

INDIGENOUS JURISDICTION AND DAILY LIFE: EVIDENCE FROM NORTH AMERICA

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I want to begin by acknowledging the Gadigal people of the Eora nation, the traditional owners of this country. It is a privilege to be in your territory. I also want to thank the Gilbert and Tobin Centre of Public Law and the other organizers of this conference for the invitation to be here and for the opportunity to visit this magnificent land once again. As a non-Indigenous person—and not even an Australian—I feel honored to be here and to share the agenda with people who have worked at ground level for so long on the problems this conference is addressing.

My task this afternoon is to consider whether there is an argument for Indigenous jurisdiction, based on its impact on the daily lives of Indigenous peoples. I think one can argue for jurisdiction on various grounds. One could make a moral argument—that is, on the ground of obligation. Here the argument might be that history has created an obligation on the part of those who benefited from colonial dispossession to allow the dispossessed a major voice in what happens to them and in their

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affairs. One might also argue for jurisdiction on human rights grounds: the right of a people to self-determination and self-government. I expect one might also make an argument on more parochial, legal grounds, although I lack the expertise in Australian law to suggest what that argument might look like.

But my assignment, as I see it, is to examine the practical case for Indigenous jurisdiction. Does it work? This is a pressing issue. If you are an advocate for Indigenous jurisdiction, in today's political environment you need all the arguments you can muster. If you are a skeptic on the subject, or even an opponent, it seems to me the public good still requires you to consider all dimensions of the case, including the practical one. For after all, if one of the purposes of public policy is to improve public welfare, including Indigenous welfare, then the question of efficacy deserves close consideration, regardless of how the other arguments fare.

On the other hand, my ability to consider that case here in Australia is limited by my knowledge and experience, which have been gained largely in North America and particularly in the United States. But that also simplifies my task, for the North American evidence is increasingly clear. Let me give you the bottom line. The United States and Canada have spent the better part of a century struggling to deal with the disastrous consequences of colonialism for the Indigenous peoples of North America, including its catastrophic impact on Indigenous health and welfare. They have tried numerous policies, from removing Indigenous people from their lands, to forced assimilation, to systematic neglect. During all that time, only one overarching policy orientation has ever shown sustained evidence of actually improving the condition of Native peoples: the policy of Indigenous self-determination and self-government—that is, a policy that puts substantive decision-making power in Aboriginal hands. That policy, of recent vintage in the U.S. and still not fully

realized in Canada, has been inconsistent, and it is perennially under attack in both countries. But the bottom line remains. From the point of view of Native welfare, shifting jurisdiction to Native peoples is the *only* policy that has worked.

Of course there is more to it than that. Jurisdiction alone is not enough, and I will say more about some of what else is necessary at the end of these remarks. But the North American evidence is striking: if you want significant, sustainable improvement in the daily lives of Indigenous communities, begin by putting substantive decision-making power in Indigenous hands.

What I'm going to do for the twenty minutes or so is give you some of the evidence of that fact and consider what that evidence suggests. The evidence itself is case-specific as opposed to aggregate data. While we have such data, sometimes the best way to make an argument is with stories, which is what I have chosen to do today. These stories argue that jurisdiction matters to the daily lives of Indigenous people. It is not all that matters, but without it—in North America at least—those lives tend to be tougher, poorer, and more costly to the society at large.

Let's start with health. American Indian nations, like the Indigenous peoples of Australia, have suffered for decades from poor health. More than a century of abject poverty left its mark in high rates of infectious disease, epidemic diabetes, high mortality rates from accidents and violence, severe incidences of mental and behavioral illness, and other problems. To be sure, in recent decades, major progress has been made, in particular against infectious disease and infant mortality. But overall, Indigenous health conditions in the U.S. remain far behind mainstream populations.

Furthermore, some of these health challenges have been very difficult to address. Funding is insufficient, and certain problems—particularly behavioral ones—have proven nearly intractable. Yet in parts of the United States American Indian nations themselves are making major advances against serious health issues. Here are some examples.

- A few years ago, the Grand Traverse Band of Ottawa and Chippewa Indians in the state of Michigan was concerned because the federal health provider to American Indian nations—the U.S. Indian Health Service—was paying too little attention to the issues the tribe felt were most pressing, in particular behavioral and mental health problems. In frustration, and equipped with dollars from a successful economic venture, the tribe took over management of its own health care: deciding priorities, allocating resources, hiring staff, building its own clinic, and running the show. They shifted health priorities to areas they felt were critical and changed health care practices to better reflect local knowledge and concerns. The result has been a more efficient health care system, improved health outcomes in the problem areas they have focused on, and an increase in jobs for the local population and in skills within that population. In short, jurisdiction has led to improved health care and improved health.
- In Alaska—where the distances, as here, are huge, roads often are non-existent, and Native communities typically are small and often isolated—five Native villages in the Bristol Bay region have joined together to escape external control of health care decisions and form the Nulavna Health Board. They have taken over control of health care and of federal funds provided to support health care, moving decisions away from regional centers and closer to local communities. One village donated land for a new clinic, built with

