RESEARCH PRIORITIES

LAW ENFORCEMENT IN PUBLIC LAW 280 STATES

Carole Goldberg
Professor, UCLA School of Law
&
Heather Valdez Singleton
Research Associate, UCLA American Indian Studies Center

Paper prepared for
Crime and Justice Research in Indian Country Strategic Planning Meeting
National Institute of Justice, United States Department of Justice
October 14 & 15, 1998

Legal Background

Absent authority expressly granted by federal legislation, states lack criminal jurisdiction over crimes committed by Indians in Indian country[1]. Tribal and federal law enforcement generally share authority over such offenses, although there is a realm of exclusive tribal jurisdiction. This legal arrangement reflects constitutional and treaty-based principles establishing a special government-to-government trust relationship between the United States (U.S.) and the tribes. These principles in turn reflect the reality that states' interests in governing power and resource control have often conflicted bitterly with tribes' claims to governance and territory. Tribes have feared that state jurisdiction would prevent them from defining norms and administering justice in accordance with evolving tribal traditions, and would expose tribal members to indifferent or hostile law enforcement institutions.

The first comprehensive federal legislation to introduce state criminal jurisdiction into Indian country was enacted in 1953, and is commonly known as Public Law 280. Its most notable feature is that it was adopted and implemented without the consent of the affected tribes, raising serious questions about the proper discharge of the federal trust responsibility and the scope of Congressional authority in Indian affairs. Its second most notable feature is that it did not

[1] The term Indian country is codified at 18 U.S.C. 1151. The Code provides, "The term 'Indian country,' as used in this chapter, means, (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."

provide any federal financial support for the newly established state law enforcement responsibilities, making it an early form of an "unfunded mandate." Public Law 280 identified six states ("mandatory states") where state criminal jurisdiction over offenses by Indians would immediately supplant federal Indian country criminal jurisdiction.[2] It also permitted other states to assume complete or partial jurisdiction over crimes committed by Indians within Indian country ("optional states").[3] Nine states accepted this invitation before 1968, when Public Law 280 was amended to require tribal consent to state jurisdiction.[4] Since 1968, no tribe has given its consent.

Over the years, judicial decisions have given some clearer definition to the jurisdictional contours of Public Law 280 and have stirred up some areas of uncertainty.

- The U.S. Supreme Court has declared that state criminal laws which are "regulatory" rather than "prohibitory" are outside the scope of jurisdiction conferred by Public Law 280. Yet this distinction eludes clear line-drawing and has generated considerable litigation. In a recent California case,[5] for example, the state attempted to enforce its hunting and fishing laws against Indians within Indian country, and the trial court held that the laws are regulatory and therefore inapplicable. Courts have differed on the question whether state traffic laws are applicable within Indian country under Public Law 280.
- The Ninth Circuit held in 1975 that local laws, as opposed to laws of statewide applicability, could not be applied to Indians on reservations under Public Law 280. The U.S. Supreme Court has never ruled on this question.
- Most federal and tribal justice systems that have addressed the issue of concurrent tribal jurisdiction in Public Law 280 states have determined that such jurisdiction exists. The U.S. Department of

[2] "Mandatory states" are those where the federal government relinquished its Indian country criminal jurisdiction and declared that state criminal laws shall be effective over Indians within as well as outside Indian country. States did not have to take any further action to acquire jurisdiction, and could not refuse it. The six mandatory states are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. A few tribes in these states were expressly excluded from state jurisdiction. These tribes were the Confederated Tribes of the Warm Springs Reservation (Oregon) and the Red Lake Band of Chippewa Indians (Minnesota).

[3] "Optional states" are those where the federal government allowed states to choose whether to assume Indian country criminal jurisdiction. These states would have to undertake some affirmative legislative act before they could exercise such jurisdiction.

[4] The nine states were Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington. Some of these optional states made their acceptance of Public Law 280 jurisdiction contingent on tribal or individual Indian consent, consent which was never forthcoming. Thus, for example, North Dakota's action has never resulted in any exercise of state jurisdiction. Other optional states accepted jurisdiction over very limited subject areas. Arizona's legislation limited state jurisdiction to air and water pollution.

[5] California v. Natt, 97-1590, 97-1704, Municipal Court of California, County of Del Norte, April 25, 1998.

Justice holds its view that "Indian tribes retain concurrent criminal jurisdiction in P.L. 280 states."[6] These opinions recognize the fundamental principle of federal Indian law that tribes have inherent authority over activities in Indian country, and may not be divested of such authority absent express Congressional provision. Public Law 280 contains no language removing tribal criminal jurisdiction, which suggests that the tribal power remains intact. Yet the U.S. Supreme Court has yet to resolve the matter, and the Attorney General of California, as recently as 1995, took the position that Public Law 280 divested tribes of criminal jurisdiction.[7]

- Language in the Indian Gaming Regulatory Act of 1988 suggests that federal criminal jurisdiction will supercede state jurisdiction in Public Law 280 states with respect to gaming offenses. The effect of this language has been contested by states such as California.[8]

Under amendments enacted in 1968, Public Law 280 did offer states, but not tribes, the opportunity to undo its jurisdictional rearrangement. Through provisions in Public Law 280 governing retrocession, states may offer to return jurisdiction to the U.S. for individual tribes or for all the tribes in the state. Retrocession has occurred for individual tribes in several mandatory states[9] as well as for tribes in several optional states.[10] Bills to allow tribally-initiated retrocession have failed in the U.S. Congress and in several state legislatures.

