



Indigenous Law & Policy Center

November 10, 2011

Statement of the Michigan State University College of Law Indigenous Law and Policy Center on the Tribal Law and Order Act

Boozhoo!

To the Honorable Troy A. Eid, Chairman of the Indian Law and Order Commission, and Jeff Davis, Executive Director of the Commission, and the rest of Commission members, we offer greetings and a *chi-miigwetch* for the opportunity to offer our views on the Tribal Law and Order Act (the Act or TLOA), Pub. L. 111-211, Title II, July 29, 2010, 124 Stat. 2263, and the future of Indian country criminal law and jurisdiction.

As you know, Mr. Chairman, our 8th Annual Indigenous Law and Policy Conference, held on October 28-29, 2011 in East Lansing, MI, was titled, “*Beyond the Tribal Law and Order Act: Can (Should) Congress Enact an Oliphant Fix?*” We invited a wide segment of speakers, including members of the Indian Law and Order Commission, federal government officials, tribal court and elected government officials, and American Indian law scholars to discuss the ongoing issues with the Tribal Law and Order Act and Indian country criminal law and jurisdiction. Much of our commentary here is guided by the knowledgeable, profound, and wise statements and opinions expressed in that conference.

Summary of the Indigenous Law and Policy Center’s Statement

In this Statement, we argue that the Tribal Law and Order Act is a necessary first step for the restoration of general tribal criminal jurisdiction over Indian country. We argue there are two general barriers to the restoration of tribal jurisdiction – structural and legal. Structural barriers largely involve the limited governmental capacity of Indian tribes to administer justice systems, which includes resource limitations on providing due process guarantees, adequate jail space, and other infrastructure questions. The terrible irony of TLOA is that the American Indian reservations with the worst crime problem are the same reservations that do not have the structural capacity to implement the Act. Legal

barriers involve the federal judiciary's constitutional concerns about subjecting nonmembers to tribal justice systems. We believe a modest, careful approach to restoring tribal jurisdiction is the best bet over the long term, perhaps utilizing methods and processes developed in accordance with the various Indian Self-Determination Acts. The federal government should adopt a process to favor the tribes in the worst condition, rather than a process that favors the tribes with the greatest capacity. We also propose a possible expansion of federal habeas review of tribal court convictions a useful way to jumpstart the process and allay constitutional concerns.

The Tribal Law and Order Act of 2010

In the Act, Congress, perhaps for the first time, recognized that federal law governing Indian country law and order has failed in dramatic fashion. Congress found that the Indian country law enforcement presence is approximately half of that in comparable rural communities nationally. TLOA § 202 (a)(3). Congress also found that the “complicated jurisdictional scheme” that exists in Indian country contributes to the lack of an effective law enforcement presence as well. *Id.* § 202 (a)(4). As a likely result, Congress found that Indian country crime, especially violent crime against Indian women, is incredibly high. *Id.* § 202(a)(5). Congressional findings are consistent with reports by others. *E.g.*, Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* (2007). Others have asserted that “Every hour of every day an American Indian woman within the authority of a tribal court is the victim of sexual and physical abuse.” Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 2, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. ___, 128 S. Ct. 2709 (2008) (No. 07-411).

While observers agree there is an epidemic of violent crime against Indian women and in Indian country generally, the causes of this epidemic are less clear. While social and economic ills are heavily to blame, there are at least two legal and political sources that we will discuss. They are the Major Crimes Act (MCA), 18 U.S.C. § 1153, and the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

The MCA, enacted in 1885, federalized felony cases in Indian country. As a result, the United States Attorney's Offices have primary jurisdiction in most states over Indian country felonies.¹ So when a perpetrator, Indian or non-Indian,

