Missing Tools in the Federal Prosecution of Child Abuse and Neglect

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I. INTRODUCTION

When ten-year-old Mary Ellen was discovered, her body was bruised, whip welts covered her legs, and her face had a large gash on the left side where her foster mother had cut her with scissors the day before. That was in 1874, and although the case was not the first recorded prosecution of child abuse, it was the first case to garnish wide public support and sympathy for the fate of abused children. There was no specific child abuse legislation at the time, so the case had to be prosecuted under the state's assault and battery laws. Much progress has been made since 1874, and every state has determined that legislation specific to child abuse and neglect is necessary.

Early child abuse legislation focused on criminally prosecuting the abuser and removing the child from the abusive environment. Today, legislation is directed at reporting abuse to help both the abuser and the abused and to keep the family intact; yet society still considers the possibility of criminal prosecution both a deterrent of abuse and an incentive to counseling. While the possibility of criminal prosecution by itself is not the solution to abuse, it is considered an important part of effective child abuse legislation.

2 Perhaps the first recorded prosecution of child abuse was the case of John Walker, who died in 1655 in Massachusetts from child abuse. CHILDREN AND YOUTH, supra note 1, at 123-24.
3 Id. at 189.
4 LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS 243-271 (Supp. 1992); Sanford N. Katz et al., Child Neglect Laws in America, 9 FAM. L.Q. 1, 4 (1975); Robert M. Mulford, Historical Perspective, in CHILD ABUSE AND NEGLECT 1, 6 (Nancy B. Ebeling & Deborah A. Hill eds., 1983).
5 Mulford, supra note 4, at 2-6.
6 Id. at 6; Sally T. Owen & Herbert H. Hershfang, An Overview of the Legal System: Protecting Children from Abuse and Neglect, in CHILD ABUSE AND NEGLECT 229, 229-33 (Nancy B. Ebeling & Deborah A Hill eds., 1983).
7 Mason P. Thomas, Jr., Child Abuse and Neglect Part 1: Historical Over-
The term "child abuse" includes physical battery, neglect, and emotional and sexual abuse. Nevertheless, the first rounds of state legislation dealt only with physical endangerment and neglect. States did not begin enacting legislation to handle sexual abuse cases adequately until the early 1970s. The federal government only took part in this second round of legislation by enacting laws to protect minors from sexual assault and exploitation. The government even included such abuses on Indian reservations by incorporating a sexual abuse provision into the enumerated crimes on Indian lands that could be prosecuted in federal district court.

Despite the government's good intentions, one major hole in the prosecution of child abuse remains, forcing federal prosecutors to apply poorly-suited laws to federal cases that should be prosecuted under a federal child abuse act. To date, there is no federal child abuse legislation specifically authorizing criminal prosecution for physical abuse and neglect. The federal government took part in the second round of state child abuse legislation focusing on sexual abuse, but completely missed out on the first round of state legislation focusing on physical child abuse and neglect.

In the absence of federal physical child abuse legislation, child abuse on federal property must be prosecuted either under state law if the Assimilative Crimes Act can view, Legal Matrix, and Social Perspectives, 50 N.C. L. REV. 293, 347 (1972).


10 See Thomas, supra note 7, at 347.


13 Such legislation is pending, however. See, e.g., H.R. 3366, 103d Cong., 1st Sess. (1993) (a recent bill introduced by Representatives Bill Orton (D-Utah), and Patricia Schroeder (D-Colo.), provides "penalties for child endangerment and abuse in the special maritime and territorial jurisdiction of the United States").

14 18 U.S.C. § 13(a) (1988) states in part:
be applied, or under general assault and other federal criminal charges. The Assimilative Crimes Act allows the government to apply existing state statutes to crimes on federal lands if those crimes are not specifically defined by Congress.\textsuperscript{15} Only certain enumerated offenses on Indian lands, however, can be prosecuted in federal court, and physical child abuse and neglect are not included in these offenses.\textsuperscript{16} The effect of this exclusion limits federal prosecution on Indian lands and precludes application of state laws to Indians. The Assimilative Crimes Act, therefore, does not apply to physical child abuse or neglect on Indian lands.

Federal prosecution of physical child abuse and neglect under state laws or general federal criminal statutes is often successful, but it is also burdened with unnecessary difficulties. Prosecutors are unable to prosecute all aspects of child abuse, and face complications in applying multiple federal and state laws to a single case. Additionally, prosecution efforts confront difficulties coordinating with programs to restore the family.