Federal Policies

Public Law 280 did not expressly abolish tribal justice system jurisdiction, diminish the federal government's overall trust responsibility to tribes, or reject federal obligations to provide services to tribes other than federal law enforcement. Nonetheless, the Bureau of Indian Affairs (BIA) interpreted Public Law 280 as a mandate to withdraw or contract federal financial support for services to tribes in Public Law 280 states, including law enforcement and tribal justice system services.[11] When tribes complained of inadequate state law

[6] Office of Tribal Justice position paper, November 9, 2000.

[7] See Vince Bielski, "Tribal Justice," 15 California Lawyer 37, 40 (November, 1995). In addition, in 1986 the California Attorney General John Van de Kamp wrote the Solicitor of the Department of Interior asking for reconsideration of a previous Solicitor's Opinion upholding concurrent tribal criminal jurisdiction in California. Letter from Ralph W. Tarr, Solicitor, U.S. Department of Interior to John K. Van de Kamp, Attorney General, State of California, October 8, 1986.

[8] Sycuan Band of Mission Indians v. Roache, 38 F.3d 402, 407 (9th Cir 1994), amended 54 F.3d 535 (1995).

[9] Nebraska--Omaha Tribe and Winnebago Tribe; Wisconsin--Menominee Tribe; Oregon—Confederated Tribes of the Umatilla Reservation; and Minnesota—Bois Forte Band of Chippewa (Nett Lake).

[10] Washington--six tribes; Nevada--fifteen tribes; and Montana--Confederated Salish and Kootenai Tribes.

[11] For example, a 1975 report of the BIA Division of Law Enforcement Services recommends that with respect to funding equity among tribes, "guidelines should be based on the assumption that the BIA will provide sufficient funding for a basic law enforcement program in all parts of Indian

enforcement efforts, the BIA tried to divert funds from tribal education programs to pay state law enforcement personnel, rather than developing tribal law enforcement alternatives.[12]

With respect to tribal law enforcement and tribal justice systems, the BIA's policy of denying support could not have come at a less propitious time. Beginning in the late 1950's, tribes in non-Public Law 280 states supplanted federal administrative courts located on reservations with their own tribal justice systems.[13] Building tribal communities and repelling state jurisdictional assaults were two important objectives inspiring such tribal initiatives. Federal funding became more plentiful and readily available for these initiatives after passage of the Indian Civil Rights Act of 1968, which required tribal justice systems to provide certain legal protections found in the federal Bill of Rights. As a 1975 Task Force Report from the BIA Law Enforcement Division stated, "The passage of the Indian Civil Rights Act in 1968 makes improvements in the CFR and tribal justice systems imperative."[14] From the early 1970's, the BIA established new and enlarged categories of funding to support these new tribal institutions.[15] BIA tribal justice system funding rose from approximately $1.5 million in 1972 to over $10 million in 1990.

Because of the federal policy described above, tribes in Public Law 280 states were largely excluded from this new funding. In California, for example, the tribes rarely received a single dollar of the $10,000,000 allocated annually by the Department of the Interior for Indian judicial services. Less than 1 percent of the national BIA law enforcement budget has been allocated to California, which has at least 6 percent of the total Indian service population.[16] This lack of federal support precluded or stunted the growth of tribal law enforcement and justice

---

country where Federal Indian jurisdiction exists." BIA Division of Law Enforcement Services, Indian Reservation Criminal Justice: Task Force Analysis 1974-1975 (1975) [hereafter BIA Task Force Analysis]. The clear implication of this statement is that tribes in Public Law 280 states should be excluded, regardless whether they possess concurrent jurisdiction. It should be noted that the BIA has recently executed a deputization agreement with a PL-280 tribe, the Cabazon Band of Mission Indians in California, for the enforcement of all federal laws that apply to their reservation, see Cabazon Band of Mission Indians v. Smith, 271 F.3d 910 (2001).

[12] Statement on Public Law 280 and Law Enforcement by Southern California Indians for Tribal Sovereignty, December 13, 1991 (copy on file with authors).

[13] For example, in 1959 the Navajo Nation assumed control over law and order functions on the Reservation and established the Navajo Judicial Branch. David Wilkins, The Navajo Political Experience 138 (Dine College Press, 1999). By 1974, there were nearly 75 such tribal justice systems. BIA Task Force Analysis at 40

[14] BIA Task Force Report at 95. "CFR" courts are adjudicatory forums established and operated by the Department of the Interior, which are governed by the Code of Federal Regulations.

[15] Id. at 9-19; 40-44; 95-98.

[16] This Indian service population figure reflects rural California Indians living in California counties with a reservation, as calculated from the 1990 census. See Carole Goldberg-Ambrose and Duane Champagne, A Second Century of Dishonor: Federal Inequities and California Tribes, A report prepared for the Advisory Council on California Indian Policy 27 March 1996 (on file at the UCLA American Indian Studies Library).

systems in Public Law 280 states.[17]

Tribal and State Concerns

Ever since its enactment, Public Law 280 has inspired tribal protests and complaints. These oft-voiced objections can be found in Congressional hearings, Justice Department Task Force Reports, the final report of the American Indian Policy Review Commission, and reports prepared for the National American Indian Court Judges Association, the Advisory Council on California Indian Policy, California Indian Legal Services, and a now-defunct group known as Southern California Indians for Tribal Sovereignty. Public Law 280 has been described variously as "a noose which has been gradually choking Indian tribes and the Indian way of life out of existence," "a complete failure," and a regime so bad that "the talents of man could not devise a worse system." In 1974, Wendell Chino, President of the National Congress of American Indians, offered this unqualified condemnation of the law:

> Public Law 280 . . . as far as the American Indians are concerned it is a despicable law. Public Law 280 if it is not amended, will destroy Indian self-government and result in further loss of Indian lands. On those reservations where states have assumed jurisdiction under the provisions of Public Law 280, lawlessness and crimes have substantially increased and have become known as a no man's land because the state and federal officials will not assume the responsibility of Public Law 280.

