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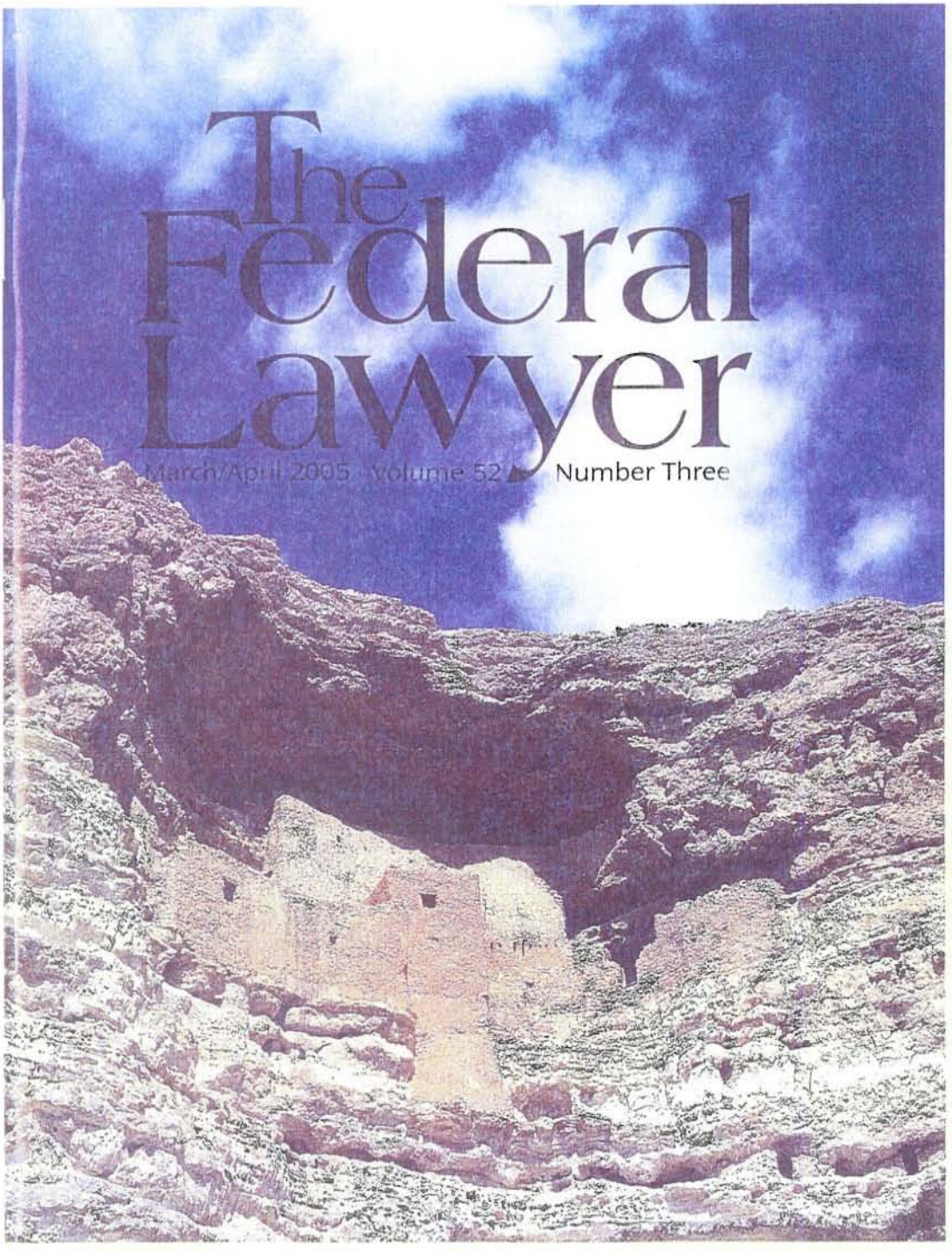
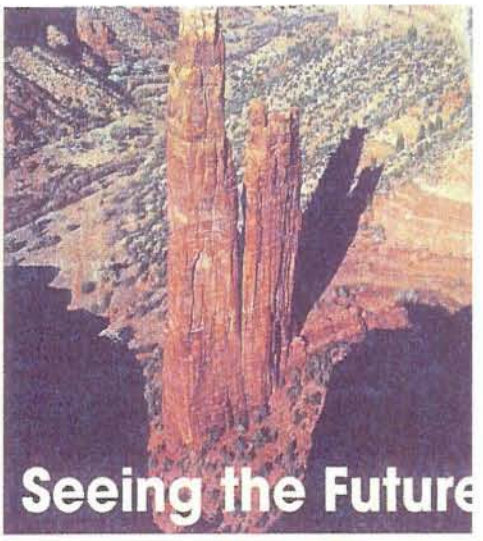
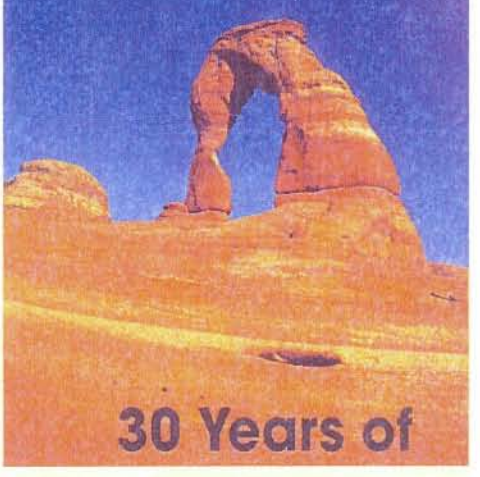




