DEPARTURE REFORM AND INDIAN CRIMES: READING THE COMMISSION’S STAFF PAPER WITH “RESERVATIONS”

Jon M. Sands*

1. An Overlooked Subject in Departure Reform

Even before Koon v. United States,1 calls encouraging departure flexibility increased. Now after Koon, the subject has been the topic of widespread discussion, symposia and not a few special issues.2 The Commission’s staff had anticipated this debate with a 1995 discussion paper on departures and offender characteristics.3 The Departure Paper lays out the criticisms of the guidelines’ departure theory, and the various options for reform, which range from minor tinkering to wholesale revamping. Often in guideline analysis, Indian offenses are forgotten, or merely labeled “Other.” In so doing, the guidelines ignore the unique culture, legacy and history of the Indian tribes.4

Indian offenses are a major part of the practice of federal criminal law in a few districts, such as Arizona, New Mexico and Montana. For the Indians who appear in federal court, prosecuted for offenses that fall under federal jurisdiction by virtue of occurring on a reservation, the guidelines have an inordinate but frequently overlooked impact. Therefore, I have reservations in mind when analyzing the Departure Paper, Koon, and departure reform—not trepidation, or doubt, but actual reservations: areas which are all too frequently overlooked and forgotten by the Commission, commentators and practitioners.

The reservations and the people living on them range from tribes that number close to 300,000 (the Navajo Nation) to tribes with a few thousand, or even a few hundred, members. Some reservations are vast (the Navajo Reservation is approximately the size of West Virginia), or small (some are a few square miles).

Indian offenses constitute a small percentage of the overall federal caseload. The Commission’s 1995 Annual Report indicates that the approximately 40,000 federal crimes consisted of 40% drug cases, 15% fraud, 20% theft or robbery, almost 10% immigration, and close to 7% firearms. Indian offenses make up a small slice of the 11% of cases labeled “Other.”

Using the same figures, 39% of offenders are White; 29% are Black; 27% are Hispanic and “only” 4.3% are Other. Indians are lumped into this Other category.

The Other racial category is responsible for close to 20% of the assaults prosecuted in federal court, 25% of the murders, 67% of the manslaughters and over 75% of the sexual abuse cases. Close to all involve Indians. Indians are prosecuted almost exclusively for violent offenses on reservations.

Prior to the guidelines, federal judges tried to take into account Indians’ different culture and the distinct societal background presented by the tribes. Such considerations seem especially critical given that the tribes are separate political sovereigns, whose jurisdiction is that of domestic nations. As one scholar commented:

The concept of separation is well-founded: treaty negotiations for both sides recognize each other’s “radically different views.” Generally, Whites and Indians still maintain realities that are worlds apart. The difference in world views are reflected in the divergent legal systems. Yet the American legal system readily takes tribal disputes from the reservation and places them on the desks of federal judges.5

So far, the Commission has been loath to acknowledge race and culture, which are linked, in sentencing.6 Nonetheless, courts have considered both, either to explain or to mitigate a defendant’s role in an offense or his culpability.7 For example, courts will lessen punishment for an involuntary manslaughter that resulted from a shaman’s bad advice or the murder of a skinwalker (Navajo witch) perceived as cursing the family. Facing the offense of selling or bartering golden eagle feathers, courts will take into account if the feathers were to be used in religious ceremonies or rites.

2. Indians under Federal Jurisdiction

The statutes authorizing federal criminal jurisdiction in Indian territory are few in number and are found primarily in 18 U.S.C. §§ 1151-1153. The language of these sections not only limits the application of federal criminal jurisdiction to Indian territory, but also draws significant distinctions based on whether the victim or the accused is an Indian. The basis for these classifications lies in the purposes for which federal jurisdiction was conferred, initially to protect the interest of settlers from the Indians, and later to protect the Indians against their hostile neighbors.8

Federal authority over Indian territory derives from the basic doctrine of federal Indian law: the dependent status of Indian tribes. In one of the earliest cases involving an examination of the tribal federal relationship, Cherokee Nation v. Georgia, the Supreme Court characterized the Indian tribes as “domestic dependent nations.” The Court found the basis for this relationship, and subsequent authority over the tribes by Congress, in the Supremacy Clause of the Constitution, “which empowers Congress to

* Assistant Federal Public Defender, District of Arizona.
regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” As dependent nations, the Indian tribes are found to be subject to the overriding sovereignty of the federal government because their rights as independent nations were diminished, and they occupied the reservations only by the consent of the United States.