Chino's statement captures many of the themes of tribal concern:

- Infringement of tribal sovereignty;
- Failure of state law enforcement to respond to Indian country crimes or to respond in a timely fashion;
- Failure of federal officials to support concurrent tribal law enforcement authority;
- A consequent absence of effective law enforcement altogether, leading to misbehavior and self-help remedies that jeopardize public safety.

Other themes of tribal concern that have emerged from statements by tribal members are:

- Discriminatory, harsh, and culturally insensitive treatment from state authorities when they do attend to Indian country crimes;

[17] The Federal government, through the United States Department of Justice, has recently made inroads by providing some funding to tribes in Public Law 280 states, including funding for programs for victims of crimes, violence against women, and community based policing and court development.

- Confusion about which government is responsible and should be contacted when criminal activity has occurred or presents a threat.

It is unclear whether these tribal concerns are equally intense in each of the Public Law 280 states. There are indications that states have varied in their willingness to support concurrent tribal jurisdiction; that the different BIA Area Offices have varied in their levels of financial support to Public Law 280 tribes; and that tribes affected by Public Law 280 have varied in their ability to develop their own law enforcement systems. California tribes have experienced high levels of state resistance and low amounts of federal assistance, with the predictable consequence of poorly developed tribal law enforcement and tribal justice system systems. Wisconsin tribes seem to have enjoyed greater acknowledgement of their governmental powers, both from state and federal agencies, and correspondingly enjoy more fully developed law enforcement and justice systems.[18]

Tribal concerns about Public Law 280 have some counterparts in criticisms leveled at the statute by state and local law enforcement agencies. Typically these charges focus on the absence of federal funding for state law enforcement services within Indian country or on difficulties in carrying out state law enforcement obligations because of uncertainty about the scope of state jurisdiction and officers' unfamiliarity with tribal communities.

The Need for Research on Public Law 280

Public Law 280 has not received research attention commensurate with its importance to federal Indian policy and law enforcement concerns. According to the Justice Department's own report, twenty-three per cent of the reservation-based tribal population in the Lower 48 states and all the Alaskan Natives fall under Public Law 280.[19] The statute covers twenty-eight per cent of all federally-recognized tribes in the lower 48 states, and seventy per cent of all recognized tribes (including Alaska Native villages).

[18] Some states, such as Wisconsin and Minnesota, seem to have found tribal law enforcement and court systems less threatening to state control than other states such as California. In these states, the presence of powerful tribes that were excluded from Public Law 280 has meant that the local BIA Area Office was accustomed to providing budget lines for tribal justice systems and police. In contrast, the Area Office which serves only California tribes received no allocation at all in these categories. State law enforcement authorities in Minnesota in particular seem to view cooperative arrangements, such as cross-deputization, as a desirable response to lack of federal support for state responsibilities on reservations. In contrast, there is only one cross-deputization agreement (Hoopa) and one deputization agreement (in Imperial County the County Sheriff deputizes tribal police) in California.

[19] Nearly half the Indian population is non-reservation based, and hence already subject to state authority. As a result of the U.S. Supreme Court's decision in Native Village of Venetie v. Alaska, 522 U.S. 520 (1998), there is now very little Indian country left in Alaska. This near-absence of Indian country results in very little territory left in Alaska where the state requires federal authorization in order to exercise Indian country jurisdiction.

Empirical research in the field of criminal justice is not particularly useful, because it tends to focus on Indians as an ethnic group, or on Indians in non-Public Law 280 states.[20] Government studies are no more enlightening. Even in recent years, with alarming reports of rising Indian country crime rates, Public Law 280 states have been ignored. For example, the October, 1997 report of the Executive Committee for Indian country Law Enforcement Improvements, commissioned by the U.S. Departments of Justice and Interior, did not address Public Law 280 states in its data analysis or policy recommendations, reasoning that "P.L. 280 states generally require only limited services from federal criminal investigators" (p. 11).

The shortage of research on Public Law 280 has not gone unnoticed. A recent National Institute of Justice funded study entitled, "Justice in Indian country: A Process Evaluation of the U.S. Department of Justice Indian Country Justice Initiative" (1998), noted the absence of research on crime in Indian country in Public Law 280 states, and recommended "a DOJ study devoted to the unique problems of law enforcement on reservations subject to P.L. 280" (p. 23).

The federal government did not abandon or become absolved of its trust responsibility to tribes when it enacted Public Law 280. In delivering jurisdiction to states regardless of tribal consent, the federal government assumed a trust obligation to monitor the effects of that jurisdiction and to insure that tribes enjoy an appropriate level of law enforcement and judicial services.[21] Ongoing research to assess the impact of Public Law 280 and the need for enhanced tribal jurisdiction, retrocession, or other mitigating measures is essential if that obligation is to be properly discharged.

Existing Qualitative Studies of the Impact of Public Law 280

The survey-based research on Public Law 280 that does exist addresses the experience in individual states -- Washington in one case, California in the other. The two major survey studies are Professor Ralph Johnson's 1974 report for the National American Indian Court Judges' Association, and the survey that UCLA Professors Duane Champagne and Carole Goldberg conducted in 1995 for the Advisory Council on California Indian Policy. Neither of these studies comes close to exhausting the research potential of Public Law 280.

[20] See Donald E. Green, "American Indian Criminality: What do we really know?" in American Indians: Social Justice and Public Policy, Donald E. Green and Thomas V. Tonneson, eds. (1991); Donald E. Green, "The Contextual Nature of American Indian Criminality" 17 American Indian Culture and Research Journal No. 2 (1993); Marianne Nielsen and Robert Silverman, eds. Native Americans, Crime, and Justice, (1996).

