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FEATURES

Indian tribes are retaking jurisdiction over domestic violence on their own land

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Diane Millich was only days into her marriage when her husband first hit her. So began her year of "horrific terror."

Millich, a member of the Southern Ute tribe of southwestern Colorado, called tribal police many times from her home on the reservation. But because her husband was not an American Indian, tribal police had no authority over him. Colorado's La Plata County overlaps the reservation, but county sheriffs had no jurisdiction over crimes committed against Indians on Indian land.

“After one beating, my ex-husband called the tribal police and the sheriff’s department himself, just to show me that no one could stop him,” she recalled during the signing ceremony for the 2013 reauthorization of the Violence Against Women Act, first passed in 1994.

After Millich left her husband for good, he stormed into her office with a gun, swearing to kill her. A co-worker saved her life by pushing her out of the way, taking a bullet to the shoulder. This violent assault is what it took to finally trigger an arrest (although authorities had to use a tape measure to determine whether the office was off-reservation). But because none of the hundred-plus beatings had ever been charged, she said, Colorado considered her ex-husband a first offender. He ultimately pleaded guilty to aggravated driving with a revoked license.

The jurisdiction problem in Millich's case—and those of thousands of other Native American victims of crime—can be traced to a 1978 U.S. Supreme Court decision, *Oliphant v. Suquamish Indian Tribe*, which ruled that tribes have no jurisdiction to prosecute non-Indians for crimes on Indian land.

By default, federal authorities have that jurisdiction. And although a federal law, 1953's Public Law 280, gave authorities in 16 states jurisdiction over reservation crimes, that law isn't a reliable guide because the statute didn't apply to every tribe in most of the affected states. Some tribes have since won back tribal jurisdiction. Regardless of their PL 280 status, some tribes have an agreement with local authorities to share jurisdiction.

But even when jurisdiction is settled, extratribal authorities often decline to prosecute domestic violence unless there's a serious injury. A 2010 U.S. Government Accountability Office report says U.S. attorneys declined to prosecute 46 percent of assaults referred from Indian country between 2005 and 2009. They have a lot of disincentives.

"Federal prosecutors are reluctant to institute federal proceedings against non-Indians for minor offenses in courts in which the dockets are already overcrowded, where litigation will involve burdensome travel to witnesses and investigative personnel, and where the case will most probably result in a small fine or perhaps a suspended sentence," Judge Ben Duniway wrote in the 1976 9th U.S. Circuit Court of Appeals ruling in *Oliphant*, before the case was granted cert to the Supreme Court.

That reluctance still applies. "The U.S. attorney's criminal caseload is super high, but it's all related to immigration and drug smuggling," says Fred Urbina, the attorney general for the Pascua Yaqui tribe of Arizona. "So they wouldn't take anything that wasn't a major crime where bones were broken or someone was sexually assaulted."

But that could change. Thanks to a provision in the 2013 reauthorization of VAWA, federally recognized tribes had the option to start prosecuting domestic violence by non-Indians as of March 7 this year. VAWA's Section 904 gives tribal authorities "special domestic violence jurisdiction" over non-Indians accused of intimate partner violence or violating a protective order. Three tribes involved in pilot projects testing the change took up jurisdiction more than a year ago and had already prosecuted 23 defendants as of March.

Yet supporters acknowledge that the provision is not perfect. Drafters wrote the law narrowly, leaving out related crimes like sexual assault or child abuse. Implementing the law requires money that tribes may not have. And according to John Dossett,

general counsel of the National Congress of American Indians, opponents of tribal juris-diction—such as those who claim the measure infringes on defendants' constitutional rights—are expected to back a constitutional challenge to Section 904.

A STEP TOWARD SAFETY

Despite these limits, many Indian legal observers see Section 904 as a major step toward safer reservations, and, perhaps, full tribal criminal jurisdiction.

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"For Indian country at least, it's huge," Urbina says. "I would even call it historic."

In *Oliphant*, then-Associate Justice William H. Rehnquist said the majority was "not unaware of the prevalence of non-Indian crime on today's reservations. … But these are considerations for Congress to weigh."