Seeing the Future

Through the Past



30 Years of

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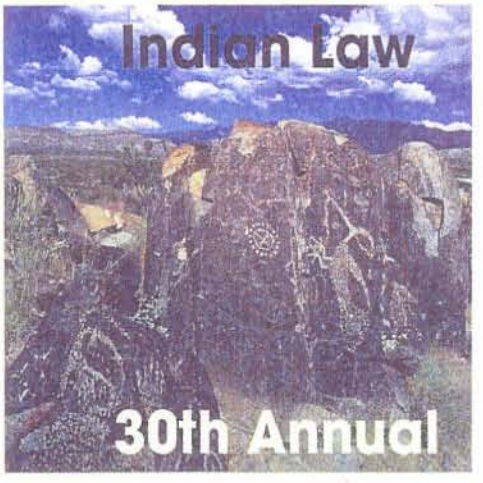
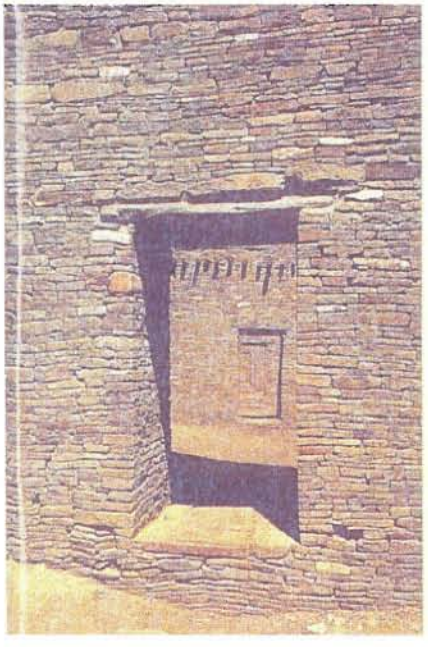
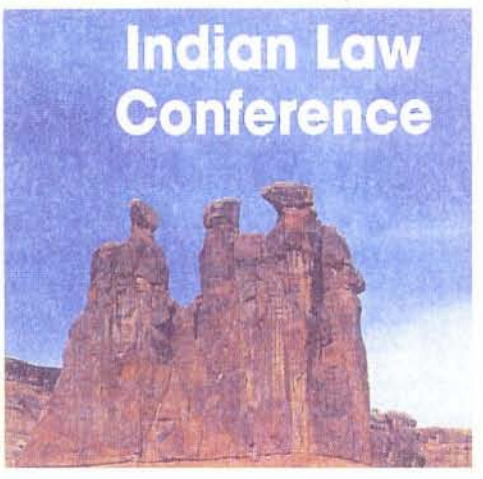