[21] The October, 1997 Report of the Executive Committee for Indian country Law Enforcement Improvements includes the following statement (at Tab F): "In order to stay focused on securing essential funds to improve law enforcement services through a more responsive organizational structure, we do not plan to ask for any changes in P.L. 280." Of course, the federal government must establish priorities for attention and funding. But it should do so only after a thorough understanding of the operation and effects of Public Law 280. Research on Public Law 280 can insure that the federal government is adequately informed when it allocates its priorities.

Professor Johnson's research was published in Volume 1 of a series on Justice and the American Indian, and is entitled "The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations." Funded by a grant from the Judges' Association to the Yakima Nation, Professor Johnson's study focused exclusively on Washington State, one of the optional Public Law 280 states. Professor Johnson's research staff interviewed approximately 250 tribal members from twenty different tribes in Washington State, as well as federal, state, and local judicial and law enforcement personnel within the state. According to the report, its main purpose was to document "perceptions of Washington State Indians concerning state jurisdiction."

In his findings and conclusions, Professor Johnson articulates all of the themes of tribal dissatisfaction listed above. About one half of the Indians surveyed felt that they were treated poorly or indifferently by state, county, and local police. Juvenile matters were of greatest concern to the largest number of Indians interviewed. Violent crimes, traffic laws, narcotics, trespass, and theft were their next greatest concerns.

Yet there are problems resting contemporary policy on Professor Johnson's research. First, it is over 25 years old. It is not known whether the problems he identifies continue to plague Indian country in Washington State. In addition, because Professor Johnson looked only at Washington State, it is difficult to generalize from his results. Washington instituted an unusually complex and confusing jurisdictional arrangement when it accepted Public Law 280. For a limited number of subject areas, such as child welfare, state jurisdiction was asserted for Indian country state-wide. For other subject areas, state jurisdiction turned on tribal consent and the ownership of the land on which an offense took place. Tribal members surveyed by Professor Johnson expressed an unusually high degree of uncertainty about the agencies responsible for law enforcement on their tribal territories, and state and local law enforcement personnel seemed no less dismayed over the confusion.

The study that Professors Goldberg and Champagne undertook for the Advisory Council on California Indian Policy,[22] entitled "A Second Century of Dishonor: Federal Inequities and California Tribes," was conducted in 1995, but has not yet been published. The findings will be incorporated into the final report of the Advisory Council. In the interim, discussion of this study can be found in an article Professor Goldberg published in the UCLA Law Review[23] and in her book Planting Tail Feathers: Tribal Survival and Public Law 280 (1997, with Timothy Carr Seward).

[22]The Advisory Council was established by Congress in 1992 to investigate ways in which California tribes were disadvantaged under federal policy compared with tribes in other parts of the U.S., and to recommend legislative and administrative steps to ameliorate such disadvantage.
[23] Carole Goldberg-Ambrose, "Public Law 280 and the Problem of Lawlessness in California Indian Country," 44 UCLA Law Review 1405, 1437-41 (1997).

Professors Champagne and Goldberg sent a survey questionnaire to all 103 federally recognized California tribes, to which nineteen tribes responded.[24] One section in this questionnaire probed the tribes' experience and degree of satisfaction with state law enforcement. All of the themes of confusion, inadequate or untimely service, and insensitive or discriminatory treatment appear in the responses. All but two of the nineteen tribes, for example, complained of serious gaps in protection from county law enforcement. And one-third of the tribes complained that the county officials fail to respect tribal culture and sovereignty. Problems with drugs and violent crimes received frequent mention. In addition to soliciting and analyzing the survey responses, we carried out several intensive case studies to determine the day-to-day operation of Public Law 280 in California. These case studies led us to conclude that Public Law 280, though enacted to curb perceived "lawlessness" on reservations, had actually given rise to lawless behavior, because of jurisdictional vacuums and abusive exercise of state power.[25] In particular, limited and uncertain state jurisdiction under Public Law 280, coupled with the absence of tribal justice systems and law enforcement due to lack of federal funding,[26] created situations where there was no legal remedy for problems such as dumping of noxious wastes on tribal land and unauthorized occupation of tribal rental housing. As a consequence of these legal vacuums, tribal members involved in these case studies sometimes engaged in self-help that erupted, or threatened to erupt, into violence. Abusive exercise of state power was documented in one case study where Public Law 280 had contributed to hostile relations between reservation residents and local law enforcement.

Although the UCLA study is more recent than Professor Johnson's, and addresses a state with a more typical form of Public Law 280 jurisdiction, it does not provide a definitive qualitative assessment of the statute. Law enforcement was only one of many topics covered in the survey, so it could not be pursued in as much depth as it would be in a survey devoted exclusively to that subject. Because the survey was conducted on a very low budget, UCLA's research was unable to reach a higher percentage of the tribes, which presents a serious limitation to the data. There was also no opportunity to question state and local law enforcement personnel, an important source of information about Public Law 280. Furthermore, our own study documented that California tribes have

[24] The low response rate is attributable to the fact that the survey covered a broad range of subjects (e.g., welfare, unemployment, public safety), and the Advisory Council provided extremely limited funding for the study. It was not feasible to follow-up the mail survey with visits to reservations to meet with tribal officials who could answer the lengthy, nearly 50-page questionnaire.

[25] See Goldberg-Ambrose, supra note 23.