Because the problems associated with the application of state laws under the Assimilative Crimes Act affect all cases regarding the regulation of federally controlled lands within states, this Comment does not focus on the problems associated with the federal application of state child abuse laws. Rather, it closely examines the difficulties involved in federal prosecution of child abuse cases beyond state jurisdiction but without applicable federal legislation. First, by examining the purposes and effects of existing legislation, this Comment reveals a void in federal prosecution of physical child abuse, and particularly of child neglect. Second, it addresses the role of criminal child abuse legislation. Third, it discusses the difficulties of prosecuting child abuse under statutes not specific to the crime. Finally, this Comment outlines measures the government could take to fill the void.

\textsuperscript{15} \textit{Id.}  
\textsuperscript{16} 18 U.S.C. § 1153(a) (listing the crimes subject to prosecution under federal statute or the Assimilative Crimes Act on Indian lands).
II. FEDERAL CHILD ABUSE LEGISLATION

Although the federal government has established a plethora of child programs designed to prevent neglect and abuse, the only federal legislation available for the prosecution of child abuse is restricted to sexual abuse of minors.\(^\text{17}\) Prosecution of physical child abuse and neglect on federal lands can only be conducted by application of state law or general federal criminal statutes, such as assault and homicide.

A. There Is No Existing Federal Legislation Specific to Physical Child Abuse or Neglect

Federal child abuse legislation can be separated into two categories according to the statute's purpose: (1) legislation designed to motivate and to provide resources to state and local governments to prevent and to prosecute child abuse; and (2) legislation designed to make the prosecution of child abuse on federal land possible. As demonstrated in the following discussion, the primary focus of federal child abuse legislation has been on the first goal. The justifications for this focus are undisputed.\(^\text{18}\) Nevertheless, the lack of focus on prosecution legislation has been to the detriment of abused children on federal lands.

1. Legislation to motivate and provide resources to state and local efforts

Child abuse legislation has primarily been the domain of the individual states.\(^\text{19}\) To aid states in preventing and prosecuting abuse, the federal government has established several programs and agencies designed to give information and monetary grants to state and local governments that follow federal recommendations.\(^\text{20}\) In this way, the federal government has influenced the drafting of state child abuse


\(^{19}\) For a detailed discussion on how the federal programs work see THEODORE J. STEIN, CHILD WELFARE AND THE LAW 14-18 (1991).

\(^{20}\) Id. at 35-63.
reporting, prevention, and prosecution laws. What follows is a brief synopsis of the role, purpose, and effectiveness of current legislation that provides resources for state and local efforts against child abuse.

a. The Child Abuse Prevention and Treatment Act of 1974 (CAPTA). The primary purpose of this legislation was to establish the National Center on Child Abuse and Neglect (hereinafter NCCAN). The NCCAN’s main responsibilities were to make grants to the states to implement child abuse and neglect prevention treatment programs and to provide information on these programs. To qualify for a grant, states must:

1. report known or suspected instances of child abuse;
2. investigate reports of child abuse or neglect and provide means for protecting children if abuse is found;
3. maintain confidential records;
4. provide a guardian ad litem for court proceedings;
5. implement a public education program on child abuse and neglect; and
6. give persons who report in good faith immunity from civil liability.

CAPTA, however, was not the driving force behind state reporting legislation it appeared to be. Prior to CAPTA’s implementation, all fifty states had established reporting laws. Furthermore, because CAPTA and the NCCAN have lacked adequate funding and staff, they have not provided the information and grants expected.
b. Indian Child Protection and Family Violence Prevention Act. This Act accomplishes for Indian lands much of what CAPTA was intended to accomplish for states. It addresses physical and sexual child abuse and neglect by requiring health and public workers to report suspected child abuse. Paradoxically, while it imposes criminal sanctions on those who fail to report, it does not impose any criminal sanctions on abusers.

