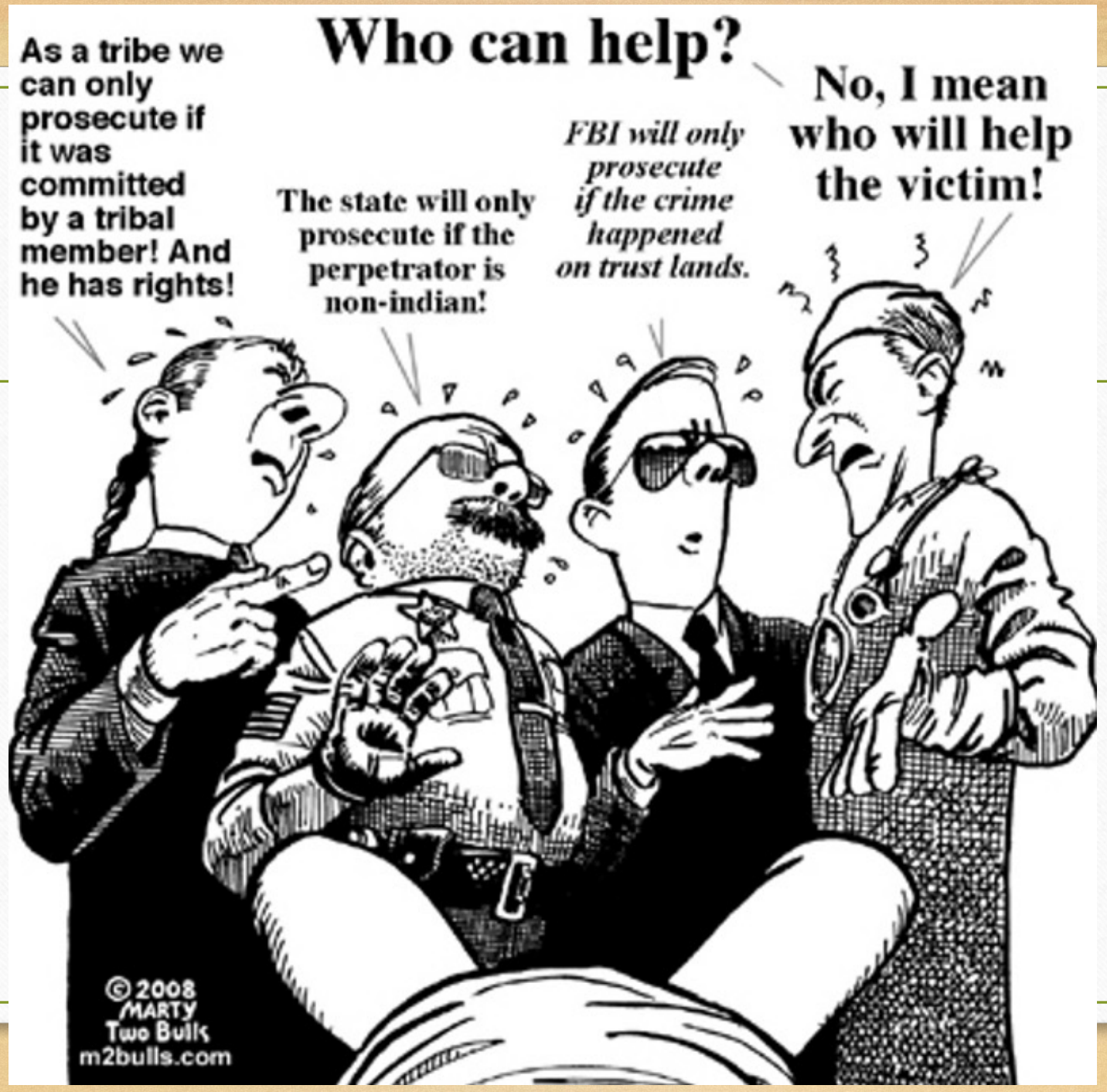
Reforming Criminal Procedure in Indian Country

University of North Dakota

Indian Law Symposium – March 24, 2022

Topics

- VAWA 2022
- Consent to Jurisdiction
- Extradition


Who can help?
As a tribe we can only prosecute if it was committed by a tribal member! And he has rights!
The state will only prosecute if the perpetrator is non-indian!
FBI will only prosecute if the crime happened on trust lands.
No, I mean who will help the victim!
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Criminal Jurisdiction in Indian Country

- Tribes cannot criminally prosecute non-Indian criminals
  - Oliphant v. Suquamish, 435 US 191 (1978)
- States cannot criminally prosecute non-Indians who commit crimes against Indian victims
  - Williams v. United States, 327 U.S. 711 (1946)

- "While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian."
  - -Williams v. United States at 714

Criminal Jurisdiction in Indian Country

- That leaves the federal government…
  - Until 2010 there was little mandatory reporting
  - Before TLOA's enactment federal prosecutors declined to file charges in 52% of cases involving the most serious crimes in Indian country, including almost half of all murder cases and two-thirds of all sexual assault cases.
  - "Testimony around TLOA even revealed that federal prosecutors have been 'punished' internally for focusing too much on Indian country crimes." Crime and Governance in Indian Country, 63 UCLA L. Rev. 1564 (2016).