insurance monies and federal funds that used to go to health providers headquartered in the cities. The results are impressive: having a local clinic has meant that residents have more frequent medical check-ups; people who had not seen a dentist in years now see one regularly; and medical staff are much quicker to detect and better able to understand community health issues, leading to better preventive care—which saves money. There have been other economic benefits as well: not only have transportation costs been dramatically reduced as fewer patients have to be airlifted out of roadless communities at huge expense, but the clinic has brought the community jobs that used to be in distant cities, improving the local economy. And health care now is integrated into community life; before, it was something you went away for.

- On the Malaspina Coastal Plain of Alaska, the Native village of Eyak used to depend on a distant regional organization for health care services. The corporation had an indirect cost rate of 48%, consuming major portions of health care funds in central administration and limiting services in the village. The local clinic and druggist typically closed the last two weeks of each month as funds ran out, leaving residents without health care. In the mid-1990s, the Eyak Tribal Council decided to take over administration of the clinic from the regional organization. They were able to cut administrative costs enough to reduce the indirect cost rate nearly in half, freeing significant funds for service provision. The clinic now operates without service interruptions despite significant federal funding cutbacks, yet offers more comprehensive care than it did before: in effect, an economy of limited scale. The key, according to the Tribal Council, has been accountability: as decision-making power moved from distant centers to local entities, accountability rose, demands from citizens were actually heard, and spending

became more transparent to end users, leading to improvements in both efficiency and care.

But health care is not the only aspect of daily life potentially transformed by jurisdictional shifts. What about housing?

- Still in Alaska: Arctic Village, in the northern part of the Alaskan interior, used to have a housing program that was run by a central bureaucracy hundreds of kilometers away. Dissatisfied with the program's failure to address the housing needs of the tribe, Arctic Village took advantage of federal legislation allowing them to take over the program and run it themselves, using federal dollars but placing them under Village control. Prior to the takeover, no local people were involved in housing decisions; worse, no new homes were being built in a community chronically short of housing and facing long and harsh Alaskan winters. Since the takeover, the tribe has built 25 new homes. Last year, they employed 100 people in home construction, all tribal residents, rotating employment among community members so as to spread out both training and job opportunities. Furthermore, community involvement has created a new sense of home ownership, leading to better home maintenance and further reducing costs.
- Another Alaskan village—New Chivak—similarly took over control of housing from a centralized bureaucracy. Not only have village residents learned construction trades in the course of building new homes, but they also have learned design skills, producing new house designs that have better heat retention and cost significantly less per unit than the homes being built by the central bureaucracy. There is now a market emerging in Alaska for the community's house designs. As one tribal leader said, "this is hard work, but it's our work."

- Turning to environment and natural resources: In the state of New Mexico, Sandia Pueblo suffered from deteriorating water quality in the Rio Grande, a major river on which the Pueblo depends for drinking water and ceremonial purposes. In 1987, the U.S. Congress passed legislation that recognized the rights of Indian nations to develop and enforce their own water quality standards—a significant jurisdictional shift. Six years later, Sandia Pueblo became the first Indian nation in the U.S. to develop water quality standards recognized as binding by the U.S. Environmental Protection Agency. Sandia's standards are more stringent than those of the state of New Mexico. Furthermore, the Pueblo has developed its own, professional quality monitoring capability, giving it access to a continuous data stream for use in negotiation and litigation with polluters and other governments. The Pueblo's high standards now have to be taken into account in all upstream discharge permits, making the Pueblo a leader in the effort to improve water quality for both Indian and non-Indian residents of the Rio Grande Valley. This has led to improved water quality for Pueblo citizens—a health issue—and improved availability of water of sufficient quality to be used in the Pueblo's traditional religious ceremonies—a critical aspect of daily life.
- Still in New Mexico: for years, the state of New Mexico imposed its own hunting, fishing, and other wildlife regulations on the extensive lands of the Jicarilla Apache Tribe. The tribe not only had limited jurisdiction over these resources but virtually no money to manage them. Beginning in the 1980s, the tribe moved aggressively to take over wildlife management on their lands, persuading the federal government to give them control of a small funding stream. That small beginning, coupled with a U.S. Supreme Court

decision affirming that Indian nations could assert jurisdiction over hunting and fishing on their lands, evolved over the next decade into a top-quality fish and wildlife management program, entirely tribally run. The tribe has developed and enforces—through its own law enforcement and court systems—one of the strictest hunting and fishing codes in the U.S., has restored a threatened, trophy-quality mule deer population and a major trout fishery, and has brought in world-class wildlife science to produce one of the premier programs for the management of elk populations in North America. Not only is their fish and wildlife operation self-supporting; it's profitable, producing revenue used to fund other tribal programs. This may sound far afield from daily life, but it involves the restoration of wildlife populations that are significant in Apache culture; it has put the Apache people in the driver's seat in natural resource management and regulation on their lands; it has produced a revenue stream that helps fund tribal operations; and it is a source of pride for the Apache people.