¹ Major exceptions are so-called Public Law 280 states, which include Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, and other states such as Kansas and New York. In nearly all reservations in these states,

commits an act of violence against an American Indian woman, the U.S. Attorney has the primary enforcement responsibility. Sometimes, this is literally physically impossible. Consider a typical case at a reservation located in the western Upper Peninsula of Michigan, which is covered by the U.S. Attorney's Office in Grand Rapids, Michigan. On a good day, it's an 11 hour drive to the reservation. In winter, it may be impossible. Add in the quick timeframes for properly using a rape kit (far less than 11 hours), and sexual assaults in Michigan Indian country often cannot be prosecuted. Other districts are similar. The Turtle Mountain Band Reservation in northwest North Dakota is more than 10 hours from Fargo, where the U.S. Attorney's Office is located. The U.S. Attorney's Office in Cheyenne, Wyoming is as far from the Wind River Reservation as you can get in the state. And so on.

Moreover, as Dean David Getches wrote over 30 years ago, there is no safety net of criminal prosecution authority if the federal government declines to prosecute a case. *See* NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS AND THE FUTURE 84 (David Getches, ed. 1978). Back then, Getches estimated that the federal government declined to prosecute about 75 percent of Indian country cases referred to the U.S. Attorneys. More recent declination numbers are uncertain and even misleading, but that percentage of Indian country declinations is so significant that perpetrators must be aware they are unlikely to be investigated, let alone prosecuted, for Indian country crimes. And if the feds do not prosecute, there often is no one else.

Which brings us to the second likely cause of the rise of Indian country crime against Indian women – *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In 1978, then-Associate Justice Rehnquist issued an opinion effectively holding that no Indian tribe could assert criminal jurisdiction over non-Indians. Rehnquist's opinion is one of the most notorious opinions in federal Indian law, which is saying something, having been crafted out of 150 years of self-serving legislative history for bills never enacted by Congress, Interior Solicitor's opinions later withdrawn, and U.S. Attorney General opinions defending the rights of slaveowners to murder their slaves. *See generally* ROBERT A. WILLIAMS, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 97-113 (2005). Regardless, the *Oliphant* opinion could have held that the relatively small Suquamish Tribe could not assert criminal jurisdiction over non-Indians because the Tribe had little authority over its own reservation territories. Or the opinion could have held that under the Indian Civil Rights Act, 25 U.S.C. § 1303, convicted non-Indians have the habeas right in

state governments have primary criminal jurisdiction authority over Indian country. *See* 18 U.S.C. § 1162 (Public Law 280 states); 18 U.S.C. § 3243 (Kansas); 25 U.S.C. § 232 (New York).

federal court, and required tribal courts to comply with federal constitutional guidelines.

Instead, the *Oliphant* Court reached the broadest ruling possible. As a result, non-Indian perpetrators of violent crime against Indian women in Indian country have virtual immunity from prosecution. As any expert on domestic violence knows, these kinds of crimes have a snowball effect. If the perpetrator isn't stopped early on, when the crimes are mere misdemeanors, they have a troubling tendency to escalate to felonious assault and even murder. The federal government often is unable to step in until domestic violence reaches felony proportions, when it might be too late to save victims. Cf. Ronald Weich, Assistant Attorney General, to Hon. Joseph R. Biden, Jr. (July 21, 2011) (describing a "cycle of violence" against Indian women in Indian country caused by lack of federal tools to address the problem).²

The Supreme Court's decisions left two sovereigns in charge of tribal law enforcement in relation to non-Indians: the federal and state governments. Federal law enforcement of domestic violence and sexual assaults against women generally are ineffective for a variety of reasons.³ First, federal law enforcement resources are limited, and "stretched too thin to provide the level of support needed in tribal communities to adequately confront this problem." Letter from James S. Richardson, Sr., President, Federal Bar Association, to the Senate Indian Affairs Committee at 2 (July 2, 2008). See also Leslie A. Hagen, *Prosecuting Non-Indian Perpetrators of Domestic Violence*, BEDOHGEIMO: A NEWSLETTER FROM THE UNITED STATES ATTORNEY'S OFFICE, WESTERN DISTRICT OF MICHIGAN, Winter 2004, at 5.