VAWA 2013

- The inherent criminal power of Indian tribes includes the ability to prosecute non-Indians for 3 offenses
  - Domestic Violence
  - Dating Violence
  - Violation of a Protection Order

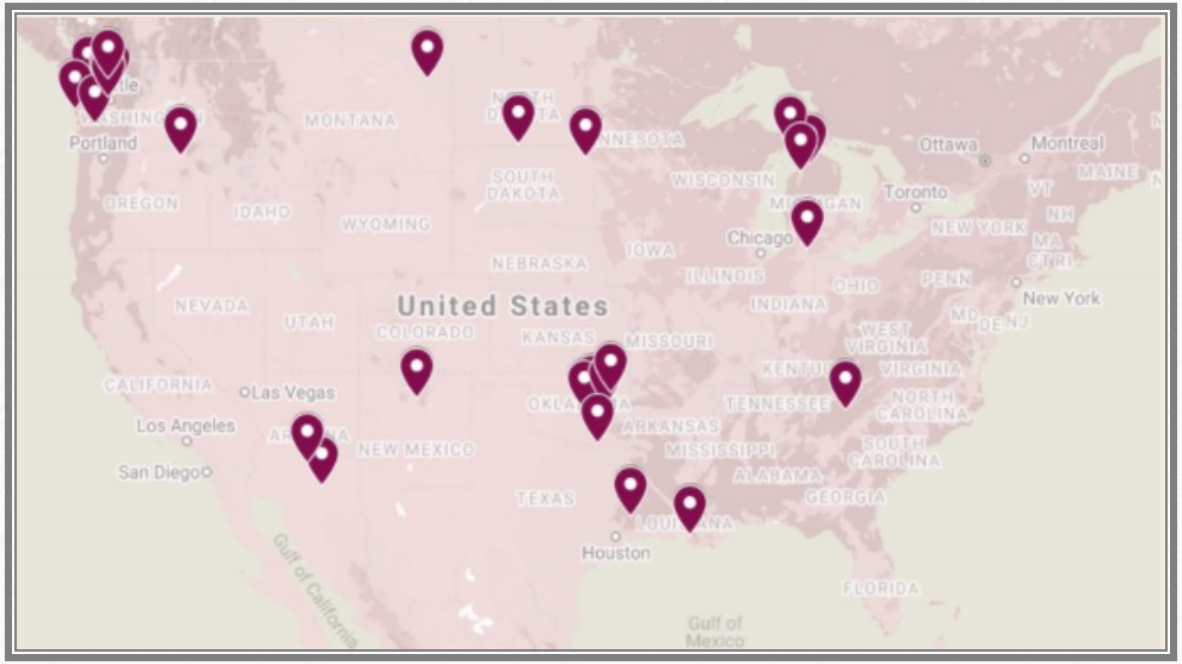
VAWA 2013

- Limitations
  - No jurisdiction over non-Indian on non-Indian crime
  - SDVCJ only applies if the defendant
    - Resides in the Tribe's Indian Country
    - Is employed by the Tribe
    - Is a spouse or partner of a tribal member, or an Indian who resides in the Tribe's Indian country

SDVCJ

NCAI reports that as of Feb. 2021, 27 Tribes have assumed Special Domestic Violence Criminal Jurisdiction

- Standing Rock Sioux
- Sisseton-Wahpeton Oyate
- Assiniboine and Sioux Tribes of the Fort Peck Reservation



More Needs to be Done

- The 2022 VAWA Reauthorization made the following findings:
  - More than 4 in 5 Native women have experienced violence in their lifetime
  - 96% of Native women and 89% of Native men who are victims of sexual violence, have experienced sexual violence by a non-Indian perpetrator
  - DOJ's 2017 report – 66% of federal declinations involved assault, murder, or sexual assault
  - A majority of cases involving SDVCJ since 2013 have involved children as either witnesses or victims to the violence

2022 Reauthorization

- On March 15 – VAWA Reauthorization was signed into law as part of the 2022 Consolidated Appropriations Act
- Replaces Special Domestic Violence Criminal Jurisdiction with "special Tribal criminal jurisdiction"
- Implementing Tribes now have jurisdiction over
  - Assault of Tribal justice personnel
  - Child Violence
  - Dating Violence
  - Domestic Violence
  - Obstruction of Justice
  - Sexual Violence
  - Sex Trafficking
  - Stalking
  - Violation of a Protection Order

