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# Overlooked Areas of Federal Sentencing: Federal Enclaves, Indian Country, Transfer of U.S. Prisoners From Abroad

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With drug and immigration offenses crowding the dockets of federal courts and the continued Congressional federalization of large numbers of "street crimes," not much attention has been paid to sentences for offenses committed in geographic enclaves over which the federal government has traditionally exercised jurisdiction. These territories include Indian Country, federal parks, military installations, federal buildings, and other areas over which the federal government exercises exclusive (or, in limited cases, concurrent) jurisdiction.

This *FSR* Issue is devoted to these often overlooked crimes and offenders. It discusses some of the unique jurisdictional issues present in these cases, such as the determination of whether the area on which the crime was committed is in fact a federal enclave, focuses on the problems arising from the application of federal guidelines to ordinarily state-type offenses involving Native Americans and addresses the special topic of sentence calculations when American prisoners are transferred from other countries pursuant to treaties to serve foreign sentences in American prisons.

### I. Federal Enclaves

Determining whether an offense is committed on federal territory may be difficult but is crucial to establish federal jurisdiction. Beth Farber and Susan Bauer state that assessing who has jurisdiction over an offense is the first step in any investigation involving alleged federal enclaves. Their article details some of the difficulties and challenges in making such a finding.

Federal jurisdiction over Indian Country is predicated on the Major Crimes Act which criminalizes fourteen major offenses.[1] However, determining who is a Native American and whether an offense was committed on a reservation may be challenging. As then U.S. Attorney for South Dakota Ted McBride indicated in testimony before the Advisory Committee to the U.S. Commission on Civil Rights, Indian Country is often non-contiguous, making it difficult to determine whether state, tribal or federal law applies.[2]

After finding federal jurisdiction, advocates must determine which law applies. As Farber and Bauer indicate, when no federal law or regulation addresses conduct that is criminalized by state law, the Assimilative Crimes Act directs the application of the appropriate state statute. While felonies committed on federal territory are generally covered by the U.S. Code and offenders will therefore be sentenced under the guidelines, many violations that occur on federal land are misdemeanors to which the guidelines do not apply when their maximum punishment is six months or less. Farber and Bauer expertly lay out some of the pitfalls in determining what substantive law and sentencing provisions apply in different scenarios.

While in some situations the application of federal law implies a higher sentence, this is not necessarily the case. Some examples Farber and Bauer provide show situations in which the federal offense carries a lesser maximum sentence than the comparable state crime.

### II. Native Americans

Indian communities across the United States vary widely in their social, economic and cultural characteristics. However, most of them face severe economic and social problems.[3] As Judge Kornmann and John Butcher indicate in their respective articles, Native Americans constitute the poorest, and often forgotten, minority in the United States.

The violent crime rate in Indian country is twice to three times the national average. In contrast to a falling violent crime rate across the country generally, Indian territory has witnessed dramatic increases in violent offenses recently.[4] Most crimes, as Judge Kornmann notes, are related to alcohol abuse.

In many unfortunate ways Native American communities in the United States may not be very different from aboriginal settings in Canada and Australia. In Australia aborigines are eight times more likely to be murdered than non-indigenous Australians; they constitute thirteen percent of all homicide victims and nineteen percent of all murderers. Their imprisonment rate is fifteen times higher than that of non-indigenous Australians.[5]

In a study released in March 2000 the South Dakota Advisory Committee to the U.S. Commission on Civil Rights indicated that "much of Indian Country has lost confidence in our democratic institutions," largely because many Native Americans perceive the criminal justice system as operating "in a disparate and discriminatory manner".[6] In its public hearings the Committee encountered bitter criticism of the federal sentencing guidelines which many Native Americans who testified perceived as disproportionately harsh, compared to analogous state sentences. The Committee concluded that such views "reinforce and strengthen the perception of unequal justice for American Indians." Therefore, it recommended that the U.S. Civil Rights Commission study the perceived racially discriminatory impact of the guidelines.