In addition to creating CAPTA provisions specifically for Indian lands, the Act actually goes beyond that which CAPTA envisioned, perhaps to overcome CAPTA's inadequate funding. It not only allocates more funding to encourage tribes to develop or enhance child protective service programs, but it also requires that the Secretary of the Interior establish Indian child resource centers in every area office of the Bureau of Indian Affairs, something CAPTA would only have made optional.

c. The Adoption Assistance and Child Welfare Act of 1980 (AACWA). AACWA aims at "preventing or remedying, or assisting in the solution of problems which may result in the neglect, abuse, exploitation or delinquency of children," by removing them from unsafe situations, whether that be in the home or in foster care, and by placing them in a safe environment. Under AACWA, Congress intended to encourage states to make reasonable efforts to maintain family unity either by working with the family to avoid removing the child, or by first removing the child and then reuniting the child with the family as quickly as possible. If reuniting the child with the family is not possible, however, states are encouraged to join interstate compacts.
to find adoptive families for the children.\textsuperscript{35}

d. The Indian Child Welfare Act of 1978.\textsuperscript{36} This act is comparable with AACWA, but is only applicable to abused Indian children.\textsuperscript{37} The hope is to “protect the best interests of Indian children within their tribal culture,” by requiring active efforts—rather than the reasonable efforts required by AACWA—to place children within the extended family or members of the tribe.\textsuperscript{38}

e. Regulations regarding Title XX Social Services Block Grants.\textsuperscript{39} Social Services Block Grants are the primary source of state funding for state child abuse prevention and treatment programs. States can use these funds as long as the programs meet the broad federal goal of “preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests, or preserving, rehabilitating or reuniting families.”\textsuperscript{40}

2. Legislation to prosecute child abuse on federal lands is limited to sexual abuse and exploitation

The only pieces of federal legislation providing for the prosecution of child abuse on federal lands are the Sexual Abuse Act of 1986\textsuperscript{41} and statutes dealing with the sexual exploitation of children.\textsuperscript{42} Ironically, although all states addressed the issue of physical abuse and neglect first and amended their statutes to include sexual abuse later, the federal government has yet to either set aside a section under general criminal statutes to deal specifically with child abuse, nor has it established child neglect as a separate crime.\textsuperscript{43}

The Sexual Abuse Act makes rape and other sexual crimes illegal and sets aside sections 2241 and 2243 to make the defendant strictly liable for sexual acts committed

\textsuperscript{35} Id. at 42-43.
\textsuperscript{37} STEIN, supra note 19, at 43.
\textsuperscript{38} Id.
\textsuperscript{40} STEIN, supra note 19, at 44-45.
\textsuperscript{41} 18 U.S.C. §§ 2241, 2243.
\textsuperscript{42} 18 U.S.C. §§ 2251-58.
\textsuperscript{43} Yet Congress took similar action by setting aside two sections of the Sexual Abuse Act for children and minors, and by establishing sexual exploitation of children as a separate crime under 18 U.S.C. §§ 2251-58.
upon a child or minor. Section 2241 makes sexual acts and attempted sexual acts with a child "who has not attained the age of 12 years" a crime, regardless of the defendant's knowledge or ignorance of the child's age.\textsuperscript{44} Section 2243 makes the same acts criminal if perpetrated upon a minor between the age of twelve and sixteen, but allows some defenses.\textsuperscript{45} It is a defense if the defendant was also a minor or less than four years older than the victim, or if the defendant had a reasonable belief, supported by a preponderance of the evidence, that the minor was sixteen years of age or older.\textsuperscript{46}

The statutes that prohibit child sexual exploitation are intended both to prevent and prosecute the use of children in the pornography industry. Both civil and criminal charges may be imposed.\textsuperscript{47}

B. Historical Background: Possible Causes of the Legislative Oversight

A review of the history of state and federal child abuse legislation gives some indication as to why the federal government has failed to enact legislation to prosecute physical child abuse and neglect on federal land when it has done so for sexual child abuse. There are two major periods in the history of child abuse legislation and each contributed differently to legislative efforts.\textsuperscript{48} The first period came as a result of the sensational Mary Ellen case\textsuperscript{49} and peaked in the early 1900s. The second came in the 1950s and 1960s with the development of medical technology which allowed medical personnel to diagnose child abuse more accurately.\textsuperscript{50} The Mary Ellen and associated cases failed to generate federal legislation, possibly because the government perceived no need for such legislation. The second period changed the focus of legislation so that criminalizing child

\textsuperscript{44} 18 U.S.C. § 2241.
\textsuperscript{45} 18 U.S.C. § 2243.
\textsuperscript{46} 18 U.S.C. § 2243.
\textsuperscript{47} 18 U.S.C. §§ 2251-2258 (1988). Section 2251(a) states in part: "Any person who employs . . . entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished . . . ."
\textsuperscript{48} Thomas, supra note 7, at 328.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
abuse appeared unnecessary and counterproductive.\textsuperscript{51} 