2022 Reauthorization

- Allows tribal jurisdiction for the first time for non-Indian on non-Indian crime involving "obstruction of justice" and "assault of Tribal justice personnel"
- Removed entirely the requirement that a non-Indian defendant have ties to the Tribe in order to be prosecuted under VAWA

Consenting to Jurisdiction

Rule 9(B)(3) of the Northern Cheyenne Code of Criminal Rules provides, in part:

"If the defendant is a non-Indian, the Court shall explain his right to assert lack of personal jurisdiction of the Court over the defendant in a criminal action. If the defendant affirmatively elects to waive personal jurisdiction, the action shall proceed as if the defendant were an Indian. If the non-Indian defendant does not affirmatively waive the lack of personal jurisdiction, the action shall become a civil action to exclude the defendant from the Reservation. . . . The defendant may assert or waive lack of jurisdiction at any time prior to the start of trial."

Roberts v. Elliott (In re Roberts Litig.), 693 Fed. Appx. 630 (9th Cir. 2017)

- Sherri Roberts (a non-Indian) was charged with trespass by the Northern Cheyenne Tribal Court.
- With her advocate present, and after being informed of the consequences of consent, Ms. Roberts affirmatively consented to the criminal jurisdiction of the tribal court.
- When she failed to appear – bench warrants were issued.
- Non-Indian BIA officers twice arrested her on the basis of those warrants.
- Ms. Roberts brought a *Bivens* action – alleging the BIA officers violated her constitutional rights and a Federal Tort Claims Act claim for false arrest

Roberts v. Elliott (In re Roberts Litig.), 693 Fed. Appx. 630 (9th Cir. 2017)

- Ninth Circuit (Bybee, M. Smith, Christen) unanimously affirmed the dismissal of all claims
  - "The Supreme Court has not addressed the interaction between *Oliphant*'s rejection of inherent criminal jurisdiction over non-Indians and a non-Indian's ability to waive the question of personal jurisdiction before the tribal court in criminal matters. The extent to which a non-Indian may consent to tribal jurisdiction is not settled law."
  - Even officer knowledge that Ms. Roberts was a non-Indian would be insufficient for her to recover because "the tribal court rules provide for waiver of lack of personal jurisdiction over non-Indians."

Roberts v. Elliott (In re Roberts Litig.), 693 Fed. Appx. 630 (9th Cir. 2017)

- On the Federal Tort Claims Act
  - "The bench warrant was issued pursuant to the tribal judge's correct determination that Roberts failed to appear at a status conference, which established probable cause to arrest her. Even if Roberts is correct that the warrant was not actually valid, that does not dispute the facial validity of the warrant in the eyes of the arresting officers for the purpose of the tort analysis."


IMPLICATION


EXTRADITION

Constitutional Requirement

- Article IV Section 2 of the U.S. Constitution
  - "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."
- But the Constitution does not apply to tribal government.

Constitutional Requirement

- But the Constitution does not apply to tribal government.
  - Talton v. Mayes (1896) ("as the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government")
  - United States v. Wheeler (1978)
  - Michigan v. Bay Mills (2014) ("While each State at the Constitutional Convention surrendered its immunity from suit by sister States, 'it would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity against state-initiated suits.")

Arizona ex rel. Merrill v. Turtle (9th Cir. 1969)

- Oklahoma's Governor asked Arizona's Governor to extradite to OK a Cheyenne Indian accused of second degree forgery who was living with his wife on the Navajo Reservation in AZ.
- AZ Governor ordered the Sheriff in Apache County to execute the warrant after the Navajo refused to extradite
- Defendant sought a write of habeas corpus – arguing that the State of Arizona had no authority to arrest him on the Reservation

Arizona ex rel. Merrill v. Turtle (9th Cir. 1969)

- 9th Circuit Agreed and Ordered Defendant Released
  - We have been referred to no specific Congressional action limiting the power of the Navajo tribal government to deal with the extradition of Indians resident within the Reservation or granting to the State of Arizona the authority to exercise extradition jurisdiction over such residents. In these circumstances, Arizona's right to exercise the jurisdiction claimed must be determined in light of whether such exercise would "infring[e] on the right of reservation Indians to make their own laws and be ruled by them," or, as the *Williams*' test was characterized by the court in *Kake, Organized Village of v. Egan*, 369 U.S. 60 (1961), "whether the application of that law would interfere with reservation self-government."
  - The Navajo Nation had an extradition code that would not permit extradition to OK

Extradition

- There is no constitutional power for a state to order the extradition of an Indian from Indian country
- When does a state have to comply with the tribe's extradition code?