*United States v. Rogers* firmly established Congress’s legislative power over criminal cases in Indian territories. The defendant in *Rogers*, a White man, had sought to avoid federal prosecution for the murder of another White in Indian territory by claiming Indian status for himself and the victim, through marriage and adoption into the Cherokee tribe. The *Rogers* Court held, however, that “Congress may by law punish any offense there, no matter whether the offender be a white man or an Indian.” Thus, “Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian Country.”

The primary criminal jurisdictional statute applicable to the Indian reservations is the Major Crimes Act, 18 U.S.C. § 1153. The federal sentencing guidelines apply to violations of the Major Crimes Act that are defined by federal statutes. Initially, courts were split on the issue of what sentencing law to apply to those offenses (notably burglary) that are to be “defined and punished” according to state law. In 1990, Congress amended 18 U.S.C. § 3551(c) to make the guidelines applicable to the Major Crimes Act and other jurisdictional offenses. The guidelines recognize that tribal convictions and sentences do not count in assessing criminal history points. However, courts have considered tribal misdemeanors in setting a sentence.

3. **Sentencing Indians**

A. **The Commission**

When the guidelines were formulated, the Commission was made aware of the role Indian culture played in Indian offenses. At public hearings, the Commission heard testimony by Tova Indritz, Federal Defender, District of New Mexico, Michael Katz, Federal Defender, District of Colorado, and others, about the culturally different and unique context presented by Indian crimes in Indian Country. They urged consideration of the special circumstances that surround sentencing an Indian offender and a sensitivity to the tribe’s sense of justice. Commissioners hearing the testimony acknowledged the different cultural context of these special federal crimes. It struck a chord. Then-Commissioner, and now Justice, Breyer recognized the unusual and atypical nature of these cases. His solution was to urge courts to exercise their discretion to depart in the Indian cases.

**MS. INDRITZ:** (after describing an incident where a family agreed upon a unique arrangement regarding a murder) [We need] … more opportunity for discretion on the part of the trial judges, who really are the only ones who can take into account the particular facts which may seem unusual or may not be so unusual.

**COMMISSIONER BREYER:** Well, you have something unusual to the country as a whole, but nonetheless of the particular community it may be premeditated crimes are less common and provoked more common, even though it’s unusual in that community, in which case we don’t have to write a guideline I wouldn’t think[,] that governs all kinds of family relationships which may be common in some parts of the world, and not in others.

**MS. INDRITZ:** I think that’s the reason there should be more room for discretion.

**COMMISSIONER BREYER:** Depart.

At that point, at least then-Commissioner Breyer recognized that (Indian) culture can and should be considered in sentencing.

When the guidelines were issued, however, culture quickly became subsumed as one of those 5H factors that should not be considered in sentencing. Courts also regarded culture as shorthand for forbidden sentencing considerations such as race, sex, creed, national origins or socioeconomic factors. The recent *Departure Paper* reiterates this theme. Culture was, in a sense, a departure that dare not speak its name.

B. **The Courts**

In districts that regularly deal with Indian defendants, federal judges have come to use a special sentencing process to take into account the different culture presented by the tribes. In *United States v. Big Crow*, the Eighth Circuit faced the appropriateness of a departure from four to two years imprisonment in an Indian assault case. The question was whether the guidelines had considered factors such as the high rate of unemployment, alcohol abuse, and socio-economic deprivations on an Indian reservation in setting sentence ranges.

The decision focused on the defendant’s consistent efforts to overcome the adverse environment of the Pine Ridge Indian Reservation in South Dakota. The court noted that the guidelines cautioned against looking at socio-economic background, race, and employment, family and community ties. However, where unemployment on the reservation was shockingly high, where alcohol abuse, school dropout rate and stunted opportunities were among the worst in the nation, and where there were few, if any, employment opportunities, the Eighth Circuit held that the guidelines had not accounted for these factors. The tribal culture had not prepared tribal members to deal with these socio-economic difficulties. *Big Crow* takes into account the concerns
expressed by the Commission at earlier hearings regarding Indian crimes. In these unusual cases, departures may be warranted.

