

## Roger Williams University Law Review

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Volume 19  
Issue 1 Vol. 19: No. 1 (Winter 2014)

Article 2

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Winter 2014

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### Recommended Citation

Pearl, M. Alexander (2014) "Of "Texans" and "Custers": Maximizing Welfare and Efficiency Through Informal Norms," *Roger Williams University Law Review*: Vol. 19: Iss. 1, Article 2.  
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# Of “Texans” and “Custers”: Maximizing Welfare and Efficiency Through Informal Norms

M. Alexander Pearl\*

## ABSTRACT

*Professor Robert Ellickson (Yale) theorized that the informal norms of a close-knit community maximize aggregate welfare and Professor Barak Richman (Duke) identified two distinct types of private ordering systems: “shadow of law” and “order without law.” Under the Ellickson-Richman structure, many Indian tribes qualify as close-knit groups where informal norms effectively operate. The additional trait of isolation—both geographic and cultural—makes them ideal communities for the prioritization of informal norms. The imposition of external law, such as state law,*

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\* Assistant Professor of Law, Florida International University College of Law. Enrolled member of the Chickasaw Nation of Oklahoma. This article, or portions of it, has been presented to the faculties of Stetson University College of Law, the University of New Mexico School of Law, Florida Coastal School of Law, and St. Thomas University School of Law (Miami, FL). I had the opportunity to discuss various ideas from this paper at the Berkeley Law Symposium “Heeding Frickey’s Call.” I am forever indebted to Professor Frickey for his teaching and wisdom. There are many colleagues and friends who contributed to my thinking about these issues. Among them, I’d like to thank Hannibal Travis, Manuel Gomez, Matthew Mirow, Howard Wasserman, Tom Baker, Tracy Hresko Pearl, Matthew Fletcher, Ezra Rosser, Sarah Krakoff, Dr. Kelly Fayard, Curtis Berkey, Scott Williams, Rovianne Leigh, Mary Louise Frampton, Keith Harper, Dennis M. Gingold, John C.F. Loving, Robert Harmala and the myriad tribal leaders and advocates who have shared their knowledge and opinions with me. A special thanks to my research assistant, Robert Strongarone, for his exceptional efforts. All mistakes are mine.

*is harmful and unnecessary to the maintenance of order in these communities. Recent legislative efforts to ameliorate criminal problems in Indian Country miss the mark and an alternative solution prioritizing the operation of informal norms and private ordering should prevail over application of external law and structures.*

### Of “Texans” and “Custers”: Maximizing Welfare and Efficiency Through Informal Norms

*“The Haileys refer to him as a ‘Texan’—a term that in Shasta County connotes someone who is both an outsider and lacks neighborly instincts.”<sup>1</sup>*

—Robert Ellickson, *Order Without Law*.

*“There are better ways to solve these problems than by bringing in the 7th Cavalry and wiping them out. I would say we are in a war right now.”<sup>2</sup>*

—Former Chairman of the Soboba Band of Luiseno Indians on the Riverside County Police Department’s conduct regarding tribal members.

In his famous work, *Order Without Law*, Professor Robert Ellickson provides “a real-world perspective” on the Coase Theorem.<sup>3</sup> Ronald Coase’s *The Problem of Social Cost* is one of the most influential works on the law, giving rise to what would become called the Coase Theorem.<sup>4</sup> The Coase Theorem—a term he never used to describe his own work—is often misunderstood and is subject to a variety of interpretations.<sup>5</sup> For purposes of this

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1. ROBERT C. ELICKSON, *ORDER WITHOUT LAW* 63 (Harvard Univ. Press 1991).

2. David Kelly, *Riverside County Tribal Members are Angry After Two Latest Killings by Deputies*, L.A. TIMES LOCAL (May 14, 2008), <http://www.latimes.com/news/local/la-me-soboba14-2008may14,0,5062286.story#axzz2jPqlW5cl>.

3. ELICKSON, *supra* note 1, at 2.

4. *Id.*

5. Compare Charles K. Whitehead, *Sandbagging: Default Rules and*

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article, I employ Professor Ellickson's recitation of the Theorem that "when transaction costs are zero, a change in the rule of liability will have no effect on the allocation of resources among the parties."<sup>6</sup>

This article expands upon Ellickson's assessment of how social behavior is affected by law and other forces, such as the informal norms in a given social group. His hypothesis states that "members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another."<sup>7</sup> Ellickson's empirical study of Shasta County provides a close look at how a "close-knit community" will encourage cooperative behavior within the group, without resort to external law, simply by application of diffuse informal community norms.<sup>8</sup> Ellickson's treatment of the position of law as central or peripheral to the behavior of community members is representative of a larger legal philosophical debate between Law and Society followers, and those in the Law and Economics camp.<sup>9</sup>

The first quote from Ellickson's book introduces the idea that within a close-knit group, "Texans," exist as those whose behavior consistently deviates from the informal normative expectations.<sup>10</sup> One of Ellickson's points is that the exercise of informal norms, including rewards and punishments, in a close-knit group effectively addresses internal deviations from expected behavior in a more efficient and welfare maximizing manner.<sup>11</sup>

The second quote is a statement made by a former chairman of the Soboba Band of Indians located in Riverside County, California.<sup>12</sup> The "7th Cavalry" statement refers to General Custer and his United States 7th Cavalry, who heavily

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*Acquisition Agreements*, 36 DEL. J. CORP. L. 1081, 1091 n.33 (2011) (describing different interpretations of the Coase Theorem), with Daniel Q. Posin, *The Error of the Coase Theorem: of Judges Hand and Posner and Carroll Towing*, 74 TUL. L. REV. 629 (1999) (challenging the validity of the Coase Theorem).

6. ELLICKSON, *supra* note 1, at 2.

7. *Id.* at 167.

8. *Id.*

9. *Id.* at 168.

10. *Id.* at 63.

11. *Id.* at 10.

12. Kelly, *supra* note 2.

participated in many battles with various Indian tribes on the frontier of the United States.<sup>13</sup> I define the term “Custer” as an individual existing outside of the close-knit group. Consequently, a Custer is able to supersede the informal norms of the group. These individuals ignore, or are at least not bound by, the informal norms of the close-knit group. The remedial actions taken by members of the close-knit group, therefore, are ineffective in curtailing a Custer’s deviations from the expected behavior of the community. This article examines how Texans and Custers affect the informal norms of the close-knit group and vice versa, resulting in a conclusion about the extent to which informal norms should be insulated from the operation of external mandatory law.

The scope and thesis of this article is narrow, and a few caveats must be given. This article does not seek to add to the copious scholarship bearing directly on the Coase Theorem. Nor does it attempt to join in the legal centralist vs. legal peripheralist dialogue. Further still, this article is not a “real-world perspective” like that accomplished by Ellickson. Instead, this article attempts to add to the ideas articulated by Ellickson by applying his hypothesis to other situations beyond property and tort law—the areas of law typically associated with Coase’s Theorem.<sup>14</sup> Specifically, I argue for the protected operation of informal norms within certain close-knit groups with regard to the regulation of criminal conduct.

Legal academia’s interest with informal norms (which goes by many other names, *e.g.* private enforcement mechanisms, private ordering, *etc.*) is not necessarily new.<sup>15</sup> As Professor Weisberg has pointed out, the “norms school” has not necessarily discovered a new idea.<sup>16</sup> Indeed, Weisberg has criticized the norms school for

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13. See generally THOM HATCH, *THE CUSTER COMPANION: A COMPREHENSIVE GUIDE TO THE LIFE OF GEORGE ARMSTRONG CUSTER AND THE PLAINS INDIAN WARS* (Stackpole Books 2002). In no way do I intend for this article to be a referendum on Gen. Armstrong Custer’s conduct, legacy, or life in general. Instead, I use his mythos and image as expressed by the former chairman of the Soboba Band as a contrast to the “Texan” archetype identified in Ellickson’s work.

14. ELLICKSON, *supra* note 1, at 3.

15. Barak D. Richman, *Norms and Law: Putting the Horse Before the Cart*, 62 *DUKE L.J.* 739, 740 (2012).

16. Robert Weisberg, *Norms and Law: and the Norms of Criminal Law*

engaging in sloppy or merely conclusory analysis of informal norms in the criminal context. This article is not a response to Weisberg, but instead attempts to faithfully apply Ellickson's theory to certain close-knit groups in the criminal area.

Put simply, the issue explored here concerns the extent to which informal norms should either (1) preclude, (2) be prioritized over, or (3) be protected from interference by external mandatory legal forces. This theory advocates for the protected application of informal norms—as opposed to state or federal law—in the criminal context for certain close-knit communities. The theorized result is that such close-knit groups whose informal norms are protected from interference by exogenous law will better maximize aggregate welfare, increase efficiency in member interactions, and reduce criminal conduct. To use my own terminology, the preclusion of Custers allows informal norms to operate, thereby creating better outcome for both members of the close-knit community (by curtailing Texans) and outsiders.

Part I explains Ellickson's theory and analyzes other important contributions made by other scholars. I highlight key components of Ellickson's assessment concerning the close-knit community's ability to both define and maximize welfare according to its *sui generis* values. Part II discusses the taxonomy of historical and current examples of communities utilizing informal norms, or private law based mechanisms, to resolve disputes and how efficient results that maximize welfare (as defined by the community) are achieved. Part III, addresses the question of whether government law enforcement interferes with the close-knit community to an extent great enough to diminish the efficacy, or existence, of operative informal norms. By analyzing scholarship on community policing, I explain that while advocates of community policing and informal norms share similar goals, community policing is fundamentally adverse to—and hinders—the operation of informal norms.

Part IV examines anthropological sources to argue that the unique attributes of various Indian tribes and tribal communities warrant definition as the type of close-knit communities contemplated under Ellickson's theory. Part V explains why the informal norms of certain tribal communities should be allowed to

operate without interference from outside legal forces (Custers). To set up this section, a historical and present day analysis of criminal law and jurisdiction in the context of Federal Indian Law is necessary. I examine the background of criminal jurisdiction in Indian Country, the history of Tribal-State relations, and the resulting fragmentation of criminal jurisdictional authority between the federal government, tribal governments, and state governments. I focus on a particular anomaly in Federal Indian Law, where Indian tribes in certain states are subject to State criminal jurisdiction, as opposed to Federal criminal jurisdiction. The consequences of this anomaly in tribal communities are described through a review of statistics and an analysis of recent empirical scholarship of the on-the-ground situation for these certain tribal communities.

Finally, Part VI looks at the relevant provisions in the recently passed Tribal Law and Order Act of 2010 and asks whether they effectively address the criminal justice issues facing Indian tribes subject to State criminal jurisdiction. I propose an alternative way of thinking about the problem of crime in these areas of Indian Country based on the theory that close-knit tribal groups are better situated to curtail crime and maximize community welfare through application of informal norms rather than through the mandatory imposition of exogenous law.

#### I. ORDER WITHOUT LAW: INFORMAL NORMS IN CLOSE-KNIT COMMUNITIES

Clearly defining the terminology used in this article is important. This article focuses on the distinction between a “law” and an “informal norm.” Both are “rules,” but very different types. Ellickson’s theory sets forth certain types of controllers that create rules affecting human behavior: first-party, second-party, and third-party.<sup>17</sup>

Rules originating from first-party controllers are called personal ethics and are enforced by the individual’s own personal reflections.<sup>18</sup> Second-party controllers are other individuals who have a direct relationship with the conduct of another person. For example, in a contract, the promisee has the ability to compel—

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17. ELLICKSON, *supra* note 1, at 130–31.

18. *Id.* at 126.

through rewards and punishments—the promisor to conform his conduct to the terms of the contract.<sup>19</sup> There is a specific and direct relationship between the actor and the controller.

Ellickson's (and my) inquiry focuses on two types of third-party controller created rules. Third-party controllers are subdivided into three types: (1) Social Forces, (2) Organizations, and (3) Government.<sup>20</sup> As Ellickson wrote, "[t]hird-party control differs from second-party control in that the rules are ones to which the actor may not have agreed; in addition the sanctions may be administered by persons not involved in the primary interaction."<sup>21</sup> Ellickson's examined two specific types of third-party controllers, Social Forces and Government, and also the rules that they each create.<sup>22</sup> While both types of third-party controllers provide rules of behavior, they are distinct in two primary ways. Social Forces are controllers that are non-hierarchical and unaffiliated with the State.<sup>23</sup> Government, on the other hand, is hierarchical and *is* the State.<sup>24</sup> Rules emanating from Social Forces are called "norms" or informal norms.<sup>25</sup> The rules created by Government are "laws."<sup>26</sup>

With these terms set out, recall Ellickson's goal to examine the Coase Theorem in a real-world perspective. The Coase Theorem suggests that "law" will not dictate the behavior of the parties, instead, the parties will bargain to an efficient outcome regardless of where the law places property entitlements.<sup>27</sup> Coase did not discuss informal norms. This is Ellickson's important contribution stemming from his real world test of the Coase Theorem. In essence, Ellickson confirmed the outcome of the Coase Theorem—that law does not dictate the choices and behavior of individuals under certain circumstances.<sup>28</sup>

Ellickson hypothesized that "members of a close-knit group develop and maintain norms whose content serves to maximize

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19. *Id.* at 126–27.

20. *Id.* at 131.

21. *Id.* at 127.

22. *Id.* at 127–28.

23. *Id.* at 127.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 2.

