



Implementing

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Criminal jurisdiction in Indian country is a dangerous mess—especially for Indian women. The U.S. government caused the mess, and since 1978 the U.S. Supreme Court has been the predominant perpetrator. In recent years tribal nations have been appealing to other federal branches to fix it. On March 7, 2013, despite a long, hard, contentious fight, Congress and the president took a historic step toward protecting Indian women by signing the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) into law. On that day, for the first time since 1978, Congress re-recognized the inherent sovereign power of tribal nations to punish non-Indians who perpetrate domestic violence crimes against citizens of tribal nations in Indian country.

standably, the Suquamish tribe prosecuted Oliphant and Belgarde for their crimes in the Suquamish court; otherwise they would have gone unpunished. The defendants challenged the tribe's jurisdiction all the way to the U.S. Supreme Court. Ultimately, Justice William Rehnquist, in writing for the majority, held that tribes were implicitly divested of the power to prosecute non-Indians "except in a manner acceptable to Congress."³ This created a serious hole for public safety in Indian country.

Former Associate Attorney General Tom Perrelli highlighted the danger implicit in Indian country criminal jurisdiction rather well when testifying before the Senate Committee on Indian Affairs on Nov. 10, 2011. He said:

VAWA 2013

Today three tribal nations have exercised that sovereign power multiple times, and other tribes are beginning to implement VAWA 2013 as well. These three tribes have proven that non-Indian domestic violence in Indian country is a reality and that non-Indians can get fair trials in tribal court.

Indian country criminal jurisdiction is a product of a long history of bad decisions from all branches of the U.S. government.¹ In 1978 the Supreme Court made things more dangerous for victims when it decided *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). That case involved two non-Indian residents of the tribe. One defendant, Oliphant, assaulted a tribal police officer and resisted arrest at Suquamish's annual celebration, Chief Seattle Days, while the other defendant, Belgarde, led police on a high-speed chase that ended with him slamming into a tribal police vehicle. In Belgarde's case, tribal officers called the Kitsap County Sheriff out to the scene, but, upon arriving, the officers refused to take any action.² Under-

Tribal governments—police, prosecutors and courts—should be essential parts of the response to these crimes. But under current law, they lack the authority to address many of these crimes. ... [T]ribal courts have no authority at all to prosecute a non-Indian, even if he lives on the reservation and is married to a tribal member. Tribal police officers who respond to a domestic violence call, only to discover that the accused is non-Indian and therefore outside the tribe's criminal jurisdiction, often mistakenly believe they cannot even make an arrest. Not surprisingly, abusers who are not arrested are more likely to repeat, and escalate their attacks. Research shows that law enforcement's failure to arrest and prosecute abusers both emboldens attackers and deters victims from reporting future incidents. In short, the jurisdictional framework has left many serious acts of domestic violence and dating violence unprosecuted and unpunished.

In addition to the real world confusion Perrelli highlights, the safety gap was exacerbated by the historic fact that federal prosecutors more often than not declined to prosecute Indian country crimes. Between October 2002 and September 2003, 58.8 percent of cases referred by the Bureau of Indian Affairs for federal prosecution were declined.⁴ Between October 2003 and September 2004, the rate dropped to 47.9 percent, an improvement, but significantly higher than the national average of 21.5 percent for the same time period.⁵ While historical statistics are not available concerning the declination rates of non-Indian crimes, one can reasonably assume they were at least as high as the average for all other crimes. However, since passage of the Tribal Law and Order Act of 2010 and a sea change in the way U.S. attorneys interact with tribal nations, declination rates have significantly improved with an overall rate of 34 percent for 2013. Unfortunately, we still don't know what the declination rate is for crimes committed by non-Indians against Indians, because it has not yet been accurately tracked.⁶

The danger implicit in the jurisdictional mess has been borne by Indian women, who face an epidemic level of violence in the United States.⁷ Indian women are 2.5 times more likely to be sexually assaulted than other women.⁸ More than 1 in 3—34.1 percent—of Indian women will be raped in their lifetime.⁹ While national murder rates of Indian women in general are second to black women, statistics specific to Indian country show that murder rates of Indian women soar to more than 10 times the national average.¹⁰

