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FAILED PROTECTORS: THE INDIAN TRUST AND KILLERS OF THE FLOWER MOON

*Matthew L.M. Fletcher**

KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI. By *David Grann*. New York: Doubleday. 2017. P. 291. Cloth, \$28.95; paper, \$16.95.

INTRODUCTION

David Grann's *Killers of the Flower Moon: The Osage Murders and the Birth of the FBI*¹ details a story that is widely known in Indian country² but that has never before penetrated mainstream American culture:³ the mass-murder conspiracy that haunted the Osage Indian Nation in the 1920s and that was known by newspapers at the time as the Osage Reign of Terror.⁴

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1. David Grann is a staff writer, *The New Yorker*.

2. Grann's book is far from the first book to address these events. Chickasaw novelist Linda Hogan's first book, *Mean Spirit* (1990), is a fictionalized account and was nominated for a Pulitzer Prize in 1991. *Finalist*, *Mean Spirit*, by Linda Hogan (Atheneum), PULITZER PRIZES, <http://www.pulitzer.org/finalists/linda-hogan> [<https://perma.cc/55LN-8SVM>]. Osage writer Dennis McAuliffe, Jr.'s *Bloodland: A Family Story of Oil, Greed and Murder on the Osage Reservation* (1994) is a fact-based account focused on the writer's family members that suffered through these events. There are other accounts as well. See LAWRENCE J. HOGAN, THE OSAGE INDIAN MURDERS: THE TRUE STORY OF A MULTIPLE MURDER PLOT TO ACQUIRE THE ESTATES OF WEALTHY OSAGE TRIBE MEMBERS (1998); LONNIE E. UNDERHILL, THE OSAGE INDIAN REIGN OF TERROR: THE VIOLENCE OF BILL HALE, 1921–1923 (2010); see also DONALD L. FIXICO, THE INVASION OF INDIAN COUNTRY IN THE TWENTIETH CENTURY: AMERICAN CAPITALISM AND TRIBAL NATURAL RESOURCES 27–53 (2d ed. 2012); Rennard Strickland, *Osage Oil: Mineral Law, Murder, Mayhem, and Manipulation*, NAT. RESOURCES & ENV'T, Summer 1995, at 39; Molly Stephey, *The Osage Murders: Oil Wealth, Betrayal and the FBI's First Big Case*, NAT'L MUSEUM AM. INDIAN (Mar. 1, 2011), <http://blog.nmai.si.edu/main/2011/03/the-osage-murders-oil-wealth-betrayal-and-the-fbis-first-big-case.html> [<https://perma.cc/9NU3-F495>].

3. Grann's book may soon become a film. See Nick Vivarelli, *Leonardo DiCaprio, Martin Scorsese Teaming Up Again for New Movie*, VARIETY (July 14, 2017, 8:34 AM), <http://variety.com/2017/film/news/martin-scorsese-development-killers-of-the-flower-moon-dante-ferretti-1202495680/> [<https://perma.cc/68SJ-SJYX>].

4. E.g., *Courts End Osage Indian 'Reign of Terror': Murder and Sudden Death Have Broken Tribal Peace Since Oil Was Discovered on Oklahoma Reservation—White Men Indicted for Killings*, N.Y. TIMES, Jan. 17, 1926, at 4, <https://www.nytimes.com/1926/>

Grann's tale focuses on the family of Mollie Burkhart—including her mother, Lizzie Q. Kyle, and her sisters—all of whom were murdered except Mollie. Shedding light on a series of American tragedies is admirable, but Grann's focus on the Osage murder investigation as the "Birth of the FBI" is a sad joke. All along, it was the United States that held the threads of the lives of the Osage people. In a very real sense, it was the United States that was the criminal mastermind.

Worse, while *Killers of the Flower Moon* is a story of the federal government's broken promises to Indian people and Indian nations, a horrific part of American history, that story is not over. The conditions that the United States implemented that led to the Osage Reign of Terror remain in place in twenty-first-century Indian country. Law and order in Indian country in the twenty-first century is broken. Each year, thousands of women and children are victims of violent crime,⁵ perhaps the greatest omission in *Killers of the Flower Moon*.

Broadly speaking, the federal government is the primary reason Osage people suffered and continue to suffer these outrages. The United States' encroachment on the Osage Nation's traditional homelands in what is now Missouri and Arkansas forced the tribe to undergo a series of migrations that ultimately placed the Osage Nation in Oklahoma.⁶ The United States created the conditions that allowed local business interests and law enforcement to conspire to murder dozens of Osage people—and steal from many more—for years without consequence. The United States' limited response to these murders was too late and far too incomplete. All these failings derived from the government's failure to fulfill the federal-tribal trust relationship, the modern label for the historic legal obligation called the duty of protection.

This Review uses *Killers of the Flower Moon* as a starting point to highlight how Indian people in Indian country continue to be subjected to high crime rates. And yet, however horrible the Osage Reign of Terror was, the reality for too many Indian people today is much worse. This Review shows how policy choices made by all three branches of the federal government have failed indigenous people. Part I establishes the federal-tribal trust relationship that originated with a duty of protection. Part II explains how the United States' failure to fulfill its duties to the Osage Nation and its citizens

01/17/archives/courts-end-osage-indian-reign-of-terror-murder-and-sudden-death.html (on file with the *Michigan Law Review*); Hale Found Guilty of Osage Murder: Alleged Inciter of "Reign of Terror" Among Tribe Is Sentenced to Prison for Life, N.Y. TIMES, Jan. 27, 1929, at 20, <https://www.nytimes.com/1929/01/27/archives/hale-found-guilty-of-osage-murder-alleged-inciter-of-reign-of.html> (on file with the *Michigan Law Review*).