[26] This lack of federal funding was directly attributable to Public Law 280. See page 4, supra. While tribal governments retained concurrent civil and criminal jurisdiction notwithstanding Public Law 280, the federal government refused to support development of tribal legal institutions. *See* Vanessa J. Jimenez & Soo C. Song, "Concurrent Tribal and State Jurisdiction under Public Law 280," 47 American University Law Review 1627 (1998).

received less support for the development of tribal justice systems than tribes in other Public Law 280 states, suggesting that California Indian country may be experiencing more severe law enforcement problems than reservations in the other affected states. The absence of cross-deputization agreements, active tribal justice systems, and retrocession activity in California also distinguishes the experience in that state from many other Public Law 280 states.

Existing Quantitative Research and Data Sources

Quantitative studies of the impact of Public Law 280 on tribes and local law enforcement do not exist and are hindered by current data collection practices. Studies of this type would enable us to answer questions such as the following:

- Are crime rates on reservations covered by Public Law 280 higher or lower than crime rates on reservations not covered by that law or in non-reservation areas of Public Law 280 states?
- Do crime rates rise or fall on reservations following assumption of Public Law 280 jurisdiction or following retrocession of such jurisdiction?
- Is law enforcement response time better or worse on reservations affected by Public Law 280?

We can't answer these questions because the data to answer them are not compiled by federal, tribal, or state authorities.[27] While most Indian tribes with law enforcement agencies report their crime statistics in Indian country annually to the BIA crime analysis division, Public Law 280 tribes are conspicuously absent among those reporting. BIA agencies report crimes committed in Indian country for inclusion in the FBI Uniform Crime Report; yet for many years no reservation under Public Law 280 had ever responded. BIA crime analysis, the agency that collects this information from the tribes, pays no heed to the noncompliance, explaining that the lack of funding for state law enforcement in Indian country makes the reporting difficult. While this has begun to change since about 1999 with community oriented policing grants awarded to Public Law 280 tribes,[28] tribes that do not have law enforcement agencies still do no report crime data.

We have tried with only limited success to construct useable crime rate data for California Indian country. California Criminal Justice Statistics includes numbers for crimes in California that separate homicide arrest rates by ethnicity. But this information is statewide, and thus tells us nothing about homicide in Indian country; and it lumps together anyone not white, black, or Hispanic into a generic

[27] Federal government studies have emphasized the difficulties in collecting crime data for reservations outside Public Law 280 states, as well. Criminal Justice in Indian Country, Report No. 96-16, (Department of Justice, 1996). S. Wakeling, M. Jorgensen, S. Michaelson, M. Begay, Policing on American Indian Reservations 13-15 (National Institute of Justice, 2001).

[28] In California, of the 107 federally recognized tribes only two, the Cabazon Band of Mission Indians and the Hoopa Valley Tribe, currently report their crime statistics to the BIA.

"other" category. The Indian Health Service provides statistics on homicide rates for their service population that, in California, consists of California Indians living within the state, whether or not within Indian country. A further flaw in its data is that it acknowledges serious underreporting of Indian race on death certificates in California.

The best source for crime statistics within California Indian country is county level data. However, the several County Sheriff's offices we contacted claim that crimes in Indian country often go unreported. Therefore, even these numbers may be unreliably low. Our own analyses, using reservation population figures from the BIA's 1997 Tribal Information and Directory, and major crime data from the counties of San Diego and Riverside, nonetheless suggest very high rates for the eight major crimes. In San Diego County, for example, the 1997 general crime rate for those crimes is 852 per 100,000 people. For the 18 reservations within the county, the rates are much higher. While one reservation's rate is 328 per 100,000 people, the other 17 reservations have rates per 100,00 that range from 1,333 to 17,500.[29] Similarly, in Riverside County, crime rates for the eight major crimes per 100,000 people ranged from 934 to 4,298 for the six reservations other than Agua Caliente.

There is a desperate need for improved data-gathering, record-keeping, and data analysis regarding crime in Indian country affected by Public Law 280. Ironically, more than twenty years ago, in 1975, the National Congress of American Indians and the National Tribal Chairmen's Association testified before Congress about the need to create a Public Law 280 data bank.[30] That initiative is long overdue. Data that are gathered should be in a form that allows for comparisons with tribes in non-Public Law 280 states, tribes excluded from Public Law 280, tribes for which jurisdiction has been retroceded, and areas outside Indian country in Public Law 280 states. In addition to new data-gathering, there is a need to reconstruct crime data from periods before the establishment of Public Law 280 jurisdiction and from periods preceding and following retrocession by individual tribes, keeping in mind the limitations associated with underreporting.

Priorities for New Research

1) Quantitative research regarding crime rates in Indian country affected by Public Law 280. Any serious policy analysis must begin with the best available data regarding reported crime rates in Public Law 280 states. To evaluate the impact of state criminal jurisdiction as opposed to the federal/tribal regime applicable without Public Law 280, it is desirable to document the experience in several different states affected by the statute, representing both

[29] Rates for other reservations in San Diego County are as follows (all rates are per 100,000): 1,429; 1,563; 2,353; 4,861; 4,831; 5,000; 10,000; 12,064; 14,667.