28. *Id.* at 4.



the aggregate welfare that members obtain in their workaday affairs with one another."<sup>29</sup> In other words, under certain conditions informal norms are more efficient in maximizing welfare than their exogenous law counterparts.<sup>30</sup> This is why *Order Without Law* has been so influential. Not only does Ellickson's work validate, in a sense, Coase's Theorem under certain conditions, but it also provides an additional basis for explaining why individuals cooperate: informal norms.<sup>31</sup>

At the same time, Ellickson identifies "words of caution."<sup>32</sup> He reiterates that his theory is plainly inapplicable to non-close-knit groups.<sup>33</sup> In addition, he points out that maximizing the aggregate welfare of a close-knit group may serve to harm or punish outsiders, including the examples of racial segregation and Jim Crow laws as evidence of this.<sup>34</sup> Finally, he notes that simply maximizing the aggregate welfare of the close-knit group may not be the sole and ultimate goal for the group. He suggests that the protection of fundamental civil liberties or other concerns may trump informal norms that would result in maximum aggregate welfare.<sup>35</sup>

Bearing those concerns in mind, Ellickson's work contains three key concepts that must be clearly laid out: "welfare," "workaday affairs," and "close-knit group." Ellickson uses the term "welfare" to include tangible and intangible benefits; in particular he cautions that the term is not simply reducible to wealth or money.<sup>36</sup> As examples, Ellickson notes that welfare "refers to all things and conditions that people value."<sup>37</sup> Market prices are a way to measure value for those things traded in the open market, albeit a crude one.<sup>38</sup> However, intangible things with value cannot be measured because they are not openly traded, *e.g.* friendship.<sup>39</sup> Under these circumstances, where there

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29. *Id.* at 167.

30. *See id.*

31. *See id.*

32. *Id.* at 169.

33. *Id.*

34. *Id.*

35. *Id.* at 169–70.

36. *Id.* at 168.

37. *Id.*

38. *Id.* at 171.

39. *Id.*

are a mixture of things and conditions susceptible to both objective and subjective measures of value, “patterns of social exchange . . . can help reveal how people value outcomes reached outside the marketplace.”<sup>40</sup> The close-knit social group and its members determine the relative values of intangible things and conditions. In essence, welfare is defined by the community through its operations.

What are “workaday affairs?” Workaday affairs are those interactions between the members of the close-knit group that pertain to their common situation, *i.e.* that which creates the close-knit group. In Shasta County, the workaday affairs arose among the close-knit group of cattle ranchers. They were all engaged in the same business and interacted with each other daily. The workaday affairs governed by informal norms are those that are “ordinary matters” conducted on the stage set by “ground rules.”<sup>41</sup> The ground rules contemplated by Ellickson are foundational rules like a concept of private property—under either a Lockean Labor Theory or a communal theory.<sup>42</sup> These foundational rules are what allow the close-knit group to engage in voluntary exchange with one another: they allow for the community members to assign value to things and conditions. Thus, Ellickson’s theory of welfare-maximizing informal norms presumes the existence of foundational rules.

Finally, the close-knit group has a very specific definition. Moreover, it is a central focus in the theory set forth below. Close-knit groups are not simply those individuals who maintain common connections, interests, or traits. Instead, Ellickson states that a close-knit group is one where “informal power is broadly distributed among group members and the information pertinent to informal control circulates easily among them.”<sup>43</sup>

There are two primary components that condition the existence of a close-knit group and determine the degree of “close-knitedness”: (1) reciprocal power to administer sanctions and benefits is completely distributed among members of the close-knit group and (2) group member information about the past and

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40. *Id.* at 172.

41. *Id.* at 176.

42. *Id.* at 174.

43. *Id.* at 177–78.

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present.<sup>44</sup>

First, the ability to administer sanctions in the future against other members of the close-knit group must be both widely distributed and readily deployable.<sup>45</sup> Ellickson analogizes to the iterated version of the Prisoner's Dilemma wherein each player has the same ability to apply sanctions or benefits.<sup>46</sup> The repeat play aspect of the iterated game compels each player to think long term because there is a continuing relationship with the other player. In addition, each player has recurring opportunities to exercise self-help power over the other.<sup>47</sup> "When relations are continuing, an enforcer will receive more personal benefits if a particular sanctionee is induced to act more cooperatively in the future."<sup>48</sup>

Second, "repeat play by itself is insufficient to induce cooperation."<sup>49</sup> Members must have information about the current circumstances in order to "forecast" the consequences of their choice to exercise their reciprocal power of self-help.<sup>50</sup> With regard to past information, a member needs this information in order to understand how other members of the group operated in prior instances.<sup>51</sup> Historical information affects the member's assessment of his future conduct by giving her an idea of the severity of previous conduct (cooperative or uncooperative).<sup>52</sup> Without historical data, the individual is operating in a vacuum with no baseline for determining what type of conduct is expected and the seriousness of deviation from that expectation. It bears directly on her election to exercise, or withhold, her reciprocal power.

With these terms defined, Ellickson's theory finds that within a close-knit group, the informal norms created among those members will maximize welfare for the aggregate group, pertaining to their workaday affairs.<sup>53</sup>

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44. *Id.* at 177–80.

45. *Id.* at 178–79.

46. *Id.*

47. *Id.*

48. *Id.* at 180.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 181.

## II. PRIVATE LEGAL MECHANISMS

By no means does Ellickson's theory represent the entirety of the "norms school of thought." Professor Richman has skillfully identified important distinguishing factors of types of informal norms.<sup>54</sup> His article creates a taxonomy for informal norms based systems—or private ordering.<sup>55</sup> Richman shares at least one view with Weisberg, scholars writing about informal norms often do so with imprecision.<sup>56</sup> Consequently, Richman adds structure to scholarly work on non-public law mechanisms for dispute resolution.<sup>57</sup> Richman divides extralegal mechanisms into two groups: "those operating in the 'shadow of the law' and those that create 'order without law.'"<sup>58</sup>

The growing fascination in the legal academic community likely traces its roots to Stewart Macaulay's 1963 scholarship on the analysis of the informal norms among businesspeople that resolve disputes without resorting to legal mechanisms.<sup>59</sup> Fifty years later, academics remain intrigued, and perhaps befuddled, by the operational relevance of informal norms. By defining terms, Richman attempts to bring a degree of clarity to the continuing discussion of informal norms in legal scholarship.

Richman identifies a fundamental beneficial feature of public law based dispute resolution: availability among parties.<sup>60</sup> Public law courts can enforce rules, agreements, and resolve disputes among perfect strangers; whereas informal norms are likely ineffective under such social circumstances.<sup>61</sup> Systems of private ordering can operate either in the "shadow of the law" or operate to create "order without law." In a shadow of law base system, the parties' respective assessments of their positions are fundamentally informed by their knowledge of how a public law

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54. See generally Richman, *supra* note 15, at 739.

55. *Id.* at 740.

56. *Id.* at 741–42.

57. *Id.* at 743–44.

58. *Id.*

59. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61 (1963) ("Disputes are frequently settled without reference to the contract or potential or actual legal sanctions.").

60. Richman, *supra* note 15, at 743.

61. *Id.*

court would likely resolve their dispute.<sup>62</sup> The parties have a reasonably accurate view of their legal rights—something that entirely relies upon the existence, operation, and use of public law courts rendering relevant decisions. Without the public law court’s enforcement of similar disputes, a shadow of law system simply cannot exist.<sup>63</sup> Shadow of law systems arise among well-informed parties as a way to resolve disputes, through cooperation, in a quicker and less expensive manner than that created by public law courts.<sup>64</sup> Arbitration is a formalized version of such systems; indeed, public law courts readily enforce arbitration agreements and defer to the arbitrators’ decision so long as it “draws its essence from the contract.”<sup>65</sup> Richman summarizes shadow of law systems by stating that “. . . once legal entitlements are clearly defined, parties can economize on litigation costs and reach agreements through Coasean bargaining. So long as the law’s shadow is well defined, parties can engage in mutually valuable conduct without assuming the costs inherent in state-made legal procedures.”<sup>66</sup>

Order without law systems are distinct. Owing to Ellickson’s work, Richman characterizes this system as involving “a much more categorical rejection of state law and state institutions.”<sup>67</sup> The creation and enforcement of informal norms comes purely from the community, “they are an alternative to, not an extension of, formal legal sanctions.”<sup>68</sup> Enforcement mechanisms in order without law systems vary greatly and are *sui generis* to the particular community in which the informal norms exist. Sanctions can result in economic or social, or both, harm to an individual deviating from an informal norm. Richman notes that order without law systems often arise under circumstances where reliable public law courts are unavailable to parties, therefore creating a need for consistent and equitable exercise and

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62. *See id.* at 744.

63. *See id.* at 744–45.

64. *See id.*

65. Richman, *supra* note 15, at 745–46; MyLinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street*, 62 S.C. L. REV. 407, 409–11 (2010); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (declaring the national policy favors arbitration).

66. Richman, *supra* note 15, at 745.

67. *Id.* at 746.

68. *Id.* at 747.

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enforcement of informal rules.<sup>69</sup> But, he correctly notes their continued existence into the present day, as depicted in Ellickson's work in Shasta County.<sup>70</sup>

Richman identifies some costs created by types of private order systems, whether they are shadow of law or order without law based.<sup>71</sup> There are significant obstacles to entering such a community engaged in private ordering. Would-be newcomers to such communities lack the reputational history that encourages long-term members of the community to deal with them.<sup>72</sup> Pre-existing members of the community are concerned that the newcomer will turn out to be a Texan, thereby requiring the community to engage in sanctioning behavior and the application of informal rules.<sup>73</sup> It is simply easier, more efficient, and less costly for members of the community to continue to deal with other long-term members who have reputational good standing. There is risk involved in branching out, thereby potentially foreclosing entry into the community to anyone.

This feeling of uneasiness from long-term members of the community is recognizable in the present day to anyone who has ever purchased anything online. Online merchants have reputational ratings. On eBay, prior purchasers leave comments for individual sellers, allowing anyone to see whether prior transactions went smoothly.<sup>74</sup> Negative comments represent reputational sanctions that may economically impair the seller in the future.<sup>75</sup> This is punishment levied by private individuals without any regard to the law. In a given auction, those sellers with checkered reputations may command only a reduced number of bidders on an item readily available by a number of other sellers. The reduced bidders represent the risk aversion to a seller with subpar reputation, just as a newcomer will face greater scrutiny by long-term members in a given community. Even in disparate communities, such as online auction sales, reputational sanctions carry weight and no public law court need enter the fray

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69. *See id.* at 747–49.

70. *See id.* at 747–50.

71. *Id.* at 758–59.

72. *Id.* at 758.

73. *See id.*

74. *How Feedback Works*, EBAY (Mar. 4, 2013), <http://pages.ebay.com/help/feedback/howitworks.html>.

75. *Id.*

to alter patterns of behavior within the community.

This paper is solely concerned with order without law systems. Moreover, it utilizes the definitional structure created by Ellickson for the operation of informal norms only under certain criteria described in Part I.<sup>76</sup> The next section moves from the commercial transactional context and examines how law and informal norms operate in the criminal context by analyzing the scholarship on community policing.

### III. INFORMAL NORMS AND CRIMINAL LAW

Thus far, I have reviewed the operation of informal norms in commercial and transactional settings. Is that the extent of their application? The next section explores this question by examining the rise of community policing in the 1980s and its alterations in recent years. Community policing represents an attempt at the best of both worlds: informal norms and public law. Much of the scholarship on community policing uses the term “informal norms” to describe the purpose of policing and revision of law enforcement strategies. Utilizing the definition created by Ellickson along with Richman’s taxonomy of private ordering, I argue that community policing is not executing informal norm based systems. Instead, I argue that community policing fundamentally undermines the operation of informal norms and is simply a delegation of public law authority to private actors.

The application of the “norms school” of thought to criminal law is not new.<sup>77</sup> My contribution is to apply Richman’s structural taxonomy and ask whether community policing is really a system

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76. *Supra* Part I.

77. *See generally* TRACEY L. MEARES & SAN M. KAHAN, *URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES* (Beacon Press 1999) [hereinafter MEARES & KAHAN, *URGENT TIMES*]; Miriam Hechler Baer, *Cooperation’s Cost*, 88 WASH. U.L. REV. 903 (2011); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996); Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513 (2002) [hereinafter Kahan, *Reciprocity*]; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Eric J. Miller, *Putting the Practice into Theory*, 7 OHIO ST. J. CRIM. L. 31 (2009); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005); Robert Weisberg, *Norms and Law: and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 469 (2003).

of private ordering—either a shadow of law or order without law system. To begin, it is essential to center the discussion and community policing can mean a lot of different things. A review of recent scholarship on community policing is therefore necessary.

