

Crisis Situation for Native American Women in a Broken Legal System

By Cynthia L. Cooper

The stories of Helen Parisien, manager of the Bridges Against Domestic Violence near one of the Lakota Indian reservations in South Dakota, stand out most for how common she says they are. She described her experiences in detail to the U.S. Senate Committee on Indian Affairs in September 2007.

"I received a call concerning a young woman who reported being physically beaten and raped. . . . I had to make numerous calls in an attempt to get cooperation from law enforcement. . . . When I finally reached the investigator, I was told he would be down that same afternoon to interview the victim. He did not come down. . . . The police never did do an investigation. In continuing conversations with this woman, she told me that she lived in daily fear of being found by her abuser," Parisien said. "While it may seem to you that these incidents are extreme, I am sorry to say they are the norm."

A broken system in handling sexual assault and domestic violence cases of Native Americans and Alaskan

Natives is marked by confounding criminal jurisdiction and a woeful lack of resources. "Women and children bear the brunt of it because they are the ones with the least power," says lawyer Caitlin Collier, who provided legal assistance to victims for the South Dakota Coalition Against Domestic Violence and Sexual Assault.

Violence against Native American women has reached crisis levels. The Department of Justice reported that Native American women face the highest rates of sexual assault in the United States, more than double the rates experienced by other women. One in three Native women is sexually assaulted in her lifetime, according to the Department of Justice. Advocates reported 44 rapes in a single weekend on the Pine Ridge Reservation in South Dakota.

"We've created an atmosphere for violence, and the victims are women," says Loretta A. Tuell, a Washington, D.C., lawyer who represents tribes.

The federally recognized tribes—there are more than 550—are sovereign nations with a special relationship to the United States. Tribal authority is both recognized and limited by federal law. But a crazy-patch scheme puts the prosecution for sexual violence in tribal, federal, or state jurisdiction depending on a confusing conglomeration of rules.

"It's hard to know where to begin because it's such a mess," says Sarah Deer, an assistant professor at William Mitchell College of Law in St. Paul, Minnesota, and a scholar on women and Indian law. For example, tribal courts may not prosecute non-Indians, no matter what crimes they commit. Yet, according to reports from the Justice Department, more than 85 percent of the perpetrators of rape and sexual violence against Indian women are non-Indians. "For the tribes, their hands are tied," Deer says.

The situation results in "rape with impunity," according to Amnesty International USA, which in 2007 released a report, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA*.

"The issues of sexual assault and domestic violence are certainly very serious issues in Indian Country and within Alaska Native communities," says Sen. Lisa Murkowski (R-Alaska), a former prosecutor now serving on the Senate Committee on Indian Affairs. "The jurisdictional scheme on Indian reservations provides law enforcement challenges, as well as a lack of adequate resources to cover remote and rural communities on Indian reservations," she adds.

Tuell is more blunt: "People who want to commit crimes go onto reservations."

Determining Jurisdiction

Jurisdiction is a primary part of the mess. Indian tribes retain the power to establish tribal courts, and about 350 exist, many of which include appellate systems. However, in 1883 Congress placed authority for most felonies in Indian Country—as the land is known in federal law—in federal courts in the Major Crimes Act. Public Law 280 in 1953 assigned jurisdiction for certain reservations to selected states (California, Minnesota, Nebraska, Oregon, Wisconsin, and later Alaska). In addition, all states had the option to take over jurisdiction between 1953 and 1968, and a number did so. A 1968 law, the Indian Civil Rights Act, limited the sentencing authority of tribal

courts: currently one year's imprisonment or a \$5,000 fine.

Other complications for sexual assault victims came after the 1978 ruling of the U.S. Supreme Court in *Oliphant v. Suquamish Indian Tribe* (435 U.S. 191), holding that tribal courts do not have criminal jurisdiction over non-Indians absent specific congressional approval. The case arose from a Pacific-Northwest tribe that charged a non-Indian with assault on a tribal police officer. Writing the 6-2 majority opinion, then-Associate Justice William Rehnquist said that the guarantees of due process were not the same in the tribal court, noting for example that non-Indians were excluded from juries. *Id.* at 194.