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In his piece Judge Kornmann puts his discomfort with the use of the guidelines in cases involving Native Americans in even starker terms: "Too often are [federal judges] required to impose sentences based on injustice rather than justice . . . ." He chastises Congress for failing to consider the impact of legislation on Indian Country. In that respect, however, Congress is not alone. Most Americans have little or no idea about conditions on reservations and the daily lives of Native Americans. John Butcher provides a glimpse at the hardship many Native Americans who live on reservations endure, ranging from the lack of utilities to the absence of even basic services. Because of the dramatic differences that exist between Indian Country and the rest of the nation, Judge Kornmann argues that the guidelines, at least in their current relatively rigid form, should not apply to Indian Country.

Because of the report of the Advisory Committee and continued criticism of the harsh sentences imposed on Native Americans, the Sentencing Commission will hold a public hearing in Rapid City, South Dakota, on June 19, 2001. The Commission's goal is to start an open dialogue with Native American communities about the application of the guidelines on reservations. Judge Kornmann's and John Butcher's articles add to this conversation by proposing a number of thoughtful modifications to the sentencing of Native Americans under the guidelines.

Because of the diversity of Native American tribes, the most frequently committed offenses differ between reservations, not only in different parts of the United States but even within the same state. Nevertheless, one common thread appears to be the involvement of alcohol in many offenses committed by Native Americans on Indian territory. Because of the high rate of alcoholism on reservations and the commission of connected crimes, the caseload in judicial districts which have substantial Indian territory tends to be very high. Many of these alcohol-related offenses are punished more severely than comparable state crimes. Especially drunk driving offenses, as Judge Kornmann points out, yield much higher sentences in federal court than in South Dakota's state courts. Other offenses, such as assaulting a police officer while under the influence of alcohol, are heavily penalized under the guidelines. For local and state police, however, dealing with drunken offenders tends to be a routine aspect of their work which rarely merits heavy punishment.

John Butcher focuses on the Native American sex offender and demonstrates that seventy percent of defendants sentenced under the guideline provisions on aggravated criminal sexual abuse, statutory rape and sexual abusive contact are Native Americans. He shows how substantive and sentencing laws in South Dakota and New Mexico together with different charging and plea practices tend to lead to substantially lower state court sentences for comparable crimes.

Butcher also indicates how most Native American sex offenders do not fit the stereotype of the "sexual predator." Many of them could benefit substantially from treatment and display a low risk of recidivism. Rather than distinguishing different types of sex offenders, however,

members of Congress (and the general public) tend to consider longer sentences the only "guarantee" that sex offenders do not recidivate. Moreover, legislative changes are frequently tied to highly publicized offenses, even if those are not typical of a particular crime category.

Recent enhancements of sex offender guidelines, for example, have been driven by concerns over "Internet predators". However, the "typical" offender sentenced under these guideline provisions, as John Butcher points out, tends to be a Native American who commits incest. For that reason, Butcher suggests that the Commission acknowledge that offender as its baseline and exclude him from the imposition of more severe and inappropriate enhancements that would primarily affect Native Americans.

For Native Americans, longer sentences are often more traumatic than for other offenders since incarceration means separation from their culture and family. Therefore, Butcher proposes also increased departure opportunities for low risk sexual offenders.

Judge Kornmann suggests a number of avenues for revising the guidelines to make the sentencing of Native Americans fairer. First, he provides examples how a judge can use his/her interpretive power over federal statutes to protect Native Americans from excessive and inappropriate punishment. Second, he asks the Commission to permit more departure opportunities, especially when young offenders are concerned. Judge Kornmann ends with a moving plea to Congress and the Sentencing Commission. He wants the guidelines to allow for more mercy and understanding when federal judges are asked to sentence especially young Native Americans for offenses that would usually be tried in state courts.

In addition to his guideline-specific recommendations, Judge Kornmann develops an ambitious plan for the fairer sentencing of Native Americans by suggesting more substantial funding for the expansion of tribal court systems, as long as procedural safeguards present in state and federal courts are guaranteed.