5. See Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 20, 2012), <https://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html> (on file with the *Michigan Law Review*).

6. See Alysa Landry, *Native History: Osage Forced to Abandon Lands in Missouri and Arkansas*, INDIAN COUNTRY TODAY (Nov. 10, 2013), <https://indiancountrymedianetwork.com/history/events/native-history-osage-forced-to-abandon-lands-in-missouri-and-arkansas/> [<https://perma.cc/773G-2J9Z>].

allowed, and even indirectly encouraged, the Osage Reign of Terror. Part III offers thoughts on the future of the trust relationship in light of the rise of tribal self-determination. This Review concludes with a warning about how modern crime rates against indigenous women and children are outrageously high in large part because of the continuing failures of the United States.

I. PROTECTION

Long ago, the United States undertook a legal obligation to Indian people and tribal nations called the “duty of protection.”⁷ *Killers of the Flower Moon* offers merely one example of how the federal government failed to meet that duty. This Part details the origins and scope of the federal government’s duties to Indian people generally and to the people of the Osage Nation specifically.

The federal government established the Osage reservation in 1872 through the Osage Act.⁸ In 1906, the Osage Allotment Act severed the surface estate and mineral estate, resulting in the unusual circumstance in which the owners of the land on the surface do not own the minerals or other resources below.⁹ The Act authorized the allotment of the Osage reservation, which transferred much of that land in fee to tribal members.¹⁰ But the Osage Nation’s ownership of the reservation’s severed mineral estate was preserved—to be held in trust by the United States for the benefit of the tribe.¹¹ Oil and gas is plentiful on those lands (pp. 53–55). Each of the 2,229 Osage people at that time owned an equal, undivided interest in the mineral estate (p. 243).

Eventually Osage citizens became wealthy, as wealthy as anyone on the planet, in Grann’s telling of the story (p. 6). Historian Donald Fixico claims that companies paid at least \$240 million in royalties to Osage people during this period,¹² a figure that surely would be in the billions in today’s dollars.¹³ The tragedy of *Killers of the Flower Moon* is that newly wealthy Osage Indians began to disappear or die under mysterious circumstances, seemingly murdered one by one (pp. 5–16, 31, 36, 67–69). Local law enforcement

7. See *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, *there arises the duty of protection*, and with it the power.” (emphasis added)); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832) (“This treaty, thus explicitly recognizing the national character of the Cherokees, and their right of self government; thus guarantying their lands; *assuming the duty of protection*, and of course pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force.” (emphasis added)).

8. Act of June 5, 1872, ch. 310, 17 Stat. 228.

9. Act of June 28, 1906, ch. 3572, 34 Stat. 539.

10. Pp. 49–53; *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1082 (10th Cir. 2017).

11. *Osage Nation v. Irby*, 597 F.3d 1117, 1120–21 (10th Cir. 2010).

12. FIXICO, *supra* note 2, at 48.

13. Rennard Strickland reported that by the 1970s, Osage people had collected over \$500 million in royalties. Strickland, *supra* note 2, at 39.

found no leads and initially prosecuted no one; the Oklahoma Attorney General charged the local sheriff with willfully refusing to enforce the law (p. 56). Local people, some of whom later would be convicted of murder, hired private investigators with Osage money (pp. 56–65). The Federal Bureau of Investigation (FBI), only recently formed, intervened (pp. 103–12). Grann tells the story of how non-Osage persons in Osage County thwarted local prosecutions, forcing the FBI to intervene in one of its first high-profile cases (pp. 92–96). Along the way, apparently due to the lack of cooperation from the locals, the FBI embraced modern law enforcement investigative work, which led to the prosecution of several non-Osage persons for the murder of several indigenous people (Chapters Nine to Thirteen, Nineteen).

Grann is not a lawyer, so it is worth describing the legal environment in which the circumstances described in *Killers of the Flower Moon* arise. The foundation of federal Indian law is the legal relationship between the United States and federally recognized Indian tribes.¹⁴ That relationship has gone through several shifts over the course of American history. For the past half century or so, the law primarily refers to that arrangement as a trust relationship.¹⁵ For a century or more before that, the law generally referred to that relationship as a guardianship, with the federal government as teacher and protector and Indian people as the government's wards.¹⁶ But these are merely metaphors. The relationship is best characterized as a duty of protection, which is how the United States and Indian nations first described the relationship in the earliest treaties and federal laws.¹⁷ The duty of protection undertaken by the United States in relation to Indian nations in the early decades of the American Republic was not unheard of in international law, where it was recognized that superior sovereigns could take weaker sovereigns under their protection.¹⁸

In the earliest federal Indian law decisions of the United States Supreme Court, during the tenure of Chief Justice Marshall, the Court confirmed the duty of protection the United States owed to Indian nations. The Court referred to Indian nations as “domestic dependent nations” and “distinct, independent political communities,” confirming tribal nations’ status as do-

14. MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 5.2, at 175 (2016).

15. *E.g.*, *United States v. Mason*, 412 U.S. 391, 398 (1973) (“There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust.”).

16. FLETCHER, *supra* note 14, § 5.2, at 178–81; Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, “*We Need Protection From Our Protectors*: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians,” 6 MICH. J. ENVTL. & ADMIN. L. 397, 408 (2017).

17. *E.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (“Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for *protection*; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.” (emphasis added)).

18. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832) (“This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.”).

mestic, sovereign entities.¹⁹ As domestic sovereigns, Indian tribes have the legal capacity under American constitutional law to negotiate and execute treaties with the United States.²⁰ Those Indian treaties and the relevant acts of Congress define, implement, and confirm the federal government's continuing duty of protection to Indian nations.²¹ The treaties memorialized federal government obligations to Indian nations that Indian treaty negotiators bargained for; those obligations continue to this day as federal law under the Supremacy Clause absent a clear statement of intent from either party to abrogate them.²² The Supreme Court later recognized that the United States additionally owed a moral obligation to Indian nations deriving from the duty of protection and the course of dealings between the federal government and indigenous people, dealings that tended to involve the betrayal, in one form or another, of the duty of protection.²³

Call it a trust, a guardianship, or a duty of protection, but as a matter of law, the federal government's bargained-for legal relationship with Indian nations and Indian people is a significant source of authority for federal laws even today—along with the Indian Commerce Clause, the Treaty Power, and perhaps other sources.²⁴ Consider any federal law or government program in Indian affairs. Each law and program can be traced to the duty of protection originating in Indian treaties. Numerous Indian treaties reference housing, health care, education, job training, law enforcement, support for tribal economies, protection of lands, and military protection. Each of these promises by the United States to Indian nations serves as a source of authority for the work of the Bureau of Indian Affairs, the Indian Health Service, and every other federal office that does Indian affairs work. But more fundamentally, the duty of protection accepted by the United States is the source of the power to perform this work.

Indian treaties also established bargained-for property rights, typically called treaty rights in modern parlance.²⁵ These rights can include the right to hunt, fish, gather, and farm on and off Indian lands without interference.²⁶ These rights can include the right of exclusivity to land and exclusivi-

19. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 (“They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.”); *Worcester*, 31 U.S. (6 Pet.) at 559 (“The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . .”).

20. FLETCHER, *supra* note 14, § 5.3, at 212–14.

21. *Id.* § 5.2, at 177–78 (collecting treaties acknowledging duty of protection).

22. *Id.* § 5.7, at 228.

23. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

24. FLETCHER, *supra* note 14, § 5.2, at 181–94 (collecting statutes enacted based on implementing the general trust responsibility).

25. *See generally id.* § 3.7.

26. *See generally* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY §§ 1:2–:4, at 20–121 (2005).

ty of government. Treaties specific to one or more tribes might even go further and protect individual Indians' right to travel²⁷ or an Indian tribe's right to be free from federal regulations.²⁸ The federal government, as a party to Indian treaties and their bargained-for content, has an obligation to protect those treaty rights.

The federal government's intervention in the Osage killings was no mere story of the FBI swooping in to save discreet minorities from corrupt local government. There is no bank robbery or kidnapping, no drug trafficking or international terrorism, no Russian or Chinese interference in American elections. The federal government's obligation then (and now) was to ensure safety in Indian country, but to say the Department of Justice placed (or now places) much of a priority on Indian country crime is simply wrong. Consequently, the Osage people pay a terrible price.

II. BETRAYAL

Killers of the Flower Moon grippingly details the story of the methodical killing of Mollie Burkhart's entire family by her husband, his relatives, and his business partners. The FBI and the federal government, in Grann's telling, swoop in with law enforcement and prosecutorial power.²⁹ They effectively stop the killing of Mollie and her remaining child. But the real story is not how Mollie is saved but how the federal government failed the Osage murder victims before her. The federal government's betrayal of the Osage Nation and its citizens was deep, varied, and systematic.

The federal government has owed a duty of protection to the Osage Nation for over two hundred years. The Osage Nation is a party to numerous treaties with the United States, beginning in the 1800s.³⁰ The historic Osage Nation, a group of villages including the four Great Osage villages and the Little Osage village, ceded what is now the State of Missouri, the northern half of Arkansas, and large parts of Kansas and Oklahoma in the earliest treaties with the United States.³¹ With the final cession by treaty, the Osage Nation and the federal government established a reservation for the tribe in

27. *E.g.*, Cree v. Flores, 157 F.3d 762, 769 (9th Cir. 1998).

28. *See, e.g.*, Chickasaw Nation, 362 N.L.R.B. 109 (2015).

29. *See* chapters 17–18.

30. *See, e.g.*, Treaty with the Great and Little Osages, Sept. 29, 1865, 14 Stat. 687; Treaty with the Great and Little Osages, Jan. 11, 1839, 7 Stat. 576; Treaty with the Kiowas, Ka-ta-kas, and Ta-wa-ka-ros Indians, May 26, 1837, 7 Stat. 533; Convention with the Comanches and Witchetaws, Aug. 24, 1835, 7 Stat. 474; Treaty with the Great and Little Osages, Aug. 10, 1825, 7 Stat. 268; Treaty with the Great and Little Osages, June 2, 1825, 7 Stat. 240; Treaty with the Great and Little Osages, Aug. 31, 1822, 7 Stat. 222; Treaty with the Great and Little Osages, Sept. 25, 1818, 7 Stat. 183; Treaty with the Osages, Sept. 12, 1815, 7 Stat. 133; Treaty with the Great and Little Osages, Nov. 10, 1808, 7 Stat. 107. These treaties are collected in Logan v. Andrus, 457 F. Supp. 1318, 1321 n.6 (N.D. Okla. 1978).

31. FIXICO, *supra* note 2, at 28; Geoffrey M. Standing Bear, *Can the Host Survive Removal of the Parasite?*, 9 KAN. J.L. & PUB. POL'Y 807, 809 (2000).