Professors Dan Kahan and Tracey Meares are two of the most prominent writers on community policing and empirical data on crime.<sup>78</sup> In 2002, Meares explained that community policing is ubiquitous and that “many police departments” employ some type of community policing in their enforcement.<sup>79</sup> David Thacher wrote “community policing exhorts city police departments to forswear their autonomy and collaborate with practically everyone: community groups and institutions, property owners, agencies of city government, other police and security forces, elected officials, businesses, and so on.”<sup>80</sup> Sarah Waldeck said that “the community policing moniker has been assigned to so many different initiatives, no brief summary” can describe it in detail.<sup>81</sup> In a near tautology, community policing can be thought of as a general requirement for the police to partner, in some form, with the surrounding community.<sup>82</sup> This is a shift away from the idea that police department needed to operate in isolation from political forces and “monopolize the task of crime control.”<sup>83</sup> Waldeck provides some examples of community policing theory in action, including permanent beat cops visible and accessible on the streets, community input regarding the type and priority of enforcement services received, and teaching community residents about how to protect themselves from becoming victims of crime

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78. See generally Kahan, *Reciprocity*, *supra* note 66; Dan M. Kahan & Tracey L. Meares, *Foreward: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) [hereinafter Kahan & Meares, *Foreward*]; Tracey Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593 (2002) [hereinafter Meares, *Praying*]; MEARES & KAHAN, URGENT TIMES, *supra* note 77; Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 806 (1998) [hereinafter Meares & Kahan, *Inner City*].

79. Meares, *Praying*, *supra* note 78, at 1593–94.

80. David Thacher, *Conflicting Values in Community Policing*, 35 LAW & SOC'Y REV. 765 (2001).

81. Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable With Others?*, 34 GA. L. REV. 1253, 1254 (2000).

82. See *id.*

83. See Thacher, *supra* note 80, at 765.



again in the future.<sup>84</sup> For purposes of the “norms school,” Waldeck notes that police officers in a community policing model may be taught to try and identify “relationships between individual events and develop solutions to underlying problems.”<sup>85</sup> This comment directly concerns the convergence of informal norms theory and criminal law.

Meares and Kahan have argued that individuals do not elect to violate the law in a vacuum; they are part of a community where other members’ decisions create norms to violate or not violate the law in their community.<sup>86</sup> This point dovetails, to a general degree, with the conclusion of the Coase Theorem (law does not solely determine the outcome between private parties) and of Ellickson (parties in close-knit groups generate informal norms that maximize aggregate welfare with respect to workaday affairs).<sup>87</sup> Despite the existence of a law preventing a certain behavior, a norm may nonetheless arise in a community that encourages (or at least does not discourage) an individual’s election to act otherwise. Meares and Kahan advocated for intervention by community policing utilizing strategies that reinforce positive norms, so-called order maintenance norms, the enforcement of which will promote norms that deter crime.<sup>88</sup> This combats the pre-existing community norms of deviation from publicly-originated law, but applied via the community through apparently informal norms.

Meares and Kahan recognize the potentially important role of informal norms in communities while also understanding that public law is not necessarily effective at conditioning behavior under certain circumstances.<sup>89</sup> However, as Richman has noted, under certain shadow of law systems of private ordering, the law *is* influential in recommending behavior and sanctioning deviations by the community.<sup>90</sup> Community policing, then, attempts to use the community as the vehicle through which public law is applied—albeit informed by the partnership in

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84. See Waldeck, *supra* note 81, at 1254.

85. *Id.*

86. See Meares & Kahan, *Inner City*, *supra* note 78, at 806.

87. See ELLICKSON, *supra* note 1, at 2, 167.

88. Meares & Kahan, *Inner City*, *supra* note 78, at 815–18.

89. *Id.*

90. See generally Richman, *supra* note 15.

existence between the police and the community. It nonetheless is external to the community. The norms which community policing seek to undermine *are* the informal norms of the community. Therefore, there is an inherent antagonistic relationship between the informal norms of the community and the public law based informal norms initiated by the community policing strategy and executed by various members of the community. The norms imposed by community policing strategies are informal norms in sheep's clothing. Despite the cloaking of an informal norm, they are Custers.

These are not community norms; they have not arisen organically. They are fundamentally external and foreign to the community. Community policing strategies like this are alien solutions to internal problems. Thacher provides a basis for understanding why these strategies might not succeed:

Any complex society involves differentiation in terms of roles and values (Durkheim 1960; Walzer 1984), so every social institution pursues priorities separate from and potentially in conflict with the others. Consequently, interorganizational partnerships bring together institutions committed to potentially incompatible priorities. The practitioners who manage these relationships will find themselves in contested normative terrain, pressured by conflicting social aims that had formerly been institutionally segregated. To be responsive to each institution, they must be centrally concerned with resolving the tensions among those conflicting values.<sup>91</sup>

In other words, community policing efforts to cloak public law as informal norms may face an uphill battle from the outset. There are so many players and parties in a community with different values, ideas, and levels of commitment that community policing's noble effort to curtail criminal conduct is foundationally impaired. These observations are familiar because they are the converse of Ellickson's definition of the close-knit group.<sup>92</sup> Power and information are not broadly distributed among the members of the group. Therefore, informal norms will not maximize aggregate welfare on workaday affairs under these circumstances.

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91. Thacher, *supra* note 80, at 766.

92. ELLICKSON, *supra* note 1, at 177.

Much of the scholarship on community policing focuses on inner-city or urban areas. These communities perhaps do not meet the definition of a close-knit group set up by Ellickson—where informal norms are at their zenith in terms of influence. Recall, close-knit groups must have an even distribution of reciprocal power to punish others and have accurate information about the past and present community.<sup>93</sup> For example, power imbalances may exist in these inner-city and urban areas thereby removing the ability of one individual to levy punishment against another. As a consequence, informal norms are significantly weaker in their ability to condition an individual’s behavior. We do not know enough about these communities in order to determine whether they are close-knit in the Ellicksonian sense.

In other words, community policing is not a system of private ordering. It is best understood as a delegation of public law authority and rules to private actors.<sup>94</sup> These private actors may enforce these rules—and perhaps more efficiently than their public law police officer counterparts—but the rules enforced are not the informal norms of the community. By definition, they originated from an exogenous source, rather than organically from within. At this point, these rules bear little resemblance to those theorized by Ellickson.

Again, my focus here is not to explain the failure or success of these types of community policing efforts in communities (close-knit or not). Instead, I focus on the application of the Richman taxonomy and Ellickson definition in order to provide specificity to the application of informal norms to criminal conduct under certain conditions, *i.e.* close-knit groups. Therefore, my argument does not concern those communities that lack close-knittedness. Instead, I argue that informal norms should regulate criminal conduct—without interference by public law enforcement—where the community displays a high degree of cohesion and is extremely close-knit.

A final and important point is that community policing may preclude the creation of close-knit group informal norms, which may maximize aggregate welfare for the community. For

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93. *See id.*

94. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 123 (Univ. of Chicago Press 2001).

example, the imposition of beat cops working the streets signals a greater presence of law enforcement from an outside entity. When that entity enforces public law to curtail behavior, community members identify public law as the authority, thereby undermining the creation, efficacy, and operation of informal norms in the community. As described above by Meares and Kahan, this is perhaps the point of community policy—to correct informal norms in the community that encourage individuals to break the law.<sup>95</sup> But, community policing will also crush those informal norms with positive effects on the community because it fundamentally impairs the close-knit group's development of informal norms. Order maintenance rules do not select which norms to undermine, they operate to replace the existing norms and create new ones. The enlistment of non-state actors and development of crime control partnerships with community institutions and private entities may well reduce crime rates and result in healthier, safer communities which are not close-knit. Community policing may have the unintended consequences of suppressing the creation of positive informal norms.

#### IV. TRIBES AS CLOSE-KNIT COMMUNITIES

Recall that Ellickson's definition of a close-knit group requires that all of the group's members be able to exercise reciprocal power of self-help, *i.e.* sanction the conduct of another member and that all members have information about the past and present.<sup>96</sup> He states that his theory of informal norms simply does not apply to transient communities.<sup>97</sup> Of course, certain communities are more close-knit than others. I suggest an addition, or refinement, of this qualification that the more isolated the community, the higher the degree of cohesion will be among members. This is not new; Ellickson implies as much in a footnote when he suggests that remote island communities may operate without a criminal justice system.<sup>98</sup>

Ellickson warns against construing the definition of close-knit as a proxy for the characteristic that a group may be small.<sup>99</sup>

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95. Meares & Kahan, *Inner City*, *supra* note 78, at 815–18.

96. See ELLICKSON, *supra* note 1, at 177–80.

97. *Id.* at 169.

98. *Id.* at 178 n.38.

99. *Id.* at 182.

While a group’s small size may concentrate the degree of close-knittedness, thereby making both the enforcement of norms and the ability to obtain information about the past and present easier, it is not a *per se* requirement.<sup>100</sup> This section is dedicated to a brief examination of a certain community—Indian tribes—and the extent to which they may qualify as Ellicksonian close-knit groups along with unique features that may make them more likely to strongly enforce informal norms.

Communities come in all shapes and sizes. Those that are the source of legal academic inquiry in the context of informal norms are particularly colorful: a Tuna Court,<sup>101</sup> stand-up comedians,<sup>102</sup> diamond merchants,<sup>103</sup> roller-derby participants,<sup>104</sup> ranchers,<sup>105</sup> Wisconsin business owners,<sup>106</sup> and now, a brief survey of certain Indian tribes.<sup>107</sup> Professor Keith Basso describes in great detail the language, patterns of speech, culture, and importance of place to the tribal communities of Western Apache Indians.<sup>108</sup> Basso

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100. *Id.*

101. Eric A. Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 94 CAL. L. REV. 313 (2006).

102. Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand Up Comedy*, 94 VA. L. REV. 1787, 1790 (2008).

103. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

104. David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012).

105. *See generally* ELLICKSON, *supra* note 1.

106. *See generally* Macaulay, *supra* note 59.

107. This article looks only at certain tribal communities. As an enrolled tribal member of the Chickasaw Nation of Oklahoma, I am constantly awed by the beautiful diversity of tribal communities. My legal career has given me the opportunities to witness and interact with Indians in California, Massachusetts, South Dakota, Oklahoma, Arizona, New Mexico, Washington, Florida, and other places. I cannot stress enough how different all of these communities are, and while there may be very broad generalities to be made among these distinct tribes, I must emphasize that each is its own nation, culture, and people. This article explores the traits in certain tribal communities, and I make no claim regarding the presence or absence of these traits in other tribal communities. It may be likely, perhaps very likely, that other tribal communities have the same or similar traits. But such a claim would require additional study and support beyond the scope of this article.

108. *See generally* KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE (Univ. of N.M. Press 1996). There are many federally recognized Indian tribes that are Western Apache.

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attempts to explain the fundamental philosophical and cosmological distinctions of Western Apache thought:

Staying away from places is something that Western Apaches would not recommend, and . . . they are not alone. Vine Deloria, Jr. (Standing Rock Sioux), has observed, most American Indian tribes embrace “spatial conceptions of history” in which places and their names—and all that these may symbolize—are accorded central importance. For Indian men and women, the past lies embedded in the features of the earth . . . which together endow their lands with multiple forms of significance that reach into their lives and shape the ways they think. Knowledge of place is therefore closely linked to knowledge of the self, to grasping one’s position in the larger scheme of things, including one’s own community, and to securing a confident sense of who one is as a person.<sup>109</sup>

Basso attempts to express the importance of place and the equally important idea that this is connected to the cohesion and identity of the community. He continues, “[t]he [Western Apache] sense of place, their sense of tribal past, and their vibrant sense of themselves are inseparably intertwined. Their identity has persisted.”<sup>110</sup> Basso then allows the people of Cibecue, Western Apache individuals, to share their experiences; one said:

I think of the mountain called . . . (White Rocks Lie Above In A Compact Cluster) as if it were my maternal grandmother. I recall stories of how it once was at that mountain. The stories told to me were like arrows. Elsewhere, hearing that mountain’s name, I see it. Its name is like a picture. Stories go to work on you like arrows. Stories make you live right. Stories make you replace yourself.

—Benson Lewis, age 64, 1979.<sup>111</sup>

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Professor Basso’s work focused on a region of Western Apache people, Cibecue, located on the Fort Apache Reservation—home of the White Mountain Apache Nation.

109. *Id.* at 34.

110. *Id.* at 35.

111. *Id.* at 38.

One time I went to L.A., training for mechanic. It was no good, sure no good. I start drinking, hang around bars all the time. I start getting into trouble with my wife, fight sometimes with her. It was bad. I forget about this country here around Cibecue. I forget all the names and stories. I don't hear them in my mind anymore. I forget how to live right, forget how to be strong.

—Wilson Lavender, age 52, 1975.<sup>112</sup>

Basso then states the obvious: the difficulty in interpreting these statements arises due to their origination from an "experience in a culturally constituted world of objects and events with which most of us are unfamiliar."<sup>113</sup> Here, Basso's point about outsiders being unable to comprehend the simple statements of these individuals resonates in the context of informal norms and law. Informal norms are *sui generis* by definition.<sup>114</sup> Ellickson's point was that the close-knit group makes collective determinations about the relative value of things and conditions, that which makes up the aggregate welfare.<sup>115</sup> The informal norms are organized, through cooperation, in order to maximize the aggregate welfare of the community with respect to the workaday affairs of the members.

The Western Apache have a definition of welfare based on their place, the stories, and the events that make and have made them who they are.<sup>116</sup> As Basso said, it is their identity.<sup>117</sup> Therefore, one might say that the substance of the Western Apache informal norm is to maintain Western Apache identity.<sup>118</sup> Forgetting the stories is something Western Apache are not supposed to do.<sup>119</sup> Leaving their place is "not recommended."<sup>120</sup> Both amount to a rejection of Western Apache identity.<sup>121</sup> These are the substantive informal norms of the Western Apache: to

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112. *Id.* at 39.

113. *Id.*

114. *Id.*

115. ELLICKSON, *supra* note 1, at 181.

116. BASSO, *supra* note 108, at 34.

117. *Id.* at 35.