Rick Sarre further investigates and develops the challenging question Judge Kornmann asks in the Australian context. How can (Australian) courts consider the special situation of aborigines in sentencing them? Should aboriginal customary law be applied to aborigines?[7]

Sarre describes the originally negative attitude of Australian courts toward customary law and points out how in recent decades they have come to recognize "native" law at least in some limited circumstances. In the criminal justice arena, however, the development has been especially slow. While the use of customary sentencing practices may serve especially preventive purposes, certain traditional sentencing practices may violate established human rights norms. Therefore, Sarre urges caution while advocating consideration of customary sentences where they can be formalized without violating Australia's international obligations. The Sentencing Commission may be well advised to consider such nuanced accounts of sentence modifications and the use of customary sentences in other countries with marginalized "native" populations, such as Australia and Canada.

Congress and the Sentencing Commission need to consider what goals the federal sentencing of Native Americans serves. Equal treatment for all may easily turn into inequality when the basic conditions differ so dramatically between reservations and the rest of the country. Therefore, the Commission should view the sentencing of Native Americans against the backdrop of the long and tortured history of Native Americans in this country. As Judge Kornmann makes very clear, Native Americans remain the forgotten minority which continues to suffer from centuries long abuse. In light of the high crime rate in Indian Country, in the long run it might be useful to focus less on punishing crimes committed on reservations but instead on putting together a comprehensive program to *prevent* such crime, which would have to include substantial efforts against alcohol abuse.

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### III. Different Perspectives: Incarcerating Foreigners in the United States—Transferring Imprisoned U.S. Citizens Home

The United States has entered into a number of prisoner transfer treaties with foreign countries. These treaties allow U.S. citizens incarcerated in another signatory state to be transferred to the United States to serve the remainder of their sentence, and non-U.S. citizens to be sent to their countries of origin. While the former aspect is little known, much publicity has surrounded the incarceration of non-U.S. citizens in the United States. States have asked the federal government for reimbursement when holding large numbers of undocumented

migrants; the execution of foreign citizens in Arizona and Virginia has led to diplomatic and legal entanglements for the United States.[8]

Lara Vinnard's piece describes the role of the U.S. Parole Commission in assessing the sentence length for U.S. citizens incarcerated abroad who are then transferred back to the United States. She focuses on the advantages of such prisoner transfers, especially when the offenders are held in countries that abuse human rights and resort to torture or when prison conditions are substantially worse than in the United States. In some situations, however, U.S. citizens convicted abroad may be better advised to serve their sentences there. This applies especially when conditions of confinement abroad are better than in federal prisons. Some of the Western European countries, such as Germany, may serve as examples. A prerequisite for a prisoner transfer is that the offense committed is not only a crime in the country in which the offender is held but also in the United States.

Vinnard focuses in detail on the process by which the Parole Commission sets the release date after determining the analogous offense under U.S. law. While the sentence served may not be longer than the total length of imprisonment imposed abroad, the Parole Commission is empowered to grant downward departures for prisoners who accept responsibility or played a minor role. In addition, downward departures also can be applied to cases where the offender was tortured while in foreign custody. Lara Vinnard's piece provides an insightful and practically grounded introduction to the area of prisoner transfers and re- sentencing.

**Notes**

1. Jon M. Sands, *Indian Crimes and Federal Courts*, 11 FED. SENT. REP. 153 (1998).
2. South Dakota Advisory Committee to the U.S. Commission on Civil Rights, *Native Americans in South Dakota: An Erosion of Confidence in the Justice System—Chapter 2: Executive Summary*, www.usccr.gov/sdsac/tran.htm.
3. Stewart Wakeling et al., *Policing on American Indian Reservations*, NATIONAL INSTITUTE OF JUSTICE JOURNAL (Jan. 2001), www.ncjrs.org/txtfiles1/jr000246.
4. *Id.*
5. Paul Tait, *Domestic Violence Endemic in Black Australia*, REUTERS, Feb. 16, 2001.
6. South Dakota Advisory Committee to the U.S. Commission on Civil Rights, *Letter of Transmittal*, www.usccr.gov/sdsac/tran.htm.
7. In *State v Roberts*, 894 P. 2d 1340 (Wash. 1995), a state court suspended the prison sentence of two Native American offenders when a tribal court banished them to an uninhabited Alaskan Island.
8. *LaGrand Case (F.R.G. v. U.S.)*, I.C.J. (filed March 2, 1999) (opinion has not been issued yet); *Case concerning the Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 99 (order discontinuing proceedings); Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough*, web.amnesty.org (visited May 22, 2001).