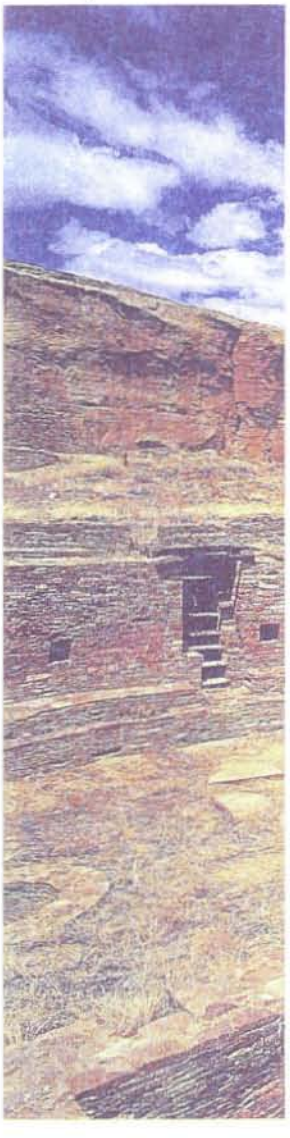
30th Annual

Indian Law Conference





The Federal Criminal Justice System in Indian Country and the Legacy of Colonialism



The crime rate involving American Indians is soaring, and crime in Indian country may be exacerbated by a system that is designed to address it. In federalizing local crimes that have no national impact, the federal criminal justice system in Indian country creates a host of practical problems that calls into question whether the system is consistent with many basic principles of American criminal justice. Because of the tremendous distance between some reservation communities and urban federal courthouses where the cases are tried, Indian country defendants may be effectively denied the right to a public trial before a jury of their peers. Similarly, communities in Indian country may find it difficult to exercise their First Amendment rights of public access to the key institutions of justice for their Indian reservations. As a result, the system designed to address criminal justice and public safety in Indian country simply does not work in a manner consistent with American norms of criminal justice. Consequently, the system ought to be reconsidered.

By Kevin K. Washburn

Fort Peck Indian reservation to Great Falls or Billings, Mont. Depending on the distance and road conditions, either one-way trip to the courthouse could take more than six hours each day.

Those distances are daunting to anyone, but even more so to residents of Indian reservations (and certainly to victims or witnesses to violent crimes) whose incomes tend to be well below the poverty level. The poverty rate among Indians is roughly two and one-half times the national average and may well be higher on Indian reservations, where jobs are scarce.[10] In 1999, for example, 41.5 percent of the residents of the Navajo reservation had an annual household income of less than $15,000.[11] It is fair to assume that most reservation residents drive vehicles consistent with their incomes. Indeed, the "Indian car" has become nearly as fabled today as the Plains Indian pony was in the past — but for vastly different reasons.[12] Because of the distances, a witness in an Indian country case may be facing a five-hour or longer drive in an untrustworthy vehicle during a northern winter with nothing to look forward to but being forced to speak in public in front of a large group of non-Indian strangers, and perhaps being forced, in this unfamiliar environment, to endure a painful cross-examination in which his or her motives and perhaps character will be questioned.

Consider also the unfortunate federal prosecutor or defense attorney: a harried trial attorney working hard to marshal the evidence in a criminal case while nervously looking out the window of the federal courthouse (at falling snow in Minneapolis in winter or the searing heat of the Arizona desert in summer) and desperately hoping that his or her witnesses will appear on time.[13] Federal criminal trials always involve delicate and careful logistical decisions. Imagine the substantial difficulties for the prosecution and defense in attempting to produce the witnesses they need to prove their cases. The risk of erroneous conviction or unmeritorious acquittal is high, and both results have substantial costs. The problems of erroneous conviction of an innocent person are obvious to anyone concerned with justice, but consider the equally serious problem of the failure to convict a guilty felon: the felon is released back into the community where he or she may commit another similar offense. Such a system cannot be counted on to reliably improve the statistics, which should be alarming in view of the fact that Indians already face the highest crime victimization rates in the country.

The Indian Community and the Federal Jury Pool

The crimes enumerated in the Major Crimes Act are routine offenses of a local nature that have significant local effects, but few effects beyond the locality. Yet most federal juries, which are chosen in urban courthouses, lack a single representative from the local Indian community where the offense occurred and may not include a single person who lives within federal Indian country.