Congress didn't weigh them until it took up the 2013 VAWA. In the 35 years in between, crimes committed in Indian country by non-Indians largely went unanswered, unless they were major enough to attract outside prosecutors' attention. The Indian Law and Order Commission, a bipartisan group appointed by Congress in 2010 to study justice in Indian country, called the resulting waste of lives and money "shocking."

"When Congress and the administration ask why is the crime rate so high in Indian country, they need look no further than the archaic system," its November 2013 report said.

That's believed to be one factor driving the high rate of domestic violence against Indian women (and crimes against Indians generally). A 2008 survey by the Centers for Disease Control and Prevention found that two out of five Indian women reported being battered in their lifetimes; for all American women, it was one in four. And a Bureau of Justice Statistics report says when Indian women are victims of violent crimes, 88 percent of the perpetrators are not Indians.

Experts say that many victims don't even bother reporting crimes because they know little will be done.

Brent Leonhard, an attorney with the Office of Legal Counsel for the Confederated Tribes of the Umatilla Indian Reservation in eastern Oregon, says his tribe interviewed victims as part of a family violence program in 2011-12. “Where the partner was non-Indian, we found that over 80 percent chose not to go to the police,” he says.

That’s part of the reason that support for Section 904 among Native Americans was strong. Dossett, the general counsel of the National Congress of American Indians, says he and his colleagues had been working on a measure like it since 2003. Thirteen Native groups lobbied for the bill, according to the Center for Responsive Politics. The ABA lobbied for VAWA reauthorization, and the House of Delegates supported Section 904 with 2012’s Resolution 301.

In a statement issued after Congress passed the reauthorization act, then-ABA President Laurel Bellows said, “Expanding protections for Native Americans, campus victims, survivors of sexual assault and victims of violence, regardless of immigration status—and for the first time including protections for lesbian, gay and bisexual victims—is a critical victory for human dignity.”

But in other circles, Section 904 was controversial—so much that it became one of the roadblocks to VAWA’s reauthorization. Critics, including Sen. Charles Grassley, R-Iowa, argued that because reservation juries are composed entirely or mostly of Indians, “the non-Indian doesn’t get a fair trial.” Conservative lawmakers also raised concerns that Section 904 would infringe on defendants’ constitutional rights. (Tribes are not subject to the Constitution because they never adopted it. However, the 1968 Indian Civil Rights Act reproduces many of the Constitution’s due process protections, and tribes may enact their own civil rights laws.)

As a result, the final version of Section 904 was written narrowly. It covers only intimate partner violence or violations of protective orders that take place on federally recognized tribes’ land. To be prosecuted, the accused must have a substantial tie to the tribe, live or work on the reservation or have an intimate relationship with a member of the tribe.

Until December, the law also expressly excluded all but one of Alaska’s 229 Native communities. That provision was originally inserted by Alaska Sen. Lisa Murkowski and former Sen. Mark Begich. Both pushed to repeal it after a backlash from Alaska Natives. President Barack Obama signed the repeal Dec. 18.

And in cases where the defendant could be imprisoned, Section 904 adds civil rights protections in tribal courts. It requires tribes to offer public defenders—at the tribe’s expense—judges with legal training, a guarantee of effective assistance of counsel,

and juries drawn from a cross section of the community.

Those civil rights provisions have already gotten a workout on three reservations, which have been prosecuting crimes as part of the Justice Department's pilot project since Feb. 20, 2014. Those tribes are the Pascua Yaqui, the Umatilla and the Tulalip tribes of northwestern Washington.

As of March, the three tribes had prosecuted 23 defendants on a total of 38 criminal counts: 16 defendants by Pascua Yaqui, five by Tulalip and two by Umatilla. Nine cases ended in plea deals and Tulalip reservation attorney Michelle Demmert says the Tulalip court dismissed one case for insufficient facts. Umatilla deputy prosecutor Kyle Daley said that one more offender had been arrested but not yet formally charged. Most of the other cases are pending.

In November, Pascua Yaqui took its first defendant to trial. (A second trial was scheduled for April.) As the first Section 904 prosecution anywhere, the trial was closely watched. But although it was first, it was not typical: The male defendant was charged with battering a male partner. Section 904 does cover same-sex violence, but Urbina says the more typical victim on his reservation is a single mother with a male batterer.