[30] See Indian Law Enforcement Improvement Act of 1975: Hearing on S. 2010 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, 94th Congress, 1975.

mandatory and optional states, states that assumed partial vs. complete Public Law 280 jurisdiction, and states with and without tribal justice systems. These data in turn should be compared with the best crime rate data available from similar reservations in states not affected by Public Law 280 and for crime rate data in other comparable parts of the Public Law 280 states. Furthermore, for particular reservations, comparisons should be drawn between crime rates before and after the state's assumption of Public Law 280 jurisdiction, and crime rates before and after the state retroceded jurisdiction under the statute. The Salish-Kootenai Reservation in Montana, where Public Law 280 jurisdiction was retroceded in 1995, may be a good focus for such a study. Another interesting case study would be the Winnebago Reservation in Nebraska, a mandatory Public Law 280 state. The Winnebago retrocession occurred in 1986. The records and presentations developed by tribes and states in connection with the retrocession process will likely be valuable sources of data for such studies. Should resources such as these not be available, documenting the current situation would lay the groundwork for future longitudinal studies

To determine whether state jurisdiction under Public Law 280 deals particularly well or poorly with specific types of Indian country crimes, quantitative research should also look for patterns within the reported crime rates. It may be the case, for example, that special problems arise in areas such as drug offenses, domestic violence, or other areas of concern.

Testimony by tribal members and Indian Health Service reports suggest that crime may be especially underreported in Public Law 280 states, due to nonresponsiveness of state officials, concerns about impairment of tribal sovereignty, or problems with cultural insensitivity and harassment when state officials do respond. Therefore, there is a need for research that studies crime victimization apart from reports to law enforcement agencies. It may be possible to analyze existing victimization research according to jurisdictional areas such as Indian country. If that is not possible, then separate surveys would be necessary, involving the same array of states described above.

2) Quantitative studies bearing on the quality of law enforcement under Public Law 280. In addition to crime rates, quantitative studies should examine measurable aspects of the quality of state law enforcement services in Public Law 280 states. For the same array of states and time periods described in recommendation #1, researchers should determine the time required for police to respond to crime reports. Non responsiveness or excessively slow response of state law enforcement is a common complaint that tribes and their members raise about Public Law 280. State and local law enforcement may already maintain records documenting response time. If not, the federal government should support and fund research to provide such documentation. In order to make appropriate comparisons, it will be necessary to document federal and tribal responses in areas where they exercise authority.

Another measurable aspect of the quality of state law enforcement under Public Law 280 is the frequency of complaints filed against police. Hearings on Public Law 280 regularly generate complaints from tribal members about culturally insensitive and harsh or harassing treatment by state police. Whether these encounters also produce formal complaints to state or federal agencies is uncertain. However, it will be useful to ascertain whether reservation residents in Public Law 280 states are more likely than residents in other parts of those states or residents of non-280 reservations to file grievances against law enforcement. These data may be difficult to gather because the agencies that receive such complaints may not categorize them by the jurisdictional character of the territory from which they come.

3) Documentation and evaluation of federal law enforcement funding and services to tribes subject to Public Law 280 jurisdiction. Champagne and Goldberg attempted to document federal law enforcement funding and services from state and BIA resources to California tribes, and to compare those levels with funding and services to tribes in other Public Law 280 states as well as non-Public Law 280 states. Although securing necessary data from the relevant federal agencies was difficult, at least the information from California was reflected in funding to a single BIA Area Office, and there were no tribes in California for which jurisdiction had been retroceded.

Comparable data for other Public Law 280 states was more difficult to sort out, because BIA funding is typically separated by Area Office, and Area Offices may contain several states, some subject to Public Law 280 and others not. Furthermore, even the data for Public Law 280 states are not always separated by tribe, so it is not possible to distinguish those where jurisdiction has been retroceded from others. Without information about current levels of support, it is difficult to assess whether tribes under Public Law 280 are being treated inequitably or whether absolute levels of federal support are inadequate.

Through the U.S. Department of Justice, resources for law enforcement services to states vary from direct block grants and formula funds. Tribes are eligible to access these resources for law enforcement services. A review of awards to Public Law 280 tribes as subgrantees should be documented to assess the degree to which Public Law 280 tribes access these funds. It is important to know whether funding under some federal programs for law enforcement is systematically denied to tribes in Public Law 280 states, even though they might utilize such support to develop their own justice systems.

4) Qualitative assessment of law enforcement under Public Law 280. The survey of California tribes, conducted by UCLA for the Advisory Council on California Indian Policy, should be replicated and its content amplified for a sample of additional tribes in California, a sample of tribes in other Public Law 280 states, and a comparison sample of similar tribes in non-Public Law 280 states. Such a comparative assessment across states would have the value of

identifying existing strategies and arrangements that may offer more effective law enforcement solutions within the framework of Public Law 280.

A survey of this sort should assess such matters as:

- the governmental source and availability of law enforcement services;
- the responsiveness of such services;
- the extent of communication between law enforcement officials and tribal members about the law enforcement needs of the community;
- the quality of investigations;
- the nature and extent of tribal members' confusion/understanding about Public Law 280;
- any problems with "jurisdictional vacuums" because of Public Law 280;
- whether tribal members have concerns or experience that state law enforcement and criminal justice systems have been insensitive, harassing, discriminatory, or overstepping jurisdictional limits;
- how tribal justice systems and law enforcement in Public Law 280 states interact with their state counterparts, and whether beneficial cooperative arrangements have developed between state, tribal, and federal law enforcement;
- whether law enforcement problems have been especially acute with respect to certain types of crimes, such as drug offenses, hunting and fishing, domestic violence, or juvenile offenses;
- the degree of tribal members' satisfaction or dissatisfaction with the quality of law enforcement; and
- whether they believe that tribally-based justice systems would do a better job of achieving peace on the reservation.

Ideally, any such instrument should be administered in an interview format, to allow for more open-ended comments as well as responses to particular questions. As in the Advisory Council study, the tribe would designate an individual who would be responsible for any fact-gathering necessary to respond to the survey.