Even in states with large Indian populations, Indians represent, at most, only 5–10 percent of the statewide population.[14] As a result, Indians are likely to have minimal representation in the jury venire. Underrepresentation happens for a variety of reasons. First, because juries in most federal districts are chosen from state voter rolls, federal jury venires consistently underrepresent the poor. People living in poverty are generally less likely to register to vote and, even if they have registered, are more likely to have moved since they last registered.[15] Because Indians have among the highest poverty rates, they are especially underrepresented.

Putting aside poverty, Indians may have even lower representation in the potential jury pool than their low absolute numbers might forecast. Indians are likely to be far more invested in their tribal governments than in their state or county governments. Because juries are routinely selected from voter registration lists in state political subdivisions, even relatively politically active tribal members may nevertheless be unrepresented. The federal Jury Service and Selection Act apparently allows use of tribal voting registration lists in creating jury venires, but it does not require such use.

Finally, there is a substantial geographic component to the problem of underrepresentation. The federal districts that include Indian reservations are physically among the largest in the United States. Of the five largest federal judicial districts (Alaska, Montana, New Mexico, Arizona, and Nevada) all but Alaska have substantial Indian country jurisdiction, and all have only one U.S. attorney. Because of the tremendous size of each of the districts, each is divided into multiple divisions. Most federal courts are located in larger cities, and they tend to assemble their jury pools from the division in which they sit rather than from the entire district.[16] The cumulative result of all of these problems is that Indian communities are rarely well represented in the jury pools in Indian country cases. As a result, an Indian country defendant is unlikely to look at the jury and see the face of a single American Indian.

A Representative Jury

Although the lack of a representative jury pool is troubling from a policy standpoint, the problem also has serious constitutional ramifications. The Sixth Amendment right to a trial by an impartial jury has been interpreted to require that the jury venire be "fairly representative of the local population." In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Supreme Court held that the constitutional notion of trial by jury implicitly "presupposes a jury drawn from a pool broadly representative of the community." The Sixth Amendment exists to protect the right of the accused to a fair trial, but the Supreme Court has repeatedly indicated that only a body that is "representative of the community" can properly serve that function. Highlighting the "political function" of the jury, the Supreme Court has explained that "the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it." According to the Court, "community participation in the administration of the criminal law ... is ... critical to public confidence in the fairness of criminal justice."[17]

The Supreme Court has also suggested myriad ways in which juries improve criminal justice, many of which hinge

directly on community involvement. One broad way that juries improve the criminal justice system is simply by providing 12 different human perspectives on the evidence presented at trial and thus improving the quality of the final decision on guilt or innocence. The jury also guards against official corruption by pulling together a group of citizens and empowering them to watch over the work of the prosecutor and the judge.[18] In that sense, the jury interposes the "common sense judgment" of the community between the defendant and powerful government officials.[19]

While the foregoing roles are merely functional, some of the roles that juries serve are more overtly political. Just as communities, through juries, affect the administration of criminal justice, the criminal justice system uses the jury to educate the public and to ensure the legitimacy of the system. Jury duty "educates citizens in the mechanics of their justice system";[20] juries ensure "public confidence in the fairness of the criminal justice system" as well as public acceptance of judicial outcomes;[21] and juries "satisfy the community's desire to participate in, and consequently exert some control over, the criminal justice system."[22] This important role is highlighted in numerous recent cases, such as *Apprendi*, *Blakely*, and *Booker*, in which the Supreme Court has held that only the jury, not the judge, can constitutionally determine the facts relevant to sentencing. According to at least some members of the Court, the jury has a "comparative advantage" over the judge in that it knows and can express the "community's moral sensibility" and can more effectively "express the conscience of the community."[23]

In cases that arise under the Major Crimes Act, obtaining jurors from the entire district or from another division than the one in which the crime occurred results in the routine use of jurors from outside the Indian country jurisdiction of the court. Although neither the Constitution nor the Sixth Amendment uses the term "peers," from time to time, the Supreme Court has indicated that the right to trial by jury means a right to a jury of one's peers.[24] Because the term is not explicitly used in the Constitution, it has never been effectively defined, at least for purposed of the federal criminal justice system.[25] The Court has suggested, however, that the term is implicitly included within the definition of jury and that it includes only those persons with the same legal status as the defendant — those who live within the reach of the same laws.[26] Because the average person serving on a federal jury venire cannot be punished for any Indian country offense unless he or she ventures into Indian country and commits a crime against an Indian, the average juror in an Indian country case is not routinely subject to the same laws as the people living within the Indian community. Such jurors are thus not "peers." Thus, this scheme is arguably contrary to the principle enunciated in *Strauder v. West Virginia*, 100 U.S. 303 (1879) — that a person should be judged by persons subject to the same laws.