- Let's turn to courts and public safety. The Gila River Indian Community is located close to the largest city in the state of Arizona. While the community's lands are substantial and its population relatively small, it has experienced many of the problems of urban life, including high crime rates. The community also has suffered from inadequate public safety services, with emergency police and medical response times that sometimes averaged an hour or more, endangering citizens' lives. In 1998, armed with federal legislation supporting the tribal takeover of certain services and using federal funds supplemented by their own economic development revenues, the Gila River tribes took over public safety on their lands. By 2003 they had doubled the number of police officers, improved police training, increased medical emergency staff, and invested in new equipment.

Response times at Gila River dropped dramatically and today are better than in most Arizona cities, with accompanying drops in crime rates and medical emergency fatalities—a net improvement in quality of life as a result of tribal action.

- The vast Navajo Nation, which stretches across several states in the American Southwest, fought for years to retain jurisdictional power on its lands, including the right to operate its own tribal courts. But it was stuck with western-style courts, which often had little legitimacy in traditional Navajo communities. In the 1980s, the Judicial Branch of the Navajo Nation began integrating traditional Navajo practices into the Nation's court system. Today, Navajo common and statutory laws are the “laws of preference” in the Nation's Supreme Court, seven district courts, and five family courts, while 250 Peacemakers in the Judicial Branch's Peacemaking Division help resolve a wide variety of individual, domestic, business, and property disputes, using traditional Navajo dispute resolution mechanisms. The Navajo Nation Court has become a pillar of strength in the Navajo community, dealing with more than 9,000 cases a year, establishing its legitimacy among both Navajos and non-Navajos, and transforming the Navajo experience of justice.
- Finally, economic development. In the 1980s and early 1990s, the Winnebago Tribe of Wisconsin faced high unemployment rates and an economy heavily dependent on government employment and a casino gaming operation. Taking responsibility for its own economic future, the tribe moved to strengthen its economy by using casino revenues to start a diversified set of businesses under the control of a wholly owned, tribal corporation. Importantly, the tribe moved forcefully to keep politics out of its businesses and make its corporation a profit-oriented, first-class, corporate

enterprise. The results have been spectacular. Today, the corporation uses the tribe's jurisdictional advantages to manage a number of successful businesses, has cut unemployment at Winnebago by more than half, and returns dividends to the nation that are used to fund other programs.

- And last but not least: Cochiti Pueblo. This is a very traditional Indian community in New Mexico that operates through a set of political mechanisms that most of us from the mainstream would not recognize. There are no elections at Cochiti; there is no constitution or legal code or commercial code. What they have is jurisdiction over their own affairs and a still powerful Indigenous culture that compels public-spirited behavior from tribal leaders, focuses governance away from distributive issues—who gets what—and toward productive activity, and sustains the legitimacy of governing institutions in the eyes of the community. The result is a viable, sustainable, self-determined economy that provides jobs for its people and revenues for the nation.

Of course these are anecdotal stories (although there are a lot more where these come from). What about more systematic research? I could give you some of our own results in the United States, but let me instead give you one piece of particularly striking evidence assembled by researchers in Canada.

- Adolescent suicide is a major problem in numerous Native communities in North America. But the rates vary: in some communities, suicide is rampant among young people; in others, it is virtually unknown. Recently, two researchers obtained data allowing them to examine adolescent suicide rates in 195 Aboriginal communities in British Columbia. They tested the effects of a number of factors on adolescent suicide rates, among them the existence of cultural centers in these communities, successful prosecution of land claims,

and Native control over education, police, fire services, and health care. All but the first of these, it seems to me, in one way or another indicate assertions of self-governing power. Result: across these communities, as the number of these factors present rises, adolescent suicide rates drop. In other words, where assertions of self-governing power were greatest or most numerous, suicide rates were lowest. The apparent explanation: affirmations of cultural value and assertions of control over Indigenous lands and affairs create an environment that supports in young people both a sense of confidence in who they are and a belief in a viable future, creating a hedge against suicide.² This needs further study and replication, but it is provocative and compelling research.

In one way or another, all of these are success stories—they trace significant improvement in the daily lives of Aboriginal peoples. But they do more. They show that jurisdiction can be a win-win proposition. Both Aboriginal and non-Aboriginal people benefit in these stories. In the cases I’ve given you, programs operate more efficiently, health improves, costs decline, and the long-term burden of Native poverty begins to be reduced for both Indigenous nations and the society as a whole. These empowered nations are solving problems that the United States and Canada have failed to solve for nearly a century.