Lack of jurisdiction over non-Indians is a problem, says Matthew Fletcher, an associate professor at Michigan State University College of Law and director of the Indigenous Law and Policy Center at the university in East Lansing, Michigan. "Large numbers of people who are not tribal citizens reside or conduct business in Indian Country, or have Indian spouses and intimate partners who reside there."

Note that Amnesty International reports that 3,600 of the 9,000 residents of the Standing Rock Reservation in the Dakotas were non-Native.

The lack of jurisdiction rule creates nightmares for federal prosecutors. Thomas Heffelfinger, a former U.S. Attorney in Minnesota, says federal prosecutors must research the heritage of the victim and defendant (generally referring to state courts if both are non-Indian) and must determine that the crime was committed on Indian land—also not simple. "You need a GPS in your squad car to determine if it is Indian Country. It adds delays to criminal enforcement and prosecution, and delays mean justice doesn't follow very well," Heffelfinger reports.

The Senate Committee on Indian Affairs reported that between 2004 and 2007, federal prosecutors declined to prosecute 72 percent of child sexual crimes and 75 percent of adult rape cases referred from Indian Country.

"There is a need for simplification

of the law as it applies to Indian Country," Heffelfinger says. "In the area of public safety, no one is in need more than Native women and children."

Resources Fall Short

Limited resources and remote lands also cause difficulties for sexual assault victims. Sen. John Barrasso (R-Wyo.), a member of the Senate Committee on Indian Affairs, said in February 2009 that the Wind River Reservation in his state is nearly the size of Connecticut but has no more than two full-time police officers on 24-hour duty.

Sexual assault and domestic violence prosecutions are marked by confounding criminal jurisdiction and a lack of resources.

Collection of evidence with standardized rape kits also falls short. Beginning in 2003, the National Congress of American Indians Task Force on Violence Against Native Women and others began campaigning for the Indian Health Service (IHS) to follow standardized sexual assault policies and protocols, or SAPPs. The Violence Against Women Act of 2005 finally addressed some of their concerns, but the programs remained unfunded and unimplemented. Most recently, the Omnibus Appropriations Act of 2009 signed by President Barack Obama in March authorized an IHS Sexual Assault Nurse Examiner program.

Domestic violence presents a similarly bleak picture. A report by the Centers for Disease Control and Prevention in February 2008 found that 39 percent of Native Indian women experience domestic violence, the highest of any group in the United States.

Murkowski notes that Alaskan Native Villages are especially isolated—one-third do not even have a road. "When a woman or child is a victim of domestic violence, there is nowhere to go. Your abuser is not only known to you, but to the whole community. It is just very, very difficult," she says.

In the Violence Against Women Act of 1994, Congress required U.S. jurisdictions to give full faith and credit to tribal protection orders and vice versa. See 18 U.S.C. § 2262. But under *Oliphant* non-Indian partners, responsible for one-quarter of the assaults, are still out of reach. Tribal systems also have been denied access to a federal database to either enter or find existing protection orders, according to the National Congress of American Indians.

Other legal and cultural problems can arise for domestic violence victims when their cases go to state courts, for example, if they live off-reservation. Antoinette Sedillo Lopez, a professor at the University of New Mexico in Albuquerque who guides clinic programs, says in one family law case from the clinic, a state court judge thought a Navajo woman was too depressed to parent because she was quiet. "This is her culture: She's deferential; she's quiet. But she's a nursing student and she's doing really well, and the judge is talking about taking the kids away. There's a lack of cultural sensitivity," Lopez says.

Collier saw instances of hostility toward Native women in South Dakota state courts. "They are treated differently, no doubt about it," she says. She notes that on reservations, however, the tribal judges are often closely tied to tribal authorities, and some women fear they will not be heard. "There is no 'one size fits all,'" she adds.