Kansas in 1825.³² That lasted until 1871, when the United States terminated the reservation and forced the Osage Nation to Oklahoma; there, the federal government—using Osage trust funds acquired from the sale of their Kansas lands—had purchased land from the Cherokee Nation,³³ itself a victim of removal (pp. 40–41). Initially, Oklahoma was a disaster for the Osage people; starvation and disease reduced the Osage population from 3,679 to about 1,000 in just a few years.³⁴ All the buffalo were gone (p. 42). The federal government refused to pay treaty annuities to the Osages until they took up farming, which was nearly impossible given the difficult terrain of the Oklahoma reservation (p. 42). The tribe established a constitutional system of government in 1881, only to have the federal government terminate that government in 1900.³⁵ Oil began flowing in 1897, likely encouraging the federal government to assume more control over the reservation lands and the American Indians living there.³⁶ The government enacted an allotment plan in 1906 and severed the mineral estate.³⁷ The government also created a tribal membership roll that established a headright system: an interest in the mineral estate akin to a share in a corporation.³⁸ Under this system, only headright winners could vote in tribal elections.³⁹ If Osage people did not acquire a headright before 1908, they could not vote.⁴⁰ By the 1970s, only about two thousand of the more than nine thousand Osage people owned headrights and could vote and hold office.⁴¹

Grann describes how American policymakers and political commentators responded to the sudden Osage wealth. One local newspaper lamented that Osage Indians were “so rich that something [had] to be done about it” (p. 76). Political commentary riddled with racism mocked Osage Indians during the 1920s (pp. 76–77). Federal elected officials and the Department of the Interior imposed onerous financial limitations on Osage people (pp. 77–79). Recall that the United States held the Osage mineral estate in trust for Osage members who owned one or more headrights. And recall that in the early part of the twentieth century, the federal government usually acted as more of a guardian than a trustee. Grann writes that the Office of Indian Af-

32. Pp. 37–38; Standing Bear, *supra* note 31, at 809. Incidentally, the Kansas reservation, known as the Osage Diminished Reserve, was where Laura Ingalls’s family squatted; Ingalls’ family was one of many squatting non-Indian families that would eventually force the Osage from their own lands. Frances W. Kaye, *Little Squatter on the Osage Diminished Reserve: Reading Laura Ingalls Wilder’s Kansas Indians*, 20 GREAT PLAINS Q. 123, 126–29 (2000).

33. Kaye, *supra* note 32, at 129.

34. Standing Bear, *supra* note 31, at 809.

35. *Id.*

36. *Id.* at 810.

37. Pp. 49–53; Standing Bear, *supra* note 31, at 810–11.

38. Pp. 52–53; Standing Bear, *supra* note 31, at 811.

39. Standing Bear, *supra* note 31, at 811.

40. *Id.*

41. *Id.*

fairs (now the Bureau of Indian Affairs) maintained lists of “competent” and “incompetent” Osage Indians (p. 58). The government treated Osages with one or more white ancestors as mixed race and therefore “competent.” But Osages with no white ancestors were “incompetent” (p. 58). The government found white guardians, usually “prominent white citizens [of] Osage County” (p. 58), for “incompetent” Osages. Guardians had near-total control over the finances of Osages deemed incompetent, even requiring Osages to get permission to purchase toothpaste, in Grann’s telling (p. 58). Grann notes that the Commissioner of Indian Affairs sent an investigator to look into “the expenditure of large amounts of money by these Indians” and “the wasteful and extravagant manner of the full bloods.”⁴² The government’s inspector blamed the Christian devil for the troubles of the Osage people: “The devil was certainly in control on that day when agreements and ratifications were made between the Osage people, the department, and Congress, and his majesty has certainly been in high glee at the subsequent results and the marked accomplishments.”⁴³ Perhaps to relieve the Osage full bloods from falling into utter depravity,⁴⁴ Congress reaffirmed that “full blood” Osages would remain legally incompetent in 1921.⁴⁵ Ten years later, after almost her entire family was murdered, the government finally declared Mollie Burkhart legally competent (p. 229).

The murders were one thing, but parallel to the killings was the broader problem of corrupt guardians. FBI investigators looking into the murders of Mollie Burkhart’s family and others also learned significant details about the abuses perpetrated on Osage people by their guardians. Guardians often concocted complex transactions to swindle Osages, such as purchasing cars at market value and reselling the car to their Osage wards at five times the value of the car (p. 154). Other times, guardians just stole overtly from their Osage wards (p. 154). Grann writes that these arrangements collectively amounted to “an elaborate criminal operation, in which various sectors of society were complicit” (p. 154). He adds:

The crooked guardians and administrators of Osage estates were typically among the most prominent white citizens: businessmen and ranchers and lawyers and politicians. So were the lawmen and prosecutors and judges who facilitated and concealed the swindling (and, sometimes, acted as guardians and administrators themselves) (p. 154).

42. *Osage Extension: Hearings on S. 4039 Before the S. Comm. on Indian Affairs*, 66th Cong. 83 (1920) (letter from H.S. Traylor, Inspector); pp. 78–79.

43. *Osage Extension*, *supra* note 42, at 83; p. 79.

44. *Osage Extension*, *supra* note 42, at 83 (“I have visited and worked in and about most of the cities of our country, and am more or less familiar with their filthy sores and iniquitous cesspools, yet I never wholly appreciated the story of Sodom and Gomorrah, whose sins and vices proved their undoing and their downfall, until I visited this Indian nation.”).

45. Act of Mar. 3, 1921, ch. 120, § 3, 41 Stat. 1249, 1250 (declaring all Osage tribal members to be citizens, and declaring “all adult Osage Indians of less than one-half Indian blood” competent).

“Incompetent” Osages also could marry white people who would then become their financial guardians. These so-called guardians had control over the revenue from the Osage headright interest, that unusual property right created by federal law and policy. And sometimes Osage life partners became their killers.