Jurors from outside Indian country may be, in some sense, "impartial," but they may be entirely uninterested. Such jurors might be able to adequately perform the simple task of measuring the evidence against an objective legal standard; however, juries are used for much more sophisticated reasons. After all, a judge could perform the same task; yet the Supreme Court has repeatedly said that a judge is not adequate.[27] A foreign community may not be able to serve as a check on abuses of federal power as well as a jury that lives in Indian country and sees how that power is exercised. A jury that is not representative of the community within the court's jurisdiction is no better than a judge.

Indian country defendants who are tried before juries that are not representative of Indian country communities have a compelling argument that their juries fail to protect their fundamental constitutional rights. Such juries do not "represent the community," and they do not "express the moral sensibility" of the Indian country community. As a result, such juries do not reflect the community's sense of judgment in deciding the case. Moreover, the verdicts produced in this context fail to serve basic purposes of criminal law. The defendant does not feel the shame that comes from the sting of community judgment or even the weight of the community's judgment. In addition, the verdicts produced by these illegitimate juries may not give the Indian community any confidence in the outcome. As a result, the legacy of colonization is present in each of the verdicts produced under such a system.

Defendants and Community Access to Trials

The public nature of the trial is also a fundamental constitutional concern and a key protection available to criminal defendants. For the innocent defendant, public trials are crucial because they serve to ensure the "integrity and quality" of the testimony offered at trial.[28] According to the Supreme Court, the community's presence encourages witnesses to perform their duties more conscientiously. Moreover, publicity may "induce unknown witnesses to come forward with relevant testimony."[29]

If these are the key concerns involved in conducting a trial, it is crucial for the community in which the offense occurred to have access to the trial. Would not access by members of the affected community, rather than by distant strangers, be more effective in keeping the witnesses conscientious and honest? Is it not harder to lie in front of one's own friends and neighbors than before strangers? Indeed, the *absence* of any members of the community in the gallery or on the jury may embolden a witness who is prone to lie or may at least make it possible for the witness to be more careless. In such circumstances, the witness is not directly accountable to the community for the testimony he or she provides. Indeed, in Indian country cases, the Indian community may be entirely unaware of the proceeding. At the same time, the cultural gulf may render the witness less invested in and less respectful of the federal criminal justice process.

Similarly, it is the defendant's own neighbors who are likely to be most concerned about any attempt to "employ [the] courts as instruments of persecution" against a member of their community. Moreover, if publicity is designed to create an opportunity for unknown witnesses to emerge with meaningful testimony, the purposes of pub-

licity cannot be served unless the specific community in which the witnesses are located has access to the trial.[30]

Indian Communities and Open Access to Trials

Even though the defendant's interests sometimes overlap with those of the community, it is important to turn from the defendant's Sixth Amendment safeguards inherent in public trials to the public's own First Amendment right to open access to trials. In *Richmond Newspaper v. Virginia*, 448 U.S. 555 (1980), and in numerous other cases, the Supreme Court has recognized that the First Amendment creates a constitutional right of access to criminal trials for general members of the public who are not parties to the case.[31] Many of the justifications for public access are rooted in the legitimate interests of the defendant, but the First Amendment protects the rights of the community as well: "[P]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct. ..."[32] The public has a "definite and concrete interest in seeing that justice is swiftly and fairly administered."[33] The Court has termed this the "community therapeutic value" of trials and has indicated that this interest can be served only by giving the public open access to trials:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. ... The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in a covert manner. [And] results alone will not satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence. ...[34]

The Court has also explained that, without public access, a community may not understand the criminal justice system in general or its particular workings in a specific case. In short, it is difficult for a community to accept what it cannot observe.[35]

Given these broad justifications for public trials, it is doubtful whether the First Amendment rights of Indian communities are ensured in Indian country trials that are conducted hundreds of miles away from the Indian country communities where the crimes occurred. Consider, for example, the justification that public trials offer "community therapeutic value"; such a purpose simply cannot be served unless the Indian country community has access to the trial. No other community will do. It is the affected community that will have a "fundamental, natural yearning to see justice done. ..." It is the affected community that might otherwise engage in "vengeful self-help" if it is not satisfied with the process or the outcome.[36] Yet the affected community in Indian country may have no knowledge of the trial.[37]