In addition to such a tribal survey, the qualitative assessment of Public Law 280 should include a survey of state and local law enforcement officials involved in carrying out that law's mandate. An appropriate sample of such officials should be interviewed to determine:

- actual patrol practices and response times for reservations, attending to geographic factors such as distance of the reservation population to the nearest city or town, to the racial/ethnic make-up of local law enforcement forces, and the extent of cultural information in the training received by these forces;
- extent of communication and interaction with tribal communities regarding law enforcement priorities and practices;
- funding problems associated with Public Law 280 jurisdiction;
- extent of understanding/confusion about Public Law 280, and how that may

affect law enforcement practices;
- particular subjects, such as drug offenses, domestic violence, juvenile crime, hunting and fishing, that may present especially difficult law enforcement problems within Indian country;
- degree of understanding of tribal cultures, and any issues that may arise because of cultural differences;
- extent of cooperation, if any, with tribal law enforcement and judicial institutions; and
- their views about retrocession of Public Law 280 jurisdiction.

The surveys proposed in this section would provide essential preliminary data to guide more focused, in-depth research. For example, two Public Law 280 states could be identified, one (such as California) with more acute law enforcement problems, and another (perhaps Wisconsin), where crime rates are not so high, tribes have been able to take more initiative, and state officials seem more receptive to such efforts. In those states, more extensive interviews of tribal and state political leaders, law enforcement officers, and court officials could aid an assessment of obstacles and solutions to improved law enforcement in the face of Public Law 280.

The surveys would also help identify particular problem areas requiring more intensive study. If, for example, domestic violence, hunting and fishing, juvenile crime, or drug offenses surfaced as especially acute law enforcement problems in the tribal and state/local surveys, additional research could help identify the most serious impediments to improved law enforcement and recommend solutions.

5) Evaluation of retrocession and concurrent tribal jurisdiction. Many tribes dissatisfied with state jurisdiction under Public Law 280 have responded with retrocession campaigns and the development of tribal institutions capable of exercising concurrent jurisdiction. [31] Although the legal issues associated with both strategies are explored in Professor Goldberg's book, Planting Tail Feathers, there have been no systematic empirical studies of the effectiveness of these measures.

Retrocession. As originally enacted, Public Law 280 included no provision for retrocession. In 1968, however, the statute was amended to allow states, but not tribes, to request retrocession from the federal government, subject to acceptance or rejection in the discretion of the Secretary of Interior. Since that time, state jurisdiction has been retroceded over nearly thirty tribes, often after long, active campaigns by the affected tribes. The effect of retrocession is to reinstate the regime of tribal/federal responsibility for law enforcement within Indian country.

[31] *See, e.g.,* Bonnie Bozarth, "Public Law 280 and the Flathead Experience," 39 Journal of the West No. 3 46 (2000).

What has been the stimulus for tribal retrocession campaigns? What have been the benefits and disadvantages, if any, of retrocession? What policies and practices at the tribal, federal, and state level make for more successful retrocession? There have been no studies that address these question, and such research is badly needed. We have undertaken some preliminary inquiries, identifying three recent cases of retrocession that would make good case studies: Winnebago, a Nebraska tribe which first rejected the idea of retrocession and then embraced it, achieving retrocession in 1986; Ely Colony, the last Nevada tribe to achieve retrocession, in 1988; and Salish-Kootenai, a Montana tribe that conducted several campaigns before achieving partial retrocession over misdemeanors in 1995. These three tribes encompass both mandatory (Nebraska) and optional (Nevada and Montana) Public Law 280 states.

In-depth research would focus on problems with state jurisdiction that generated the call for retrocession; changes in crime rates since retrocession; tribal members' perceptions about the timeliness and quality of law enforcement response before and after retrocession; conditions and arguments that facilitate tribes' successful campaigns for retrocession; financial and other effects on tribal and federal institutions; tribal needs for funding and training to facilitate successful assumption of jurisdiction following retrocession; any successful forms of cooperation between tribal, state, and federal agencies to facilitate retrocession; and overall impact on the cultural and political vitality of tribes. The result of this research would be a kind of political history of each tribe focusing on law enforcement, a rare and valuable body of material.

Concurrent jurisdiction. Even without retrocession, some tribes have exercised criminal jurisdiction within the framework of Public Law 280 and the limits imposed by the Indian Civil Rights Act. The Stockbridge-Munsee and Hochunk Tribal justice systems in Wisconsin, as well as the Salish-Kootenai Tribal justice system before retrocession, are examples of concurrent jurisdiction under Public Law 280. Unlike retrocession, this strategy does not require consent or initiative from the state, although it may require cooperation from federal funding sources.

Such concurrent tribal jurisdiction raises interesting problems of comity, choice of law, and issue preclusion, which are discussed in Planting Tail Feathers.[32] But apart from these legal issues, there are major questions about the effectiveness of this approach as an alternative to retrocession. For example, if research determines that concurrent jurisdiction achieves many of the same objectives as retrocession without the need for long and arduous political campaigns, tribes in Public Law 280 may already possess the means to rectify problems associated with Public Law 280. Alternatively, concurrent jurisdiction may merely engender conflicts and competition between state and tribal institutions. There is no existing body of research which examines the practical operation of concurrent

[32]See Planting Tail Feathers, pages 174-80.

jurisdiction in order to determine its effectiveness. How do states and tribes allocate law enforcement and prosecutorial responsibility? What deference, if any, do they give to one another's decisions? What kinds of federal resources are needed to insure the success of tribal concurrent jurisdiction? Have some states and tribes developed effective models for cooperative agreements to facilitate concurrent jurisdiction? These questions and others can be pursued through intensive interviews with relevant tribal and state officials related to a sample of tribes exercising concurrent jurisdiction.