If a white person married an Osage “incompetent,” federal law allowed the white person to inherit the headright: the individual interest in the mineral estate (p. 161). The way the United States implemented its duty of protection to Osage Indians was to set up a legal mechanism that uniquely encouraged non-Osage people to murder them and steal their property rights. Federal agents investigating murders discovered a pattern, at least in relation to Mollie Burkhart’s family. Anna Brown, divorced and pregnant, had bequeathed her estate to her mother, Lizzie Q. Kyle (p. 162). Mollie’s husband, Ernest Burkhart; his brother Bryan Burkhart; and their uncle William Hale, a leading white citizen of Osage County, conspired to murder Anna (pp. 128–29, 162). Lizzie supposedly had inherited eight headrights by the time of Anna’s death,⁴⁶ likely making her one of the wealthiest people in Oklahoma and maybe the entire United States. The conspiracy then turned to Lizzie, who died of poisoning (pp. 35–36, 162). Lizzie had bequeathed most of her estate to her daughters Mollie and Rita (p. 162). Mollie’s sister Minnie had married a man named Bill Smith; Minnie then died of a mysterious “wasting disease,” with Bill inheriting her estate (pp. 63, 162). Mollie’s sister Rita then married the same Bill Smith (p. 63). A murderer blew up their house, killing Rita and Bill both (pp. 85–92). A quirk of their will meant that Bill’s family inherited Rita’s estate (p. 162). Only Mollie and her children remained. And Mollie was married to Ernest Burkhart, one of the conspirators. After federal investigators interrogated him, Ernest confessed to the conspiracy (pp. 189–91). He later testified to the conspiracy in court during the trial of his uncle William Hale for the murder of another Osage headright owner, Henry Roan (pp. 211–12). During the trial, Mollie’s daughter, Little Anna, died of a severe illness (p. 209). But since the FBI was in Osage County to prosecute murder, they did not pursue facts that might have allowed the Osages to bring breach of trust claims against their guardians. The Department of the Interior and the Department of Justice should have been overseeing these guardians but did nothing.

This history shows that the federal government failed to uphold its duty of protection to the Osage Nation and its citizens long before the murders. First, the United States forced the Osage Nation from its homelands outside Oklahoma to a reservation in Kansas. Then, the United States terminated the Kansas reservation in favor of a reservation in Oklahoma on land no one wanted. Congress next ordered the allotment of Osage Nation lands but allowed the tribe, collectively, to retain its mineral estate. Bafflingly, the government created the headright system that undermined tribal self-determination for decades. In the 1900s, the federal government terminated

46. FIXICO, *supra* note 2, at 36.

the Osage tribal government. During this time, even after learning the Osage mineral estate was incredibly valuable, the federal government did little or nothing to advise or assist Osage citizens. As non-American Indians began to abuse the legal system to place Osage allottees under state guardianship, the federal government did nothing to stop them. Even after the Osage murders began, the federal government did little—excepting the prosecution of Henry Roan’s murder, which incidentally was part of the same conspiracy leading to Mollie Burkhart’s family’s murders. It took an Osage Tribal Council request in 1923, along with payments of \$20,000 to the Department of Justice, to persuade the United States to investigate (pp. 96, 110). The federal convictions of William Hale and others for several Osage murders suggest that the United States, perhaps belatedly, recognized its duty of protection. Needless to say, the Osage murders are a mission-critical failure of the federal government’s duty of protection. Why did this happen?

In the modern era of federal American Indian law, which began in the mid-twentieth century,⁴⁷ the duty of protection is described with two key terms of art. The first is the general trust relationship, duty, or obligation.⁴⁸ The second includes enforceable trust duties or obligations.⁴⁹ The general trust relationship is a term of art the United States Supreme Court adopted to describe the duty of protection.⁵⁰ The Court usually employs the phrase to distinguish the obligations to manage tribal or American Indian assets that the United States has imposed on itself by statute or regulation—in other words, an enforceable trust or fiduciary duty.⁵¹ Despite the fact that the general trust relationship *is* the duty of protection, which we know is a bargained-for series of rights of Indians and tribes and a series of concomitant federal legal obligations to preserve those rights, the Supreme Court describes the general trust relationship as a mere moral obligation that is unenforceable in federal courts.⁵² That the general trust relationship is the source

47. Charles F. Wilkinson labeled the Supreme Court’s decision in *Williams v. Lee*, 358 U.S. 217 (1959) as the beginning of the “modern era” of federal Indian law. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 1 (1987).

48. FLETCHER, *supra* note 14, § 5.2, at 181.

49. *Id.* § 5.2, at 194.

50. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (“Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized ‘the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.’ This principle has long dominated the Government’s dealings with Indians.” (citation omitted) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

51. See FLETCHER, *supra* note 14, § 5.2, at 194.

52. Cf. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) (“In this case, we consider whether the fiduciary exception applies to the general trust relationship between the United States and the Indian tribes. We hold that it does not. Although the Government’s responsibilities with respect to the management of funds belonging to Indian tribes bear some resemblance to those of a private trustee, this analogy cannot be taken too far. The trust obligations of the United States to the Indian tribes are established and governed by statute rather

of federal authority to enact and implement American Indian affairs statutes but is somehow unenforceable by the trust beneficiary is one of the greatest contradictions, and tragedies, of American law.

The federal government's duty of protection toward the Osage Nation and its citizens should have forced the United States to act quickly, at least when nonindigenous people began to swindle and murder Osage people. But under the government's theory of the duty of protection, there was no obligation at all. Instead, there is discretion, akin to prosecutorial discretion. Nothing can force the United States to act to fulfill its duties under the general trust relationship, though at least the government is authorized to intervene when it actually chooses to do so.

The jurisprudence of the general trust relationship means that Congress is constitutionally authorized to enact Indian affairs laws but free to disregard its treaty obligations at its discretion. Of course, that is not what Indian nations bargained for. But the Supreme Court's jurisprudence enables this state of affairs.