Second, federal prosecutors are hamstrung by federal statutory definitions of federal crimes and by concerns over territorial limitations, leading to a higher declination rate for Indian Country crimes. *Hearing to Examine Federal Declinations to Prosecute Crimes in Indian Country before the Senate Indian Affairs Committee*, 110th Cong., 2d Sess. 8-11 (Sept. 18, 2008) (Prepared Testimony of Drew H. Wrigley, United States Attorney for the District of North Dakota). Because federal prosecutors have to prove (or disprove) whether the crime occurred within Indian Country, whether the suspect is Indian or non-Indian, and whether the victim is Indian or non-Indian, in addition to definitional requirements, many crimes are not prosecuted due to lack of sufficient evidence.

² This letter is available at <http://turtletalk.files.wordpress.com/2011/07/justice-department-legislativeproposal-on-violence-against-native-women.pdf>.

³ This is not to blame federal prosecutors, who perform outstanding work when they are able. See, e.g., Matthew L.M. Fletcher, *The U.S. Attorney Mess and Indian Country*, INDIAN COUNTRY TODAY, March 30, 2007 (recognizing the efforts of Hon. Margaret Chiara, the former United States Attorney for the Western District of Michigan).

Id. at 37-39 (Prepared Testimony of Thomas B. Heffelfinger, former United States Attorney for the District of Minnesota).

Third, federal prosecutions in Indian Country are hampered by delay due to lack of resources, the distance of the crime from the United States Attorney's Office, and difficulty in securing witness cooperation. *Id.* Unlike tribal court investigations and trials, reservation residents must travel long distances at great expense and difficulty for federal trials, a distance that may be impossible to traverse for many Indian people. *See* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 711-712 (2006).

In states where Public Law 280 controls, mandating state criminal jurisdiction over Indian Country, many of the same problems arise. States required assert criminal jurisdiction over Indian Country, such as California and Alaska, "have never received special federal funding to support law enforcement and criminal justice." Tribal Law and Policy Institute, *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women* at 7 (Dec. 31, 2007).⁴ As such, states and counties rarely will establish an on-reservation police presence, resulting in a very long response time after calls for service. *Id.* at 7-8. State courts and services are "often hundreds of miles from the victims' homes and communities." Brief of *Amici Curiae* National Network to End Domestic Violence et al. at 6, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. ___, 128 S. Ct. 2709 (2008) (No. 07-411). "[S]ince tribal members are often a small percentage of county populations, local police and prosecutors have an incentive to give priority to other parts of their territory." Tribal Law and Policy Institute, *supra*, at 8. A recent study concludes that on-reservation residents, Indian and non-Indian, are deeply dissatisfied with the law enforcement efforts of Public Law 280 states. *See* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 711 (2006). *Contra* Douglas P. Payne, *Criminal Jurisdiction in Indian Country: Complicated by Design, but Not Lawless*, ADVOCATE (IDAHO STATE BAR), Oct. 2011, at 48 (defending the Benewah County, Idaho prosecutor's office from charges that counties do not prosecute non-Indian crime in Indian country).

Tribal courts have made efforts to alleviate the problems caused by the loophole. Some tribal courts have exercised their civil contempt powers, their powers to exclude (or banish) individuals from the reservation, and other civil remedies. *See* *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1008 (10th Cir. 2007); *Moore v. Nelson*, 270 F.3d 789, 790-91 (9th Cir. 2001);

⁴ This report is available at <http://www.tribal-institute.org/download/Final%20280%20FG%20Report.pdf>.

State v. Esquivel, 132 P.3d 751, 754 (Wash. App. 2006). These remedial measures alone are not solutions.

As we will show below, we believe there are two important barriers to effective responses to this rise in Indian country crime – legal and structural. The Act is much-needed first step in developing a concerted federal-tribal response to this epidemic of crime in Indian country by laying the groundwork for resolving both barriers.