That unusual fact pattern set the stage for an unusual outcome. The Pascua Yaqui prosecutor, O.J. Flores, says the assault was well-documented, and the tribally appointed defense attorney even conceded that it took place. But the defendant argued that he was merely a roommate to the victim, not a romantic partner. That would mean there wasn't the intimate relationship necessary for jurisdiction under Section 904.

The argument worked, Urbina says, because the victim wasn't completely open about his sexuality. The jury ultimately found that the relationship wasn't proven, and the judge entered an acquittal. (The defendant's victory was short-lived: After trial, he was immediately arrested on an armed robbery warrant from Oklahoma.)

JURISDICTIONAL GAPS

In state court, prosecutors who anticipated this problem could bring assault and battery charges instead. Because Section 904 is limited to intimate partner violence, Flores couldn't bring those charges, although he says he "absolutely" would have if those charges had been available. "The assault was a slam dunk," says Flores.

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The experiences of pilot project tribes have exposed several such jurisdictional gaps and the inability to bring charges for crimes that tend to occur alongside domestic violence, such as substance abuse, property destruction, threats and stalking.

But perhaps the most urgent gap found by pilot project tribes was child abuse. The Pascua Yaqui cases included a total of 18 children who had at least seen the violence, and some who had been abused. Urbina says that in one case, a mother slapped her child hard enough to draw blood because the child called police on the mother's abuser.

At the Justice Department's Indian Nations conference in December, Sharon Jones-Hayden, the sexual assault and domestic violence prosecutor for Tulalip, said she could have brought many more charges if she'd been able to prosecute crimes against children. One very serious case from Tulalip was passed to federal authorities in December, in part because it involved allegations of child abuse.

"In every one of our cases, children were present. In two of the cases, children were victimized," Jones-Hayden told a conference workshop at the Agua Caliente reservation near Palm Springs, California. "And it's frustrating and heartbreaking not to have a remedy for that."

Sexual assault is another major jurisdictional gap, the pilot project tribes say. Though sexual assault is often part of domestic violence, Section 904 doesn't permit tribes to prosecute it, regardless of whether the assailant is a partner or a stranger. Demmert says two of Tulalip's five cases involved rape.

Tribal authorities can address these issues indirectly by referring cases to other agencies, offering social services or removing children from unsafe homes. But because domestic violence and other crimes are often intertwined, Demmert says, it can be difficult to prosecute domestic violence and leave the other charges to federal or state authorities. As a result, tribal prosecutors sometimes have to decide whether to prosecute only some of the crimes or let go of jurisdiction and hope that other authorities decide to take it up.

Urbina says the good news is that the first Pascua Yaqui trial "showed that the system works." The jury foreman was a non-Indian tribal employee, per Section 904's "fair cross section of the community" requirement. And despite concerns raised in congressional debate over VAWA, the non-Indian defendant was not convicted.

"It was a majority Yaqui jury, and they came back and to a person indicated that they felt that the tribe did not have jurisdiction," he says. "And they were given all the facts; they were shown some gruesome photographs of the injuries to a tribal

member on the reservation, [and] we were in tribal court."

And while tribes say it's too soon to see a change in crime rates, Jones-Hayden already sees a difference in the way victims respond.

"It's been rewarding on a level I didn't anticipate to prosecute some of these cases," Jones-Hayden told the workshop. "The response from some members of our community who were victimized for a long time and who had never seen justice—they're just surprised and excited that something was happening."

CHALLENGES POSSIBLE

In December, two other tribes had applications pending to be pilot project tribes, and another 36 were interested enough to join a related discussion group. And as of March, all federally recognized tribes have the option to take up jurisdiction without permission from the Justice Department.

But it could be short-lived. During the debate over VAWA, conservative opponents hinted that they'd bring a challenge to tribal jurisdiction.

One such opponent was the Heritage Foundation's Paul Larkin Jr. He argued during the VAWA debate that Section 904 violates the Constitution's Article II, which says federal judges must be appointed in specific ways, and Article III, which gives federal judges life tenure and immunity from salary cuts. Because tribal judges don't necessarily have those guarantees and are appointed by tribes, Larkin says, they can't meet those requirements. Thus, he wrote on the Heritage Foundation's website, Congress did not have the authority to pass Section 904.