That story begins with the cases that confirmed the meaning of the duty of protection of the United States to Indians and Indian nations. In *Cherokee Nation v. Georgia*, Chief Justice Marshall tied the duty of protection to the metaphor of guardianship, with the United States as guardian and Indian people as wards dependent on the federal government for all basic needs.⁵³ The facts on the ground directly contradicted Marshall's description in that some Indian tribes, most especially the Cherokee Nation of the early nineteenth century, were hardly dependent on the government, but no matter to the Court then or now.⁵⁴ The Court retreated somewhat from this characterization the next year in *Worcester v. Georgia*,⁵⁵ but the jurisprudential damage had been done. The rhetoric of guardianship and dependency dominated the national political and legal discourse on Indian affairs from that point until the 1970s, when dependency talk became mixed with self-determination talk.⁵⁶ Still, even now, the Supreme Court categorically defines Indian tribes by referring to their dependent status.⁵⁷ Recall that under the doctrine of the duty of protection, dependency is a limited notion referring exclusively to the external aspects of Indian affairs.⁵⁸ In internal tribal affairs, dependency has a much different meaning and is reservation specific.

than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.”).

53. 30 U.S. (5 Pet.) 1, 17 (1831).

54. Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 547–48 (2007) (noting that Founding era leaders were preoccupied with the possibility that American Indian tribes could wage a devastating war on the still-weak American Republic).

55. 31 U.S. (6 Pet.) 515, 542–43 (1832).

56. The tribal self-determination era is usually understood to have begun in the 1970s. FLETCHER, *supra* note 14, § 3.12, at 103–06.

57. *E.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (“As dependents, the tribes are subject to plenary control by Congress.”).

58. *See supra* Part I.

The metaphor of guardianship did not completely dominate national Indian affairs policy until the 1880s, when the Supreme Court decided the cases of what some refer to as the plenary power trilogy.⁵⁹ The first case, *Ex parte Crow Dog*, established the Court's view that Indian people were effectively subhuman as a matter of law.⁶⁰ To the Court at that time, American Indian nations were virtual nonentities. The second case, *United States v. Kagama*, confirmed congressional plenary power to legislate on all aspects of Indian reservation life and governance; it was based entirely on the Court's understanding that Indian people could not care for themselves, so weak and dependent they were on the federal government.⁶¹ The third case, *Lone Wolf v. Hitchcock*, drove the stake of guardianship deep into the heart of tribal sovereignty by confirming federal power to abrogate Indian treaties at will and adopting the guardianship model for assessing decisions of the United States to dispose of tribal and individual Indian property interests.⁶² In this trilogy, guardianship talk went from a metaphor to the law of the land.

Congress finally began to retreat from the guardianship model of Indian affairs regulation in the 1970s and 1980s and expressly acknowledged the general trust relationship in every major Indian affairs statute enacted since then.⁶³ Congress also generally waived federal government immunity to claims by Indian tribes and individual Indians for breach of trust arising

59. Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, 40 HUM. RTS., May 2015, at 3, 4.

60. 109 U.S. 556, 571 (1883) ("It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though *savage life*, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by *superiors of a different race*, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their *savage nature*; one which measures the *red man's revenge* by the maxims of the white man's morality." (emphases added)).

61. 118 U.S. 375, 383–84 (1886) ("These Indian tribes are the *wards of the nation*. They are communities dependent on the United States. *Dependent largely for their daily food. Dependent for their political rights*. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From *their very weakness and helplessness*, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." (emphases added)).

62. 187 U.S. 553, 564–67 (1903).

63. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4][a], at 420–421 (2005 ed.), *quoted in* *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 192–93 (2012) (Sotomayor, J., dissenting).

from the mismanagement of tribal and Indian assets.⁶⁴ In short, congressional policy has been moving toward an understanding of its duty of protection as akin to a trust obligation. Yet the United States is not all the way there.

The Department of Justice continues to advocate zealously in favor of the guardianship model. It sometimes argues, in order to avoid liability, that federal government mismanagement of Indian and tribal assets should be assessed by the judiciary under a *Lone Wolf* model of guardianship rather than by a common law trust.⁶⁵ More recently, federal courts have strongly admonished and sanctioned the Department of Justice for making misrepresentations of fact to the court.⁶⁶ The Department of Justice also views the general trust relationship as imposing no enforceable duties whatsoever.⁶⁷ In most cases, the Supreme Court grants the win to the government's theory of the duty of protection, severely diluting the ability of Indian tribes and individual Indians to seek redress for breaches of trust.⁶⁸ In the case of the general trust relationship, the Supreme Court has all but held that there is nothing enforceable. Worse for tribal interests, Justice Thomas does not recognize a duty of protection *at all* and advocates for the Court to adopt his theory that there is little or no congressional power to legislate in Indian affairs.⁶⁹ Again, this is not what Indian nations had in mind when they negotiated in good faith with the United States during the treaty era.

III. THE FUTURE OF THE TRUST RELATIONSHIP

Killers of the Flower Moon makes the argument, at least implicitly, in favor of the duty of protection. Grann's narrative suggests that the bad guys were those awful white men who swindled and murdered their way to enriching themselves with Osage wealth. Grann's coda tells how the federal government eventually released its files on William Hale's conspiracy (p. 238), but there is much more evidence in the federal archives about many more murders (p. 283). One might take away from the book that the solution is federal oversight of the sort that might effectively implement the ancient duty of protection guaranteed in Indian treaties and in federal Indian law

64. *E.g.*, 28 U.S.C. § 1505 (2012).

65. *Rey-Bear & Fletcher*, *supra* note 16, at 431.

66. *Id.* at 431 & n.209 (collecting cases).