Underscoring this epidemic are statistics that show non-Indians are often the perpetrators. According to federal statistics, 66 percent of violent crimes against Indians were perpetrated by non-Indians. Non-Indians also accounted for 85 percent of rape or sexual

dian. In 2011 the CTUIR Family Violence Program saw 43 victims of domestic violence. In 35 of those cases, we know the race of the perpetrator, and 10 of them were non-Indian. So it appears that at the CTUIR in 2011, at least 29 percent of the domestic violence cases involved non-Indian perpetrators. The statistics are even worse for 2012. The Family Violence Program saw 35 victims. We know the race of the perpetrator in 23 of those—14 of those 23 were non-Indian. That means in 2012, roughly 61 percent of the domestic violence incidents at the CTUIR involved non-Indian perpetrators.

Prior to 2010 federal prosecutors did not file a single non-Indian domestic violence case from the Umatilla Indian Reservation. One case was prosecuted in 2010. In 2011, two cases were prosecuted. That means in 2011, 80 percent of the non-Indian domestic violence incidents were not prosecuted. In 2012 none were prosecuted. But to be fair, the U.S. Attorney's Office for the District of Oregon has improved a great deal since 2010, as is true of many other U.S. attorney's offices throughout the country. The two cases prosecuted in 2011 were the only two cases involving non-Indian domestic violence that were reported to police. In 2012, one case that was reported, and being a special assistant U.S. attorney at the time, I reviewed and declined the case because there was insufficient evidence to sustain a conviction. What this means is that, in the best-case scenario, 80 percent of the non-Indian domestic violence cases the CTUIR Family Violence Program handled in 2011 were not even reported to the police. In 2012, 93 percent of the non-Indian cases went unreported.

There is a very good reason for Indian victims not to report non-Indian domestic violence in Indian country. They know that, historically, non-Indian domestic violence crimes went unprosecut-

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assaults against Indian women.¹¹ The study revealing these statistics was attacked by those opposing tribal jurisdiction under VAWA 2013. Opponents correctly said that the study revealing these statistics was not specific to Indian country but also suggested non-Indian domestic violence was not a problem. While it is true the study was not specific to Indian country, it isn't far-fetched to assume that many of the crimes reported by Indian victims in the study arose in Indian country. As for not being a problem, they were wrong.

Despite the dearth of Indian country non-Indian crime statistics, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) doesn't need to rely on assumptions. Approximately 3,280 people live on the Umatilla Reservation, 46 percent of whom are non-In-

ed and unpunished. If no one gets prosecuted, a victim isn't going to report the crime. Reporting the crime in this situation can make the victims less safe and can both anger and embolden the perpetrator.

Given the jurisdictional mess, high rates of crime, historically high declination rates, and low reporting, something needed to be done. That something was VAWA 2013, giving tribes at least a limited opportunity to prosecute non-Indian domestic violence crimes perpetrated against Indians as an exercise of inherent sovereign power.

VAWA 2013 builds on the Tribal Law and Order Act of 2010 (TLOA). Parts of TLOA amended the Indian Civil Rights Act of 1968, which sharply limited tribal court punishment authority. Pursuant to TLOA, a tribe can exercise felony sentencing authority over crimes

that are considered a felony under any similar state or federal law and over any repeat offenses. The authority is limited to three years in jail and \$15,000 per offense and up to nine years in jail per criminal proceeding. However, to exercise this authority, a tribe must meet certain requirements, including providing a licensed defense attorney to indigent defendants free of charge, guaranteeing effective assistance of counsel, and ensuring proceedings are presided over by a law-trained judge, among others. VAWA 2013 requires tribes to provide these same rights to non-Indian defendants for any offense they are charged with and adds requirements that a jury pool include a fair cross section of the community and that defen-

stitutionality of VAWA 2013. He declined to do so.

