

Prosecuting Crime in Indian Country

The authority to prosecute crimes that take place in Indian country (including domestic violence) is badly fractured and is divided between the federal, state, and tribal governments based on the identity of the offender, the identity of the victim, and the nature of the crime.

Before we take a look at the way criminal jurisdiction works in Indian country, let's take a brief look at how it works outside Indian country. Generally speaking, crimes are considered offenses against the peace and dignity of the state. That's why criminal prosecutions are brought by government employees (prosecutors or district attorneys) on behalf of the government itself. That's why criminal prosecutions are always labeled "the State" versus or "the People" versus the defendant.

If someone commits a crime within a state's borders, it is a given that the state can file criminal charges against the perpetrator. Likewise, someone commits a federal crime anywhere in the boundaries of the United States, the federal government can prosecute.

The same is not true in Indian country. Most tribal governments also have a territory or lands they govern, and that is the Tribe's Indian country. "Indian country" is the legal term of art used to refer to the territory governed by a tribe.

Federal law divides the ability to prosecute crimes committed within Indian country between the federal, state, and tribal governments. This chart illustrates how that authority is divided up:

<i>Victim</i>	<i>Perp</i>	<i>Tribal?</i>	<i>Federal?</i>	<i>State?</i>
Indian	Indian	Yes, tribe can criminally prosecute any Indian who commits a crime within the tribe's territory	Maybe under MCA, if listed offense committed. No under ICCA because isn't inter-racial. Yes under federal DV crime.	No. States lack criminal jurisdiction over Indians in Indian country, unless is a PL 280 state or other special grant of jurisdiction exists.
Indian	non-Indian	No, tribe cannot criminally prosecute non-Indian.	No under MCA because D isn't Indian Yes under ICCA because is inter-racial. Yes under federal DV crime.	No. States lack criminal jurisdiction over Indians in Indian country, unless is a PL 280 state or other special grant of jurisdiction exists.
non-Indian	Indian	Yes, tribe can criminally prosecute any Indian who commits a crime within the tribe's territory	Maybe under MCA, if listed offense committed. Yes under ICCA because is inter-racial. Yes under federal DV crime.	No. States lack criminal jurisdiction over Indians in Indian country, unless is a PL 280 state or other special grant of jurisdiction exists.

non-Indian	non-Indian	No, tribe cannot criminally prosecute non-Indian.	No under MCA, because D not Indian No under ICCA because isn't inter-racial. Yes under federal DV crime.	Yes, states possess criminal jurisdiction over crimes committed by non-Indians against non-Indians, even in Indian country.
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As you can see, the key elements are the identity of the victim and the alleged perpetrator.

If both parties are Indian, then the

- a) tribe has the ability to prosecute the alleged perpetrator, because tribal governments can prosecute all crimes committed by Indians within Indian country. Tribes cannot prosecute crimes committed by non-Indians. Think how strange that is. I live in Arizona. Suppose I traveled to Oklahoma to visit relatives and while I was there, I hit my cousin Bob. The state of Oklahoma can certainly prosecute me for that crime. I would be laughed out of court if I attempted to defend myself by saying "but I'm not Oklahoman; Oklahoma can't prosecute me." Nevertheless, federal law prohibits tribes from prosecuting non-Indians for crimes.
- b) the federal government can prosecute under either the federal crimes of interstate domestic violence, interstate stalking, and interstate violation of a protection order and/or under the Major Crimes Act.
 - i) The federal domestic violence crimes apply anytime anyone crosses a jurisdictional boundary line such as into Indian country or from one state to another, with the intent to commit the listed crime. The federal government always possesses the authority to prosecute these crimes regardless of whether they are committed. Other examples of "general federal crimes" are mail fraud and assault on a federal officer.
 - ii) The Major Crimes Act is one of two federal statutes, (the other is the Indian Country Crimes Act, also known as the General Crimes Act, and we'll discuss it in a moment), which give the federal government some additional powers to prosecute crimes that take place within Indian country. The Major Crimes Act gives the federal government authority to prosecute Indians who commit any of the crimes listed in the statute in Indian country. Those crimes tend to be ones viewed as more serious and include most violent crime.
- c) the state government cannot prosecute. States can prosecute all crimes committed by a non-Indian against another non-Indian, but absent specific authorization, states have no authority over crimes committed in Indian country and which involve Indians. There are two forms of specific authorization - Public Law 280 and special settlement acts. Public Law 280 is a statute that applies to a handful of states (LIST) and gives those states the same criminal jurisdiction in Indian country that the state possesses within the rest of the state. There are also a small number of statutes enacted to settle land disputes, and some of those also give states the authority to prosecute crimes in Indian country.