118. *See generally* BASSO, *supra* note 108.

119. *See id.*

120. *Id.*

121. *Id.*

respect and honor their identity.<sup>122</sup>

Basso goes on to further describe the language and speech patterns of Western Apache.<sup>123</sup> He provides a description of the types of stories that Western Apache tell.<sup>124</sup> He notes that these stories belong to all Western Apache.<sup>125</sup> They are not localized in particular people with authority in the community. All in the community, if they have heard, may tell them. Basso explains that members of the Western Apache understand the cultural context in which these stories are to be told, because each type has an identifiable purpose.<sup>126</sup>

Relevant for this article, there are stories that are told to condition behavior. Much literature describes the sanctions of informal norms in the context of reputation and gossip. For Western Apache, the sanctions are carried out through the reminders of who they are as a people, what their identity is, and the important role that each Western Apache plays in maintaining that identity as a tribal community.<sup>127</sup> Basso closely studied Western Apache storytelling,

which holds that oral narratives have the power to establish enduring bonds between individuals and features of the natural landscape, and that as a direct consequences of such bonds, persons who have acted improperly will be moved to reflect critically on their misconduct and resolve to improve it.<sup>128</sup>

While this could sound like the personal ethics in a system of first-party control, it misses the interconnectedness of the community, the stories themselves, and the cultural and geographic isolation of the tribal community. There is no one else that understands these stories as they are to be understood in their cultural context. One, not accustomed to hearing them, has no frame of reference, philosophically or geographically, thereby losing the concept of community in the narrative. Basso goes on to

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122. *Id.*

123. *Id.* at xi.

124. *Id.* at 3.

125. *Id.*

126. *Id.*

127. *Id.* at 40.

128. *Id.*



say that these stories shape Apache conceptions of themselves.<sup>129</sup> This is not a fable designed to convey the importance of telling the truth; instead, these are stories that explain and express who they are as people and as a community.<sup>130</sup>

Basso identifies the major categories of Western Apache speech: ordinary talk, prayer, and narrative story.<sup>131</sup> Narrative stories are further broken down into four types: myth, historical tale, saga, and gossip.<sup>132</sup> Each type of story has different values, which "describe the objective that Apache narrators typically have in recounting them."<sup>133</sup> Myths are intended to enlighten and instruct.<sup>134</sup> Historical tales attempt to criticize, warn, or "shoot arrows," to use the Western Apache phrase.<sup>135</sup> Sagas are for entertainment.<sup>136</sup> Finally, gossip serves to inform and malign.<sup>137</sup> Basso deconstructs examples of each of these types of Western Apache story, but this article only utilizes Basso's impressive work and categorization to demonstrate the complexity of the informal norms of Western Apache culture and the significant cultural and geographic isolation implicit in the informal norms.<sup>138</sup>

The Western Apache clearly qualify under Ellickson's definition of a close-knit group.<sup>139</sup> The ability to condition wrong behavior is widely distributed among all Western Apache since all members can tell the stories to those who deviate from the substance norm of maintaining Western Apache identity. In addition, the stories themselves convey some of the information about the past and the present that is required in order for members of a close-knit group to exercise the reciprocal power of self-help.

The unique aspect of the Western Apache, and perhaps many other tribal communities, as compared to other groups meeting

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129. *Id.* at 40–41

130. *Id.*

131. *Id.* at 49. The Western Apache spelling of these categories can be found at: BASSO, *supra* note 108, at 49.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 50.

136. *Id.*

137. *Id.*

138. *See generally* BASSO, *supra* note 108.

139. *See* ELLICKSON, *supra* note 1, at 181.

Ellickson's definition is isolation. Isolation can be conceived of in two senses: (1) geographic and (2) cultural. Close-knit groups that meet Ellickson's definition of power and information, who also contain the trait of being isolated in either sense, are that much more susceptible to the operation of informal norms. Therefore, informal norms should be allowed to operate without the interference of external public law intervention. For Indian Country, the operation of public law in tribal communities has been mandatory as opposed to the residents of Shasta County who may voluntarily opt to utilize public law in the context of a lawsuit for trespass and damages.<sup>140</sup>

The next section explains how public law enforcement in Indian Country did not always exist, but now presents fundamental problems for tribal communities.

#### V. CRIMINAL JURISDICTION IN INDIAN COUNTRY

Crime in Indian Country is not new. How this problem has been addressed has undergone sweeping legal changes since the formation of the United States. In order to provide context for how the problem of crime should be addressed in close-knit tribal communities, and to properly locate the informal norms theory within the pre-existing public law framework, a survey of criminal jurisdiction in Indian Country is necessary. Criminal jurisdiction in Indian Country is a complex area of federal Indian law and has generated a great deal of scholarly and empirical interest. In addition, given Congress' plenary power over Indian affairs, the prospect of legislative tinkering is omnipresent.<sup>141</sup> This section provides a history of criminal jurisdiction in Indian Country, describes this evolution from preclusive operation of tribal informal norms to the imposition of exogenous mandatory public law.

##### A. *Pre-Contact Tribal "Criminal Jurisdiction"*

Modern Federal Indian law recognizes Indian tribes as "domestic dependent nations," a phrase coined by Chief Justice

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140. See generally Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996).

141. See generally *United States v. Kagama*, 118 U.S. 375 (1886).

John Marshall in *Cherokee Nation v. Georgia*.<sup>142</sup> At best, the phrase “domestic dependent nation” is a term of art, ill defined if the phrase is left to be interpreted solely by reference to the words alone.<sup>143</sup> At worst, it is in inherent conflict and a conundrum for jurists, legal advocates, tribal leaders, and non-Indians with interests in Indian Country.<sup>144</sup> One thing is clear, Indian tribes maintain some degree of self-government. A fundamental attribute of a community’s self-governing authority is the capability to make and enforce rules. Indeed, the enforcement of these community specific concepts is a “fundamental expression of a community’s notion of justice.”<sup>145</sup>

Since time immemorial, tribal communities have employed complex political structures to govern all aspects of the community.<sup>146</sup> As with other communities with defined governmental processes, Indian tribes “initially had complete control to express community norms” regarding appropriate and disapproved conduct.<sup>147</sup> As discussed in this article, even in the absence of defined governmental processes, order may arise without law.<sup>148</sup>

#### B. *The Increasing Complexity of Criminal Jurisdiction in Indian Country*

Many scholars, including myself,<sup>149</sup> have correctly

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142. *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831).

143. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 437–38 (2005).

144. *See id.*

145. ROBERT ANDERSON, BETHANY BERGER, PHILIP FRICKEY & SARAH KRAKOFF, *AMERICAN INDIAN LAW, CASES AND COMMENTARY* 310–11 (West 2d ed. 2010).

146. *See* SHARON O’BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 14–20 (Univ. of Okla. Press, 1989).

147. ANDERSON ET AL., *supra* note 145, at 311.

148. ELLICKSON, *supra* note 1, at 169. *See also* Bernstein, *supra* note 103 (describing the extra legal dispute resolution process in the diamond industry); Fagundes, *supra* note 104 (describing informal norms to protect roller derby pseudonyms); Feldman, *supra* note 101 (describing a highly specialized extra legal court to resolve tuna market disputes); Oliar & Sprigman, *supra* note 102 (discussing informal norms and self help enforcement in the comedy industry).

149. *See generally* Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185 (2008) (clarifying the complexities

characterized the structure of criminal jurisdiction in Indian Country today as maze-like.<sup>150</sup> This section summarizes the respective jurisdictional authority for tribes, States, and the federal government. The history of criminal jurisdiction in Indian Country illustrates the drastic changes Congress and the Judiciary can have upon the on-the-ground circumstances of tribal communities.

### 1. Federal Jurisdiction

The first federal foray into altering criminal jurisdiction among Indian tribes within their territories came as part of the Trade and Intercourse of 1790, which provided federal jurisdiction over acts by non-Indians against Indians which “would be punishable by the laws of [the] state or district . . . if the offense had been committed against a citizen or white inhabitant thereof.”<sup>151</sup> Notably, this statute did not reach crimes committed by Indians.<sup>152</sup>

In 1817, Congress again altered criminal jurisdiction in Indian Country by extending federal jurisdiction to crimes committed by “any Indian, or other person or persons.”<sup>153</sup> This statute is now known as the Indian Country Crimes Act or the General Crimes Act.<sup>154</sup> Codified at 18 U.S.C. § 1152, the ICCA states that “[e]xcept as otherwise provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to Indian country.”<sup>155</sup> The 1817 amendment contained two exceptions recognizing the

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involved in the system).

150. See MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 8 (Amnesty International 2007); Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504, 575 (1976); Gideon Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 149 (2010); Hart & Lowther, *supra* note 149, at 187.

151. First Trade and Intercourse Act, 1 Stat. 137 (1790).

152. See *id.*

153. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152 (2006)); see also *United States v. Wheeler*, 435 U.S. 313, 324 (1978).

154. *Wheeler*, 435 U.S. at 324.

155. General Crimes Act, 18 U.S.C. § 1152 (2006).

jurisdiction of tribal governments.<sup>156</sup> First, it exempted crimes committed by one Indian against another Indian.<sup>157</sup> Second, it precluded federal jurisdiction where it would violate treaty stipulations specifically providing for tribal jurisdiction.<sup>158</sup>

Later, in 1854, Congress created a third exception for application of the ICCA where an Indian was punished by the local law of the Tribe.<sup>159</sup> Two of these exceptions, for Indian-on-Indian crime and the preclusive operation of Tribal law to punish an offender, are early examples of public law which expressly recognizes the existence of a tribal community with powers of self-government.<sup>160</sup> These are early expressions of law and policy that favor the operation of informal norms over the intervention by mandatory exogenous public law.

Another limitation within the ICCA is that the crime must occur in “Indian country.”<sup>161</sup> The phrase “Indian country” is defined at §1151 and includes (1) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, (2) dependent Indian communities, and (3) all Indian allotments, the Indian titles to which have not been extinguished.<sup>162</sup> Federal criminal law is not comprehensive, and it does not include provisions for the variety of criminal conduct in the same way as state codes.<sup>163</sup> To fill the gaps of the ICCA, Congress passed the Assimilative Crimes Act (ACA) in 1825, which covers “[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof.”<sup>164</sup> The ACA further provides that whenever an individual in an area covered by the ACA

is guilty of an act or omission which, although not made punishable by any enactment of Congress, would be

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156. *Id.*

157. *Id.*

158. General Crimes Act, 18 U.S.C. § 1152 (2006); ANDERSON ET AL., *supra* note 145, at 312–13.

159. Act of March 27, 1854, 10 Stat. 270 (codified as amended at 18 U.S.C. § 1152 (2013)).

160. General Crimes Act, 18 U.S.C. § 1152 (2006).

161. *Id.*

162. 18 U.S.C. § 1151(a)–(e) (2006); *see also* FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 732 (2005).

163. ANDERSON ET AL., *supra* note 145, at 313–14.

164. 18 U.S.C. § 13 (1996).

punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.<sup>165</sup>

The ICCA provided a limited basis for federal jurisdiction, but even with the ACA filling in gaps, federal jurisdiction within Indian Country remained narrow.<sup>166</sup> This fact commanded national attention in the late 1880s culminating with two major events: the Supreme Court's decision in *Ex parte Crow Dog* (also known as *Kan-Gi-Shun-Ca*) and Congress enacting the Major Crimes Act.<sup>167</sup>

In *Ex parte Crow Dog*, the Supreme Court considered whether federal jurisdiction existed when one Indian murdered another Indian.<sup>168</sup> Of course, the circumstance involving Indian-on-Indian crime was specifically exempted from federal jurisdiction in the Indian Country Crimes Act.<sup>169</sup> A famous case in federal Indian law resulted. The facts of *Crow Dog* leading up to the murder show very strong political and social forces at work within the tribal community.<sup>170</sup> Both Kan-Gi-Shun-Ca (Crow Dog) and Sinte Gleska (Spotted Tail) were members of the Brule Sioux Tribe located in present day South Dakota.<sup>171</sup> Both men were respected leaders within the Brule Tribe, but the two fought with each other despite the appearance of mutual respect—Sinte Gleska appointed Kan-Gi-Shun-Ca as the chief of police twice in prior years.<sup>172</sup> On August 5, 1881, Kan-Gi-Shun-Ca shot and killed Sinte Gleska.<sup>173</sup> The event was handled in accord with Brule Tribal rules and during a tribal council meeting the next day, tribal leaders ordered an end to the conflict by dispatching mediators to the

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165. *Id.*

166. See ANDERSON ET AL., *supra* note 145, at 313–14.

167. Major Crimes Act, 18 U.S.C. § 1153 (2006); *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883).

168. *Crow Dog*, 109 U.S. at 557.

169. General Crimes Act, 18 U.S.C. § 1152 (2006).

170. See generally SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY (Frederick Hoxie & Neal Salisbury eds., 1994).