In July 2013 the CTUIR made all the necessary changes to its Criminal Code to exercise criminal jurisdiction over non-Indian domestic violence cases, and the CTUIR also guaranteed all of the rights of non-Indian defendants to all defendants regardless of citizenship status or level of offense. On Feb. 6, 2014, the CTUIR, Tulalip tribes, and the Pascua Yaqui tribe were authorized by the U.S. attorney general to exercise VAWA 2013 jurisdictional authority over non-Indians early. Since March 7, 2015, any tribe that meets the requirements of VAWA 2013 may do so without prior approval from the attorney general.¹³

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dants receive timely notice of habeas corpus rights.¹²

The CTUIR implemented TLOA felony sentencing in March 2011. The CTUIR already provided a public defender to anyone who wanted one, regardless of income. Those defense attorneys are graduates of ABA-accredited law schools and are licensed by the state bar. Judge William Johnson is the presiding judge and is a long-time member of the Oregon Bar. He has presided over many criminal cases for the past 30 years. He is also a tribal member.

Given that the CTUIR already provided the rights required under TLOA 2010, and in fact provided greater rights, exercising felony sentencing authority only required minor changes to the Criminal Code. Since March 2011, there have been many felony prosecutions and convictions at the CTUIR. Three individuals are currently housed in federal prison for tribal court convictions under the Bureau of Prisons TLOA Pilot Program. In the very first Pilot Program case, the CTUIR actually had the defendant's federal defense attorney represent him in tribal court.

Long before VAWA 2013 was enacted into law, the CTUIR included non-Indians in jury pools. The CTUIR provides many of its services to any community members regardless of tribal membership, including the services of the Family Violence Program. The CTUIR also has long informed defendants of their right to file habeas corpus petitions in federal court. However, no one has ever filed such a petition. In fact, in the first non-Indian criminal conviction under VAWA 2013 at the CTUIR, the CTUIR Office of Legal Counsel encouraged the defendant to file an action in federal court challenging the con-

Implementation at the CTUIR has been unexceptional. Cases proceed in the same as all other cases. The only difference is that the community member who stands accused happens to be non-Indian. As Judge Johnson likes to say, all non-Indians are given the same rights the CTUIR gives to its members. To date four non-Indian domestic violence cases involving three defendants have been filed in the CTUIR court. Two defendants have pleaded guilty in three cases. One case is pending. Those who have been convicted are subject to tribal probation, including the requirement to undergo batterer intervention treatment, which the CTUIR provides free of charge.

Tulalip has had 10 non-Indian domestic violence cases since February 2014. Five of them pleaded guilty. One was transferred to federal court because children were also victims of the crime and VAWA 2013 does not expand inherent tribal jurisdiction to cover those crimes. One case was dismissed for insufficient evidence. Three are awaiting trial.

Pascua Yaqui has had 20 cases involving 16 defendants. They have had five convictions. One case went to jury trial. The jury, which included non-Indians but was predominantly Indian, found the defendant not guilty for lack of proof beyond a reasonable doubt of a dating or domestic relationship between the defendant and victim, who had been involved in a same-sex relationship.

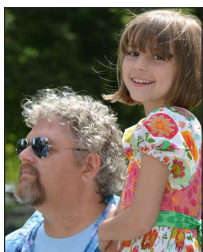
Since VAWA 2013 jurisdiction has been opened up to all tribes that choose to implement it, the prosecutor at Eastern Band of Cherokee Nation has filed two cases involving non-Indians, and a domestic violence protection order has also been filed. All of them

are pending as of this writing.

To date, not one non-Indian defendant has filed a petition in federal court claiming his or her rights have been violated. None has expressed an interest in challenging the constitutionality of VAWA 2013. None has expressed a desire to have his or her case prosecuted in federal court. It appears more victims are coming forward and reporting the abuse. Hopefully, with implementation of VAWA 2013, those victims not only feel safer but are safer.