Legislation from the first period is characterized by the child rescue efforts of private “cruelty” societies.\textsuperscript{52} For over a century, reports of the Mary Ellen case erroneously concluded that the case was prosecuted under the state’s newly enacted cruelty to animals statutes. The confusion arose from the heavy involvement of the recently formed societies to prevent cruelty to animals. The founder of those societies took a personal interest in the Mary Ellen case and created the first of hundreds of societies for the prevention of cruelty to children.\textsuperscript{53} Had the state needed to prosecute the case under the cruelty to animals statutes, the government might have more readily sensed a need for specific child abuse legislation. The case, however, was successfully prosecuted under assault and battery laws, so there was no perceived need for criminal legislation specific to child abuse.

Law makers gave these societies wide latitude and encouraged their goal of removing children from abusive environments and placing them in schools or institutions under a liberal interpretation of the parens patriae theory.\textsuperscript{54} This theory gave the state the right to assume the parent’s role, once it determined that the parent was unfit. These societies focused on punishing the abuser and removing the child from an abusive environment.\textsuperscript{55} Because child abuse at the time was narrowly defined as merely overt physical endangerment, in many instances the abuser was punished by applying existing assault, battery, and homicide laws as was done in the Mary Ellen case. Even years later, when many states were creating laws specifically against child abuse, commentators considered such efforts redundant to already existing assault and battery legislation.\textsuperscript{56} Given such a narrow definition of abuse, the federal government probably saw no need to create redundant legislation criminalizing it.

\textsuperscript{51} \textit{Id.}; \textsc{Vincent De Francis \& Carroll L. Lucht, Child Abuse Legislation in the 1970s}, at 14 (1974).
\textsuperscript{52} \textit{Thomas, supra note 7, at 310-12.}
\textsuperscript{53} \textit{Id. at 308; Child Abuse Act Hearing, supra note 1, at 185.}
\textsuperscript{54} \textit{Thomas, supra note 7, at 315.}
\textsuperscript{55} \textit{Id. at 312.}
\textsuperscript{56} See, for example, \textsc{De Francis \& Lucht, supra note 51, at 14, in which De Francis comments that “legislatures in a number of states have created the new crime of ‘child abuse’ or ‘cruelty to children,’ apparently overlooking the already existing criminal sanctions for assault, battery and homicide, all applicable to the abuse of children.”}
The second focus of legislation in this first period required increased funding, so states passed regulations authorizing the removal of children under parens patriae and placing them in institutions. As states financed and regulated these institutions, the institutions and cruelty societies that created them gradually came under complete state control. As state control increased, private interests and public support diminished.

The decline in interest was so severe that when reports of child abuse again caught the attention of the media in the 1950s and 1960s, child abuse was treated as a newly discovered problem. Public outrage demanded prosecution of abusers, and given the broadening definition of the crime and the nature of the victim, every state universally criminalized child abuse. Nevertheless, the overall focus of state legislation during this period was to help not only the abused child, but the abuser and the family; the abused child either would not have to be removed or would be quickly returned to the home. Given the focus of state legislation, and in particular, the effect mandatory state reporting laws had on increasing the number of known child abuse cases, Congress was pressed to provide additional resources to assist state efforts.

Consequently, Congress passed CAPTA and AACWA not to criminalize physical child abuse and neglect, but to create national agencies which would encourage effective reporting, and most importantly provide a source of information and funding for states.

In the mid-1980s, however, Congress criminalized sexual child abuse and rape. This action by Congress was preceded