171. *Id.*

172. ANDERSON ET AL., *supra* note 145, at 93.

173. *Crow Dog*, 109 U.S. at 557; HARRING, *supra* note 170, at 1, 108–09.

respective parties to ensure resolution.<sup>174</sup> In addition to the mediation, the families engaged in traditional resolution. In accord with Brule Tribal law, the family of Kan-Gi-Shun-Ca provided Sinte Gleska’s surviving family members with \$600, eight horses, and one blanket.<sup>175</sup>

Despite the tribal community’s resolution of this intra-tribal crime, Federal authorities promptly arrested Kan-Gi-Shun-Ca two days later at the direction of the Indian agent.<sup>176</sup> Apparently, the Indian agent’s actions were not arbitrary; instead, they were part of an effort on behalf of the Indian Office—the precursor to the Bureau of Indian Affairs—to extend federal criminal jurisdiction in Indian Country.<sup>177</sup> In 1883, the Supreme Court in *Crow Dog* ruled that federal jurisdiction was lacking because the ICCA contained an exception for crimes between Indians, and no other source conferred jurisdiction.<sup>178</sup>

In response to *Crow Dog*, in 1885, Congress enacted the Major Crimes Act (“MCA”).<sup>179</sup> The MCA specifically created federal jurisdiction over fourteen “major” felonies when committed by an Indian against Indians or non-Indians in Indian Country.<sup>180</sup> A year later, the Supreme Court upheld the constitutionality of the MCA in *United States v. Kagama*.<sup>181</sup> The *Kagama* Court could not find a specific constitutional provision that authorized Congress to enact a criminal code for Indian Country but it upheld the law nonetheless.<sup>182</sup> The Court reasoned that “[t]he power of the general government over these remnants of a race once powerful, now weak and diminished in numbers . . . must exist in [the federal] government, because it never has existed anywhere else . . . because it has never been denied; and because it alone can enforce its laws on all tribes.”<sup>183</sup> Thus, federal jurisdiction exists

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174. HARRING, *supra* note 170, at 110.

175. *See id.* at 110, 104–05 (for more background on tribal law and custom).

176. ANDERSON ET AL., *supra* note 145, at 93.

177. *Id.*

178. *Crow Dog*, 109 U.S. at 561–62, 572.

179. Act of March 3, 1885, § 9, 23 Stat. 362.

180. COHEN, *supra* note 162, at 743; *United States v. Torres*, 733 F.2d 449, 453–54 (7th Cir. 1984).

181. *United States v. Kagama*, 118 U.S. 375, 385 (1886).

182. *Id.* at 379–80, 385.

183. *Id.* at 384–85. *Kagama* is generally known to be the first case

today in an expanded form. However, it is important to note that the existence of federal jurisdiction does not divest a tribe of concurrent jurisdiction over the same crimes. Instead, Congress retains the ability to adjust criminal jurisdiction in Indian Country to this day, something that plays a key role regarding the creation of state criminal jurisdiction over crimes occurring in Indian Country.

## 2. Tribal Jurisdiction

Tribal jurisdiction in the pre-contact era was comprehensive and coextensive with a tribe's territory. Federal statutes, treaties, and the judge-made doctrine that the diminishment of tribal authority due to tribes' "dependent status" have all chipped away at tribal criminal jurisdiction since the founding of the United States.<sup>184</sup> However, federal statutes and case law simultaneously confirm the continuing capability of tribes, albeit limited, to exercise criminal jurisdiction over tribal members and territory.

As described above, the ICCA contains an exception that precludes federal jurisdiction where a tribe has already punished the tribal member who committed the criminal act, thereby recognizing and deferring to a tribal community's authority to punish wrongdoers.<sup>185</sup> In addition, the MCA does not preclude the exercise of tribal criminal jurisdiction over an Indian who has committed a major crime sufficient to trigger federal jurisdiction. This principle is reflected in *Talton v. Mayers*, which ratified tribal criminal jurisdiction.<sup>186</sup>

In *Talton*, the Supreme Court considered whether the Fifth Amendment grand jury and due process clauses applied to tribal courts exercising criminal jurisdiction over tribal members.<sup>187</sup> The Court reasoned that the powers of Indian tribes pre-date the formation of the Constitution and, therefore, cannot be constrained by its provisions unless specifically provided for by

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confirming the existence of plenary power—or creating such a thing. Plenary power over Indian affairs is a concept of federal Indian law with its own scholarship, a summary of which is unnecessary in this article.

184. *United States v. Wheeler*, 435 U.S. 313, 326 (1978); *see generally* COHEN, *supra* note 162, at 221–37.

185. 18 U.S.C. § 1152 (1996).

186. *See Talton v. Mayers*, 163 U.S. 376 (1896).

187. *Id.* at 376–77, 379.



later law.<sup>188</sup> Nearly half a century later, the Supreme Court again considered the interaction between Tribal courts and the Fifth Amendment prohibition against Double Jeopardy.<sup>189</sup>

In *United States v. Wheeler*, an Indian was convicted of a crime in both tribal and federal courts, and he later challenged the jurisdiction of the United States.<sup>190</sup> In its decision, the *Wheeler* Court acknowledged the longstanding precedent that a tribe’s power to punish offenders was an important aspect of its retained sovereignty.<sup>191</sup> Relying on *Talton*, the Court confirmed that a tribal prosecution does not preclude the existence of federal jurisdiction since the exercise of authority emanates from two separate sovereigns with two entirely different sources of power.<sup>192</sup> Based on the decisions in *Talton* and *Wheeler*, and the express exemption in the ICCA, the existence of concurrent tribal authority to punish Indians for criminal conduct is confirmed.<sup>193</sup> However, the MCA is a narrow statute conferring federal jurisdiction for a select few serious felonies.<sup>194</sup> When an Indian commits a crime not listed under the MCA against another Indian in Indian Country, the tribe exercises exclusive criminal jurisdiction over the Indian offender.<sup>195</sup>

The Supreme Court has limited the criminal jurisdiction of tribal courts in one specific, and infamous case: *Oliphant v. Suquamish Indian Tribe*.<sup>196</sup> The issue in *Oliphant* was whether tribes could exercise criminal jurisdiction over non-Indians who commit a crime against an Indian within the tribe’s territory after two non-Indians entered the Suquamish Indian reservation in Washington State and proceeded to speed across the highway, collided with a tribal police vehicle, and were subsequently

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188. *Id.* at 384.

189. *United States v. Wheeler*, 435 U.S. 313 (1978).

190. *Id.* at 313.

191. *Id.* at 328–29.

192. *Id.* at 329–30.

193. *See* General Crimes Act, 18 U.S.C. § 1152 (2006); *See Talton v. Mayers*, 163 U.S. 376 (1896); *See United States v. Wheeler*, 435 U.S. 313 (1978).

194. Major Crimes Act, 18 U.S.C. § 1153 (2006) (listing the fourteen major felonies).

195. Tribal Court Clearinghouse, <http://www.tribal-institute.org/lists/jurisdiction.htm> (last visited Sept. 27, 2013).

196. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 191, 212 (1978).

arrested by tribal law enforcement.<sup>197</sup> After being detained in tribal facilities, they filed writs of *habeas corpus* in federal district court.<sup>198</sup> In *Oliphant*, the Court held that tribes lack the inherent authority to punish non-Indians and have not been delegated the federal authority to do so.<sup>199</sup> The basis for the Court's determination rested in part on the diminishment of tribal sovereignty by virtue of tribes' dependent status.<sup>200</sup>

In sum, tribes only have criminal jurisdiction over Indians.<sup>201</sup> Where the crime committed falls under the MCA, regardless of the ethnicity of the victim, the tribe exercises concurrent jurisdiction along with the federal government.<sup>202</sup> However, if the crime committed is not listed under the MCA, federal jurisdiction is precluded by the ICCA exception, and tribal criminal jurisdiction is exclusive if the victim was Indian.<sup>203</sup> If the victim was non-Indian and the crime committed by the Indian is not an MCA-listed crime, then federal jurisdiction is precluded only if the tribe has exercised criminal jurisdiction and prosecuted the individual.<sup>204</sup>

### 3. State Law Jurisdiction Pre-Public Law 280

In general, the principle that states lack jurisdiction (both civil and criminal) in Indian Country is foundational in Federal Indian law.<sup>205</sup> In addition, a multitude of both federal and state courts have considered whether states could exercise jurisdiction

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197. *Id.* at 194–95.

198. *Id.*

199. *Id.* at 208–10.

200. *See id.*

201. In *Duro v. Reina*, the Supreme Court determined that Indian tribes lack criminal jurisdiction of non-member Indians. 495 U.S. 676 (1990). For example, the Navajo Nation would lack jurisdiction over a member of the Cherokee Nation just as it lacked jurisdiction over a non-Indian. Tribes were displeased with this decision and sought relief from Congress via a legislative fix. Congress passed the so-called “Duro-fix” confirming the inherent tribal authority to assert criminal jurisdiction over all Indians—regardless of tribal citizenship. The congressional authority to enact this legislation was challenged in *United States v. Lara*, 541 U.S. 193 (2004), where the Supreme Court upheld the Duro-fix.

202. Major Crimes Act, 18 U.S.C. § 1153 (2006).

203. General Crimes Act, 18 U.S.C. § 1152 (2006).

204. Tribal Court Clearinghouse, <http://www.tribal-institute.org/lists/jurisdiction.htm> (last visited Sept. 27, 2013).

205. *Worcester v. Georgia*, 31 U.S. 515, 520 (1832).

over criminal conduct in Indian Country under the statutory structure governing federal criminal jurisdiction.<sup>206</sup> Each decision has determined that absent an express grant of jurisdiction via statute, states lack criminal jurisdiction in Indian Country.<sup>207</sup> The lone exception to this general rule exists for the situation involving a crime committed in Indian Country between a non-Indian perpetrator and a non-Indian victim.<sup>208</sup> In *United States v. McBratney*, the Supreme Court determined that state jurisdiction exists in this limited case.<sup>209</sup> The Court relied on the fact that the Indian tribe located where the crime occurred does not have a federally protected interest in the resolution of crime between non-Indians.<sup>210</sup>

#### 4. Summary Chart

As a way of shorthand, the above principles of jurisdiction are depicted below in a chart.

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State Jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Federal Jurisdiction under 18 U.S.C. § 1152 is exclusive of state and tribal jurisdiction.
Indian	Non-Indian	If listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. If not listed in

206. COHEN, *supra* note 162, at 754 n. 168.

207. See *Williams v. Lee*, 358 U.S. 217, 222 (1959); *Langley v. Ryder*, 778 F.2d 1092, 1095–96 (5th Cir. 1985); *State v. Spears*, 647 A.2d 1054, 1062 (Conn. App. Ct. 1994).

208. *United States v. McBratney*, 104 U.S. 621, 624 (1882).

209. *Id.*

210. *Id.* at 624.

		18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but not of the tribe, under 18 U.S.C. § 1152. If the offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state law is assimilated under 18 U.S.C. § 13.
Indian	Indian	If the offense is listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. See section 1153(b). If not listed in 18 U.S.C. § 1153, tribal jurisdiction is exclusive.
Non-Indian	Victimless	State jurisdictions is exclusive, although federal jurisdiction may attach if an impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be both federal and tribal jurisdiction.

Figure 1-1. Carole Goldberg & Heather Valdez Singleton, *Law Enforcement and Criminal Justice Under Public Law 280, 4*, (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

### C. *Legal and Functional Gaps in Criminal Jurisdiction*

The fragmentation of authority for law enforcement responsibility, investigation of crimes, and prosecution of crimes creates two basic problems: a legal gap and a functional gap.

#### 1. *The Legal Gap*

The legal gap exists where an individual can commit a crime which the state, federal, and tribal governments are unable to

address through law enforcement, investigation, and prosecution. Up until Congress passed Senate Bill S. 47, also known as the *Reauthorization of the Violence Against Women Act*, on February 28, 2013,<sup>211</sup> the most prominent example of this problem was in the area of domestic violence.<sup>212</sup> Statistics indicate that over seventy percent of Indian woman who are the victim of domestic violence describe the perpetrator as being non-Indian.<sup>213</sup> This immediately removes the ability of tribal law enforcement to intervene without a superseding cooperative agreement with the county law enforcement.<sup>214</sup> What about the federal government? The MCA only confers jurisdiction upon the federal government for fourteen major crimes—none of which include domestic violence.<sup>215</sup> Certainly if the injury sustained by the Native woman is severe enough, it may trigger federal jurisdiction under the MCA.<sup>216</sup> Of course, based on *Worcester*, the State as a general matter has no ability to assert jurisdiction over crimes committed against an Indian on the reservation.<sup>217</sup> This is the legal gap; among the various political entities, none of them clearly has the authority to arrest, investigate, prosecute, and punish the offender.

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211. S. 47 Bill Summary and Status Violence Against Women Reauthorization Act of 2013, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s.47>.

212. See generally Amy Radon, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275 (2004) (describing the prevalence and complexities of legal remedy for domestic violence on Indian reservations).

213. Lawrence A. Greenfield & Steven K. Smith, *American Indians and Crime*, U.S. DEPT OF JUSTICE: BUREAU OF JUSTICE STATISTICS, 8 (1999), <http://www.bjs.gov/content/pub/pdf/aic.pdfindex.cfm?ty=pbdetail&iid=387>.

214. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

215. Major Crimes Act, 18 U.S.C. § 1153 (2006); *Senate Bills 872, 1192, and 1763: Hearing Before the Comm. on Indian Affairs*, 111th Cong. (Nov. 10, 2011) (testimony of Thomas J. Perrelli Assoc. Att’y Gen.), <http://www.justice.gov/ola/testimony/112-1/11-10-11-asg-perrelli-testimony-re-s-872,-s-1192-and-s-1763.pdf>; Gaylen L. Box, *Crow Dog: Tribal Sovereignty & Criminal Jurisdiction in Indian Country*, 50 ADVOC. 13, 15 (May 2007).