Incremental, Long-Term Solutions

To better address crime on reservations, Sen. Byron L. Dorgan (D-N. Dak.) introduced the Tribal Law and Order Act of 2009 (S. 797) in April. The multifaceted legislation would give tribal courts the ability to

(Continued on page 14)

RIDING THE WAVES OF IMMIGRATION LAW

(Continued from page 9)

practice, she admits to waking up in the middle of the night. “I worry that I didn’t cross a t or dot an i, and you get so involved in people’s personal lives. But I am totally upfront with a client from the very beginning and try to manage expectations so they make their own decisions.”

Riding the Waves

In addition to the emotional component, the uncertainties and vagaries inherent in the practice of immigration law can make it difficult to manage a practice efficiently.

“Adjudications and standards can change on a weekly basis. We might see a change initiated by the Immigration Services, which then will see a trend or a profile and the standards change. Occasionally there’s a law change and everyone runs to comply with it,” says Susan Fortino-Brown, another Chicago practitioner who serves as a liaison to the U.S. Citizenship and Immigration Services in Lincoln, Nebraska.

Fortino-Brown remembers filing 100 applications in 2007 when the State Department briefly extended filings of applications for Adjustment of Status. “In terms of staffing, it’s very

difficult because anything could disrupt our normal work flow.”

“This area is one where we ride the waves. Sometimes the practice is more focused on getting people through the process because there is an amnesty or a visa lottery; other times it’s about enforcement,” Fortino-Brown says. “The swings have a big effect on how one runs and organizes the practice, but it also affects us emotionally. The first [the process] is filled with many more joys; the second [enforcement] is often sad and more frustrating.”

The Current Climate: What’s to Come

As evidenced in the controversy over health care reform and coverage for undocumented residents, the upcoming immigration reform will most likely be fueled by emotion and heated debate.

While the Obama administration has indicated it will move forward in a positive way, others say workplace enforcement and raids have increased. “This has such an impact on women and children that it gives us call for concern,” Hincapie notes. However, others say that

enforcement is now focused more on keeping employers in compliance rather than punishing workers.

Stricter enforcement at the local level by state or municipalities has civil rights advocates concerned because local officials don’t have the capacity or training for enforcement. “When does it become racial profiling?” Hincapie asks.

For Rodi Alvarado, however, there is hope. In August the Obama administration signaled in a brief concerning the case of a Mexican woman that it is open to granting asylum in cases where women have suffered battery in home countries. More importantly, the brief laid out the criteria for required proof, something that has been unclear in the 13 years since Alvarado first filed.

“We are heartened by that, and hopefully it also will be applied in Rodi Alvarado’s case and it will get resolved in the next couple of months,” Musalo says. “With these two cases we can establish some models and principles that will have an impact in terms of legal standards needed for gender cases.”

Hannah Hayes is a Chicago-area freelance writer.

CRISIS SITUATION FOR NATIVE AMERICAN WOMEN

(Continued from page 11)

sentence for up to three years, enhance policing, provide access to federal databases, and improve training in sexual assault investigations.

Murkowski, a cosponsor of the bill, says, “One important section requires federal employees to testify in tribal court in certain situations. For example, if a woman is harmed, and examined by Indian Health Service providers, that federal employee of the Indian Health Service would be required to testify in tribal court. Too often without adequate evidence, offenders cannot be prosecuted.”

Many Indian advocates see the legislation as positive—if incremental. “The long vision I have is to empower tribes to respond at the tribal level,” Deer says.

“The women are the Natives, and they’re in this no man’s land. People understand the problem of jurisdiction,” Tuell says. “We’ve got to do something about the lack of resources, the lack of will.”

Tribal leaders also are working to build public and community support. Juana Majel-Dixon, a vice president of the National Congress of American

Indians, says violence against women is outside traditional Native cultures. “The stories I’ve been told by elders clearly and profoundly give evidence that, in our societies, domestic violence was not tolerated. Prior to colonization, the men were banished or they weren’t allowed to marry because their seed was sour. You’ve got to wonder, where does this get fixed? As tribal leaders, we want to fix this together,” she says.

Cynthia L. Cooper, an independent journalist in New York City, is a former practicing lawyer who writes frequently about justice topics.