



2014

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Recommended Citation

M. Alexander Pearl, *Criminal Justice in Indian Country*, 38 Am. Indian L. Rev. 374 (2014).

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CRIMINAL JUSTICE IN INDIAN COUNTRY*

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It is an honor to be invited to this conference to say a few words about Indian law, Professor Frickey, and “grounded scholarship.” We are here today to honor Professor Frickey and remember his call to make legal scholarship relevant for — and grounded in — tribal communities. Attendees and participants at this conference include tribal advocates, academics, law students, and practitioners of many different disciplines and backgrounds. The diversity of people, professions, and perspectives on tribal communities contribute to Professor Frickey’s suggestion that legal scholarship provide Native people with a voice, while also moving federal Indian law and policy.

I would like bridge the comments made during this conference with the sentiment expressed by Rovianne Leigh. As Ms. Leigh stated, we are here today in California where there are more than 100 federally recognized tribal communities. My goal in bringing focus to California’s Indian Country, and the criminal justice issues that these tribal communities face, is to highlight the distinct challenges facing these communities.¹

It is not obvious that there can be such a monumental difference between Indian tribes in California and those located in many other states. I came to law school from Oklahoma, where I was born and raised. As a member of the Chickasaw Nation of Oklahoma, I understood Oklahoma tribal communities. But experiencing northern California presented me with new perspectives on the significant diversity of Indian Country. This changed a lot of my views about what policies are appropriate for individual Native

*These materials were presented at the University of California at Berkeley Law School on Sept. 27-28, 2012, as part of a Symposium entitled “Heeding Frickey’s Call: Doing Justice in Indian Country.”

1. I use the term “Indian Country” to describe generally the areas where tribal communities are located. It is defined in federal statute as follows:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2012).

communities. The differences between Northern California, Southern California, and the Central Valley are not just geographic. These regions all contain unique politics, cultures, and norms in both tribal and non-tribal communities. For example, Oakland is a major urban Indian center bringing together Indians from all over the country.² Indeed, Oakland's Indian population has a history all its own. The same goes for the histories of Southern California tribes and those located in rural Northern California.

One thing common to all California tribal communities, however, is Public Law 280.³ Prior to 1953, the longstanding general rule was that state law, including criminal law, did not apply in Indian Country.⁴ For centuries, tribal governments were the only entities with criminal jurisdiction in Indian Country.⁵ In 1883, the Supreme Court in *Ex parte Kan-Gi-Shun-Ka* (*Ex parte* Crow Dog) confirmed that a crime committed by an Indian against another Indian did not give rise to federal jurisdiction.⁶ In response, Congress passed the Major Crimes Act, granting federal authorities the power to investigate, enforce, and prosecute certain crimes occurring in Indian Country.⁷ The federal statutes creating federal jurisdiction did not preclude tribal jurisdiction, but states lacked jurisdictional authority.⁸ This all changed in 1953 with the enactment of Public Law 280. Affecting only five mandatory states, including California, Public Law 280 precluded federal jurisdiction and conferred jurisdictional authority on the state government to enforce and prosecute crimes occurring in Indian Country, thereby flipping the general rules regarding criminal jurisdiction.

Most people familiar with Indian law and Native people understand why Public Law 280 was — and remains — wildly unpopular in tribal

2. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 93-108 (Nell Jessup Newton et al. eds., LexisNexis 2012); SUSAN LOBO, URBAN VOICES: THE BAY AREA URBAN INDIAN COMMUNITY (2002).

3. Pub. L. No. 83-280 (1953) (codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326).

4. See generally *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

5. See generally *Ex parte Kan-Gi-Shun-Ka*, 109 U.S. 556 (1883); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006).

6. Act of Mar. 3, 1885, ch. 341, 23 Stat. 385 (current version at 18 U.S.C. § 1153, 3242 (2006)); Washburn, *supra* note 112, at 803-05.

7. 18 U.S.C. § 1153; see also Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes* 34 ARIZ. ST. L.J. 113 (2002).

8. *United States v. Wheeler*, 435 U.S. 313, 329 (1978); *United States v. Lara*, 541 U.S. 193, 207 (2004).

communities. States and tribes have long clashed with one another.⁹ The Supreme Court has even recognized that they are often “deadliest enemies.”¹⁰ To be fair, states were not necessarily thrilled about Public Law 280 either, since it did not simultaneously increase funding commensurate with the newly obtained enforcement authority and caseload.

After nearly sixty years, Congress finally amended Public Law 280.¹¹ In the Tribal Law and Order Act of 2010 (“TLOA”), Congress allowed Indian tribes located in mandatory Public Law 280 states to request the Department of Justice to re-assert criminal jurisdiction.¹² If the federal government accepts, the result would be tri-partite jurisdiction, shared among federal, state, and tribal governments. This is perhaps a step in the right direction, as an attempt to level the playing field across Indian Country by providing tribal governments in California with similar opportunities for protecting their communities as those living in South Dakota and other states not subject to Public Law 280. The law potentially re-establishes the federal-tribal law enforcement relationship for California tribes, whereas tribes in non-Public Law 280 states have not been denied the involvement of federal law enforcement and prosecution.

However, there is much more to Public Law 280 and its long-running consequences in California than the simple question of which government has the authority to enforce and prosecute crimes. There are over 100 federally recognized Indian tribes in California and only a small percentage have comprehensive courts and police forces. This is a dramatic difference compared to tribes in non-Public Law 280 states.¹³ Why the great

9. See Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 73-87 (2007); Ezra Rosser, *Caution, Cooperative Agreements, and the Actual State of Things: A Reply to Professor Fletcher*, 42 TULSA L. REV. 57 (2006).