216. 18 U.S.C. § 1153.

217. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832); see also Bethany R. Berger, *Williams v. Lee and the Debate of Indian Equality*, 109 MICH. L. REV. 1463, 1506–09 (2011).

## 2. *Functional Gap*

The functional gap occurs when jurisdiction is available, yet, it goes unexercised. In 2008, the Senate Committee on Indian Affairs held a hearing on the high percentage of United States Attorneys declining criminal cases arising in Indian Country.<sup>218</sup> The concern on the part of then Chairman Dorgan and others was that the United States Attorneys were declining these cases for the wrong reasons, and Chairman Dorgan sought more detailed information regarding the basis for declinations.<sup>219</sup> The functional gap problem exists in federal, state, and tribal law enforcement contexts. Concern over the federal government's lack of accountability to tribal communities and insufficient resources are commonplace.<sup>220</sup> Indeed, the recent judicial decision in *Cole v. Oravec*<sup>221</sup> further illustrates this concern over the efficacy of exogenous law enforcement in Indian Country. In *Cole v. Oravec*, an FBI agent was sued for failing to properly investigate the deaths of two Crow Indians on the Crow Reservation in Montana.<sup>222</sup> The district court denied qualified immunity to the FBI agent and the Ninth Circuit affirmed, saying

[t]he amended complaint also sufficiently alleges discriminatory motive. It alleges that despite the fact that Bearcrane's death was ruled a homicide, the non-

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218. *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before Comm. on Indian Affairs*, 110th Cong. 2-4 (Sept. 18, 2008), [http://www.indian.senate.gov/public/\\_files/September182008.pdf](http://www.indian.senate.gov/public/_files/September182008.pdf).

219. *Id.* at 5.

220. CAROLE GOLDBERG & HEATHER VALDEZ SINGLETON, LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 33-34 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>; see also Larry Echohawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 83, 99 (2001-2002); Kevin Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 733-34 (2006) [hereinafter Washburn, *American Indians*]; Kevin Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 827, 829-30 (2006).

221. *Cole v. Oravec*, 465 Fed. Appx. 687, 688 (9th Cir. 2012); Matthew L.M. Fletcher, *Ninth Circuit Allows Bivens Action against FBI Agent that Failed to Properly Investigate Murder of Indians*, TURTLE TALK (Jan. 10, 2012), <http://turtletalk.wordpress.com/2012/01/10/ninth-circuit-allows-bivens-action-against-fbi-agent-that-failed-to-properly-investigate-murder-of-indians/>

222. *Id.*

Native American man admitted to shooting Bearcrane, and there was evidence negating the claim of self-defense, Oravec failed to properly investigate the case. Moreover, it alleges that Oravec consistently closed cases involving Indian victims without adequate investigation, and that he has been heard to make improper remarks about female Native American victims of sexual assault.<sup>223</sup>

Assistant Secretary for Indian Affairs Kevin Washburn identified the wide cultural divide that can exist between tribal communities and federal prosecutors as a reason for the existence of the functional gap.<sup>224</sup> In addition, he notes the general absence of media attention—also referred to as “external motivations”—as a potential hindrance to active engagement on the part of federal prosecutors.<sup>225</sup> Finally, it cannot be ignored that federal prosecutors are simply not located within tribal communities, thereby requiring them to travel hundreds of miles for one case.<sup>226</sup> These three components have led to wide criticism of federal prosecutors, as indicated by the 2008 Indian Affairs Committee Hearing, for the failure to allocate proper attention and resources to Indian Country cases.<sup>227</sup>

The functional gap can be explained using the terminology set forth in this article. The federal government is an outsider—a Custer. The exercise of sanctioning by a Custer is not tied to the close-knit group’s definition of welfare, and it interferes with the creation of informal norms that maximize welfare in the aggregate regarding workaday affairs. It is inefficient in its operation and destructive in its ramifications.

#### D. Public Law 280 Changes the Legal Landscape in Six States

##### 1. *Origins of Passage*

A more problematic example of the imposition of public law by a Custer is illustrated by the operation of an obscure law referred to as Public Law 280. Public Law 280 was enacted by Congress in

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223. *Id.* at 689.

224. Washburn, *American Indians*, *supra* note 220, at 731–32.

225. *Id.*

226. *Id.* at 719.

227. *Id.*

1953.<sup>228</sup> The date is relevant in light of the dramatic shifts in federal policy towards tribal communities during the preceding 20 years. For context, in 1934, the Indian Reorganization Act (“IRA”) provided statutory recognition of Indian tribes as governments with rights of self-determination.<sup>229</sup> At that time, the United States was developing policies to spur economic development to end the economic depression. The IRA contained similar themes for Indian Country, but also put Native-specific policies in place that sought to strengthen tribal civilization specifically and cultural pluralism generally.<sup>230</sup> At the heart of the IRA was the policy that Indian tribes are governmental units and may adapt on their own terms to modern times.<sup>231</sup>

Soon thereafter, a policy reversal occurred in Congress. In 1943, Congress released a study entitled “The Senate Survey of Conditions Among the Indians of the United States.”<sup>232</sup> The report heavily criticized the IRA and the underlying policies of the approaches employed with regard to trust lands, the management of trust assets and lands, and the strengthening of the Federal-tribal relationship.<sup>233</sup> A similar House Report soon followed in 1944 that recommended new measures to assimilate Indians into the larger American citizenry.<sup>234</sup> These reports fed political forces that sought to unravel the protections of the IRA. The stage was set to address the “problems” created by the IRA.<sup>235</sup>

An important part of the assimilation policy was the voluntary relocation program, started in 1931, but fully implemented by the 1950s.<sup>236</sup> The program placed Indians residing on a reservation in urban areas.<sup>237</sup> The rationale was that sufficient resources did not exist to sustain reservation

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228. Pub. L. No. 83-280 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321–26 (1953)).

229. Indian Reorganization Act, ch. 576, 48 Stat. 984, (codified at 25 U.S.C. §§ 461-79 (1934)).

230. COHEN, *supra* note 162, at 84.

231. *Id.* at 84–89.

232. *Survey of the Conditions of the Indians in the United States: Hearings Before the Senate Comm. on Indians Affairs*, S. Rep. No. 310, 78th Cong. (1943).

233. COHEN, *supra* note 162, at 89.

234. *Id.* at 90.

235. *Id.* at 89–97.

236. *Id.* at 92.

237. *Id.*



economies large enough to accommodate the resident Indians looking for work.<sup>238</sup> Therefore, the relocation of Indians from their reservation homes to urban areas became official federal policy.<sup>239</sup> This policy gained momentum in the early 1950s when Congress again took action.<sup>240</sup>

On July 1, 1952, the House of Representatives passed a resolution seeking legislative proposals “designed to promote the earliest practicable termination of all federal supervision and control over Indians.”<sup>241</sup> Soon thereafter, on August 1, 1953, Congress passed House Concurrent Resolution 108, which stated that Congress should “as rapidly as possible . . . make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens [and] to end their status as wards.”<sup>242</sup> Public Law 280 is a direct expression of the dramatic policy shift away from strengthening tribal self-determination towards assimilation of individual Indians and the consequent breakdown of tribal governing structures.<sup>243</sup> This is a far cry from the early federal criminal statutes recognizing tribal community rules and sanctions and shielding them from interference from external public law enforcement.

Five states (Nebraska, Wisconsin, Minnesota, Oregon, and California) were covered by the original 1953 law.<sup>244</sup> They are referred to as the Public Law 280 “mandatory” states.<sup>245</sup> In 1968, Congress amended Public Law 280 to allow for other states to “opt-in” and accept the transfer of jurisdiction from the federal government.<sup>246</sup> However, the 1968 amendment conditioned this transfer upon tribal consent from the tribes located in the state seeking jurisdiction.<sup>247</sup> States accepting the transfer of

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238. *Id.*

239. *Id.*

240. *Id.*

241. H.R. Rep. No. 82-2503, 82d Cong. (1952).

242. H.R. Con. Res. 108, 83d Cong. (1953).

243. *See* Pub. L. No. 83-280 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321–26 (1953)).

244. Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 700 (2006).

245. TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/lists/pl280.htm> (last visited Sept. 27, 2013).

246. Goldberg, *supra* note 245, at 703–04.

247. *Id.*

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jurisdiction after this time are known as “optional states.”<sup>248</sup> For comparative purposes, a chart is produced below to show where the jurisdiction has been transferred under Public Law 280.

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	“Mandatory” state has jurisdiction exclusive of federal and tribal jurisdiction. “Option” state and federal government have jurisdiction. There is no tribal jurisdiction.
Indian	Non-Indian	“Mandatory” state has jurisdiction exclusive of federal government but not necessarily of the tribe. “Option” state has concurrent jurisdiction with the federal courts.
Indian	Indian	“Mandatory” state has jurisdiction exclusive of federal government but not necessarily of the tribe. “Option” state has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach in an option state if impact on individual Indian or tribal interest is clear.

248. Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AM. INDIAN DEV. ASSOC. (Oct. 4, 2013), <http://www.aidainc.net/Publications/pl280.htm>.

Indian	Victimless	There may be concurrent state, tribal, and in an option state, federal jurisdiction. There is no state regulatory jurisdiction.
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Figure 1-2. Carole Goldberg & Heather Valdez Singleton, Law Enforcement and Criminal Justice Under Public Law 280, 5, (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

## 2. Initial Deficiencies of Public Law 280

As originally passed, Public Law 280 was very simple. It transferred criminal jurisdiction over crimes committed in Indian Country from the federal government to five, and later six, states.<sup>249</sup> States were tasked with daily enforcement of state law in Indian Country.<sup>250</sup> Unfortunately, Public Law 280 failed to provide funding for states newly tasked with exercising criminal jurisdiction over potentially huge areas of land and thousands of Indian people. The lack of additional funding strained police forces, human resources, physical facilities, and the state criminal justice system as a whole.<sup>251</sup>

Of course, the degree to which the states were overburdened is not ascertainable since Public Law 280 did not require, or provide funding for, funds to study the effect of Public Law 280 upon state law enforcement efficacy, crime rates in Indian Country, or any other aspect of criminal justice.<sup>252</sup> Just as there was no methodology in place to train law enforcement and prepare tribal communities for the imposition of state law enforcement, there was no attempt to address the easily foreseeable clashes and disputes between tribes and the state. Essentially Congress, through Public Law 280, completely changed the rules between these two communities and then locked them in a room together to fight over the terms of their new relationship. With states having the ultimate say in all things criminal jurisdiction, already

249. The original five states were Nebraska, Oregon, Minnesota, Wisconsin, and California. Alaska was added later. TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/lists/pl280.htm> (last visited Sept. 27, 2013).

250. *Id.*

251. Goldberg, *supra* note 245, at 704.

252. See Pub. L. No. 83-280 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321–26 (1953)).

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burdened by the unfunded mandate created by Public Law 280, it is understandable that states were uninterested in negotiating mutually acceptable solutions with Indian tribes.<sup>253</sup> Unfortunately, the unilateral nature of Public Law 280, the burden it placed on states, and the wholesale renunciation of fundamental principles of federal Indian law and tribal self-determination created a volatile situation that has continued to the present day.

### 3. *1968 Amendments*

In 1968, Congress amended Public Law 280 by requiring Indian tribes to consent to any new transfer of criminal jurisdiction from the federal government to the applicable state government.<sup>254</sup> The amendments also authorized states currently exercising criminal jurisdiction over Indian Country pursuant to Public Law 280 to retrocede, or return, that jurisdiction to the federal government.<sup>255</sup>

The new amendment, it is fair to say from the perspective of Indian tribes, stopped the loss of jurisdiction in Indian Country.<sup>256</sup> Even though the 1968 amendments allowed states to “opt in” to the Public Law 280 structure, they first had to obtain formal tribal consent from tribes located in the state.<sup>257</sup> As Professor Goldberg has noted, since the 1968 amendments, no state has successfully obtained tribal consent for the transfer of jurisdiction to the state under Public Law 280 sending a clear message regarding the tribal view of Public Law 280.<sup>258</sup>

### 4. *Public Law 280-like Statutes*

A number of other statutes similar to Public Law 280 have also been passed by Congress.<sup>259</sup> Frequently, in these statutes,

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253. See Pub. L. No. 83-280 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321–26 (1953)).

254. Enacted as part of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1321 (1968).

255. While an important aspect of Public Law 280, retrocession is outside the scope of this article.

256. See Enacted as part of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1321 (1968).

257. See *id.*

258. GOLDBERG, *supra* note 221, at 7.

259. See 25 U.S.C. §§ 1701–16 (1978) (R.I.); 25 U.S.C. § 1774 (1990)

Congress will recognize an Indian tribe or multiple tribes within a state and will simultaneously grant the state criminal jurisdiction over crimes occurring on the reservation regardless of the political affiliation of the perpetrator or victim, i.e. non-Indian or Indian.<sup>260</sup> In the West, Washington stands alone as perhaps the most complex state/tribal/federal criminal jurisdiction in the country.<sup>261</sup> While not a mandatory state under Public Law 280, the proposals to remedy the issues facing tribes in Public Law 280 states are equally applicable to those states subject to Public Law 280-like statutes.

