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OP-ED CONTRIBUTOR

Broken Justice in Indian Country

By **N. BRUCE DUTHU**

White River Junction, Vt.

ONE in three American Indian women will be raped in their lifetimes, statistics gathered by the United States Department of Justice show. But the odds of the crimes against them ever being prosecuted are low, largely because of the complex jurisdictional rules that operate on Indian lands. Approximately 275 Indian tribes have their own court systems, but federal law forbids them to prosecute non-Indians. Cases involving non-Indian offenders must be referred to federal or state prosecutors, who often lack the time and resources to pursue them.

The situation is unfair to Indian victims of all crimes — burglary, arson, assault, etc. But the problem is greatest in the realm of sexual violence because rapes and other sexual assaults on American Indian women are overwhelmingly interracial. More than 80 percent of Indian victims identify their attacker as non-Indian. (Sexual violence against white and African-American women, in contrast, is primarily intraracial.) And American Indian women who live on tribal lands are more than twice as likely to be raped or sexually assaulted as other women in the United States, Justice Department statistics show.

Rapes against American Indian women are also exceedingly violent; weapons are used at rates three times that for all other reported rapes.

Congress should step in and clearly establish the authority of Indian tribes to investigate and prosecute all crimes occurring on Indian lands — no matter whether tribal members or nonmembers are involved.

Historically, Indian tribes have exercised full authority over everyone within Indian lands. A number of the early federal treaties expressly noted a tribe's power to punish non-Indians. Toward the latter part of the 19th-century, however, federal policy shifted away from tribal self-government in favor of an effort to dismantle tribal government systems. Criminal law enforcement, especially in cases involving non-Indians, increasingly came to be viewed as a federal or state matter.

Thirty years ago, the Supreme Court formalized the prohibition against tribes prosecuting non-Indians with its decision in *Oliphant v. Suquamish Indian Tribe*. In this case, a Pacific Northwest tribe was attempting to try two non-Indian residents of the Port Madison Reservation for causing trouble during the annual Chief Seattle Days celebration — one for assaulting an officer and resisting arrest and the other for recklessly endangering another person and harming tribal property. The court held that the tribe, as a “domestic dependent nation,” did not possess the full measure of sovereignty enjoyed by states and the national government, especially when it came to the affairs of non-Indian citizens.

Then in 1990, the court extended its *Oliphant* ruling to cases involving tribal prosecution of Indian offenders who are not members of that tribe. Congress subsequently passed new legislation to reaffirm the power of tribes to prosecute non-member Indian offenders, but it left the *Oliphant* ruling intact.

This means that when non-Indian men commit acts of sexual violence against Indian women, federal or state prosecutors must fill the jurisdictional void. But law enforcement in sexual violence cases in Indian country is haphazard at best, recent studies show, and it rarely leads to prosecution and conviction of non-Indian offenders. The Department of Justice’s own records show that in 2006, prosecutors filed only 606 criminal cases in all of Indian country. With more than 560 federally recognized tribes, that works out to a little more than one criminal prosecution for each tribe.

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.

Congress should enact legislation to overrule the *Oliphant* decision and reaffirm the tribes’ full criminal and civil authority over all activities on tribal lands. This law should also lift the sentencing constraints imposed in 1968 that restrict the criminal sentences that tribal courts can impose to one year in jail and a \$5,000 fine. In cases of rape, state court sentences typically exceed 8 years, while federal sentences are more than 12 years. Tribes should have the latitude to impose comparable sanctions. (A bill pending in Congress would extend tribal sentencing authority to three years, with more latitude in cases of domestic violence, but its prospects of passage are uncertain.)

Congress recently allocated \$750 million for enhancing public safety in Indian country. This money will help tribes hire and train more police, build detention facilities and augment federal investigative and prosecutorial capacity for Indian country crimes. Ideally, the grant process will be efficient enough to make sure that this money reaches the places most in need.

But financial aid will not be enough to stop sexual violence against Indian women. Tribal courts have grown in sophistication over the past 30 years, and they take seriously the work of administering justice. Congress must support their efforts by closing the legal gaps that allow violent criminals to roam Indian country unchecked.

N. Bruce Duthu, a professor of Native American studies at Dartmouth, is the author of "American Indians and the Law."

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