



Native American Women Are Rape Targets Because of a Legislative Loophole

Tribal courts can't try non-Native individuals, which means white people can commit crimes on Native American land—including sexual assault—with virtually zero repercussions.



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Dec 16 2015, 8:00am



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By Jessica Rizzo

December 16, 2015, 12:00pm

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All photos courtesy of Amy Casselman

On December 7, 2015, the Supreme Court began hearing oral arguments for the *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, a case occasioned by the sexual assault of a 13-year-old Dollar General employee by his employer. While the Supreme Court doesn't often hear sexual assault cases, this one has a twist: The victim is Native American, and the assailant is white. The Dollar General store sits on the Choctaw reservation, land considered Indian Country (the legal term used by the federal government) and the legal question is whether tribal courts here have the civil jurisdiction to try non-Native individuals who commit crimes there. Many Native people and their allies fear the Supreme Court's verdict could render tribal sovereignty even more precarious than it already is.

No one knows this better than Native women who are survivors of sexual assault. Eighty percent of the reported sexual violence against Native women is committed by white men, who do so with virtual criminal impunity because, with very few exceptions, they cannot be tried in tribal courts. Federal authorities have the authority to step in for serious crimes, like rape or murder, but often decline to

prosecute crimes that have been committed in Indian Country. This jurisdictional black hole has created a climate that many describe as “open season” on Native women on reservations.

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Amy Casselman, a former case worker for the Washoe Tribe of California and Nevada, has authored a forthcoming book on the subject: *Injustice in Indian Country: Jurisdiction, American Law, and Sexual Violence Against Native Women*. I spoke to her to find out why Native women have been left so vulnerable, and what can be done about it.

VICE: What motivated you to write this book?

Amy Casselman: In 2009, I had the honor of meeting a woman named Lavetta Elk who in 2003 was assaulted near her home on the Pine Ridge Indian Reservation by her Army recruiter Staff Sergeant Joseph Kopf. By strategically choosing to assault her on Indian land, he leveraged his identity as a non-Native person to get away with his crime. This is the reality for many Native women because the

jurisdictional law that covers Indian country privileges non-Native people who commit crimes specifically against Native people. In Lavetta's case, because she was Native and Kopf was non-Native, the tribe couldn't prosecute him. The federal government then declined to prosecute. The US military investigated and found that Kopf had in fact sexually assaulted her, but they never prosecuted him. They never even discharged him from the military. As the result of the jurisdictional mess in Indian country, Lavetta was told that there was no justice to be found for her.

Despite this, she did not give up. Instead she aimed higher, and sued the US government for reparations based on treaty rights and won, culminating in one of the most significant legal victories for Native people in recent history. But remember, despite this, her assailant did not pay for his crime—the United States of America did, and Kopf is still a free man.

“Indian country is the only place where race becomes a de jure factor in criminal prosecution.” — *Amy Casselman*

That's horrible. How did we get into this mess?

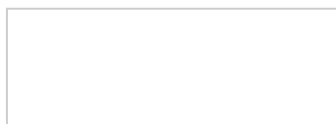
The biggest turning point was in 1978, when a US Supreme Court case called *Oliphant v. Suquamish* was decided, effectively racializing jurisdiction in America. The Court ruled that no tribal government has criminal jurisdiction over non-Native people. This case stemmed from an incident where Mark David Oliphant, who had been living and working on a reservation, assaulted a tribal police officer. He didn't think that he should be held accountable because he was white, and the Supreme Court agreed with him. Since then, Native people have not been able to prosecute non-Native people.

Tribal police officers will tell you that if they see some white person steal something from a store right in front of them, the only avenue they have to seek

justice is to forward a report to the US Attorney. The FBI's not going to come help track down the guy who stole a carton of cigarettes or whatever. *Oliphant v. Suquamish* created a massive jurisdictional void. Now, Indian country is the only place where race becomes a de jure factor in criminal prosecution. Of course, criminal justice in the United States is very racialized, but there's no law that directly states, "If you're black you're going to get a harsher sentence." It's not actually written in the law. But because of *Oliphant*, there's literally a law that says, "If you're white, you cannot be prosecuted by tribal governments, the most local and effective criminal justice systems in Indian country."

How did this decision affect women in particular?

Reservations became hunting grounds. In researching my book, I would go into the dark corners of the internet and find chat rooms where rapists and pedophiles would talk to each other about how to commit crimes. One forum was called "How to rape a woman and get away with it." Something that repeatedly came up was the suggestion that if you're not a Native person you should specifically target a Native people on reservations because you can do whatever you want there. A tribal police officer could even be present and they couldn't touch you. They couldn't do anything. This creates a lot of different types of crime—drug production, drug trafficking, human trafficking—but the people who disproportionately feel this sense of predation are Native women. Sexual assault in the US is an overwhelmingly intraracial crime, meaning that rape happens overwhelmingly between two members of the same race. Native women are the one statistical anomaly.