E. *Consequences of Public Law 280*

As discussed above, the imposition of mandatory public law enforcement from an exogenous source has significant negative ramifications for the informal norms of the close-knit community. It may not be the case that all tribal communities located in Public Law 280 states meet the definition of a close-knit group, but many will. Some empirical data exists, illustrating how these tribal communities have fared under Public Law 280. This section describes the long-term effects created by Public Law 280 and assesses the present-day problems of Indian tribes in these states. In the context of the informal norms theory advanced here, these are the consequences of the imposition of exogenous law on a close-knit group, i.e. Custer effects.

1. *Long Term Effects of Public Law 280*

**Halting the Development of Tribal Courts.** A small percentage of Indian tribes in Public Law 280 states have fully developed comprehensive tribal courts. For example, of the 107 federally recognized Indian tribes in California, only four have an existing tribal court of some sort.<sup>262</sup> Many of these tribal courts are limited to exercising jurisdiction over Indian Child Welfare Act (“ICWA”) cases under the express authorization contained in

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(N.Y.); 25 U.S.C. § 1775 (1994) (Conn.); Wash. Rev. Code § 37.12.021 (1963).

260. See 25 U.S.C. §§ 1721–35 (1980) (Me.); 25 U.S.C. §§ 1751–60 (1983) (Conn.); 25 U.S.C. § 941 (1993) (S.C.); 25 U.S.C. § 1771 (1987) (Mass.).

261. GOLDBERG, *supra* note 221, at 10–11; see also Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915 (2012).

262. GOLDBERG, *supra* note 221, at 14.

ICWA.<sup>263</sup> Tribes located in Public Law 280-mandatory states lag far beyond their non-Public Law 280 counterparts in terms of the development of tribal courts.

**Exacerbation of Tension Between State and Tribes.** States and tribes are by default at odds with one another.<sup>264</sup> The Supreme Court recognized this fact before the turn of the 19th century in *Kagama* by explaining that Indian tribes “owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.”<sup>265</sup> Scholarship in this area from Professors Matthew Fletcher and Ezra Rosser describe the shifting viewpoints on tribal-state relations and the long-term and short-term benefits derived from negotiated peace in the form of cooperative agreements.<sup>266</sup> Certainly, state and tribal interests occasionally dovetail and there are circumstances where they actually need one another in order to obtain funding or spur economic development in the area. Federal Indian Law, however, reflects an on-going conflict between Indians and non-Indians, Tribal communities and State governments.<sup>267</sup>

In *Worcester v. Georgia*, the Supreme Court considered the validity of a Georgia law requiring non-Indians living within the boundaries of the Cherokee Nation to obtain a state license in order to reside there.<sup>268</sup> The Court determined that the “Cherokee Nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . .”<sup>269</sup> The Court explained further that the Georgia state laws “ . . . interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles

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263. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 93 Stat. 3071 (codified at 25 U.S.C. §§ 1901–1963 (1978)).

264. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Worcester v. Georgia*, 31 U.S. 515 (1832).

265. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

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

267. See Rosser, *supra* note 267, at 65.

268. *Worcester*, 31 U.S. at 537, 542.

269. *Id.* at 561.

of our constitution, are committed exclusively to the government of the union.”<sup>270</sup> What the Court did not say was that, obviously, the imposition of State law significantly interferes with tribal communities.

Tribal independence stemming from *Worcester* created conflict with the states.<sup>271</sup> This is seen as a limitation on state sovereignty, an affront to the self-determining nature of the several states, and something that inevitably provides fertile soil for conflict when tribes use their independence to their advantage. The situation is little different for tribes. Tribes have been dealing with states for centuries, frequently seeking judicial intervention to mediate disputes and lobbying Congress for changes in federal law for the protection from state encroachment. Many tribes, both historically and presently, perceive a constant onslaught by state governments to infringe upon tribal territories, powers of self-determination, and tribal culture. Tribal existence as “domestic dependent nations” creates the ambiguity necessary for Tribes and States to dispute who is more sovereign.<sup>272</sup>

**Specific Effects on Tribal Criminal Justice Systems.**

Public Law 280 has particularized negative effects on law enforcement in Indian Country. Public Law 280 lacked any expressed duty on behalf of the states to provide law enforcement and associated services to Indians, therefore, leaving tribal communities with no avenue for relief.<sup>273</sup>

The development of tribal law enforcement in Public Law 280 states trails far behind that of non-Public Law 280 counterpart tribal governments, and many lack law enforcement entirely.<sup>274</sup> Upon transfer of jurisdiction over Indian Country to the mandatory states, the federal attitude was that tribes had no need for their own law enforcement since the state would be enforcing its criminal laws in Indian Country.<sup>275</sup> Public Law 280 presumed the states would fulfill the role of Custer: impose daily and

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270. *Id.*

271. *See* Fletcher, *supra* note 267, at 81.

272. *See* The Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

273. *See* Pub. L. No. 83-280 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321–26 (1953)).

274. GOLDBERG, *supra* note 220, at 13–14.

275. Goldberg & Champagne, *supra* note 244, at 702.

mandatory law enforcement for the tribal community.<sup>276</sup> The “duty” to provide law enforcement services and prosecute criminal conduct occurring in Indian Country then rested with the state.<sup>277</sup> Tribal communities were subjected to state encroachment directed by Congress for the specific purpose of removing that attribute of tribal self-governance.<sup>278</sup>

This was the fundamental policy of Public Law 280. It comes as no surprise that roughly twenty-one percent of tribes in mandatory Public Law 280 states have their own law enforcement systems, compared with nearly seventy-five percent of tribes in non-Public Law 280 states.<sup>279</sup> Only seven out of the 107 Indian tribes in California have tribally operated police departments.<sup>280</sup> The long-term effects of Public Law 280 are clear in this regard.

These are practical and real world consequences of a Custer operating in a close-knit group, in addition to the fundamental problem that a Custer forecloses the creation and operation of informal norms.

## 2. *Opinions of Public Law 280 in Indian Country*

Despite Public Law 280 affecting only five states, tribes located in these states constitute forty percent of all the tribes in the lower forty-eight states.<sup>281</sup> This statistic should make clear that Public Law 280 is a significant problem for a substantial portion of Indian Country. This fact has not resulted, unfortunately, in a wealth of statistical data on the specific issues in Public Law 280 states. A recent report by leading scholar Professor Carole Goldberg sheds some light on this issue.<sup>282</sup>

The Report specifically examined the effects of Public Law 280 on tribes and hypothesized that “effective police and justice systems in Indian country depend on the degree of accountability of law enforcement and criminal justice to tribal populations, as well as the adequacy of resources to provide policing and court

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276. *See id.*

277. *Id.*

278. *Id.*

279. GOLDBERG, *supra* note 220, at 14.

280. *Id.*

281. *Id.*

282. *See generally* GOLDBERG, *supra* note 220.



services.”<sup>283</sup> The Goldberg Report collected data from 350 individuals including “reservation residents, law enforcement officials, and criminal justice personnel connected with seventeen different reservations, twelve of which are subject to state jurisdiction.”<sup>284</sup> Findings relevant to this thesis advanced herein are explored below.

**Crime Rates.** The Report was unable to determine whether crime rates were higher in Public Law 280 states than non-Public Law 280 states due to insufficient data and the way data is undifferentiated by county law enforcement.<sup>285</sup> A positive result of this study, despite the unavailability of data, is that some police departments have reoriented their data collection programs to differentiate between crime occurring in Indian Country versus crime occurring on non-Indian land.<sup>286</sup>

**Availability of Law Enforcement.** The study found that reservation residents of Public Law 280 states “report that state or county law enforcement is less available to them than tribal police” departments.<sup>287</sup> For comparative purposes, Public Law 280 reservation residents indicate “significantly less police availability” than counterparts in non-Public Law 280 jurisdictions.<sup>288</sup> Public Law 280 reservation resident complaints include slow response times, less effective patrolling services, and higher likelihood of declining service due to remoteness of location.<sup>289</sup> The reason for these deficiencies, as described by reservation residents, include the perspective that crime in Indian country is of a lower priority, tension between the Indian and non-Indian community, selective enforcement, and a lack of resources.<sup>290</sup>

This is unsurprising if viewed through the lens of informal normative theory. Members of a close-knit community will view the agent of exogenous law enforcement as a Custer. Combined with the pre-existing and long-standing tensions between Tribes

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283. *Id.* at viii.

284. *Id.* at 473.

285. *Id.* at 474.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

and States, the Report's findings are completely expected.

**Effective of Cooperative Agreements, Concurrent Jurisdiction.** The Report found that cooperative agreements “ameliorate, but do not solve, underlying problems of accountability and resources associated with Public Law 280.”<sup>291</sup> The Report found two general types of cooperative agreements: deputization agreements (allowing tribal police to enforce state law on the reservation) and law enforcement services agreements (“pay[ing] county police to provide enhanced services on the reservation”).<sup>292</sup> The law applied remains foreign to the tribal community, ignorant of tribal norms, and largely unresponsive to the needs of the Indian community.

Crime in Indian Country, especially violence against women, is at a point of crisis. These types of cooperative agreements may provide short-term benefits in the reduction of the crime rate—something we cannot show by data because adequate statistics do not exist to confirm such a hypothesis. But, agreements of this type work to delay fundamental change regarding the recognition of tribal communities as valid. They formalize, the role of the State as a Custer, albeit with the tribal community's consent. As a Custer, they have a lower interest in the health and well-being of the community because it is not their community. Furthermore, they lack the context in order to determine whether the close-knit group is healthy because they do not understand how the group defines welfare.

In addition, the informal norms of the close-knit group are irrelevant to the Custer's determination as to the sanctions to create, when to apply them, and how to apply them. There is a chance that the sanctions orchestrated by the Custer will not resonate in the tribal community, thereby inefficiently addressing the needs of the tribal community. At the same time, the Custer's conduct precludes the development and operation of actual informal norms arising from the community. Indeed, Professor Goldberg foreshadows the *Oravec* circumstance when she warns that “[c]ross-deputization agreements are not without their own problems, which can include . . . inadequate responses to reservation calls by the non-Indian agency, and fear or distrust

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291. *Id.* at 480.

292. *Id.*

from the non-Indian community.”<sup>293</sup>

Even if the state agrees to interface with the close-knit tribal community, it is still a Custer. The imposition of public law will continue to undermine the creation, enforcement, and efficacy of informal norms within the tribal community. At their best, cooperative agreements are simply a more specific type of community policing. This paper argues for a reinvigoration of early federal principles recognizing the self-governing nature of tribal communities, especially where they are close-knit under Ellickson’s definition and encourage state and federal deference to those informal normative processes.

#### VI. PRESENT AND ALTERNATIVE SOLUTIONS FOR PUBLIC LAW 280 IN INDIAN COUNTRY

A Custer wreaks havoc on close-knit communities. In the context of Indian Country, both the federal and state governments are Custers. However, the effects of state Custers upon tribal communities is far worse than their federal counterparts. Primarily, this is because state law enforcement has day-to-day law enforcement responsibility, whereas the federal law enforcement in the FBI has only narrow jurisdictional authority.

Tribal communities in Public Law 280 states are subjected to mandatory and unilateral imposition of external law, which prevents the meaningful development of informal norms that maximize aggregate welfare and better curtail Texans. Present crime data does not allow us to determine the extent of these negative effects comparatively between Public Law 280 tribal communities and non-Public Law 280 tribal communities. Even if that data were available, such information would not allow for a one-to-one comparison since tribal communities are simply not fungible. Not all tribal communities are close-knit, however, and thus, that is where the inquiry should focus: how to assist those tribal communities that have those traits of close-knitedness.

In 2010, Congress endeavored to address various problems in Indian Country criminal jurisdiction.<sup>294</sup> Congress fundamentally changed Public Law 280 in the Tribal Law and Order Act of 2010

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293. *Id.* at 29.

294. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 221, 124 Stat. 2258 (2010).

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(TLOA).<sup>295</sup> Section 221 of the Act provides tribes in mandatory Public Law 280 states the opportunity to request the Attorney General of the United States to reassume criminal jurisdiction in Indian Country.<sup>296</sup> Tribes may do this unilaterally without prior approval from the State.<sup>297</sup> The determination to accept jurisdiction rests solely with the Department of Justice.<sup>298</sup> In essence, Section 221 turns Public Law 280, the original 1953 version, on its head by placing States in the former position of tribes as overlooked, ignored, and un-consulted entities.

This policy change will be largely ineffective as the defects mirror those that caused the original failure of Public Law 280. First, it fails to provide funding to ensure that upon re-assumption of jurisdiction the federal government's law enforcement agencies and the United States Attorney have adequate staff, resources, and means to properly investigate and prosecute criminal conduct. This is especially problematic in light of the current opinion that the federal presence in Indian Country criminal matters is insufficient.<sup>299</sup> Second, there are no safeguards to guide an orderly transition from two sovereigns with concurrent jurisdiction to three. Tension will still exist and it will likely increase. Third, while the change in policy is normatively and legally preferable, it is relevant that states are being subject to the unilateral will of Indian tribes and the federal government. Preventing States from having a voice as to the allocation of responsibility among three sovereign entities simply compounds the problem and will almost certainly make any transitional period more difficult.

The policy change, while welcome, is late; and it is impaired by the defects mentioned above. While some tribal communities might benefit from this legislative change, close-knit tribal communities would benefit from legislation that protects the creation and operation of informal norms from Custers. There is

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295. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 221, 124 Stat. 2258 (2010).