6) Cooperative agreements in Public Law 280 states. Jurisdictional conflicts between states and tribes have engendered much bitterness and costly litigation. Tribal-state agreements hold the promise of easing such conflicts and supplying needed services to tribal communities within a framework of mutual consent. For example, such agreements can allocate prosecutorial responsibility in a concurrent jurisdiction regime, or provide for cross-deputization.

Although there have been several general studies of tribal-state agreements,[33] none has focused on law enforcement and Public Law 280. Yet there are vague indications from the more general studies that agreements of this sort do exist.[34] Research is needed to identify and analyze existing agreements, to assess their value for the law enforcement enterprise from tribal and state perspectives, and to suggest possible modifications and improvements in such agreements.

In addition to tribal-state agreements, there is some history of federal-state agreements related to law enforcement in Public Law 280 states. In 1991, the BIA established cooperative agreements with the Counties of Riverside and San Diego, California, which directed federal funds to local law enforcement in exchange for augmented and more culturally informed law enforcement services on local reservations. The monies involved were diverted from tribal education and job training programs. Tribal members in the affected counties subsequently organized in opposition to these agreements, claiming that the tribes should not have to sacrifice desperately needed education and vocational programs in order to secure law enforcement services that the state was obligated to provide under Public Law 280. They also objected that the agreements failed to acknowledge tribal concurrent jurisdiction and did not provide for an adequate tribal liaison program with local law enforcement. After a brief period, the agreements were abandoned.[35] There may be other experiments of this type that have been attempted in other Public Law 280 states; but research is necessary to unearth them. An evaluation of federal-state agreements should also be included in any

[33]See Frank Pommersheim, "Tribal-State Relations: Hope for the Future?" 36 South Dakota Law Review 239 (1991); National Conference of State Legislatures, States and Tribes: Building New Traditions (1995).

[34]Pommersheim, note 33 supra, at 266, mentioning the existence of five "Jurisdiction or PL 280 Agreements."

[35] See Southern California Indians for Tribal Sovereignty, "Statement on Bureau of Indian Affairs Law Enforcement Cooperative Agreements with Counties of San Diego and Riverside," delivered at BIA Tribal Budget System Budget Meeting, San Diego, CA 13 April 1992 (on file at UCLA).

comprehensive assessment of potential benefits from cooperative agreements.

7) Possible federal administrative and legislative responses to Public Law 280. The body of research suggested above can serve as the resource for a study that will explore desirable federal policies to improve law enforcement within reservations affected by Public Law 280. This research should address the responsibilities of the Departments of Interior and Justice, as well as other federal agencies (for example, the U.S. Department of Housing and Urban Development) that may be able to assist tribes with funds or training in developing their own justice systems. It should also consider possible Congressional responses, such as legislation that would clarify the grant of state jurisdiction (e.g., the line between criminal and regulatory matters), affirm tribal concurrent jurisdiction, encourage voluntary interjurisdictional arrangements between tribes and states under Public Law 280,[36] or authorize tribally-initiated retrocession. Legislation authorizing tribally-initiated retrocession was introduced in the Congress in 1975, but has not received serious attention since that time.

The lack of data on Public Law 280 presents a serious impediment to understanding the unique set of problems associated with state criminal jurisdiction in Indian county. The research suggestions provided here, if undertaken by qualified researchers, would be the first step toward a better understanding of the efficacy of state criminal jurisdiction in Indian Country. In addition, it would initiate more systematic and ongoing data collection of crime rates in Indian Country subject to PL-280 jurisdiction. The final product of this research, detailing administrative or legislative policy options for PL-280 tribes, should be made available to the tribes and law enforcement offices in Public Law 280 states.

[36] Legislation of this sort was introduced into the Congress from 1977 to 1982. Several versions would have exempted compacting parties from any limiting effects of Public Law 280. See David Getches, "Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government," 1 Review of Constitutional Studies 1 (1993).

BIBLIOGRAPHY

Bonnie Bozarth, "Public Law 280 and the Flathead Experience," 39 Journal of the West No. 3 46 (2000)

Carole Goldberg-Ambrose, Planting Tail Feathers: Tribal Survival and Public Law 280 (with Timothy Carr Seward, 1997)

Carole Goldberg-Ambrose, "Public Law 280 and the Problem of Lawlessness in California Indian Country," 44 UCLA Law Review 1405 (1997)

Carole Goldberg-Ambrose & Duane Champagne, "A Second Century of Dishonor: Federal Inequities and California Tribes" (Report prepared for the Advisory Council on California Indian Policy, 1996)

Donald E. Green, “American Indian Criminality: What do we really know?” in American Indians: Social Justice and Public Policy, Donald E. Green and Thomas V. Tonneson, eds. (1991)

Donald E. Green, “The Contextual Nature of American Indian Criminality” 17 American Indian Culture and Research Journal No. 2 (1993)

Marianne Nielsen and Robert Silverman, eds., Native Americans, Crime, and Justice, (1996)

Vanessa J. Jimenez & Soo C. Song, "Concurrent Tribal and State Jurisdiction under Public Law 280," 47 American University Law Review 1627 (1998)

National American Indian Court Judges Association, Justice and the American Indian, Volume 1: The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations (1974)

American Indian Policy Review Commission, 95th Congress, Task Force Four Report on Federal State, and Tribal Jurisdiction: Final Report (1977)

Reform of the Federal Criminal Laws: Hearing on S. 1 Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary of the United States Senate, 94th Congress (1975)

Issues of Concern to Southern California Tribes: Hearing Before the Select Committee on Indian Affairs, United States Senate, 101st Congress (1989)

Issues of Concern to Northern and Central California Tribes: Hearing Before the Select Committee on Indian Affairs, United States Senate, 101st Congress (1989)