57 Thomas, supra note 7, at 313. The growth of private societies peaked around 1922. At that time there were 307 societies, but as the government took a greater role in the protection of children, the numbers dropped to 158 in 1942 and to only 19 by 1967. Id.
58 Id.
59 Mulford, supra note 4, at 7.
60 Katz et al., supra note 4, at 4.
61 STEIN, supra note 19, at 38; Thomas, supra note 7, at 329.
62 There were 60,000 cases reported in 1974 when all states had reporting laws in place, and 1.2 million reported in 1985, ten years later. 1987 Reauthorization of the Child Abuse Act Hearing, supra note 23, at 5.
63 For further discussions of the operation of these national agencies, see 1991 Reauthorization of the Child Act Hearing, supra note 18, at 1-4; STEIN, supra note 19, at 37.
by wide-scale state legislative efforts that furthered the prosecution of rape and spouse abuse. The improved ability to prosecute these crimes paved the way for making the prosecution of sexual child abuse possible. The crimes of rape, spouse abuse, and sexual child abuse all "imposed unprecedented demands on the criminal justice system." Rape, spouse abuse, and sexual child abuse are all witnessless crimes, provable only by victim testimony, medical examination, and expert testimony. Also, in each of these situations, the criminal justice system often victimizes the victim. Courts nationwide have started to question the way the criminal justice system treats victims, recognizing that these are all cases of violence, not passion; the victims could not "have asked for it." Following state legislative efforts, the federal government passed legislation to prosecute rape and sexual child abuse. Physical child abuse and neglect were not at issue in the legislative milieu from which federal sexual child abuse legislation emerged, however. Thus, federal prosecution of physical child abuse and neglect not under state law jurisdiction is handled as the Mary Ellen case was more than a hundred years earlier—by application of general federal assault and homicide laws.

III. SHOULD CHILD ABUSE BE CRIMINALLY PROSECUTED?

Before discussing the difficulties of prosecuting child abuse in federal court under statutes not specific to the crime, it is important to address whether child abuse should be prosecuted at all. Some studies have indicated that in some circumstances perhaps more can be done to prevent child abuse while keeping the family intact by helping the abuser through counseling and training than by punishing the abuser and removing the child. This enlightened approach attempts to work on child abuse at its roots. It views abusive parents not as criminals, but as patients, and

64 Dziech & Schudson, supra note 9, at 30-34.
65 Id.
66 Id. at 173-75.
67 Id. at 31.
69 See James Garbarino, Preventing Child Abuse and Neglect, in CHILD MAL-TREATMENT: EXPANDING OUR CONCEPT OF HELPING 169 (Michael Rothery & Gary Cameron eds., 1990).
frequently, as former child abuse victims. By striving to keep the family together, and working to help the abuser and the child, this approach attempts to minimize the trauma and guilt a child feels when compelled to “tattle” on a loved but feared family member.

For this enlightened approach to succeed, however, the abuser has to take two difficult steps: recognize his or her actions as abuse and accept counseling. The abuser may resent any intervention as persecution because he or she felt the acts either were not abuse or were justified; alternatively, he or she may feel sufficiently repentant for any harm to the child. The abuser may also resist counseling for fear of becoming subject to criminal prosecution and civil liability. Emphasis on criminal prosecution, then, can have the effect of hindering programs designed to help remove the causes of abuse. Additionally, the removal of common law tort immunity for family members of abuse victims in some jurisdictions increases the probability that the abuser will counter all efforts to encourage willing acceptance of counseling, lest he or she unwittingly provide evidence of or admit liability for abuse.

Nevertheless, all fifty states provide for criminal and/or civil penalties in cases of abuse. Society still reserves the option to remove those individuals who threaten its security, especially the well-being and future of its children. In addition, since not every abuser is a family member, criminal prosecutions do not always divide the family. If abusers are baby sitters, child care workers, extended family members, or total strangers, their prosecution presents no threat to the family or a family member. Moreover, no program has

70 Id.
71 Id.
72 Id.
74 Id.
75 Id.
76 KARP & KARP, supra note 4, at 240-242.
77 See Katz et al., supra note 4, at 4. But see Owen & Hershfang, supra note 6, at 231, 253-54 (stating that not every state has criminal statutes proscribing physical child abuse, for some apply assault, battery, and homicide laws; nevertheless, every state has laws proscribing child neglect, something the federal government has not done).
yet devised a satisfactory way either of identifying the causes of abuse or of profiling abusers and reforming them.\textsuperscript{78}

To mitigate the adverse effects of criminal prosecution, creative legislation that separates criminal child abuse from civil child dependency cases, or possibly waives or limits criminal and civil liability and penalties in exchange for recognition and counseling, may prove the most beneficial.\textsuperscript{79}

The challenge, therefore, is not to avoid or remove criminal child abuse legislation, but to make it work in harmony with efforts to prevent abuse and maintain families.

IV. DIFFICULTIES OF PROSECUTING PHYSICAL CHILD ABUSE ON FEDERAL LANDS UNDER STATUTES NOT SPECIFIC TO THE CRIME

Because current federal legislation only affects some aspects of child abuse, it is difficult, if not impossible, to effectively prosecute all aspects of child abuse in a federal court. The federal court may either be prohibited from prosecuting an aspect of the crime, or it may be required to combine several federal and state laws to a single case. Moreover, the present system hinders coordinated efforts, and may result in inequitable verdicts.