67. *Id.* at 429 (referencing a Department of Justice statement agreeing only to be "mindful" of the trust relationship (quoting Attorney General Guidelines Stating Principles for Working With Federally Recognized Indian Tribes, 79 Fed. Reg. 73,905 (Dec. 12, 2014))); *id.* at 433 ("[T]he Executive Branch has continued to assert that its trust duties to Indians are limited to express statutory or regulatory mandates.").

68. *Cf. id.* at 441–46.

69. *Cf., e.g.*, *Upstate Citizens for Equality v. United States*, 199 L. Ed. 2d 372 (2017) (Thomas, J., dissenting from denial of certiorari); *United States v. Bryant*, 136 S. Ct. 1954, 1967–69 (2016) (Thomas, J., concurring); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 657–66 (2013) (Thomas, J., concurring); *United States v. Lara*, 541 U.S. 193, 214–26 (2004) (Thomas, J., concurring in judgment).

generally. After all, it was the federal government that came to the rescue of Mollie Burkhart and her children. But the government treats its obligations as voluntary. Recall that the Osage tribal council had to subsidize the federal government's investigation (p. 110). Grann, while certainly critical of the federal government, still lets the United States off the hook.

Indian nations and Indian people expect the federal government to fulfill its trust duties, even though its track record as trustee is terrifically poor. There seems to be a deep disconnect here. The wise sage of federal Indian law Sam Deloria, who has guided the publication of several editions of *Cohen's Handbook of Federal Indian Law* since the 1970s, loves to tell a joke about the trust relationship. Imagine, he says, as Martin Cruz Smith did, that the Indians won.⁷⁰ All the white people have to move out of the country, leaving the Indians as victors on their homelands. Deloria facetiously argues that many Indians would be on the dock as the ships depart, demanding that the United States come back and fulfill its trust duties.

There is a conflict of sorts, but it is a conflict that both the United States and its treaty partners, Indian tribes, negotiated for when they established the duty of protection. For Indian tribes that need assistance to govern their lands, the federal government is obligated to act to protect those tribes and their citizens in every reasonable way. For Indian tribes that need less assistance because they are economically successful and are moving toward self-sufficiency, the United States is there to fill the gaps that arise. For Indian tribes that do not need anything from the federal government, the duty of protection does not disappear. For all Indian tribes, no matter their level of dependence or self-sufficiency, the United States retains its duty to protect them and their citizens from outside forces, both domestic and international.

The problem, then, will always be the federal government's political will to understand and implement its duty of protection to Indian nations and Indian people. The Supreme Court, with the possible exception of a decade or two during and after the Warren Court era,⁷¹ routinely enables the federal government to ignore or outright reject the duty of protection. Structurally, the Court's deference to the political decisions made by Congress and the executive branch to regulate Indian affairs is deep and broad. Ideologically, the judges on the Supreme Court are deeply suspicious of the Indian nations, which they describe almost in mystical terms.

The Supreme Court's deference to one particular federal agency—the Department of Justice—is a particular problem for tribal interests. The Department of Justice treats its obligations under the general trust relationship as completely voluntary, effectively mere political decisions. In treaty rights cases or when challenging a federal Indian affairs statute, the United States' interests largely align with tribal interests. In such cases, the Department of Justice has little choice but to align with tribal interests. At times, the federal government voluntarily intervenes in cases to support tribal interests. Exam-

70. MARTIN CRUZ SMITH, *THE INDIANS WON* (1970).

71. Fletcher, *supra* note 59, at 4–5.

ples include the Haudenosaunee land claims and the Washington and Michigan Indian treaty rights cases.⁷² So far, so good.

At other times, the United States stubbornly declines to support tribal interests or opposes tribal interests. As noted above, even during the Obama Administration, arguably the most supportive administration of tribal interests in American history, the Department of Justice's litigation position was that the federal government's interests always override the trust responsibility.⁷³ The Department of Justice has even carved out for itself the power to reject the positions of its clients—such as the Department of the Interior, the department primarily charged with administering the general trust responsibility.⁷⁴ All too often, the federal government as trustee has a conflict of interest with the tribal trust beneficiaries, and the Supreme Court has repeatedly excused the government from its obligations to Indians and tribes.⁷⁵

Absent perhaps a constitutional amendment or a new treaty dealing with these issues, extremely unlikely in any American political climate, the best tribal interests can hope for is an act of Congress that dictates to the executive branch how to meet its trust obligations.⁷⁶

CONCLUSION

Mollie Burkhart, her mother, and her sisters were victims of another form of insidious crime—violence against American Indian women and children. Of all the persons and entities supposedly covered by the federal government's duty of protection, these Indian people are the least protected.

Although the Osage murders seem like an ancient problem unlikely to recur in modern America, the rate of violent crimes against women and children in Indian country is bad, and worsening. American Indian women in Indian country are subjected to sexual assaults at a rate far worse than any other demographic.⁷⁷ American Indian women suffer from human trafficking, too, though we do not know the scope of that horror yet.⁷⁸ American

72. See FLETCHER, *supra* note 14, § 12.1, at 505–11 (Puget Sound American Indian treaty rights litigation); *id.* § 12.2, at 511–16 (Michigan American Indian treaty rights litigation); *id.* § 4.7, at 151–56 (eastern American Indian land claims).

73. Rey-Bear & Fletcher, *supra* note 16, at 433.

74. *Id.* at 439 (citing Venus Prince, *Insights from In-House and Interior: Top 10 Lessons from My 10 Years of Experience*, FED. LAW., Apr. 2016, at 28, 31).

75. See generally Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307 (2002); Venus Prince, *Insights from In-House and Interior: Top 10 Lessons from My 10 Years of Experience*, FED. LAW., Apr. 2016, at 28, 31.