If the victim is Indian and the alleged perpetrator is non-Indian, the

- a) tribe cannot prosecute, because federal law does not allow tribes to prosecute non-Indians.
- B) the Federal government can prosecute if a general federal crime is committed (such as the federal domestic violence crimes), and the federal government may also prosecute under the Indian Country Crimes Act. The Indian Country Crimes Act applies only when crimes are inter racial, that is when an Indian commits a crime against a non-Indian or when a non-Indian commits a crime against an Indian. The statute also contains a very important exception - if the defendant is an Indian, the federal government loses the ability to prosecute the defendant once the defendant is punished by the tribe. The federal government cannot prosecute under the Major Crimes Act, because that applies only when the defendant is an Indian.
- c) the state cannot prosecute, absent special authorization, because even though the perpetrator was non-Indian, the victim was Indian. States can prosecute only if both parties are non-Indian.

Let's swap those, and say the victim is non-Indian and the alleged perpetrator is Indian.

- A) the tribe can now prosecute, as the perpetrator is Indian
- b) the federal government can prosecute under the general federal domestic violence crimes, and also under the Major Crimes Act (provided a listed offense was committed). Since the crime is inter-racial, the Indian Country Crimes Act
- C) the state still cannot prosecute, as an Indian is involved in the crime (unless some special authorization exists)

If both the victim and perpetrator are non-Indian, the

- a) tribal government cannot prosecute
- b) the Federal government can prosecute only under the general federal domestic violence crimes.
- C) the state can prosecute, because both parties are non-Indian.

As these examples make clear, one of the key issues in determining who possesses jurisdiction over a particular incident of domestic violence is to determine whether either (or both) the perpetrator and victim are Indians . Generally speaking, the test to determine whether someone is an Indian for purposes of federal jurisdiction requires that the person have some Indian blood and be a member of a federally recognized tribe. It is not a judgment that can be made based on appearances. And even if a person has (and is carrying) a tribal membership card, those cards often do not have pictures on them. Law enforcement officers must ask questions and investigate the status of all persons involved in crime in Indian country.

Because this is a complicated and confusing topic, let me summarize the rules about who has the authority to prosecute what crimes in Indian country:

- 1) The Federal Government has the authority to prosecute all general federal crimes in Indian country, that is, crimes such as mail fraud and assault on a federal officer - things that are crimes everywhere in the US. Two federal statutes, the Indian Country Crimes Act (also

known as the General Crimes Act) and the Major Crimes Act, give the federal government some addition powers to prosecute crimes that take place within Indian country.

- 2) Tribal governments can prosecute all crimes committed by Indians within Indian country, but cannot prosecute crimes committed by non-Indians.
- 3) States can prosecute all crimes committed by a non-Indian against another non-Indian. Unless some sort of special authorization exists, such as Public Law 280, states have no authority over crimes committed in Indian country and which involve Indians.

As should be clear, determining who can prosecute that crime involves a complex set of factors. The fractured nature of criminal jurisdiction makes it difficult to consistently prosecute crimes occurring in Indian country, particularly when a non-Indian commits a crime against an Indian. In those circumstances, the only government that can prosecute is the federal government. That describes many domestic violence cases that occur on the reservation. In at least 86% of reported cases of rape or sexual assault against American Indian women the perpetrators are non-Native men; that is unusual because most rapes are intra-racial: 65.1% of rapes of white victims are by whites; 89.8% of rapes of African Americans are by African Americans. Statistics show that 9 out of 10 sex crimes reported on reservations are perpetrated by non-Native men. While laws do exist addressing these crimes, it is not enough to have the laws on the books - the laws must be enforced. The Department of Justice has found that U.S. Attorneys fail to prosecute 75% of all reported cases of violence on reservations.