10. United States v. Kagama, 118 U.S. 375, 384 (1886) (“[Indian tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.”).

11. 25 U.S.C. § 1326 (2006). Congress passed amendments to Public Law 280 in 1968. The amendments required tribal consent in order to transfer jurisdiction from the federal government to the state government. No tribe ever consented to a transfer after the passage of this amendment.

12. Pub. L. No. 111-211, § 221, 124 Stat. 2258, 2271.

13. CAROLE GOLDBERG & DUANE CHAMPAGNE, U.S. DEP’T OF JUSTICE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>; STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, at 3 (2005), available at <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf> (out of the eighty-eight California tribes that participated in the census, seventy-four relied on state courts).

distinction? It is difficult to say, and is more complex than this brief essay can summarize. But, Public Law 280 has played a role. State governments were allowed to enforce what essentially are foreign laws upon tribal communities with very different values, norms, and cultures. As a result, independent tribal justice systems from these communities have not had the space to emerge and mature. Even though Public Law 280 did not affirmatively preclude tribes from exercising criminal jurisdiction, the overlay of a foreign legal regime impacted the ability of tribal communities to engage in self-determination and cultural expression through creating legal regimes.

Regardless of why California Indian tribes have fewer formal criminal justice systems it is important to understand the need for a community to have comprehensive and well-functioning criminal justice systems. There is great emphasis, well-deserved, on the importance of addressing the epidemic of violence and sexual assault against Native women.¹⁴ The statistics on that issue are simply astounding.¹⁵ It is not difficult to imagine that adequately addressing this problem in California will require a different solution than those implemented in non-Public Law 280 states.

As an example, there are provisions in the TLOA, as well as the recently passed reauthorization of the Violence Against Women Act (“VAWA 2013”), that provide tribal courts with jurisdictional authority to arrest, try, and punish non-Indian offenders. While this is a laudable provision with the appropriate policy in mind, it does little to help most of California Indian tribes, which lack comprehensive courts and law enforcement. The expansion of jurisdictional authority for a tribal court does no good to an Indian tribe lacking a justice system. Even with these national policy changes in the TLOA, many of the pressing issues for California Indian tribes will persist because the solutions are not tailored for the circumstances of these communities.

14. See AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2006), available at <http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf>.

15. Statistics show that one in three Native women will be raped in her lifetime. PATRICIA TJADEN & NANCY THONENNES, NAT’L INST. JUSTICE & THE CTRS. FOR DISEASE CONTROL & PREVENTION, FULL REPORT OF THE PREVALENCE INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22 (2000), available at <http://www.ncjrs.gov/txtfiles1/nij/183781.txt>; see also *Oversight Hearing On Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters Before the S. Comm. on Indian Affairs*, 112th Cong. (2011) (statement of Sarah Deer, Assistant Professor, William Mitchell College of Law).

Another point often absent from the congressional discussion about criminal issues in Indian Country concerns tribal choices to adopt formal western-style court systems or to use tribal customary law based systems. Many tribes successfully employ both.¹⁶ This is a fundamental aspect of self-determination and directly bears on that which a criminal justice system is intended to do — express the morality of the community.¹⁷ At a basic level, tribal communities must be able to adequately protect themselves and their members. The method by which this is done should come from within the tribe, rather than from the outside.

This is a fundamental criticism of Public Law 280. It was an external law forced upon certain Indian tribes that required an outside entity to apply foreign law to communities with very different cultural practices. While the TLOA's potential for bringing the federal government back into the fold is an improvement for tribes in mandatory Public Law 280 states, such a policy does not recognize the unique challenges facing California Indian Country given their unique history with Public Law 280. Simply re-establishing the federal-tribal relationship for California tribes fails to address the need for comprehensive and culturally relevant tribal justice systems arising from within the community. In sum, it fails to address the principle of self-determination — that Indian tribes have the ability to create solutions that work best for their own community.

My hope is that the discussion on criminal jurisdictional issues starts to recognize the unique position of California Indian tribes. One possible way to draw attention to this is by working with California tribal communities. That is what this conference is about and why there are people other than legal academics contributing to this discussion. Learning and writing about tribal communities gives those “discrete and insular minorities” a voice and broadens the academic perspective.¹⁸

This is part of what Professor Frickey identified as lacking in legal scholarship. Talking about the law in a vacuum does not assist Native people, and it provides little evidence or reasoned opinions as to why a

16. See, e.g., *The Peacemaking Program of the Navajo Nation*, NAVAJO NATION, <http://www.navajocourts.org/indexpeacemaking.htm> (last visited Jan. 27, 2013); *Peacemaking Court*, CHICKASAW NATION JUD. DEP'T, http://www.chickasaw.net/judicial/index_2239.htm (last visited Apr. 2, 2013); James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983).

17. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 782-83 (2006) (“Criminal law is the formal legal institution in which communities express important collective decisions as to what is right and what is wrong within their communities.”).

18. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

change in law or policy would be warranted. It would be remarkable to go and work with tribal communities and assist in identifying problems, characteristics, and solutions specific to them. The potential benefit may well extend to Indian Country generally by adding to the public knowledge about how tribal communities operate and what needs are most pressing.

Unfortunately, we know so little about many aspects of the criminal issues in Public Law 280 Indian Country. Professor Carol Goldberg at UCLA has lead the charge by collecting important empirical information about Public Law 280 tribal communities.¹⁹ But she is one of the few people doing this type of work. It would be fascinating to do a case study working with a California tribal community interested in better understanding the kinds of issues that it is encountering. Proceeding in this manner creates an opportunity for grounded scholarship to drive policy choices that ultimately empower tribal communities.

19. GOLDBERG & CHAMPAGNE, *supra* note 120.