76. Rey-Bear & Fletcher, *supra* note 16, at 448–49.

77. NAT'L CONG. AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 3 (2018), http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [<https://perma.cc/PW5V-PV2W>].

78. U.S. DEP'T OF JUSTICE, HUMAN TRAFFICKING (INCLUDING SEX TRAFFICKING) OF AMERICAN INDIANS AND ALASKA NATIVES (2017), <https://www.justice.gov/ovw/page/file/998081/download> [<https://perma.cc/NK3E-CNKS>].

Indian children suffer when their parents suffer, as well.⁷⁹ The federal government did next to nothing for the Osage Nation's citizens a century ago. The federal government is still doing next to nothing for indigenous women and children today.

Yes, Congress focused attention on the problem with the Tribal Law and Order Act of 2010 (TLOA).⁸⁰ Yes, Congress authorized Indian tribes to prosecute non-Indians for dating violence and domestic violence in the Violence Against Women Reauthorization Act of 2013 (VAWA).⁸¹ But both statutes do far too little. First, at the demand of the Alaska congressional delegation, Congress initially excluded Alaska from benefitting from the VAWA authorization⁸² (an error it corrected later⁸³). There are 229 federally recognized Indian nations in Alaska.⁸⁴ None of them benefit from gaming. And due to a quirk in the Alaska Native Claims Settlement Act, those nations do not benefit much from natural resources extraction either. Alaska Native women suffer the worst of any group of people in the United States.⁸⁵ Second, more than half of the remaining Indian nations in the United States are similarly situated to Alaska Native tribes—lacking economic resources to do much to resolve the criminal wave against Indian women.⁸⁶ Both TLOA and VAWA require Indian tribes to guarantee criminal procedural rights beyond those required for any criminal defendant in any other jurisdiction in the United States.⁸⁷ Most Indian tribes cannot afford to comply, even if they wanted to.

The United States has created and still maintains a similar legal, political, and economic environment to the one that allowed for the murder of at least twenty-four, and perhaps hundreds, of Osage Indians (pp. 280–83) nearly a century ago.⁸⁸ It was the United States that undermined Indian trea-

79. ATTORNEY GEN.'S ADVISORY COMM. ON AM. INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE (2014), <https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf> [<https://perma.cc/82SB-YFKH>].

80. Pub. L. No. 111–211, §§ 201–31, 124 Stat. 2258, 2261–74 (2010) (codified in scattered sections of 18, 25 U.S.C.).

81. Pub. L. No. 113–4 §§ 904–05, 127 Stat. 54, 120–24 (2013) (codified at 25 U.S.C. § 1304 (Supp. V 2018), 18 U.S.C. § 2265(e) (Supp. V 2018)).

82. *Id.* § 910; § 205, 124 Stat. at 2264.

83. Act of Dec. 18, 2014, Pub. L. No. 113–275, 128 Stat. 2988 (2014) (repealing § 910, 127 Stat. at 126).

84. INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER xii (2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [<https://perma.cc/8YUJ-WNN9>].

85. *Id.*

86. NAT'L CONG. AM. INDIANS, *supra* note 77, at 29–30.

87. For example, only a law-trained judge may oversee the prosecution of non-American Indians by American Indian tribes. 25 U.S.C. § 1302(c) (2012). States do not require judges to be law trained. *North v. Russell*, 427 U.S. 328 (1976).

88. MATTHEW L.M. FLETCHER ET AL., STATEMENT OF THE MICHIGAN STATE UNIVERSITY COLLEGE OF LAW INDIGENOUS LAW AND POLICY CENTER ON THE TRIBAL LAW

ty rights and reservation boundaries with allotment and dispossession of Indian lands. It was the United States that undermined tribal governments, leaving a vacuum that has not been filled by responsible governments on too many reservations. It was the United States Supreme Court that gutted the legal authority for tribes to prosecute non-Indians for even those tribes with the capacity to enforce the law.⁸⁹ And it is the United States that refuses to accept legal responsibility for its ongoing breaches of the duty of protection, also known as the general trust responsibility, to Indians and tribes.

Killers of the Flower Moon will be an eye-opener for those who are not aware of what it means for the United States to shirk its duties to Indian people. Osage people alive today are direct victims of the Osage Reign of Terror (pp. 280–91). Grann's book tells an interesting story about the early days of the FBI, the development of early criminal investigation techniques, and the slow death of frontier injustice and corruption. It is a story ripe for a suspenseful and entertaining film.⁹⁰ But *Killers of the Flower Moon* could be so much more. For whatever reason—be it the fame of the author,⁹¹ the focus on major American historical figures like J. Edgar Hoover, or the fact that the FBI is investigating the current president—Grann's work has the attention of much of the American public. *Killers of the Flower Moon* should be a call to action for the United States to take its duty of protection seriously, but instead the stories of real American Indian lives are a framing mechanism for a true-crime FBI story. Indian tribes standing against the political winds that threaten the trust relationship, the duty of protection the ancestors negotiated for in the nineteenth century, deserve more. The thousands of American Indian women who suffer sexual assaults every year and the thousands of American Indian children who witness and suffer violence every year deserve much more.

AND ORDER ACT 1–2 (2011), https://www.aisc.ucla.edu/iloc/_files/MSU%20ILPC%20Statement%20to%20the%20Indian%20Law%20and%20Order%20Commission.pdf [<https://perma.cc/A4XN-7ZAE>].

89. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

90. Such a story risks yet another white savior film, see MATTHEW W. HUGHEY, *THE WHITE SAVIOR FILM: CONTENT, CRITICS, AND CONSUMPTION* (2014), but that analysis is for another time.

91. Grann is also the author of *The Lost City of Z: A Tale of Deadly Obsession in the Amazon* (2009), made into a film released in 2016 by acclaimed director James Gray.