The case indicates that culture alone is not the only sentencing consideration in Indian cases. Socio-economic reasons also play a factor, especially where unemployment is often over 70%, and alcohol abuse and alcoholism are rampant. Indians have one of the lowest per capita incomes of any group in the country, while some tribes, such as the Navajo, are among the fastest growing population groups in the country. Tribal culture is stressed by the demands.

Socio-economic reasons were also a prominent reason in the fashioning of a departure for “lack of youthful guidance.”23 The Ninth Circuit, in approving this departure, found that the defendant had few, if any, of the benefits a structured upbringing allowed, another way of recognizing socio-economic differences. Although not an Indian case, the same reasoning was applicable to the deprivations of many Reservations, where life was too often harsh and brutal. However, the Commission quickly precluded such consideration through a 1992 amendment.24 While the Commission may have barred this path to take into account socio-economic differences, different avenues remain to achieve the same result since the pressures and sympathies that led courts to embark on such departures are still present.

In United States v. Valdez-Gonzalez25 the Ninth Circuit approvingly cited Big Crow and found that the guidelines, in setting sentences for “mules” (drug couriers) in the border drug trade, had not adequately taken into consideration the conditions that led to such offenses. The sentencing court, in departing downward, had reasoned that because of the dire poverty facing Mexicans along the Arizona/Mexico border, mules were willing to take any risk, regardless of the penalty, to eke out an existence and the consequences that flowed from such abject poverty were not adequately considered by the guidelines. The Ninth Circuit, in affirming the departure, approved the district court’s examination of the socio-economic and international politics of the drug trade along the Mexican border. The court found that the lesser culpability of the mules in the drug trade, the reasons of poverty that drove them to it, and the “culture” of the border warranted such departures.

Federal courts have used the sentencing process to take into account the unique tribal culture. Courts recognize as rehabilitative mediated settlements between defendant and victim involving healing ceremonies and appropriate restitution. This may involve the defendant committing to counseling, giving livestock and tending to the injured family.

4. Should the Commission Try to Preclude Culture as a Departure Basis?

Does the blanket prohibition against consideration of factors such as a defendant’s cultural and socio-economic background comport with the enabling legislation? Title 18 U.S.C. §3553(a) lists the factors to be considered in setting a sentence. The section provides that “the court shall impose a sentence sufficient, but not greater than necessary to comply with the [following] purposes. Those include the nature of the offense, the defendant’s criminal history and characteristics, deterrence, public protection, rehabilitation, the need to reduce sentencing disparities as well as categorizing the applicable offense.”

Many commentators have argued that the language in §3553(a), when read together with §3553(b) on departures, should allow for more flexibility by courts in departing.26 While §3553(b) states that courts should only consider the guidelines, policy statements and official commentary for departures, §3553(a)’s broad language would seem to allow for consideration of precisely all those factors deemed forbidden by the Commission.

To prevent consideration of racial, cultural and socio-economic factors for mitigating departures undermines the goals of §3553(a). As the above discussion illustrates, despite the Commission’s attempt to preclude race and cultural considerations, courts have used them and will continue to use them, in sentencing. The reason is simple: to fashion a fair and just sentence, the court must take into consideration what has led a person to appear before it. For the Commission to blindly exclude such factors is to ignore the obvious. As Koon acknowledged, and the Departure Paper concedes, the guidelines cannot consider every factor, nor all the different combinations of factors. Thus, for it to exclude a set of factors as relevant as race, culture and socio-economics, is to prevent the courts from honestly and openly seeking to use those factors to obtain fair, just and lenient sentences within the framework of the guidelines. As the Big Crow court noted, the “legislative history suggests that the use of the phrase ‘are not relevant’ may be too sweeping because the Senate Judiciary Committee’s report states that ‘the requirement of neutrality . . . is not a requirement of blindness.’”27