A. Lack of Specific Legislation Makes Prosecution of Various Types of Child Abuse Difficult

As discussed above, the term child abuse describes a wide variety of different actions and crimes, ranging from overt physical assault, sexual abuse and exploitation, to neglect and emotional maltreatment.\textsuperscript{80} Many states address criminal child abuse with statutes that incorporate most elements of the crime, often drafted with a statement of purpose.\textsuperscript{81} This accomplishes two goals: it tries to protect and address the needs of children, a specific group of society, and it simplifies the prosecution and penalties imposed.

\textsuperscript{78} See generally DOUGLAS J. BESHAROV, RECOGNIZING CHILD ABUSE: A GUIDE FOR THE CONCERNED (1990) (arguing that the current system of child protection produces dangerously high rates of underreporting and overreporting, because of the failure of legislative and other guidelines to assist reporters in identifying abusers).

\textsuperscript{79} Patton, supra note 73, at 37-40.

\textsuperscript{80} Walker, supra note 8, at 127.

\textsuperscript{81} Katz et al., supra note 4, at 51.
In contrast to the state model, federal legislation only addresses one specific type of child abuse—sexual abuse—and leaves the remaining crimes to be prosecuted either by application of state law as authorized by the Assimilative Crimes Act, or by application of general federal criminal statutes. This approach complicates the prosecution because it requires simultaneous application of both federal and state laws, as in the case of the child who is both physically and sexually abused. It may even preclude the government from prosecution altogether, as in the case of child neglect on Indian lands, where state laws cannot be applied.

The application of more than one statute in a criminal trial, likely held before a jury, complicates the prosecution. In a case of physical and sexual abuse on federal land prosecuted in federal court, the prosecution would be required to apply the Sexual Abuse Act of the United States Criminal Code to the sexual abuse charge and applicable state child abuse statutes to the physical abuse charge under the authority of the Assimilative Crimes Act. The definitions of abuse and the case law relevant to the state legislation may vary significantly from those relevant to federal legislation. Thus, the prosecution's case becomes more complicated and confusing to present to a jury.

Finally, not all aspects of child abuse can be prosecuted in federal court. For example, if the crimes of child sexual abuse and neglect were committed on Indian land by tribal members who were tried in federal court, only the sexual abuse charge could be prosecuted. Even if the state had criminal legislation prohibiting neglect, it could not be prosecuted, because it is not an enumerated crime on Indian lands that can be prosecuted in federal court.

Furthermore, prosecution of crimes committed on Indian lands is a jurisdictional nightmare. Depending on whether the defendants are members of a tribe, in a state granted special jurisdiction, or charged with certain enumerated crimes, they may find themselves subject to tribal, state, or federal jurisdiction, or a combination of jurisdictions. Generally, the federal government has exclusive jurisdiction over

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defendants who are not Indians if the victim is an Indian, and shares jurisdiction with tribal courts if both the defendant and the victim are Indians and the crime is listed in the Major Crimes Act.\textsuperscript{85} The Major Crimes Act limits federal prosecution to "murder, manslaughter, kidnaping, maiming, a felony under chapter 109A [the Sexual Abuse Act], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of [Title 18].\textsuperscript{86} If Congress has not specifically defined and made punishable one of these crimes, then The Assimilative Crimes Act takes effect and a state statute that does define the offence can be used.\textsuperscript{87} But if the crime is one that is not specifically enumerated and the state does not have jurisdiction, then the most similar crime listed must be used or the federal government must relinquish jurisdiction to a tribal court.\textsuperscript{88}

Since child abuse is not specifically listed as a major crime on Indian lands, this limitation requires the federal government either to attempt prosecution under the other crimes listed, such as assault, sexual abuse, or homicide, or leave the case in tribal court. Even though the state may have specific child abuse statutes, the federal government is precluded from applying them if the defendant and the victim are Indians, as is often the case. While this presents no problem for cases of child sexual abuse, since this crime is specifically listed as a major crime, it does cause problems for the criminal child neglect case. All states consider certain types of child neglect a major crime,\textsuperscript{89} but under the federal statute, unless the neglect results in death and can be classified as murder or manslaughter, it cannot be prosecuted in federal court.