In light of the daily facts of life on Indian reservations, which include tremendous distances and stark poverty, the families of defendants, the victims, the witnesses, and other members of the community routinely face substantial practical barriers that prevent them from attending federal criminal trials. Of course, the public's right to open access does not necessarily require actual members of the community to be present in the courtroom, but because federal trials are not televised, they are perhaps the least friendly forums for alternative types of public access. Few Indian country cases are covered in the popular media, such as local television news broadcasts or large daily newspapers.[38] In addition, even though a handful of local communities have weekly or monthly newspapers that serve Indian country communities, few of these papers report on federal criminal trials.

Alhough there may be no formal bar to open access to trials, the federal regime's "removal" of the trial from the community where the crime occurred to a distant city creates a routine, de facto denial of public access to trials. In Indian country, most members of the Indian country community are unaware of ongoing criminal trials. Consider that witnesses who are subpoenaed to appear are routinely reimbursed for travel expenses, provided hotel rooms, and paid witness fees to appear in court, even when they are appearing pursuant to a properly served subpoena. Such payments seem to concede the argument that access might otherwise be unavailable.

Indeed, this state of affairs highlights a cruel irony in the existing system. Federal officials originally justified their need for the Major Crimes Act partially on the concern that, absent federal trials, there would be an unending cycle of violence because victims would naturally seek revenge and communities would have no tribal forum to resolve these disputes. Though that argument was dubious in context (tribes often had systems of restorative justice), it is certainly true that one of the fundamental purposes of a criminal justice system is to address wrongs within formal channels in order to prevent individuals from resorting to self-help and attempting to seek revenge. But how can the criminal justice system serve this purpose if the relevant community is unaware of the criminal justice system's work? Indeed, revenge might occur in Indian country because the community has no idea that "justice" has already been delivered.

The Supreme Court has repeatedly justified open access to trials on the theory that it enhances not only basic fairness itself, but equally important, the *appearance* of fairness within the judicial system.[39] One might place the question in the context of the ancient riddle about whether a tree falling in the forest makes a noise if there is no one there to hear it: Can Indian country trials actually find the truth and administer justice if the Indian country community is not there to witness it?

Indian Country and Trial Venue

In recent years, change of of venue in several high-profile cases — including the trial of the Los Angeles police officers accused of beating Rodney King, which was moved to the suburb of Simi Valley, and the trial of the

New York City police officers accused of killing Amadou Diallo, which was moved upstate to Albany — have been the subject of scathing academic and public commentary. Such transfers precluded the affected community from participating in and witnessing the trial. The changes of venue in the cases involving Rodney King and Amadou Diallo were extraordinary and received tremendous public attention. When the Simi Valley jury returned not guilty verdicts on the most serious charges, members of the African-American community in Los Angeles perceived a miscarriage of justice. The ensuing riot was the most destructive in 20th-century America, culminating in 52 deaths, thousands of injuries, and property damage amounting to nearly a billion dollars.[40]

Because Indian country trials are *always* handled outside Indian communities, Indian country cases routinely present the kinds of problems that seemed extraordinary in the cases mentioned above. Although it is hard to imagine a riot that has the same effect in Pine Ridge or Window Rock, the injustice occurring may be just as great. These Indian towns may be much farther from the court that hears their cases — both in distance *and* in culture — than Simi Valley is from Los Angeles or Albany is from New York City. As a result, Indian communities are routinely denied the "community therapeutic" benefit of knowing that justice has been rendered, and they may feel just as aggrieved as the New York City and Los Angeles communities felt in those cases.

Federal Criminal Justice and the Moral Foundations of Criminal Law

People have a natural and legitimate interest in the crimes that occur within their communities. Indeed, criminal conduct is behavior that the society has determined is so harmful that it deserves "the moral condemnation of the community."[41] Indeed, a crime is distinct from a civil wrong in just that sense — a criminal offense is greater than a harm to any single individual — it constitutes a harm to the entire community. It is for this reason that criminal and civil wrongs are separated and dealt with by different justice systems.