The Act's purposes include improving the Indian country criminal justice infrastructure by mandating law enforcement cooperation and coordination between the federal government, states, and Indian tribes, and empowering tribal governments to respond to Indian country crime in a more effective manner. TLOA §§ 202(b)(1), (2), and (3). Congress intended to strengthen federal responses to Indian country crime. For example, United States Attorney's Offices must prepare disposition reports on Indian country crime referrals in order to provide additional information about why referrals are declined. *Id.* § 212. Congress created special Indian country prosecutors and required each United States Attorney's Office to appoint a tribal liaison. *Id.* § 213(a). Congress restored federal concurrent jurisdiction over Indian country, at the request of a tribe, in Public Law 280 states. *Id.* § 221.

But Indian country crime is local, and federal government solutions cannot possibly provide a comprehensive solution over the long term. As Congress has begun to recognize, Indian tribal law enforcement is the appropriate first responder to Indian country crime and that tribal justice systems are the appropriate institutions to maintain law and order in Indian country. TLOA § 202(a)(2)(A). The provision that has attracted a significant amount of attention involves expansion and clarification of tribal court sentencing authority. *Id.* § 234. Section 234(a)(1) amends 25 U.S.C. § 1302(7) to allow for Indian tribes to opt-in to enhanced sentencing – up to three years and \$15,000 – provided that the Indian tribe guarantees criminal procedure rights similar to those guaranteed by the United States Constitution. The provision also clarifies concerns about tribal consecutive sentencing. *See, e.g., Miranda v. Anchondo*, 654 F.3d 911 (9th Cir. 2011).

The remainder of this Statement addresses the barriers to restoring tribal criminal jurisdiction authority sufficient to conclusively address Indian country crime.

The Future of Indian Country Criminal Law and Jurisdiction

Indian country crime is local, and we argue that solutions to Indian country crime must also be local. But we also recognize that few, if any, tribes are capable at this time of exercising general criminal justice authority sufficient to address Indian country crime. We propose a combined federal and tribal legislative and administrative scheme – with Act being an important first step – that assists Indian tribes in developing the capacity to be effective first responders to Indian country crime, with an eye toward restoring general tribal criminal jurisdiction over the long run.

As noted above, we note two key barriers to restoring general tribal criminal jurisdiction in Indian country. The first, which we term “structural,” is a question of tribal capacity to enforce criminal laws in an effective and fair manner. The vast majority of tribes are not ready to take on greater criminal jurisdiction. For example, as of mid-summer 2011, only nine tribes substantially implemented their obligations under the Adam Walsh Child Protection and Safety Act of 2006. *See* Department of Justice, Office of Justice Programs Press Release, *Justice Department Finds 24 Jurisdictions Have Substantially Implemented SORNA Requirements* (July 28, 2011) (listing the Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes and Bands of the Yakama Nation, Grand Traverse Band of Ottawa and Chippewa Indians, Iowa Tribe of Oklahoma, Kootenai Tribe of Idaho, Little Traverse Bay Bands of Odawa Indians, Pueblo of Isleta, Tohono O’odham Nation, and Upper Skagit Indian Tribe).⁵ While that number has risen in recent months, it demonstrates the difficulty Indian tribes face in developing the proper infrastructure for criminal justice.

The Tribal Law and Order Act comes at a time when tribes are suffering inordinately from the American economic downturn that started in 2008 and 2009. Many tribes have been forced to cut government budgets by a quarter, a third, and occasionally even more. The Act’s opt-in provisions require tribes to take considerable financial responsibility for public defenders, adequate jail space, law-trained judges, and other expensive infrastructure outlays. The economy has stunted tribal opportunities to take advantage of the Act’s enhancement of tribal sentencing authority, for example. Section 234(b) requires the Attorney General and the Secretary of Interior to compile a report on the effectiveness of the enhanced sentencing authority *within four years of the date of TLOA’s enactment*. The reporting time frame is a potential trap for tribal interests, in that it is very possible only a small number of tribes will have the structure in place to take advantage of the sentencing enhancement.

⁵ This release is available at http://www.ojp.usdoj.gov/newsroom/pressreleases/2011/SMART_PR-072811.htm.