So what are the keys to such success? Those keys are likely to be both multiple and diverse, but two appear to be fundamental. First is the one I’ve focused on: jurisdiction. In all of these cases, we see Indigenous nations taking control of their own affairs. Some have had to fight for that control; some have benefited from federal legislation and court decisions. But the expansion of Indigenous jurisdiction has been crucial.

² See Michael Chandler and Christopher Lalonde, zzz, *Journal of Transcultural Psychiatry* zzz.

Why? When Indigenous nations gain power over their own affairs, at least three things tend to happen. First, bureaucratic priorities are replaced by Indigenous priorities, thereby gaining Indigenous support for initiatives and programs. Second, decisions begin to reflect local knowledge and concerns. One of the great fantasies of colonialism, still alive in the Indigenous-affairs bureaucracies of the world, is the idea that “we know what’s best for you.” But we don’t. It is ludicrous to think that policy and programs for Indigenous nations can best be made in parliamentary debate and bureaucratic seclusion, both of which tend to ignore the assets that Indigenous nations themselves possess.

And the third thing that happens is that decisions get linked to consequences. When distant policy-makers and bureaucrats are making the decisions, they can make mistakes with relative impunity. When they mess things up, they pay little of the price, which instead is visited on Indigenous peoples. Decision-makers are saved from the consequences of their decisions, so there is no discipline to compel them to do better in the future.

But when Indigenous peoples themselves are in charge, they pay the price of bad decisions and reap the rewards of good ones. Over time and allowing for mistakes, the quality of decisions improves because it is the decision-makers’ own future that is at risk. Jurisdiction, in other words, creates accountability.

Does it always have that effect? Are all the stories of Indigenous jurisdiction good ones? Of course not. I could have given you plenty of disasters as well, for Indigenous societies are like the rest of us: they, too, are capable of screwing up.

And this is where the second key comes in. In these stories, Indigenous nations have to accompany jurisdiction with responsible, capable, and culturally appropriate action. The Grand Traverse Band has to be able to manage effectively a complex

health-care program; if it can't, both the program and its benefits will disappear as professionals leave, efficiency and effectiveness suffer, and service declines. The Navajo Nation has to find ways to keep politics out of its own court decisions if the people are going to continue to believe that the system is legitimate and fair—and without that belief, they're lost. Cochiti Pueblo has to be sure that the community doesn't disintegrate into battles over who gets which piece of the pie because once that happens, the pie itself will stop growing.

In other words, in these cases, self-governing power has been matched by competent, resourceful self-governance. Without that, we would have had no progress but just a great spinning of wheels.

Our overall research supports this. We have compelling evidence from diverse settings in the United States and, on a smaller scale, Canada showing that self-governing power, backed up by capable, effective, and culturally appropriate Indigenous governing systems and practices, provides the most promising foundation of Native community and economic development. As I said at the start of these remarks, in a century of U.S. efforts to improve Indian economic and community conditions, Indigenous self-determination is the *only* policy that has had broad, positive, sustained results. Nothing else has worked. But it has required both pieces: jurisdiction and capable governance.

Are these results automatically transferable to Australia? I'm very much aware that the differences among Indigenous situations in Australia, Canada, and the U.S. are substantial. What we have learned would have to be applied thoughtfully and carefully and in ways that fit the peoples and the context of Australia.

But the similarities are substantial, too. Among them is one I find particularly interesting. There are four primarily English-speaking settler societies in the world today whose first peoples

have become severely disadvantaged minorities in their own lands: Australia, the United States, Canada, and New Zealand. In all four, in recent years, it seems that the state has been willing to one degree or another to at least consider issues of equality and disadvantage. But they have been much less willing to consider issues of self-determination.

But what if the two are connected? What if overcoming systematic Indigenous disadvantage will require investing in Indigenous self-determination?

The North American evidence suggests that this is, indeed, the case. Self-determination is one of the keys to improved welfare in Indigenous communities; you're unlikely to move toward equality without it. I know of no reason to think that Australia, for all its distinctiveness, would be exceptional in that regard.

Furthermore, I believe the stories I have given you today are not really North American stories at all; they are human stories. The lessons they teach are these: Give people substantive power in their own affairs, encourage and support them in taking responsibility for themselves, offer them assistance as *they design or adopt tools that they see as appropriate* for the exercise of that power—and the chances are good that they will do remarkable things. Deny them all of that—as we have done for too long—and you should be prepared to pick up the pieces and pay the costs for generations to come.

Thank you.³

³ A selection of papers and other materials from the Harvard Project on American Indian Economic Development and its partner organization, the Native Nations Institute at the University of Arizona, can be found at www.ksg.harvard.edu/hpaied and at www.udallcenter.arizona.edu/nativenations.