Benally v. Marcum, P.2d 1270 (N.M. Sup. Ct. 1976)

- NM Police attempted to stop a Navajo man who was allegedly operating a vehicle while intoxicated in Farmington, NM.
- While being chased by state police – Defendant entered the Navajo Reservation, was apprehended, and brought back to NM
- Defendant made a special appearance to contest jurisdiction, but the trial court found jurisdiction was proper.
- Defendant sought a writ of prohibition from the appellate court, arguing that since he was an Indian apprehended on the reservation that NM had to comply with the Navajo extradition ordinance. The writ was rejected.
- Defendant appealed to the NM Supreme Court

Benally v. Marcum, P.2d 1270 (N.M. Sup. Ct. 1976)

- Unanimous Supreme Court ordered Benally released
  - "Where suppression of evidence will not suffice, however, we must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct, and when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, which guarantees 'the right of the people to be secure in their persons *** against unreasonable *** seizures,' the government should as a matter of fundamental fairness be obligated to return him to his status quo ante."

Davis v. Muellar, 643 F.2d 521 (8th Cir. 1981)

- Davis – a member at Turtle Mountain – made a call from the Reservation to a woman (off reservation) that contained a death threat
- Tribal police, acting with ND police, notified Davis at his place of employment that was he wanted for questioning at the Tribal Law and Order Office
- Davis refused to waive extradition and requested a hearing, but no tribal judges were available.
- State officers then transported Davis off the reservation into state custody even though they were aware of the extradition requirement.

Davis v. Muellar, 643 F.2d 521 (8th Cir. 1981)

- Sharply Divided 2-1 Opinion – Upheld the Removal
  - "We do not disagree that there is a special and unique relationship between the government and the tribes nor do we question the power of the United States to alter the Ker-Frisbie personal jurisdiction rule. But we are unable to find that the United States has by policy, by treaty, by statute or by court decision decreed North Dakota's loss of personal jurisdiction over appellant as a penalty for having arrested appellant in violation of the tribal extradition ordinance here involved."
- The dissent castigated the majority for ignoring the role of tribal sovereignty

Davis v. Muellar, 643 F.2d 521 (8th Cir. 1981)

- Judge McMillian Dissenting
  - It is almost always a mistake to seek answers to Indian legal issues by making analogies to seemingly similar fields. General notions of civil rights law and public land law, for example, simply fail to resolve many questions relating to American Indian tribes and individuals. The extraordinary body of law and policy holds its own answers, which are often wholly unexpected to those unfamiliar with it.

Davis v. Muellar, 643 F.2d 521 (8th Cir. 1981)

- Judge McMillian Dissenting
  - The *Ker-Frisbie* doctrine is, however, inapplicable to a state's violation of the tribal extradition ordinance. The state cannot exercise jurisdiction over the Indian fugitive, not because of a violation of the Indian fugitive's individual rights, but because of Congressional intent that the state recognize tribal sovereignty by complying with the tribal extradition ordinance. Where Congress has expressed its intention regarding the affairs of Indians, over which it has plenary authority, it is not for the courts to attempt to balance state interests against tribal interests. There is a federal policy of encouraging Indian self-government. State violation of tribal extradition ordinances impedes tribal self-government. Therefore, in my opinion, the state court should not be allowed to maintain jurisdiction over Davis until the Rolette County officials comply with the Turtle Mountain tribal extradition ordinance.

Extradition Cont.

- State v. Beasley, 199 P.3d 771 (Id. App. Ct. 2008)
  - Extradition requirements are not triggered by the identity of the arresting officer, but rather by the location of the arrest. Beasley was not present on the Fort Hall Indian Reservation and using it as an asylum when he was stopped. The stop occurred in an area of concurrent jurisdiction. The fact that tribal officers were the first to stop Beasley, before he injured himself or innocent motorists, arose from a coordinated effort with State Police and does not alter the fact that the tribal extradition code is not triggered by these facts.

Extradition From State to Tribe

- Schaur v. Burleigh County, Civ. No. A1-85-37 (D. N.D. March 30, 1987)
  - ND State Officer arrested an Indian pursuant to a tribally issued warrant.
  - "North Dakota's arrest statutes make no provisions for situations in which a person who is charged with a crime by an Indian tribe is within the jurisdiction of the state."
  - Given this silence the federal court looked to common practice and concluded that "North Dakota would recognize an exception to the general rule that warrants issued in one jurisdiction have no validity outside the boundaries of that jurisdiction. The court concludes, therefore, that the Burleigh County Sheriff's department had the authority to execute the tribal court warrant."