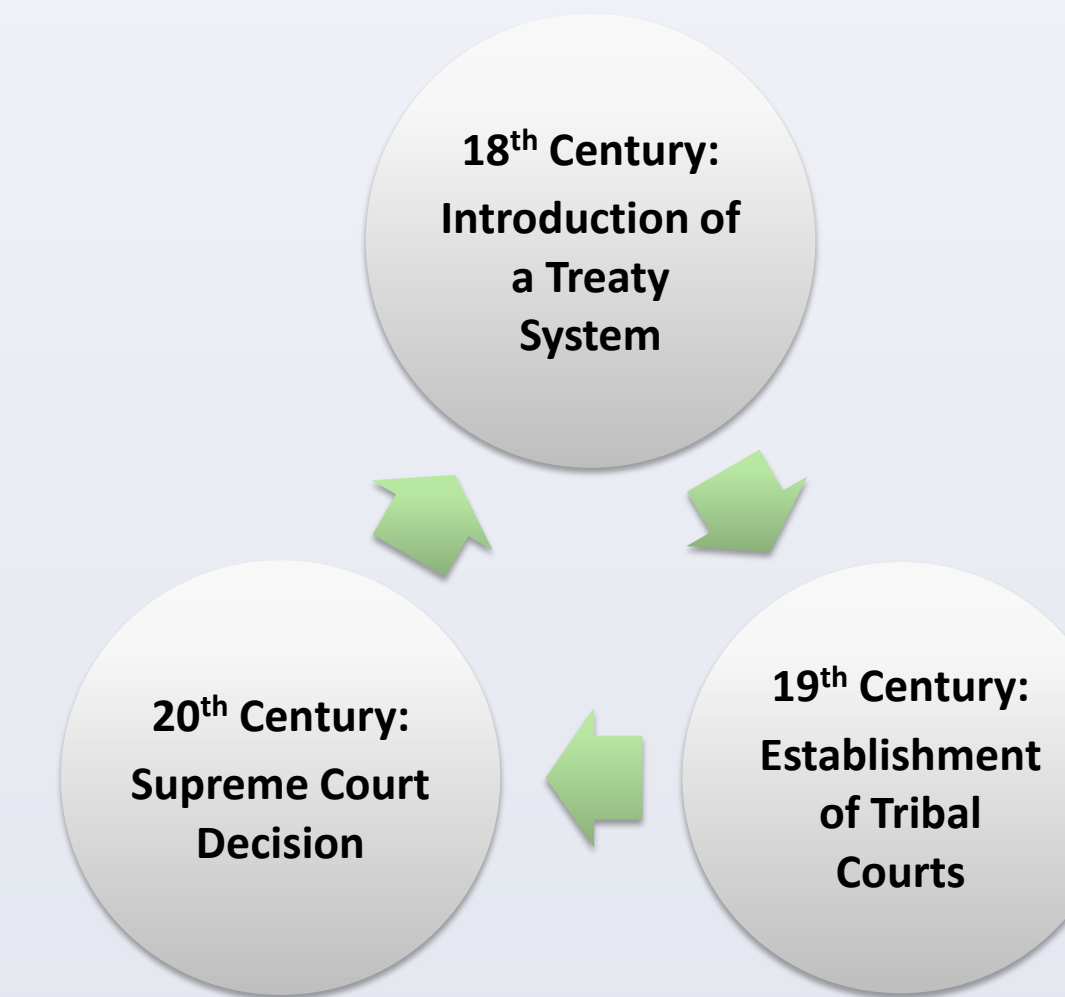
- “A few tribes during the 19th century did have formal criminal systems. From the **earliest treaties** with these tribes, it was **apparently assumed that the tribes did not have criminal jurisdiction over non-Indians.**”
- “But an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, **Indians do not have criminal jurisdiction over non-Indians** absent affirmative delegation of such power by Congress.”
- “Finally, **we are not unaware of the prevalence of non-Indian crime** on today's reservations which the **tribes forcefully argue requires the ability to try non-Indians.** But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to **conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.**”

The Supreme Court, therefore, created a precedence for the subsequent evolution of judicial power, and diminished authority of tribal court systems to prosecute non-Indian crimes committed on Indian reservations. This legal loophole has enabled the effective legalization of rape.

## Historical Evolution of Power

### Three Phases of Evolution

- Phase One: Introduction of a Treaty System
- Phase Two: Establishment of Tribal Court Systems
- Phase Three: Supreme Court Decision



## Effective Legalization of Rape on Reservations

- The origins of this phenomenon are traced to the colonial conquest of tribal societies that ensued after the arrival of Columbus in the mid-15th century—the pre-Oliphant period.
- The criminal activity of non-Indian males exists within a broader context of court systems that do not, and cannot, punish criminal offenders on reservations because of the 1978 Supreme Court decision.
- The evolution of judicial power, in the end, leads to the inability of tribal courts, or any court system, to prosecute sexual assault crimes on tribal reservations.

## Policy Prescriptions

In terms of suggests for policy changes, there are several options. One option can ease the accessibility of pro bono on reservations through nonprofit and advocacy organizations. Another approach could be reforming the legal system and granting jurisdictional authority to tribal courts over non-Indian sexual assault crimes. In addition, implementing tort reform enables an injured party to sue the wrongdoer for damages. A lawsuit can provide a form of retribution to survivors of sexual assault on reservations, and ensure a form of punishment, other than imprisonment, for non-Indian offenders.



Lisa Brunner, a rape survivor, of the Ojibwe tribe in Minnesota, is an outspoken advocate for Native American women on issues of sexual violence.

## Conclusions

Policymakers should urge the government to work closely with tribal governments to revitalize tribal court systems. Opportunities to seek justice for the survivors of sexual assault are available, and the problem must be approached with cultural sensitivity. Researchers, advocates, and lawmakers should be mindful of not reinforcing stereotypical attitudes, and must make efforts to publically acknowledge the issues impacting the lives of American Indian and Alaska Native women. An overall shift in awareness of American Indian populations needs to drive a force for change; only by recognizing the mistakes of the past can we begin or at least attempt to rectify the serious problems women endure because of their race and socioeconomic statuses as American Indian and Alaska Native citizens. If human rights are a priority for our nation, then real efforts should be made to ensure that every American citizen has access to unalienable and universal human rights, and the right to a pursuit of justice through fair and appropriate judicial processes.

## Advocacy Groups

For more information, please visit the following websites:

- National Indian Country Clearinghouse on Sexual Assault <<http://www.niccsa.org>>
- Coalition to Stop Violence Against Native American Women <<http://www.csvanw.org/resources.htm>>

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