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JOURNAL of LAW REFORM ONLINE

COMMENT

STEPS TO ALLEVIATING VIOLENCE AGAINST WOMEN ON TRIBAL LANDS

Anjum Unwala*

One in three Native American women has been raped or has experienced an attempted rape.¹ Federal officials also failed to prosecute 75% of the alleged sex crimes against women and children living under tribal authority.² The Senate bill to reauthorize the 1994 Violence Against Women Act (VAWA) could provide appropriate recourse for Native American women who are victims of sexual assault.³ This bill (S. 1925), introduced in 2011, would grant tribal courts the ability to prosecute non-Indians who have sexually assaulted their Native American spouses and domestic partners.⁴ Congress has quickly reauthorized the Violence Against Women Act twice before.⁵ But members of the House of Representatives now oppose a provision in S. 1925 that allows tribal courts to prosecute non-Native American criminal defendants, indicating that the battle to pass the bill will be prolonged.⁶

Part of the debate about tribal authorities asserting criminal jurisdiction over non-Indian criminal defendants lies in the

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1. Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES (May 22, 2012), <http://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html?pagewanted=all>.

2. Lindsey Trainor Golden, Note, *Embracing Tribal Sovereignty to Eliminate Criminal Jurisdiction Chaos*, 45 U. MICH. J.L. REFORM 1039, 1041 n.20 (2012), available at http://www.mjlr.org/wp-content/uploads/2012/08/Trainor-FTP-2_C.pdf.

3. Jacey Fortin, *Violence Against Women Act: History of Reauthorization, and Why Democrats Win No Matter What*, INT'L BUS. TIMES (Mar. 16, 2012, 4:31 PM), <http://www.ibtimes.com/articles/315468/20120316/violence-against-women-act-reauthorization-2012.htm?page=all>; see source cited *infra* note 4.

4. S. 1925, 112th Cong. §204 (2011).

5. See Fortin, *supra* note 3.

6. See David Grant, *House Passes Violence Against Women Act, Grudgingly*, CHRISTIAN SCIENCE MONITOR (May 16, 2012), <http://www.csmonitor.com/USA/DC-Decoder/2012/0516/House-passes-Violence-Against-Women-Act-grudgingly>.

Supreme Court and Congress's decades-long struggle to define Native American tribal sovereignty.⁷ Historically, the Indian Commerce Clause in the Constitution has been the "main source of federal power over Indian tribes" and has been used by Congress to "define tribal sovereignty."⁸ The passage of the Major Crimes Act⁹ in 1885 is just one example of a congressionally imposed limitation on tribal sovereignty that diminished tribal authorities' power to criminally prosecute within Indian lands.¹⁰ The Major Crimes Act extends federal jurisdiction over sixteen major crimes when committed by Native Americans in Indian country.¹¹ For crimes in which a Native American is the perpetrator and the victim is Native American or non-Indian, prosecutions of the crimes fall within both federal and tribal jurisdiction.¹²

Approximately 25 percent of domestic violence cases between spouses involve violence inflicted by a non-Indian perpetrator on a Native American woman.¹³ The Supreme Court held in *Oliphant v. Suguamish Indian Tribe*¹⁴ that federal authorities, not tribal authorities, have jurisdiction over non-Indian defendants in crimes.¹⁵ Although the Supreme Court later held in *United States v. Lara* that both tribal and federal courts had jurisdiction over non-member Indian criminal defendants, this authority was not extended to tribal courts for non-Indian criminal defendants.¹⁶ For Native American women who are victims of sexual assault, including assault committed by partners or spouses, reporting such crimes to federal authorities is not always feasible, since many federal officers responsible for tribal lands are often

7. Philip J. Prygoski, *From Marshall to Marshall, The Supreme Court's Changing Stance on Tribal Sovereignty*, ABA, http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/marshall.html (last visited Sept. 20, 2012).

8. *Id.* The Indian Commerce Clause is clause 3 of Article I Section 8 of the Constitution.

9. Major Crimes Act, 23 Stat. 385 (1885) (codified at 18 U.S.C. § 1153 (2006)).

10. See *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL CT. CLEARINGHOUSE, <http://www.tribal-institute.org/lists/jurisdiction.htm> (last visited Sept. 20, 2012).

11. *Id.*

12. *Id.*

13. Lawrence A. Greenfeld & Steven K. Smith, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME at 8 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/aic.pdf>.

14. 435 U.S. 191, 195 (1978).

15. *Id.*

16. 541 U.S. 193, 210 (2004).