One key normative problem with the federal system is that it is an example of the national legislative body substituting its own judgment for the tribal communities' sensibilities — even for offenses that have only a local effect. Jury verdicts that involve the same type of error simply compound the problem. Because the Indian community in which the crime occurred, and in which the defendant may live, is not present at trial and not represented on the jury, defendants in Indian country cases may not feel that the conviction represents the weight of the community's moral judgment. If a defendant does not feel the weight of his or her own community's moral judgment, the accused may not be confronted with the truth of the wrongfulness of his or her own actions in a way that would bring about regret for the criminal offense. The shame of being convicted of an offense may itself be one of the most valuable parts of the process for the defendant, because the outcome forces introspection, which is a key part of the process of rehabilitation. When the defendant does not perceive that it is his or her own community making that judgment, the person who is found guilty may not feel the bite of the verdict in the same way. Indeed, because the federal government is sometimes viewed as a villain in Indian country, defendants may sometimes even see themselves as martyrs and may be able to evade the most difficult aspects of introspection that can be produced by a judgment of guilt.

Conclusion

For two centuries, American criminal justice policy has involved the notion that local crimes should be addressed at the local level with formalized participation by the local community. A similar concern for localism has come to animate federal policy toward Indian tribes in recent decades. Congress, the executive branch, and even the federal courts have cast aside the previous goals of colonization and assimilation and have embraced an initiative characterized as "tribal self-determination" — the notion that important governmental decisions and programs should be carried out at the tribal level.

The theory of localism that animates American criminal justice is not so different from the motivation behind the burgeoning trend toward self-determination for tribal governments. At bottom, each of these theories springs from the same fountain of liberal political philosophy. As a result, it is increasingly apparent that the denial of tribal self-determination in the federal criminal justice system may have constitutional ramifications for criminal defendants and Indian communities. One way to address these problems is to recognize that tribal self-determination may, in essence, be constitutionally mandated in a system that values the involvement of local communities in their institutions of criminal justice. In keeping with these themes, Congress, the executive branch, and the federal courts must implement the federal criminal justice system in a manner that will embrace — rather than shun — Indian country communities. **TFL**

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Endnotes

[1]*See* 18 U.S.C. §§ 1151–1153.

[2]*See* Christopher B. Chaney, *Victim Rights In Indian Country: An Assistant United States Attorney Perspective*, 51 U.S. ATT'YS' BULL. 1, 36 (Jan. 2003) (noting that it is 381 miles from the federal courthouse in Salt Lake City to the Navajo community of Monument Valley, Utah).

[3]*See* Steven W. Perry, *Bureau of Justice Statistics, American Indians and Crime* 5–6 (2004), available at www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf.

[4]William H. Rehnquist, *Chief Justice Rehnquist on Federalization of Crimes*, 33 NDAA PROSECUTOR 9, 14 (1999).

[5]Perry, *supra*, note 3, at 5–6.

[6]Patricia Tjaden and Nancy Thoennes, *Bureau of Justice Statistics, Full Report on the Prevalence, Incidence and Consequences of Violence Against Women* (2000), available at www.ncjrs.org/pdffiles1/nij/183781.pdf.

[7]*See Tribal Justice Programs: Hearing Before the U.S. Senate Committee on Indian Affairs*, 105th Cong., 1998 WL 296449 (1998) (Sen. Inouye, vice chairman, Committee on Indian Affairs, noting, "At a time when, nationally, the violent crime rate has dropped almost 17 percent since 1992, and the homicide rate has declined about 22 percent[,] the rates of violent crimes and homicides have continued to rise on Indian reservations.").

[8]*See* Margaret Zack, *State-Federal Project Fights Reservation Violent Crime*, MINNEAPOLIS STAR TRIB., Aug. 30, 2002, at 2B.

[9]Paul Charlton, U.S. attorney, District of Arizona, *2003 Indian Country Report*, available at www.usdoj.gov/usao/az/indrpt03.html (last visited Nov. 10, 2004).

[10]Yair Listokin, *Confronting the Barriers to Native American Home Ownership on Tribal Lands: The Case of the Navajo Partnership for Housing*, 33 URB. LAW. 433, 434–35 (2001). Low income and a high rate of violent crime victimization for American Indians seem often to coexist; *see* Perry, *supra*, note 3.