B. Application of Federal Statutes Not Specific to the Crime May Yield Inequitable Results

When the Assimilative Crimes Act cannot be applied,
the federal government must either relinquish jurisdiction over the case or attempt to try it under a different federal statute. Nevertheless, application of these statutes may not allow various aspects of child abuse to be prosecuted effectively, or may result in a more difficult prosecution. Physical abuse and neglect are not covered by specific legislation; thus, when state laws cannot be applied, as is often the case on Indian lands, prosecution can only proceed under general criminal statutes such as assault and homicide.  

1. Difficulties of prosecuting physical child abuse under the federal assault statute

Generally, the application of the federal assault statute in a physical child abuse case is effective. It does, however, present difficulties that could be minimized by legislation more specific to the crime. To prove assault as it is listed in the Major Crimes Act and defined by federal statute, one of two elements must be shown: (1) the defendant must have used a “deadly or dangerous weapon”; or (2) the victim must have sustained “serious bodily injury.” Although prosecutors are often successful at proving one of these two elements in assaults by adults on adults, proving either of these two elements in a child abuse case can be more difficult due to the status of the victim, the nature of the resulting injury, and the weapons typically involved.

Unlike assault committed by an adult on an adult, child abuse is repetitive and injuries are often cumulative. The repetitive nature of abuse could literally place the child in a state of torture or slavery. Unfortunately, because of the child's status as a minor in the custody of parents, who may be the abusers, the child faces the difficult task of showing that the injuries were not only beyond reasonable punishment, but also “substantial.” The victim is a child, so smaller injuries may have a greater impact on future development and growth, yet still not meet the standards

90 18 U.S.C. § 1153(b).
92 Id.; 18 U.S.C. § 1153(a).
93 ARLENE BAXTER, TECHNIQUES FOR DEALING WITH CHILD ABUSE 34-35 (1985) (evidence of abuse includes bruises in various stages of healing, indicative of repeated abuse).
typically required by the statute or be readily visible. Accordingly, expert testimony is necessary to inform the jury of the seriousness of the injuries, despite the child's apparent recovery. Nevertheless, showing substantial injury is still possible in federal court. Unlike many state statutes, federal courts have insisted on a vague interpretation of what constitutes substantial injury, thus giving prosecutors some hope of proving that the repetitive but apparently minor injuries to a child were serious. Without the court's liberal interpretation, proving serious injury in a child abuse case under the federal assault statute would be much more difficult.

Proving assault with a dangerous weapon also poses unique difficulties in the child abuse case. The presence or use of dangerous weapons shows the defendant's intent and culpability level and justifies punishment for the intense apprehension of imminent physical injury those weapons give the victim. For this reason weapons that by themselves offer no threat, or are merely the defendant's hands or feet, are not usually considered weapons. The implicit assumption is that hands or feet do not readily show the culpability of the defendant, for the defendant does not have the prima facie means to harm the victim.

This assumption may be true when both the defendant and victim are adults, but in the case of physical child abuse with an adult, it is false to assume that untrained adult hands or feet, typically the only "weapons" used, are

95 BAXTER, supra note 93, at 34-35. (injuries from abuse and neglect may include bruises, malnutrition, poor motor development, poor hygiene, evidence of repeated injury, and constant hunger). Individually, these injuries all appear minor and would not easily meet the "serious bodily injury" standard required under the assault statute, but their cumulative effects can be devastating for the child. Id. at 22-23.

96 United States v. Webster, 620 F.2d 640, 641 (7th Cir. 1980). Under Webster, the phrase "serious bodily harm as used in the statute means something more than slight bodily injury and it means bodily injury of a grave and serious nature." Id. This is a much more liberal interpretation of state statutes which usually limit serious injury to "permanent or protracted injury, disfigurement, loss of limb or organ, or substantial risk of death." See, e.g., People v. Martinez, 540 P.2d 1091, 1093 (Cob. 1975) (narrowly defining the Colorado statute).

97 See, e.g., Vitauts M. Gulbis, Annotation, Parts of Human Body, Other than Feet, as Deadly or Dangerous Weapons for Purposes of Statutes Aggravating Offenses Such as Assault and Robbery, 8 A.L.R. 4th 1268, 1269 (1993); Mel Dayley, Annotation, Kicking as Aggravated Assault, or Assault with Dangerous or Deadly Weapon, 33 A.L.R. 3d 922, 924 (1993).
not prima facie dangerous. The difference in size and strength can make even the mere shaking of a child a deadly assault. Nevertheless, showing the serious nature of a hand or foot used against a child cannot indicate a level of culpable intent comparable to that of a prima facie dangerous weapon such as a gun or knife. While weaponless assaults of child abuse can be just as dangerous as assaults with weapons, the prosecutor has difficulty meeting the dangerous weapon element of assault on a child. Thus, under the federal assault statute, a child may continuously receive injuries very serious to the child's growth and development but not easily prove criminal assault.