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Larkin still believes this would be a viable challenge. "What you have is the federal government authorizing a judge to enter a judgment that allows someone to be confined," says Larkin, director of the Heritage Foundation's project to counter abuse of criminal law. "That type of judgment can only be entered by an Article III judge."

Tom Gede, who practices Indian and government relations law as of counsel to Morgan, Lewis & Bockius in San Francisco, cautions that Larkin's viewpoint assumes tribes using Section 904 exercise authority delegated by Congress, rather than the tribes' inherent authority.

Gede, who served on the Indian Law and Order Commission, says it's not clear which viewpoint is correct. VAWA purports to recognize "the inherent powers of [a participating] tribe … to exercise special domestic violence criminal jurisdiction over all persons."

However, another provision requires tribes to give defendants "all other rights whose protection is necessary under the Constitution of the United States." This could be read as requiring tribes to give defendants exactly the same constitutional rights they would enjoy in state or federal courts, Gede says, even though tribes aren't subject to the Constitution.

"If so," he says, "it really does smell like a delegation and not a reaffirmation of inherent powers. Even though it just says 'inherent powers.' "

If tribal authority is inherent, defendants have only the civil rights granted by the Indian Civil Rights Act—not quite all of the Bill of Rights. That's the status quo in tribal courts, but Gede thinks federal courts might find it insufficient.

"When an individual … is subjected to a prosecution and potential punishment," he says, "their fundamental liberties are at stake and many think the fundamental protections of the Constitution ought to apply directly. That could well get the majority of the [Supreme] Court."

HABEAS HITCH

Gede also sees potential problems in the procedural requirements for challenging tribal court decisions. Under the ICRA, defendants must first exhaust tribal appeals, then petition a federal district court for a writ of habeas corpus. Because habeas review requires that the defendant's liberty be restricted, there could be no remedy available for people who weren't imprisoned, even if their rights were clearly violated. Because there are no direct appeals in the federal courts, he says, tribal courts' interpretations of the act's civil rights could also be inconsistent.

On the other hand, if tribal jurisdiction over non-Indians comes from delegated powers, Gede says it could be offensive to tribal sovereignty—but it would resolve concerns about subjecting defendants to punishment by a government they can't participate in. This "consent of the governed" concern was raised by Justice Anthony M. Kennedy in his concurrence to 2004's *United States v. Lara* and echoed by critics of Section 904.

In this case, Gede thinks that argument may be defeated by the fact that Section 904 is limited to people with significant ties to the tribe. But he thinks the larger issue warrants consideration.

Professor Carole Goldberg of the UCLA School of Law, another member of the Indian Law and Order Commission, says this concern is a red herring.

“The United States exercises criminal jurisdiction over permanent resident aliens in this country without any question about the authority to do that,” she notes.

As of March, no lawsuit had materialized. There have been challenges to how tribes have implemented Section 904 in specific cases, such as a Pascua Yaqui defendant’s allegation that the tribe hadn’t complied adequately with Section 904’s notice requirements. Dossett says these have been “technical implementation questions so far,” not sweeping civil rights questions.

The pilot project tribes are very aware that what they did during their first year of jurisdiction could affect Section 904’s future—and they’re making decisions accordingly. “I think everybody understands that a legal challenge is going to come sooner or later,” says Dossett. The aim, he says, “is to implement the law well, so that when some case comes along, it’s a good vehicle.”

Jones-Hayden said at the Indian Nations conference that Tulalip prosecutors have been “cautious and thoughtful about how we make our charging decisions.”

At the conference, Leonhard told a workshop that Umatilla actually encouraged its first Section 904 defendant to appeal.

“We said we would waive tribal exhaustion requirements and wouldn’t impose greater sentences on him if he appealed it to federal court,” he said. “We want a good case going forward and it was an excellent one. Unfortunately, despite all that encouragement, he didn’t want to do it.”

Dossett thinks a legal challenge could take a while to develop. He notes that after Congress passed a law giving tribes jurisdiction over nonmember Indians, it took 13 years for the Supreme Court to uphold it with Lara.

“I think most [defendants], they just want to get over it and get on with their lives,” he says, “and maybe they don’t want to be the big test case.”

Even without a constitutional challenge, a lot of tribes may face a practical barrier to taking up VAWA jurisdiction: money. The due process protections of Section 904 require tribes to (among other things) provide public defenders and judges who are licensed attorneys. Those are basics in the state and federal justice systems, but they’re missing from many tribal systems—in part because they’re not cheap.