We recommend reaffirming and recognizing inherent tribal criminal jurisdiction over an extended period of time, and in a careful fashion that borrows heavily from the lessons learned in the administration of the so-called 638 and self-governance compacts. Unlike similar statutes that have enacted sweeping reaffirmations of tribal sovereignty, such as the so-called “Duro fix,” *compare* 25 U. S. C. §1301(2) *with Duro v. Reina*, 495 U. S. 676 (1990), which recognized tribal criminal jurisdiction over nonmember Indians, this approach would apply only to tribes that meet certain criteria. Like the Act, the criteria would include requiring – at a minimum – the prosecuting tribe to provide a right to paid indigent counsel, the right to a jury trial derived from a jury pool of both members and nonmembers, and access to adequate jail space.

Minimum criteria for eligibility in greater tribal criminal jurisdiction, however, could guarantee that Indian tribes with the greatest need will be excluded for failure to possess the financial resources necessary to meet the criteria. As such, the Tribal Law and Order Act’s “opt-in” and certification provisions, where the tribes that choose to comply with the criteria could then be subject to the statute’s application, potentially exclude that tribes with the most need – often rural, insular communities with few economic resources that often have the worst crime rates. Indian tribes farthest from gaming and natural resource markets tend to be the poorest tribes, although this is certainly not always the case.

We would therefore deviate, in part, from criteria established by the Tribal Law and Order Act, and ask that the Departments of Justice and Interior identify Indian tribes with horrific crime rates that *do not* have the resources to fully employ criminal law enforcement and prosecution authority. We would require, in accordance with the federal government’s trust responsibility to the identified tribes, that the federal government fully fund and support with necessary technical assistance the fully functioning criminal justice system for those reservations. It is, after all, the federal government that caused these problems in Indian country through policies such as tribal land allotment and cultural assimilation. *See generally* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in Indian Country*, 44 UCLA L. REV. 1405, 1409-10 (1997) (describing conditions in California Indian country caused by federal policies). Perhaps in the first years, the government would only select a small number of Indian tribes with which to work, but anything is better than nothing for the communities that are in the worst position. There simply is no time to wait around.

Our proposal is similar to the statutes that now authorize Indian tribes to take control over government functions formerly administered by the Bureau of Indian Affairs or the Indian Health Service, 25 U.S.C. § 450a et seq., and similar to the

early years of tribal self-governance, where the government selected tribes with the best capacity to self-govern. *See* Indian Self-Determination Act Amendments of 1988, Pub. L. 100-472 (1988). Those programs were, and continue to be, runaway successes. Our modified version, as noted above, would require the government to select tribes *with the most need* in the first instance, rather than tribes with the best self-governance capacities. With adequate resources, Indian tribes with the worst crime problems can and, no doubt, will develop alternatives to mass incarceration that conform to the needs of the community, and the customs and traditions of the people in that community. *See generally* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 410-29 (6th ed. 2011) (describing peacemaker courts, drug courts, and other custom and tradition-based alternatives to American-style criminal justice).

Naturally, this proposal is unusual in that it runs against the grain of previous tribal self-governance programs. But we remain in firm belief that the only feasible legal and political solution to Indian country crime is local. As such, tribes would administer their own criminal justice system, and Congress would foot the bill – at least at first – following a modified form of the self-governance model.

Indian tribes not selected based on extreme need can continue to demonstrate greater capacity to enforce law and order in accordance with the Tribal Law and Order Act and, hopefully, the SAVE Native Women Act. Congress can enhance (or the Department of Justice can recognize) enhanced tribal sentencing authority and a greater scope of jurisdiction over nonmembers and non-Indians. The parallel “opt-in” approach will help to resolve, over time, the first major barrier to Indian country law enforcement by removing many of the structural infrastructure impediments to tribal law enforcement.

We believe this combination of approaches will also begin to alleviate many of the issues that form the second barrier, which we term the “legal” barrier to general tribal criminal jurisdiction.