In the book, you talk about how the racist assumption that Native people are incapable of governing themselves perpetuates the problem.

Yes. Chuck Grassley, a Republican Senator from Iowa, has been one of the most vociferous critics of extending any jurisdictional authority to Native people. He spoke at a town meeting in 2013 where he said that on an Indian reservation, the

jury is going to be made up of Indians, so the non-Indian doesn't get a fair trial. It's the exact same argument that people were making in the 1800s, that Native people are incapable of justice, and unfair, and that non-Native people should never have to be submitted to these so-called savage, backward tribal justice systems.

In response, Indian Affairs attorney Ryan Dreveskracht stated, "Unfortunately, certain Republicans are singing the old song of unsophisticated tribal courts and uneducated tribal judges... I say, if you don't trust the ability of tribal courts to be fair and just, don't go to the reservation and rape women—but that's just my take." I think that pretty much sums it up.

Has the legal system always been like this for Native Americans?

Prior to European contact, Native communities had efficient, fully-functioning criminal justice systems, and those systems were centered around the experiences of Native women. The first written record of a law in the Creek Nation in 1824 essentially said that justice is whatever the woman wants. How does she see justice? What does she want to see happen? Sometimes that would be banishment from the tribe. I came across one case where a woman who was assaulted decided that they were going to hold the man down in the middle of their community and every woman was going to come and sit on his face because it would bring so much shame to him that he would never be able to hold his head high. So imagine if we flipped justice in that direction. Not every woman who's assaulted wants to see their perpetrator incarcerated. Not everyone wants to go on a stand and re-live their experience publicly.

Right, because taking the stand can be harrowing. Isn't that precisely what prevents so many non-Native women from coming forward to report assault in the first place?

When it comes to addressing violence against women in general, the criminal justice system we have today is totally broken. It only functions at the point of crisis, after the assault has happened. That's not really justice in my eyes. Justice would be preventing it. Rape culture normalizes sexual violence, but it also focuses on the experiences of the perpetrators rather than the experiences of the victim. Often times when you see high school boys accused of rape it's all about, "Oh, they were such promising students and they had a scholarship for football, and now their lives are ruined." What about the survivor? Don't you think her life might be affected by this? The system doesn't work for white women, so why would it work for Native women?

With cases of sexual assault, it's often the woman who is put on trial. She has to prove that this actually happened. It's the *only* crime where the victim has to prove that a crime happened. That doesn't happen if your wallet gets stolen. I think that at the end of the day we need to believe women. We need to trust women. We need to look for solutions that center women, that center the people who have themselves experienced violence. It's not anyone's place to be prescriptive about what justice looks like for other people.

The book quotes Native journalist Mary Annette Pember, who responds to the statistic that one in three Native Women will be raped within their lifetime: "I and all the Indian women I know want to know, however, who those other two women are who haven't been assaulted—because we've never met them. The truth is that it's been open season on Indian women for a very, very long time." Have you found that this is something that's mostly just accepted as a fact of life?

Nobody in human history has ever passively accepted their own oppression. People have always found ways to resist. In my experience, Native resistance has taken two forms. One is to work within the system and one is to work outside of the system. In my book I refer to Chela Sandoval's theory of differential consciousness and also Kevin Bruyneel's notion of a "third space of sovereignty." Often we're presented with binary options, but in reality if you want to make changes in the world, why wouldn't you try as many avenues as you can?

Native women can and do strategically navigate colonial structures as a way to ultimately subvert those structures. You don't have to wait for the federal government to fix the problem. There's this idea that the federal government either gives things to Native people or it takes them away—they give sovereignty or they take it back—but the Mohawk scholar Taiaiake Alfred argues that sovereignty is inherent. Nobody can give it or take it away. It would be as if I said to you, "OK, you can never be happy again. You can never smile." It's inherent, right? I can't take that away from you. And it's from this place that many Native women frame their activism—from a place of inherent strength and sovereignty over their own lands and their own bodies.

What do you hope readers take away from the book?

This book isn't about making anyone feel guilty or bad, but rather about the introspection that in my opinion all Americans have to engage in. George Lipsitz, a giant in the field of Ethnic Studies, once told me that being born in America is like entering the scene of a crime. It's bloody. It's messy. It's traumatic. And you had nothing to do with the crime, but now that you're in it, you have to decide what you're going to do about it. Are you going to try to understand what happened? Are you going to try to ignore it and pretend that nothing happened? Or are you going to fight for justice? And I think that each of us as Americans at one point consciously or subconsciously has to make that decision.

No one wants to have to contemplate the ways in which your life as you know it exists because of someone else's oppression. Or if you're Native, you don't want to think about how you are one of the few survivors of one of the most massive campaigns of genocide in world history. But if we don't do that work, then we're choosing to walk away from the crime scene and pretend that it didn't happen. And I can't live my life like that.