“located a substantial distance from tribal communities.”¹⁷ Even when Native American women have reported violent crimes to federal authorities, prosecution of perpetrators has not always happened.¹⁸ For example, in the Navajo Nation, 329 cases of rape were reported in 2007, but there have only been seventeen arrests in these cases as of August 2012.¹⁹

S. 1925, passed by the Senate in April 2012, “would allow Native American women to take American citizens who abuse them to court within the tribal legal system.”²⁰ Although the bill could be an important step for Native American communities in decreasing the rate of violence against Native American women, the House of Representatives fears an over-expansion of tribal power.²¹ The House of Representatives’ VAWA reauthorization bill (H.R. 4970), sponsored by Representative Sandy Adams (R-Fla.), passed in May 2012 and excludes the key provisions that could assist in the prosecution of domestic violence cases on tribal lands.²² The Senate bill allows tribes to prosecute non-Indians for dating violence, violations of protection orders, and domestic violence against Native American women, but does not allow for the prosecution of crimes “between two strangers, or between two non-Indians, or committed by a person with no ties to the tribe.”²³ Defendants also have the same rights in the tribal courts as they would in state courts, including an impartial jury with Indian and non-Indian jury members and the right to free appointed counsel should the defendant be indigent.²⁴ Under the Senate bill,

17. Ryan Dreveskracht, *Revictimizing Native Women for Political Purposes*, INDIAN COUNTRY TODAY (Aug. 25, 2012), http://indiancountrytodaymedianetwork.com/ict_sbc/revictimizing-native-women-for-political-purposes.

18. *See id.*

19. *Id.*

20. *See* Grant, *supra* note 6.

21. *See* Rob Hotakainen, *Congress debates power of tribes to prosecute domestic violence committed by non-Indians*, NEWS TRIB. (Aug. 12, 2012, 6:43 PM), <http://www.thenewtribune.com/2012/08/12/2253652/congress-debates-expanding-power.html>; *see also* Jennifer Bendery, *Violence Against Women Act Reauthorization Overwhelmingly Passes Senate*, HUFFINGTON POST (Apr. 26, 2012, 11:57 PM), http://www.huffingtonpost.com/2012/04/26/violence-against-women-act-passes-senate_n_1456839.html.

22. Jodi Gillette & Lynn Rosenthal, *Addressing Violence Against Native American Women in the Violence Against Women Act Reauthorization*, WHITE HOUSE BLOG (May 14, 2012, 12:20 PM), <http://www.whitehouse.gov/blog/2012/05/14/addressing-violence-against-native-women-violence-against-women-act-reauthorization>.

23. *Id.*

24. *Id.*

defendants can also appeal their convictions in tribal court and file a habeas corpus petition in federal court.²⁵ Although prosecutors, courts, and tribal police officers have successfully combated domestic violence and sexual assault crimes committed by Native Americans on tribal lands, they have been unsuccessful in prosecuting a non-Indian, even if he is married to a tribe member and lives on tribal property.²⁶ Although not all domestic violence and sexual assault crimes are committed by non-Indians, providing a solution to prosecute non-Indian suspects would fill a legal gap in the justice system of tribal communities.²⁷

The debate on the reauthorization of the Violence Against Women Act might lead to a solution that fosters the prosecution of these crimes. To summarize, the Senate version of the legislation passed with bipartisan support and would allow tribes to prosecute non-Native Americans who were believed to have assaulted their Native American partners and spouses. This reform to the Violence Against Women Act of 1994 would enable tribal courts to adjudicate cases that were previously outside their jurisdiction, thus providing a reasonable foundation for a solution to the problem of sexual assault on Native American reservations. Although some members of Congress argued that such a provision might greatly expand tribal authority, and passed a bill excluding the Senate provision, such an expansion is warranted because of the consistent failure to prosecute sexual assault cases on Native American reservations by federal authorities.

The House bill, however, eliminates the provisions that grants Native Americans the ability to prosecute “American citizens who abuse them” in tribal court.²⁸ Instead, Native American women can apply for protection orders from U.S. courts.²⁹ House Republicans fear an expansion of tribal courts’ jurisdiction should the controversial Senate provisions be included in the final reauthorization of VAWA. Similar fears of over-expansion of tribal authority in criminal cases existed in 1990, when the Supreme Court held in *Duro v. Reina*³⁰ that Indian tribes did not have jurisdiction over non-member Indians who committed crimes on

25. *Id.*

26. *Id.*

27. *Id.*

28. *See Grant, supra* note 6.

29. *Id.*

30. 495 U.S. 676 (1990).

the reservation.³¹ The Court stated “the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership.”³² “The Indian Civil Rights Act³³ allowed Indian tribes to assert “criminal jurisdiction over all Indians” including non-member Indians.³⁴ Although concerns about tribal authorities’ exercise of power over non-members existed, Congress decided to allow Native Americans to prosecute non-member Indians in criminal cases in tribal courts. This past expansion of a tribe’s authority demonstrates that S. 1925, with its included limitations on tribal power, is a natural extension of the Indian Civil Rights Act. The Senate bill provides the best solution to the rampant domestic violence and sexual assault on tribal lands while also maintaining defendants’ rights in tribal courts.

31. *See id.* at 692.

32. *See id.* at 679.

33. 25 U.S.C. § 1301 (2006).

34. *Id.*; *see also* TRIBAL CT. CLEARINGHOUSE, *supra* note 10.