The legal barrier is articulated in numerous recent Supreme Court decisions casting tribal jurisdiction over nonmembers in a negative light. The most obvious legal barrier is *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), which held that Indian tribes do not have inherent authority to prosecute non-Indians. The Court in *Duro v. Reina*, 495 U.S. 676 (1990), extended that holding to nonmember Indians. After Congress attempted to restore the inherent tribal authority to prosecute nonmember Indians in the “Duro fix,” the Supreme Court held in *United States v. Lara*, 541 U.S. 193 (2004), that Congress had authority to adjust the “metes and bounds” of tribal sovereignty in restoring inherent tribal authority. *See*

Hearing on the Constitutionality of Legislation Restoring Tribal Criminal Jurisdiction over Non-Indians before the Senate Committee on Indian Affairs, 110th Cong., 1st Sess. (June 21, 2007) (Prepared Testimony of Riyaz A. Kanji). While the authority of Congress to recognize inherent tribal criminal jurisdiction does not appear to be in doubt, the policy concerns articulated by the various Justices over the past 20 years bear mentioning.

In *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. ___, 128 S. Ct. 2709 (2008), the Court's most recent judgment against tribal court authority, Chief Justice Roberts' narrow opinion rejecting tribal court civil jurisdiction over a nonmember-owned bank that had conducted business on the Cheyenne River Sioux Tribe's reservation noted two possible reasons why tribal courts should never have jurisdiction over nonmembers.

First, the Chief Justice cited a 19th century case, *Talton v. Mayes*, 163 U.S. 376 (1896), which stands for the proposition that the United States Constitution does not apply to limit the authority of tribal governments. Indian tribes predate the Constitution, were not invited to the constitutional convention, and did not consent to the Constitution's application. Chief Justice Roberts' opinion signals that the Court is concerned that tribal courts might not conform to American constitutional law. Second, Chief Justice Roberts asserted that Indian courts "differ from traditional American courts in a number of significant respects." 128 S. Ct. at 2724 (quoting *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring)). Here, he cited to Justice Souter's separate opinion in *Nevada v. Hicks* in which Justice Souter expressed a wide variety of practical fairness problems in allowing tribal courts to exercise civil jurisdiction over nonmembers. Notably, Justice Souter asserted that tribal law was "unusually difficult for an outsider to sort out." *Hicks*, 533 U.S. at 385 (Souter, J., concurring). Importantly, Justice Souter appeared to have largely dropped his objections to tribal court jurisdiction over nonmembers in *Plains Commerce Bank*, and joined the dissent favoring tribal jurisdiction.

Perhaps like Justice Souter, the United States Department of Justice (DOJ) made an abrupt about-face on the question of tribal criminal jurisdiction. DOJ recently proposed a dramatic expansion of American Indian tribal criminal jurisdiction in its recommendations to Congress on the reauthorization of the Violence against Women Act. Ronald Weich, Assistant Attorney General, to Joseph R. Biden, Jr. (July 21 2011).⁶ After decades of often declining to support expanded tribal criminal jurisdiction, the Department of Justice has proposed that Congress recognize the inherent authority of Indian tribes to prosecute domestic violence and related crimes against all persons regardless of race. The proposal is

⁶ The letter is available at <http://turtletalk.files.wordpress.com/2011/07/justice-department-legislativeproposal-on-violence-against-native-women.pdf>.

an incredibly important development in the fight against Indian country crime. DOJ finally supports the reaffirmation of at least limited authority to prosecute such crime by the first responders in Indian country – Indian tribes.

Senator Akaka and nine co-sponsors recently introduced the SAVE Native Women Act, S. 1763 (2011). The highlight of the bill is a restoration of the tribal authority to prosecute non-Indian domestic violence. *Id.* § 201. The bill also would recognize tribal authority to “issue and enforce protection orders” against all persons. *Id.* § 202. *Cf. Martinez v. Martinez*, No. C08-5503 FDB, 2008 WL 5262793 (W.D. Wash., Dec. 16, 2008) (rejecting tribal authority to enforce personal protection order against nonmembers under the Violence against Women Act).

