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## Public Safety and Criminal Justice

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# CONFERENCE TRANSCRIPT: THE NEW REALISM: THE NEXT GENERATION OF SCHOLARSHIP IN FEDERAL INDIAN LAW\*

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\* Transcript of a meeting of the National Congress of American Indians, at Berkeley, Cal. (Nov. 17, 2006).

*Public Safety and Criminal Jurisdiction*

*Kevin Washburn, Associate Professor of Law, University of Minnesota Law School*

MR. WASHBURN: Actually, I will go ahead and start. I do want to do brief introductions of my panel. It is Carole Goldberg and I and Vivian Juan Saunders.

Vivian Juan Saunders is the Chair of the Tohono O'odham Nation in Arizona. For the linguistically challenged, we call it T.O. But Vivian's tribe is one of the very largest in the country. It is larger than many states, and it also has a long international boundary with Mexico, giving Chairwoman Saunders a unique perspective on these issues.

She has been Chair for more three years, and before that worked with a tribal college.

My other co-presenter here probably doesn't need much of an introduction. It is Carole Goldberg, who has taught for around thirty years at the UCLA Law School. She, of course, started when she was eleven. But she is probably the leading scholar actually doing this kind of work: grounded, empirical work in law.

I am going to go first. I'm the least talented, so we're going to get me out of the way.

I wanted to start by commenting a little bit on what was said this morning. I think when I heard Professor Frickey go through the taxonomy of the kind of scholarship that has been done, he listed doctrinal analysis; sainthood iconic status, saying Cohen or Marshall wouldn't have done it this way; comparative institutional work, so Congress, not the courts, ought to be doing this sort of thing, and then he talked about normative arguments.

When he got to normative arguments, I almost said, "Bingo," because I think I've been guilty of writing articles that fit in each of those categories. I do think we can all grow as scholars if we can get out of those modes.

I also really liked Riyaz Kanji's Adopt-a-Judge Program with Judge Gould. I wanted to volunteer to fly Riyaz out to Seattle. I will pledge the first \$20 to get him to Seattle, if we can maybe pass the hat later, because I think that would be a very useful conversation. Maybe I can take Judge Loken in the Eighth Circuit or someone like that.

I wanted to offer one last introductory remark. When I talked to Sam Deloria about this conference, and we tried to get him out here, we told him what the title was, "The New Realism in Indian Law Scholarship," and he said, "Well, what's the difference between that and the old realism?"

I said, “Well, it’s not really that much different. It’s just that we’re trying to get some of the younger scholars that are coming along to do it. So maybe it ought not be the new realism, but the young realism in Indian law.”

And I think that he was okay with that. He can still represent the old realism or the original realism, but we now have, hopefully, the young realism movement — in deference to Sam.

A couple of years ago, I came to Berkeley to meet with Phil Frickey and also with Frank Zimring, who does a lot of work in the area of criminal justice.

One of the things that Professor Zimring told me was that I should write about what I know. He’s been doing this a long time — and he thinks very carefully before he starts a project nowadays because he tries to focus on those things that he’s particularly good at and that only he can do, and that no one else can do.

That was enlightening to me and it validated the work that I was doing.

Professor Zimring is right, of course. I focused largely on the things that I knew when I started with my scholarship, and my work has been about the things that I know.

Again, I think I hit the Bingo. I think I’ve done all those things that Professor Frickey accused us of doing. And this is the first, of the panels today, to get into a substantive area. This substantive area is public safety and criminal justice, of course, and that is what I have been working on. So let me begin.

Much of my work has been grounded, but grounded in this particular way: The first thing I sought to do was to be fairly descriptive about the institutions of criminal justice in Indian country and how they are working.

Largely, what I have done was simply ask two questions: What do we say is the institutional role of a particular actor in the criminal justice system, for example, the prosecutor or the trial jury, and how well is the actor meeting that role when it comes to Indian country cases? It really hasn’t been any more complicated than that.

I first looked at federal prosecutors.<sup>42</sup> What I found there were a lot of obstacles in Indian country preventing the federal prosecutor from being able to function in a way that we anticipate federal prosecutors ought to function in federal cases.

One of these obstacles, of course, is vast distances, vast distances geographically between where the federal prosecutors are located and the communities that they are, in essence, prosecuting for. But those distances

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42. See generally Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 725-40 (2006).

aren't just geographical; they're also cultural. There are tremendous cultural differences between federal prosecutors and Indian country communities.

That is a fairly obvious descriptive analysis, but it hadn't really been said yet. And I've spent a lot of time analyzing how well federal prosecutors work in Indian country. I drew on my own past experience as a federal prosecutor.