[11]*See* U.S. Census Bureau, Profile of Selected Economic Characteristics: 2000, available at factfinder.census.gov/aian/aian_aff2000.html (last visited Dec. 20, 2003).

[12]The phrase "Indian car" has become a term of art in Indian country and was immortalized in a song by the same name by a Bois Forte Chippewa recording artist, Keith Secola, and his Wild Band of Indians. In the song, Secola describes the stereotypical Indian car: "My car is dented, the radiator steams/Head light don't work, radio can scream/Got a sticker, says "Indian power"/On my bumper, holds my car together." The movie *Smoke Signals* features an Indian car that can only drive in reverse, derived from a story by Sherman Alexie; *See* Sherman Alexie, The Lone Ranger and Tonto, Fistfight in Heaven 156 (1993). In popular mythology, the Indian car is generally considered far less reliable than the Indian pony of the 19th century.

[13]Larry Echohawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?* 5 N.Y.U. J. LEGIS. & PUB. POL'Y 83, 99 (2001) ("travel time [in federal Indian country cases] is often three or four hours or more" and "[w]hen witnesses have to travel far to give testimony, they sometimes do not show up.").

[14]*See* U.S. Census Bureau, *Census 2000 Brief, The American Indian and Alaska Native Population: 2000* (2002).

[15]Mitchell S. Zuklie, Comment, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 103–104 and n.18 (1996) (collecting studies across the country concluding that the poor are underrepresented).

[16]*Cf.* Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 81 (2004) (arguing that federal juries do not properly represent communities in urban drug offense cases, because the federal jury is drawn differently from one drawn under state law for a state prosecution).

[17]*Taylor v. Louisiana*, 419 U.S. 522, 529 and n.7, 530–531, 534 (1975).

[18]*See* Akhil Amar, *The Const. and Crim. Proc.: First Principles* 121 (1997) (citing Andrew Hamilton, *Federalist Paper No. 83.*)

[19]*See* Toni M. Massaro, *Peremptories or Peers?: Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 511 (1986).

[20]*Id.* at 515. *See also* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 115 (1993) ("because jury trials educate jurors in self-governance, deterring discriminatory jury selection practices helps to ensure that all citizens have an equal opportunity for the civic education jury service provides.").

[21]*Taylor*, 419 U.S. at 530.

[22]Massaro, *supra*, note 19, at 512.

[23]*See Ring v. Arizona*, 536 U.S. 584, 613–614 (Breyer, J., concurring) (citing Justice Stevens' dissent in *Harris v. Alabama*, 513 U.S. 504, 515–526 (1995)).

[24]*See Strauder v. West Virginia*, 100 U.S. 303, 308–309 (1879); *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972).

[25]*See* Massaro, *supra*, note 19, at 548–550.

[26]*Strauder*, 100 U.S. at 308.

[27]*United States v. Booker*, No. 04-104, 2005 U.S. LEXIS 628 (Jan. 12, 2005); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[28]*See, e.g., Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 578 (1980).

[29]*Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979).

[30]*Id.* at 380, 383.

[31]*Globe Newspaper v. Superior Court*, 457 U.S. 596, 603 (1982).

[32]*Press Enter. v. Superior Court*, 469 U.S. 501, 509 (1984).

[33]*Gannett Co.*, 443 U.S. at 383.

[34]*Press-Enterprise*, 464 U.S. at 569–571 (internal citations omitted, but citing, among others, Jeremy Bentham, *Rationale of Judicial Evidence* (1827)).

[35]*Id.* at 572.

[36]*Id.*

[37]*Richmond Newpapers*, 448 U.S. at 571.

[38]Kara Briggs et al., *The Reading Red Report, Native Americans in the News: A 2002 Report and Content Analysis on Coverage by the Largest Newspapers in the United States* (finding a pattern of lack of coverage and uninformed coverage following a statistical analyses of the reportage in eight of the largest American newspapers about American Indians and tribes), available at www.naja.com/docs/red.pdf.

[39]*Press-Enterprise*, 464 U.S. 501, 508 (1984).

[40]*See* Randall Kennedy, *Race Crime and the Law* 117–118 (1997).

[41]Henry M Hart Jr., *The Aims of the Criminal Law*, 23 LAW AND CONTEMP. PROBS. 401, 406 (1958).