The SAVE Native Women Act is a limited one, given the political climate, but symbolically important. It is not a full-on “fix” to the Supreme Court’s common law determination in the late 1970s that Indian tribes are prohibited from exercising criminal jurisdiction over non-Indians. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Despite these limitations, DOJ’s recommendations – coming on the heels of the Tribal Law and Order Act – may pave the way toward greater ability of Indian tribes to respond to Indian country crime in the future.

We believe that any solution to Indian country crime that places Indian tribes in the front-line – where they properly should be – requires a clear and cogent response to these concerns, regardless of whether the Supreme Court would strike down an Act of Congress providing for such a solution. Growing tribal capabilities through a series of legislative and administrative enhancements goes a long way toward resolving these issues, but this approach alone is no guarantee that the Supreme Court will be supportive of increased tribal authority over nonmembers. We point to Justice Kennedy’s ongoing concerns about the authority of Congress, in tribal and other contexts, to effectively subject American citizens to the governmental authority of sovereigns not limited by the United States Constitution. *See Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (“Our basic charter cannot be contracted away like this.”); *United States v. Lara*, 541 U.S. 193, 211 (2004) (Kennedy, J., concurring in the judgment) (noting consent theory problems with the Duro fix).

The most obvious and compelling answer to this concern is for Congress to enhance the habeas provision in the Indian Civil Rights Act, 25 U.S.C. § 1303. While we refrain from drafting specific language, we suggest that the amendment accomplish two things. First, we suggest requiring an automatic stay of a tribal court sentence pending exhaustion of tribal appellate remedies (if any) and federal

habeas review. *Compare Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995) (requiring exhaustion), *with Necklace v. Tribal Court of Three Affiliated Tribes*, 554 F.2d 845 (8th Cir. 1977) (allowing early habeas petition). *See also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (allowing stay of tribal court proceedings to review tribal authority in federal court); *Duro v. Reina*, 495 U.S. 676 (1990) (same). The second would be to clarify the standard of review in the federal habeas proceeding by requiring that federal courts apply federal constitutional standards in reviewing tribal convictions. It is possible that federal courts might apply this standard already, but there is some conflicting authority. *Compare Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir.) (applying federal standards), *cert. denied*, 519 U.S. 1041 (1996), *with Smith v. Confederated Tribes of the Warm Springs Reservation*, 783 F.2d 1409 (9th Cir.) (applying flexible standards to protect tribal sovereign prerogatives), *cert. denied*, 479 U.S. 964 (1986).

Hopefully, more direct federal court review of tribal court convictions will allay the fears of the Supreme Court, and continue to encourage Indian tribes to develop more perfect tribal justice systems. *Cf. generally* Kevin Gover & Robert Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions under the Indian Civil Rights Act*, 3 *HAMLIN L. REV.* 497 (1985) (recommending federal court review of tribal Indian Civil Rights Act decisions).

If the goal is to provide an avenue for Indian tribes to be the legitimate first responders to Indian country crime even as perpetrated by and against non-Indians, then we recommend a creative, but carefully devised solution that takes into account concerns of the Supreme Court and individuals. Congress could recognize inherent tribal criminal jurisdiction over non-Indians who commit domestic violence against Indian victims for Indian tribes that meet certain minimum criteria and that have sufficient resources. Tribes that demonstrate success can take that success back to Congress and ask for more authority, say, to prosecute nonmember and member felonies, and so on.

Above all other matters, we agree that the long-term goal should be the restore general tribal criminal jurisdiction. According to N. Bruce Duthu:

Even if outside prosecutors had the time and resources to handle crimes on Indian land more efficiently, it would make better sense for tribal governments to have jurisdiction over all reservation-based crimes. Given their familiarity with the community, cultural norms and, in many cases, understanding of distinct tribal languages, tribal governments are in the best position to create appropriate law

enforcement and health care responses — and to assure crime victims, especially victims of sexual violence, that a reported crime will be taken seriously and handled expeditiously.