Those who opposed VAWA 2013 on the claim that non-Indian domestic violence against Indian women is a rarity in Indian country have been proven wrong. Those who claimed non-Indians wouldn't be afforded due process in tribal court have been proven wrong. Those who claimed a non-Indian wouldn't be treated fairly by a tribal jury have been proven wrong. This comes as no surprise to those of us who have prosecuted cases in tribal, state, and federal courts. Non-Indian domestic violence has long been a reality but rarely was reported because the perpetrators usually walked free. Criminal defendants in tribal courts, as compared with state and federal courts, are often treated less harshly, with more respect, and with more opportunity to tell their side of things than in other courts. There is absolutely no reason to believe that a juror would skirt his or her duties and convict someone of a crime simply because the juror is a member of a tribal nation sitting in judgment of someone who is not.

Let's hope this limited *Oliphant* fix is a sign of things to come. Indian country communities will be safer if tribal nations have the power to prosecute any crime that occurs within their community. They are the local government. They have the greatest interest in ensuring the protection of their residents. When they have the resources and power to do so, they are also the most capable of ensuring that protection. ☉



M. Brent Leonhard is an attorney in the Office of Legal Counsel for the Confederated Tribes of the Umatilla Indian Reservation. He helped the CTUIR become the first jurisdiction to implement felony sentencing under the Tribal Law and Order Act of 2010 and one of the first three tribes to exercise non-Indian criminal jurisdiction under VAWA 2013.

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judges and lawyers on topics such as case management, judicial ethics, domestic and gender-based violence, opinion writing, alternative dispute resolution, and trial advocacy. She has led these delegations in partnership with the judiciaries and prosecutors of each country, the U.S. Department of State, and Lawyers Without Borders. She has served as a member of international training delegations teaching trial and appellate advocacy at Tribunals for Rwanda and the former Yugoslavia.

"There aren't enough hours in the day. I'm involved in too many things. If the good Lord could give me an extra four hours in the day, that would be great," she says while in South Bend, Indiana for a University of Notre Dame trustees meeting. Lisa Scruggs, a partner at Duane Morris LLP and former clerk for Judge Williams, recalls conversations about not having enough hours in the day: "We have joked about that. The difference is she would work an extra four

Endnotes

¹See M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663 (2012).

²Brief for the United States as Amicus Curiae Supporting Respondents at 5-17, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (No. 76-5729).

³*Oliphant* at 210.

⁴Bureau of Justice Statistics, *U.S. Dep't of Justice, Compendium of Federal Justice Statistics*, 2003, at 33 tbl.2.3 (2005).

⁵Bureau of Justice Statistics, *U.S. Dep't of Justice, Compendium of Federal Justice Statistics*, 2004, at 33 tbl.2.3 (2006).

⁶U.S. Department of Justice Indian Country Investigations and Prosecutions 2013, available at www.justice.gov/tribal/tribal-law-and-order-act.

⁷See Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* (2007).

⁸See Steven W. Perry, Bureau of Justice Statistics, *U.S. Dep't of Justice, NCJ 203097, American Indians and Crime: A BJS Statistical Profile, 1992-2002* (2004).

⁹See Patricia Tjaden & Nancy Thoennes, *U.S. Dep't of Justice, Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women* (2000).

¹⁰*Id.* at Exhibit 7.

¹¹See *American Indians and Crime* at 9.

¹²25 U.S.C. § 1302(d),(e).

¹³Section 908(b)(2) of the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 (March 7, 2013).

hours, and I would sleep."

"[Her] personality is the most impressive thing about her," said Roland Chamblee, an state judge in South Bend, Indiana, and friend from law school. "She can handle dealing with kings, popes, presidents, the senators, the court of appeals judges, the butler, the guy who opens the door, and she is the same with everybody." It is her down-to-earth personality that makes Judge Williams such a remarkable judge and role model. In a sense, she never left her position as a teacher. She shares her wisdom with those around her and tries to harness the next generation of attorneys and judges around the world. On last words of advice to young attorneys, Judge Williams states, "I think it's important to maintain your identity and who you are. There's room in the law for personality—assuming now that you're excellent and you get your job done. That's always the first thing." ☉