296. *Id.*

297. *Id.*

298. *Id.*

299. See, e.g., *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing before Comm. On Indian Affairs*, 110th Cong. (Sept. 18, 2008), [http://www.indian.senate.gov/public/\\_files/September182008.pdf](http://www.indian.senate.gov/public/_files/September182008.pdf).

precedent for this policy in federal criminal law and the emerging scholarship from Richman and Ellickson provide an empirical basis for its codification.

A. *Legally Recognized Informal Norms for Close-Knit Tribal Communities*

This article began with the archetypes of the Texan and the Custer. Informal norms solve the problem of the Texan but the presence of a Custer fundamentally impairs the creation and operation of informal norms. Therefore, my theory calls for a structure that prevents the Custer from interfering until informal norms have attempted to remediate the Texan. To put it differently, my theory argues for a principle like that found in administrative law which requires a plaintiff to exhaust administrative remedies before suing the agency in court.

Indeed, the Shasta County community already operates in this way as described in Ellickson’s work.<sup>300</sup> Cattle trespass law exists and creates legal rights between parties.<sup>301</sup> Parties may avail themselves of their legal rights in court, but Ellickson’s point is that they rarely—if ever—do so because resolving the dispute by informal norms is more efficient and maximizes aggregate welfare in the community.<sup>302</sup> To make Shasta County resemble the situation for tribal communities in Public Law 280 states, imagine the following scenario. In Shasta County, a law is passed that creates “Cattle Trespass Officers” that monitor the whereabouts of cattle, property lines, and damages caused by cattle trespass. Upon identifying trespassing cattle, the officer removes the cattle, attempts to identify the owner, and notifies the owner to come and get the cattle. The mandatory presence and enforcement of external law prevents the informal norms from ever arising, much less being effective.

The transaction costs are high in the Cattle Trespass Officer scenario. They are minimized under Ellickson’s theory of informal norms. Indeed, that is a component of how welfare is maximized through the minimization of transaction costs. It would be

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300. ELLICKSON, *supra* note 1, at 40.

301. *Id.*

302. *Id.*

inefficient, through the production of externalities, higher transaction costs, *etc.*, to have a mandatory system of cattle trespass law and cattle trespass enforcers. It is more efficient for residents to be able to conduct their workaday relations as they see fit, consistent with their inter-personal relationships. The law implicitly recognizes this and protects the development of those norms by making optional any resort to external law. A structure creating a mandatory Cattle Trespass Officer is unnecessary, unwieldy, and less efficient. In addition, the rules imposed and sanctions created bear no relation to the close-knit community's definition of welfare.

Tribal communities in Public Law 280 states are little different—they are all subject to the actions of state law enforcement.<sup>303</sup> Tribes already view the imposition of law by this exogenous entity as a fundamental intrusion in their culture, lifeways, and identity. As mentioned before, the idea that tribal communities enjoy some degree of self-governing authority is not seriously in dispute. Traditionally, Indian Law scholars and tribal advocates have asserted that self-governing authority, or sovereignty, is the basis of the argument for the preclusion of state law enforcement and revocation of Public Law 280.

The problem with this argument is that it reduces to the dispute that states and tribes always have: “who is more sovereign?” My theory here provides a substantively different basis for precluding state law enforcement, the informal norms of tribal communities maximize welfare within the community and result in greater public safety for both residents of Indian Country and those in neighboring non-Indian communities. Here, I differ with Ellickson who suggests that the operation of informal norms serves to impoverish outsiders, or make them worse off.<sup>304</sup> In this context, effective informal norms in a tribal community reduce the financial obligation of state law enforcement while also enhancing public safety for both communities.

To be clear, tribal communities have long engaged in resolving the Texan problem through traditional informal remedies, such as banishment.<sup>305</sup> Banishment is a sanction that

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303. See Pub. L. No. 83-280 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321–26 (1953)).

304. ELLICKSON, *supra* note 1, at 169.

305. See JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL

arises from the violation of an informal norm.<sup>306</sup> Tribal communities also have a history of addressing the Custer problem. Such a dispute with a foreign state was resolved either by war or by treaty. Neither is an option for tribal communities in this day. So, the question is, how does the tribal community solve the Custer problem now? Would solving the Custer problem solve their criminal problems? Tribal communities, at least some of them, seem to fit the definition of a close-knit community set forth by Ellickson.

A genuine solution cannot simply be the removal of the prior incorrect policy. A fundamentally different approach than that employed by the TLOA is needed. The principal problem with developing the best policy is that Congress must enact it. There may be alternative methods for implementing the structure presented below, but passage of a specific piece of legislation implementing this targeted approach would ensure uniformity.

#### B. *Close-Knit Communities Solve Their Own Problems Best*

Two basic principles point to the conclusion that tribal communities solve tribal problems best. First, a principle long codified by federal statutes demonstrates that tribal governments have the inherent authority and the capability of addressing criminal issues on their lands among Indians. This fact is reflected in the ICCA exceptions precluding federal jurisdiction where the tribe has already prosecuted the offending Indian and it is further confirmed by the Supreme Court in *Talton*, *Wheeler*, and *United States v. Lara*.<sup>307</sup> Second, federal statutes and case law recognize that criminal issues in Indian Country have an intra-tribal character to them that makes them appropriate for resolution by local rules rather than external entities. This is apparent in the exception to the ICCA regarding the preclusion of federal jurisdiction where the criminal conduct involves both an

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LEGAL STUDIES 359 (AltaMira Press 2010).

306. *Id.*

307. *See* *United States v. Lara*, 541 U.S. 193; *United States v. Wheeler*, 435 U.S. 313 (1978); *Talton v. Mayers*, 163 U.S. 376 (1896). “This section shall not extend to . . . any Indian committing any offense in the Indian country who has been punished by the local law of the tribe . . .” General Crimes Act, 18 U.S.C. § 1152 (2006).

Indian offender and victim.<sup>308</sup>

Tribal communities are not so distinct from other rural close-knit communities. Problems in these areas are best solved by the people who live there. This is, perhaps, an easier and more general summary of Ellickson's theory. In the criminal context, this concept takes on an even more important role. Assistant Secretary Washburn has explained that criminal law and jurisdiction are both important to community self-determination and that this concept has "long been settled as a matter of criminal law theory."<sup>309</sup> He continues on, stating "criminal laws codify the moral foundations of the community."<sup>310</sup> The import of criminal laws emanating from the community in which they are applicable has been recognized for decades.<sup>311</sup> These individuals and families are what constitute a community, they create the norms regarding conduct that is and is not acceptable. Local individuals and leaders are best positioned to (1) identify the problems in the community and (2) identify the norms at work within that particular community. Again, these are the workaday affairs to which informal norms arise. The fundamental problem with statutes like Public Law 280 is that a community is left without voice or choice in designing how their community is to be governed. To use Ellickson's terminology, they do not have a say in defining welfare and how to maximize it in the aggregate.

For tribal communities in Public Law 280 states, an outsider is not only policing them, but they are subject to laws that may not comport with their own tribal values. This is why the former chairman of the Soboba Band made his reference to Custer's 7th Cavalry—for the Soboba community there seemed to be no way of

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308. "This section shall not extend to offenses committed by one Indian against the person or property of another Indian . . ." 18 U.S.C. § 1152. The importance of resolving intra-tribal disputes at the local level exists in the civil context as well in Indian Country, as in the case of *Santa Clara Pueblo v. Martinez*, where an enrollment dispute did not give rise to federal jurisdiction. See 436 U.S. 49 (1978).

309. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 834 (2006).

310. *Id.*

311. *Id.* "Classical scholars since at least Emil Durkheim have recognized a clear and strong relationship between community values and criminal law. As Durkheim described, criminal laws are the tangible embodiment of the community's sacred moral values." *Id.* at 835 (citations omitted).



creating an alternative method of addressing the criminal issues on the reservation that complied with the needs, values, and culture of the tribal community.<sup>312</sup> Where a Custer exerts authority over all of these areas, it should come as no surprise that the tribal community feels unheard and unfairly treated.<sup>313</sup> This tension undermines the ability of law enforcement, and other aspects of the state justice system, to be effective. Simply put, members of communities must be invested in the process (how the rules are created) and the product (the implementation and outcome of the rules). As stated by Basso in his description of Western Apache, the Tribal language, stories, and the place all bear directly on the identity of the community and of the individuals.<sup>314</sup> Therefore, the Custer crushes the identity of the community in addition to less efficiently addressing concerns over criminal conduct in the community.

C. *Insulating Informal Norms by Requiring Exhaustion*

Informal norms should govern close-knit tribal communities, but members of the tribal community must have access to law enforcement—be it state or federal. There is a structure that allows for the intervention of external law enforcement that does not result in such intervention amounting to a Custer’s conduct. The key component is making access to external law enforcement voluntary on the part of the community member rather than a mandatory obligation of the external entity. By making the intervention of external law enforcement voluntary rather than mandatory, the circumstance resembles that in Shasta County where an action in trespass was available to parties, but not imposed on them.

An exhaustion requirement would serve to make external law enforcement’s job easier as well. Individuals in the community

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312. Kelly, *supra* note 2.

313. Of course, some tribes in the present day borrow heavily from their state and federal counterparts in creating a criminal code or establishing procedural rules for the prosecution of charges against individuals. Importantly, tribes that engage in such borrowing do so by choice rather than by mandate which makes a difference. Regardless, even where tribes borrow heavily from state counterparts, they may have their own law enforcement agencies who actually enforce the law within the tribal community—a distinct difference with tribal communities in Public Law 280 states.

314. BASSO, *supra* note 108.

will develop the facts and issues and attempt to resolve them organically, which may reduce the caseload for officers at the outset. In addition, even if community members are unable to resolve the dispute, issues of contention and agreement will have been identified, thereby doing some of the investigative work for the officer already. This allows for a quicker resolution of the issue.

Finally, this reduces the antagonism that typically exists between external law enforcement and tribal communities. Under this structure, respect and deference to the tribal community precedes the external law enforcement—the role is substantially different. Where tension is reduced, it allows the external law enforcement to more easily resolve the dispute.

#### D. *Native Nation Building through Informal Norms*

This structure sends a very different message to tribal communities than that expressed in Section 221 of the TLOA.<sup>315</sup> The mere (optional) modification of Public Law 280, by providing the federal government with shared jurisdiction, tells tribes that they are ill fit to create, develop, and regulate behavior in their own communities.<sup>316</sup> The exhaustion requirement creates an incentive in tribal communities to reinvigorate, enhance, and sustain their traditional values and customs and put them into practice on a daily basis. This is an opportunity to engage in true Native Nation building by combining aspects of traditional tribal culture with the demands of 21<sup>st</sup> century society.

Although the history of criminal issues for tribes under Public Law 280 states is dark, there may be a benefit to creating a policy that re-build these normative structures from the ground up. From this perspective, the near total absence of tribal courts and police forces in Public Law 280 states presents an opportunity for real comprehensive change in these communities.

#### E. *Approaches for Implementation*

Implementing the policy of insulating informal norms from external law enforcement can take a variety of forms. Two will be

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315. See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 221, 124 Stat. 2258 (2010).

316. See *id.*

covered here: legislation and through cooperative agreements. There is precedent for the legislative approach to implementing Native Nation building. Congress passed the Indian Self-Determination Act in 1975 and authorized tribes to contract with the federal government and take over particular trust services previously carried out by local BIA agency offices.<sup>317</sup> This legislation came about during a renewed push for self-determination in Congress and the Executive Branch, it was a response to the growing frustration with the performance of the BIA.<sup>318</sup> The money previously appropriated to the BIA office for discharging that duty would be provided to the tribe instead.<sup>319</sup> For example, a tribe could propose to take over the realty functions of the local BIA office and would then be responsible for carrying out the realty duties, such as negotiating leases and performing appraisals, for tribal and individual beneficiaries. In 1987, a pilot program was created in which a number of tribes were selected to test the efficacy of the program. The same approach could be used to implement the policy of Native Nation building in Public Law 280 states.

Even in the absence of a legislative directive, close-knit tribal communities could enter into cooperative agreements with local law enforcement to identify the parameters where the tribal community will be left alone. This type of agreement is subject to politics and the respective bargaining positions of the parties. In other words, the external law enforcement has to agree to not exercise its federally created authority under certain criteria to be negotiated in the cooperative agreement. Under this approach, community leaders from both groups would have to come to recognize the sovereignty of the other, which may be asking a lot.

## VII. CONCLUSION

There are many benefits to the TLOA that affect the Indian Country in non-Public Law 280 states, but the rhetoric regarding its successes is plainly inapplicable to Public Law 280 tribes. The number of affected tribes in mandatory Public Law 280 states is

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317. Indian Self Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975).

318. *Id.*

319. *Id.*

simply too great to warrant the type of absentee policy enacted in the TLOA. The approach offered in the TLOA pacifies tribal communities by moving away from solitary reliance upon the state to enforce criminal laws and prosecute offenders while shifting the burden to the federal government, which remains ill equipped to effectively address crime in Indian Country. The Custer role has been doubled to include both the state and federal governments. Local communities solve local problems best. Indian tribes are no exception and are also well positioned, in light of the history of tribal political and governmental structures, to accept this responsibility and succeed. Many tribal communities in Public Law 280 states will meet the definition of a close-knit group, and still more will contain those cultural and geographical isolating traits that enhance the efficacy of informal norms in those communities. Informal norms are likely to be more effective in maximizing aggregate community welfare, as defined by the community. This is the essence of self-government, and if allowed to operate through social forces, then the results will likely bear fruit for both close-knit group members as well as outsiders.