The gist of my conclusion was this: One of the things we say about prosecutors in this country is that they are supposed to have broad experience with their community. Prosecutors have very broad discretion in this country precisely because we expect them to know what the community needs prosecuted. There are so many laws that prosecutors can't possibly prosecute them all. So what we do is we ask them to prosecute the ones that need prosecuting, right? That is the basic idea behind or justification for broad prosecutorial discretion in this country.

Well, it doesn't take a whole lot of analysis to get from there to the fact that federal prosecutors that work in Indian country can't possibly exercise the discretion that we expect federal prosecutors to exercise because they are not physically located in Indian country.

For every other crime, generally, that a federal prosecutor prosecutes, he's prosecuting the crime on behalf of the community in which he lives. He or she is a member of the district, or a citizen of the district, in which he or she is prosecuting. Even in light of the broad federalization of crime, that basic principle is true.

It is not true, however, in Indian country. Federal prosecutors don't live and work in Indian country. So they don't have that kind of experience. They aren't prosecuting on behalf of their own community. That is one of the key problems.

Only in Indian country cases really are federal prosecutors really outsiders, handling cases that solely relate to another community other than the one they live in. Indeed, we define jurisdiction in Indian country cases as limited to "Indian country." So federal prosecutors don't work very well in this context, I concluded.

I then analyzed juries.<sup>43</sup> Just as the American criminal justice system has norms that apply to prosecutors and explain why we give prosecutors such broad discretion, there are also strong norms as to the purposes of juries in the United States. The jury is, even more than the prosecutor, supposed to be designed to guarantee the community's important role in criminal justice.

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43. See generally *id.* at 741-62.

The trial jury, in essence, is supposed to insure the legitimacy of criminal justice by being the representative of the community. Indeed, it is supposed to represent a cross-section of the community. That is a constitutional requirement. That community ought to be the defendant's community generally or really the community of the location where the crime occurred. So that is the community that is relevant in any criminal case.

The Supreme Court, in just the last five or six years has put an exclamation point on the importance of juries in American criminal justice. The Supreme Court, starting with the *Apprendi* case, has started to say, "Look, the role of the jury is really preeminent and predominant, and we have to let the jury make the key decisions, unless the defendant wishes to waive those rights."<sup>44</sup>

The *Blakely* case<sup>45</sup> followed soon after. The *Blakely* case basically said that the jury must find any facts that increase the sentence of a federal defendant, and the same developments are happening on the state level, too.

There are several other cases that I could mention, such as the *Crawford* case, for example, which requires, really, that juries hear all of the evidence.<sup>46</sup> It held that evidence can't be presented by hearsay through a federal officer. While it is sort of an evidence case, it is one that strongly buttresses the role of the jury in some senses.

In other words, the Court is strongly committed to the importance of the role of the jury in these cases. So the jury is important, right? That's the point of these recent cases.

But how well is this important institution working in Indian country? Well, if one of the chief purposes of the jury is to represent the community, these juries simply aren't doing that at all.

Grounded research tells us where juries come from. It turns out that juries in Indian country cases don't come from Indian country. Well, that's, again, a fairly obvious descriptive point, but it is a very powerful point if you think about the constitutional role of the jury in criminal justice.

Why is this happening? What happens is in many reported cases, and that's largely what I was looking at, defense attorneys were challenging jury composition, but not on the basis of the location from which the jury was drawn, but merely based on the race of the jurors. Frankly, the defense attorneys didn't get very far.

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44. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact that increases a punishment beyond the statutory maximum must be submitted to a jury).

45. *Blakely v. Washington*, 542 U.S. 296 (2004).

46. *Crawford v. Washington*, 541 U.S. 36 (2004).

It turns out that there aren't very many Native Americans on juries in Indian country cases, but under the law as it stands there doesn't need to be to pass constitutional muster. So the courts sort of shrug and say, well, that's too bad, but the disparity in this case doesn't meet our threshold to produce a constitutional violation.

But the more obvious problem is that the venires tend to be drawn from the counties near the federal courthouses, which are often more than one hundred miles from the reservation community where the crime occurred. So these juries just don't in any sense represent the community that the juries are theoretically constituted to represent.

In other words, juries in Indian country cases are failing to meet the basic Sixth Amendment requirement as to why we have juries. Juries are thus another key institution that isn't working properly in Indian country.

Now I have asserted, as to the prosecutor and the jury that, as they are currently working in the federal Indian country system, they don't work properly. More recent work has turned to grand juries and federal defenders, federal defense attorneys, and raises similar criticisms.

There are a bunch of really easy targets here — sitting ducks, it turns out. None of these institutions are working very well in Indian country.

Most of these arguments that I have been making can be corrected within the federal system, if we were interested in doing that, if we were interested in correcting the federal system. I have not really answered yet the bigger questions as to what the solution is. Indeed, both of those problems, the problems with the prosecutor and the jury, can be easily corrected without changing the essential federal model.