N. Bruce Duthu, *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 11, 2008.

DESCRIPTION OF THE INDIGENOUS LAW AND POLICY CENTER

The Michigan State University College of Law founded the Indigenous Law and Policy Center under the directorship of Donald E. (Del) Laverdure in 2005. The Center currently is directed by Matthew L.M. Fletcher, Professor of Law at MSU, Wenona T. Singel, Assistant Professor of Law at MSU, and Kathryn E. Fort, Adjunct Professor of Law at MSU and Staff Attorney to the Center. Elaine M. Barr is the 2011-2012 Fellow for the Center, and a member of the Eastern Band of Cherokee Indians. Rose Petoskey is Program Coordinator for the Center, a MSU undergrad, and a member of the Grand Traverse Band. The Center staff also hosts, edits, and authors *Turtle Talk*, a frequently updated law blog on American Indian law and policy.

Professor Fletcher is Chief Justice of the Poarch Band of Creek Indians, and an appellate justice for the Hoopa Valley Tribe, the Nottawaseppi Huron Band of Potawatomi Indians, and the Pokagon Band of Potawatomi Indians. He is a member of the Grand Traverse Band of Ottawa and Chippewa Indians. Professor Singel is an appellate justice for the Little Traverse Bay Bands of Odawa Indians, and a member of that tribe.

Professor Fletcher has authored several commentaries on Indian country criminal law and jurisdiction, including one commentary on the Tribal Law and Order Act. See Matthew L.M. Fletcher, *DOJ Takes Step Toward Addressing Violent Crime Against American Indian Women*, ACS Blog post (Aug. 4, 2011).⁷ Earlier writings on Indian country criminal law and jurisdiction by Professor Fletcher include: *Sovereign Comity: Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts*, 45:1-2 COURT REV. 12 (2009); *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, American Constitutional Society Issue Brief (March 2009);⁸ and *United States v. Lara: Affirmation of Tribal Criminal Jurisdiction over Nonmember Indians*, 83 MICH. B. J., July 2004, at 24.

Professors Fletcher, Fort, and Singel co-authored a short paper on Michigan Indian country public safety intergovernmental agreements. See Matthew L.M. Fletcher, Kathryn E. Fort, and Wenona T. Singel, *Indian Country Law Enforcement and Cooperative Public Safety Agreements*, 89 MICH. B.J., Feb. 2010, at 42. This paper was based on a MSU Indigenous Law and Policy Center study supervised by Professors Fort and Singel titled *Criminal Justice in Indian Country*:

⁷ This blog post is available at <http://www.acslaw.org/acsblog/doj-takes-step-toward-addressing-violent-crime-against-american-indian-women>.

⁸ This paper is available at <http://www.acslaw.org/files/Fletcher%20Issue%20Brief.pdf>.

The Solution of Cross Deputization, Indigenous Law & Policy Center Working Paper 2008-01 (July 2008).⁹

The MSU College of Law is one of only a few law schools in the country to offer an Indigenous Law Certificate. The College of Law offers traditional law classes on indigenous topics, and an experiential learning class offered through the Center, required for the Certificate. In this way, the College of Law, through the Indigenous Law and Policy Center, demonstrates its commitment to the education of Native law students as well as the training of lawyers prepared to work on behalf of tribes around the country, whether for tribal governments, private law firms or non-profit organizations.

We thank the participants of the 8th Annual Indigenous Law and Policy Conference, “*Beyond the Tribal Law and Order Act: Can (Should) Congress Enact an Oliphant Fix?*”, all of whom contributed immensely to the ideas expressed in this Statement. We also thank MSU 2L Victoria Hatch, a member of the White Earth Band of Ojibwe, for her contributions.

Miigwetch!

Michigan State University College of Law Indigenous Law and Policy Center:
Matthew L.M. Fletcher
Wenona T. Singel
Kathryn E. Fort
Elaine M. Barr
Rose Petoskey

⁹ This paper is available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>.