5. Any Reform Must Take Into Account Indian Cases and Indian Defendants

Department reform should reflect the uniqueness of Indian culture and respect for Indian sovereignty. To achieve this, the Commission should consider formulating a 5K favored departure, recognizing the special relationship of Indian tribes to the federal government. This suggested departure could read:

5K2.17 Dependent Sovereign Nation Status
Recognizing the unique relationship of the Indian tribes as dependent sovereign nations, a departure from the guidelines to reflect the special status may be warranted in certain circumstances. Such
circumstances would relate to the cultural context that reduces or lessens culpability. A reduced sentence may be appropriate for the nature and character of the offense provided that the tribal interest in adequate punishment and deterrence is not reduced. To broaden the concept of a departure basis for culture, the Commission also should consider a departure for those cases where cultural considerations take the matter out of the guideline “heartland.” This would be a 5H departure. This suggested departure could read:

5H1.13 Culture

A defendant’s cultural background or beliefs are not ordinarily relevant in determining whether a sentence should be within the applicable guideline range. There are limited circumstances where a defendant is plainly less culpable because motivation for the offense arises in a unique cultural context.

Departures of course recognize the atypical nature of unique cases. Perhaps, given the unique and special nature of the Indian tribes, Indian offenses should be removed from the present system. Such a rethinking would be an honest and straightforward recognition of the problem.

Such recognition would call for a legislative solution which should for once involve the Indian tribes, and reflect their culture and concerns. The Commission should seek from Congress the power to study the issue of Indian offenses and examine whether there are special circumstances that warrant special guidelines. The study should be conducted with involvement from the Indian tribe. If the Commission concludes that such special circumstances exist, the Commission should be empowered to promulgate a set of guidelines to reflect Indian offenses in Indian Country. The promulgated guidelines should be drafted after consultation with the Indian tribes.

Departure reforms, as outlined above, would address the unique status of the Indian tribes. They would allow federal courts sentencing Indian offenders to factor in Indian culture and traditions. The resultant punishment would be fairer and more just than what we have now.

NOTES

4 The terms “Indian” and “White” are used at various places in this article because those are the terms used in the statutes and in many of the older cases and statutes.
9 30 U.S. 1, 5 Pet. 1 (1831).
11 45 U.S. 567, 4 How. 567 (1846).
12 Id. at 572.
14 Compare United States v. Norquay, 905 F.2d 1157 (8th Cir. 1990) (federal sentencing guidelines apply so as to eliminate disparities between Indian and non-Indian defendants except state law sets maximum and/or minimum terms) with United States v. Bear, 932 F.2d 1279 (9th Cir. 1990) (guidelines do not apply to Indian burglary; criticizing Eighth Circuit for mixing together state and federal law).
15 See U.S.S.G. §4A1.2(e)(1).
16 See United States v. Hookano, 957 F.2d 714 (9th Cir. 1992) (considering defendant’s past criminal history in setting jail term within guideline range).
17 For example, in some Native American and Inuit languages, the concept of “guilt” cannot be expressed. Placido G. Gomez, supra note 5, at 378 n.105.
19 Courts have used cultural differences as grounds for departure also in other non-Indian cases. Recently the Ninth Circuit, in finding that a sentencing court’s exercise of the “safety valve” to go below a mandatory minimum sentence was not an abuse of discretion despite a finding of guilt by the jury, noted that the sentencing court was privy to information concerning the defendant’s culture and religious beliefs. This information related to “the defendant’s Buddhist beliefs in reincarnation and punishment for sinful acts, lack of knowledge of Western culture or of drug trafficking among the Nepali, and neighborly obligation in Sherpa culture.” United States v. Sherpa, 97 F.3d 1239 (9th Cir. 1996).


22 898 F.2d 1326 (8th Cir. 1990).

23 E.g., United States v. Floyd, 945 F.2d 1096 (9th Cir. 1991).

24 Amendment 466.

25 957 F.2d 643 (9th Cir. 1992).


27 898 F.2d at 1332 n.3 (quoting T. Hutchison & D. Yellen, FEDERAL SENTENCING LAW AND PRACTICE § 5M1.10 at 376 annot. 2 (1989)).