“There are 566 [federally recognized] tribes, and my educated guess is that fewer than 100 will be able to afford to do it,” says Matthew L.M. Fletcher, a law professor and director of the Indigenous Law and Policy Center at Michigan State University.

“You have to have three full-time lawyers at all times—a judge, public defender and prosecutor. That’s expensive.”

In addition, says Jerry Gardner, executive director of the Tribal Law and Policy Institute in Los Angeles and a former council member for the ABA Section of Individual Rights and Responsibilities, no one is keeping track of how many tribes are implementing the Tribal Law and Order Act, a 2010 law to improve Indian justice systems. But it’s likely only a handful.

“Our best knowledge is five to 10,” he says. “And that was enacted in 2010.”

Unless tribes have successful businesses, their tax bases tend to be limited by high poverty rates and low populations. A nonreservation town in this position might rely on state tax revenues, but reservations aren’t part of states.

Tribes are eligible for federal funds, but much of those come through competitive grants. And grants have strings attached: They must be renewed every few years, requiring considerable administrative work, and can be used only on specified activities. That means federal funding isn’t consistent or flexible. And it may not be funded: VAWA called for up to $5 million in grants to tribes implementing Section 904, but as of March, Congress hadn’t appropriated that money.

As a result, it’s difficult for tribes to pay for the justice system infrastructure that other American communities take for granted.

“As a general matter, tribes in North Dakota or Alaska that have no gaming revenue—those are the tribes that need a solution for the horrible crime rate,” says Fletcher, who is also a member of the ABA Section of Legal Education and Admissions to the Bar. “VAWA and TLOA don’t help them.”

TRIBAL TRADITION CONCERNS

Some tribes have also expressed concerns about losing the features of their own justice traditions if they adopt Section 904. One such tradition is peacemaking circles, a kind of restorative justice with community participation. The civil rights provisions of VAWA and TLOA take tribal justice systems closer to the British-based model.

Concerns about this are common enough that at the Indian Nations conference, Leonhard addressed them directly.

“I’ve heard people saying that they think this is an attempted jurisdictional assimilation, trying to make tribal courts federal courts,” he told the conference’s plenary session. “That isn’t the case at Umatilla. At Umatilla, what’s happened is that

the tribe is giving the same rights to non-Indians that they give to their own tribal members."

Dossett adds that some domestic violence cases would be inappropriate for a traditional proceeding.

"Those types of things are widely used for misdemeanors and minor offenses," he says. "I don't think anybody's looking to use a wellness court for a severe spousal abuse case."

Goldberg says the Indian Law and Order Commission thought a lot about this concern. Its report recommended that tribes regain full criminal jurisdiction, but subject to full civil rights protections and review by a new Federal Court of Indian Appeals. In the end, she says, the commission decided that these would enhance tribal courts' legitimacy.

She also suggests that tribes could simply ask defendants to waive their civil rights to enter traditional courts, as state defendants sometimes do to enter drug diversion courts.

There are others calling for expanded tribal criminal jurisdiction. A year after the ILOC recommended full jurisdiction, the attorney general's Task Force on American Indian and Alaska Native Children Exposed to Violence made its own report, calling for tribal jurisdiction over anyone, regardless of race, who commits crimes against Native children.

Goldberg believes Section 904 will help make the case for such changes."I think this VAWA provision will give us an opportunity to test out some of the concerns that have been expressed about tribal criminal jurisdiction over non-Indians," she says, "and I think [it] will ultimately demonstrate the tremendous value that such jurisdiction provides."

That would be welcome in Indian country. Asked what's on his wish list for more jurisdiction, Flores says: "Everything."

"Territorial jurisdiction is important," adds Urbina. "When you think about the basic reasons governments exist, one of the primary reasons is to protect the citizens that live there."

But even with its limits, Section 904 represents a major step for Native Americans. At the Indian Nations conference, Jones-Hayden described Tulalip's first arraignment of a Section 904 defendant as a "very routine" matter.

“I turned around after conducting this absolutely unremarkable hearing to see the gallery in our courtroom packed,” she said. “It was full of people who just wanted to be there for that historic moment.”

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