I have elsewhere argued that criminal law is too important for this. Criminal law is really too important to be handled by the federal government. Criminal law may be something that is so important that it ought to be happening at the tribal level.<sup>47</sup>

It may be necessary to tribal self-determination for tribes to be engaged in criminal law. Criminal law, actually, is key to self-determination because it is where a community says what is most important to us. We criminalize the behaviors that are so bad that they deserve the moral condemnation of the entire community.

Currently, tribes often don't get to make those decisions themselves. I have argued that this means they don't actually have true self-determination under the current model.

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47. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C.L. REV. 779 (2006).

The next question that arises, anytime I talk about these issues, is the inevitable “well, what would tribes do?” What would a tribal criminal justice system look like? That is inherently, to some degree, an empirical question. It is also a counter-factual question. We don’t know because, as to felony criminal justice, no tribe has felony criminal jurisdiction anymore. So we don’t know the answer.

Many of you know about the grant that Carole Goldberg, Duane Champagne, and I just received from the NIJ to do on-the-ground research; really to map out Indian country criminal justice systems and to try to figure out what’s going on, at very broad strokes, in those areas. So, hopefully, that will start to answer some of these questions.

This work, by the way, is not going to be only doctrinal. It largely involves talking to people. Luckily, we will be talking to people in a fairly systematic fashion to give it greater research legitimacy.

I have to say that the most fun part of doing this work is the talking to people. I really thought, when I left Washington and went into the academy, that all I wanted to do is sit in my office and do research, you know, because I was kind of tired of talking to people.

(Laughter.)

But it turns out that some of the best material comes from talking to people. It is also one of the most time-consuming ways of conducting research.

A couple of examples: One example involved talking to the then-police chief at the Salt River Puma-Maricopa Tribe in Arizona. He told me that, in the 1970s, they had approximately twenty unsolved homicides. Then the Indian Self-Determination Act passed, and they got a 638 contract for their tribal law enforcement. After that time, once the tribe was running its own police force and doing its own investigations, or participating heavily in them, there haven’t been any unsolved homicides since then. That’s an interesting story. That’s a story that begs to be understood a little bit more clearly. It seems to suggest, perhaps, some real solutions to the criminal justice problem and the public safety problem in Indian country.

How tribes go about criminal justice is not altogether free of complexity. Sam Deloria is fond of asking me, “Well, how would you like to be prosecuted for murder on the Pine Ridge Reservation?” He usually gets great satisfaction out of the fact that I hem and haw and can’t give him a very good answer, except that I wouldn’t really want to be prosecuted for murder in Texas either.

(Laughter.)

But some of the complexities are a little more subtle. One of the more interesting conversations I had was when I was teaching a course for tribal

judges at the National Judicial College about five years ago. The subject was the use of tribal traditions and norms and values in tribal court criminal cases.

A judge from, I think, the White Mountain Apache Reservation who handled juvenile cases came up afterwards and said, "You know, I like the general idea, but I've got a problem. I had this case involving some juveniles that were stealing cars and joyriding. They stole a car and were joyriding in it, and, well, I'm trying to figure out how to apply our tribal traditions." He said, "Let me walk through it with you."

He said, "In our culture, being able to successfully steal your neighbor's horses was the highest form of honor in our tribe."

(Laughter.)

"How do I apply that norm to these kids that stole a car and went joyriding in it?"

So we talked about the agony of trying to figure out which tribal traditions actually remain useful and which are no longer useful anymore.

But that is the fun part of this work, trying to figure out these subtleties. I am anxious to get to do more of that and to learn more of it.

For those who are interested, the best way to get involved in this work is to find a very senior law professor who comes to you and asks you to participate in a million dollar grant proposal. Sit in your office, work hard, and wait for the phone to ring! So I have been really lucky and really looking forward to the work and trying to learn a new skill, fortunately, right after tenure when I feel like I have the ability to retool. So I started with the discussion with Frank Zimring saying: Do what you know. I am starting to go beyond that, I guess, but that remains an important part of the foundation for what I am doing. To grow as a scholar, you sometimes have to do more than what you know.

Anne, I was terrified after your presentation. My knees were knocking over there. So I don't know what I'm getting myself into, but this is very exciting stuff. So I think it's great.

I think maybe I will turn it over to Carole to give a more substantive description of the very important work that she has been doing on Public Law 280.

(Applause.)

*Carole Goldberg, Professor of Law, University of California-Los Angeles*

MS. GOLDBERG: I am going to be presenting some results from the research that my colleague and husband, Duane Champagne, and I have been doing on Public Law 280, and giving you some background on how it came into existence.