2. Difficulties of prosecuting neglect

If a state child neglect statute cannot be applied, child neglect on federal lands cannot be prosecuted in federal court unless it results in death. There are no federal statutes criminalizing child neglect. If the neglect results in death, then the federal homicide statute can be applied. While applying homicide law in a case with no witnesses and questionable intent may present some difficulties, they are not unique from other homicide cases.

C. The Present System Hinders Coordinated Efforts

In August 1990, The U.S. Advisory Board on Child Abuse and Neglect, created by CAPTA, issued recommendations on ways in which efforts to prevent and treat child abuse could be improved. They gave eight general recommendations:

(1) recognize child abuse as a national emergency;
(2) provide leadership;
(3) coordinate efforts;
(4) generate more knowledge on the matter;
(5) diffuse that knowledge;
(6) increase human resources;
(7) provide and improve programs; and
(8) plan for the future.

99 Id.
According to these recommendations, the federal government, for nearly the first time in the history of child abuse legislation, was to take a leadership role and coordinate efforts between states, agencies, and programs.

But unlike state courts that have the benefit of a unified child abuse policy mirrored in legislation, federal courts have no unified policy and must apply varying federal and state legislation. This may hinder efforts to coordinate between states, agencies, and programs, because the federal policy with regard to prosecution is unclear and variable depending on the jurisdiction. Because there is no specific federal legislation against all types of child abuse, there is a greater likelihood that criminal prosecution in any given federal jurisdiction will not harmonize with federal efforts to counsel the abused and restore the family. One way for the government to improve coordination of its prosecution efforts with other policies, therefore, would be to establish a consistent criminal prosecution policy. Perhaps the quickest way to accomplish this goal would be to give federal courts a single source of child abuse legislation.

V. CONCLUSION: WAYS TO FILL THE VOID WITH A FEDERAL STATUTE AGAINST PHYSICAL CHILD ABUSE AND NEGLECT

There are three possible ways in which Congress could create a federal physical child abuse and neglect statute: (1) amend the enumerated offenses committed within Indian lands under the Major Crimes Act to include physical child abuse and neglect, so that state laws could be applied by the federal government; (2) enact legislation specific to Indian lands prohibiting physical child abuse and neglect; or (3) enact child abuse legislation applicable to all federal land.

Because this problem arises primarily on Indian lands, amending the enumerated offenses committed there would be the easiest and quickest way to ensure that cases of physical child abuse and neglect are prosecuted under laws specific to the crime. Merely adding physical child abuse and neglect to the enumerated offenses under the Major Crimes Act, without creating any new legislation, would allow federal courts to apply state child abuse legislation to crimes committed on Indian lands. Unfortunately, it would

100 See 18 U.S.C. § 1153(b).
do nothing to simplify the complications involved in applying both federal and local laws in a single forum, nor would it offer any new way to coordinate federal programs with criminal prosecution.

The next logical step would be to enact legislation similar to the Indian Child Abuse Protection and Family Violence Prevention Act, but that prohibits physical abuse and neglect. This solution follows from the same premise as the Major Crimes Act solution. Since the only time general federal criminal statutes must be applied instead of state or federal child abuse legislation is on Indian lands, addressing laws specific to that jurisdiction should solve the problem. This type of legislation is only a partial solution, however, since only Indians on Indian lands would be subject to a complete federal program. In all other federal jurisdictions, the complications of separate state and federal criminal statutes and the lack of coordination would remain.

Rather than enacting legislation specific to Indian land, Congress could pass legislation applicable to all federal jurisdictions. By taking this action, Congress could not only insure that child abuse is prosecuted under laws specific to the crime, more importantly it could provide leadership and coordination to both insure the safety of children and also to help abusers. This solution does not preclude the possibility of other options, but it does emphasize that whatever the choice, more is at stake than simply creating another criminal statute. Congress must first determine the goals of child abuse programs and legislation in order to make a choice that will pull resources together to protect children and restore families.

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