The Allocation Of Criminal Jurisdiction In Indian Country - Federal, State And Tribal Relationships

I. INTRODUCTION

Native Americans have encountered unique problems as citizens.[1] They have been subjected to prejudice and frustration as severe as that associated with any other ethnic minority. Criminal jurisdiction[2] in Indian country is allocated to the federal government, to the states, and to the Indian tribes on the bases of (1) the races of the criminal offender and of the victim; (2) the offense involved; and (3) the location of the offense.[3]

The purpose of this article is to examine the division of jurisdiction between the federal, state, and tribal governments over crimes committed in Indian country.[4] This article reaches two conclusions: (1) criminal jurisdiction in Indian country is determined by an inconsistent and complex body of law which often makes it incomprehensible to the people who live under it; and (2) the existing jurisdictional scheme has eroded tribal sovereignty and continues to impede the Indian effort toward self-determination.

Five questions provide the framework of this investigation: (1) Who is an Indian?; (2) What is Indian country?; (3) What is the

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[1]8 U.S.C. § 1401(a)(2) (1970) recognizes the federal citizenship of American Indians born in the United States. By operation of the fourteenth amendment to the federal Constitution, Indians as citizens of the United States automatically become citizens of the state of their residence. Deere v. State of New York, 22 F.2d 851 (N.D. N.Y. 1927). For an analysis of the effects of a grant of citizenship on the American Indian *see* F. COHEN, FEDERAL INDIAN LAW 153 (1971 reprint of 1942 work) and M. PRICE, LAW AND THE AMERICAN INDIAN 219 (1973).

[2]Jurisdiction as used in this article refers to governmental power to regulate, prohibit, prevent, prosecute, and punish criminal behavior.

[3]D. KLEIN, CRIMINAL JURISDICTION IN INDIAN COUNTRY: THE POLICEMAN'S DILEMMA 1 (1973) [hereinafter cited as KLEIN].

[4]This article excludes from consideration certain subjects which pertain to jurisdiction in Indian country: such as the allocation of civil jurisdiction over Indian country and the accompanying state jurisdiction over Indian hunting and fishing rights; the controversies encountered in various state efforts to apply regulations such as taxation and zoning to Indian lands; the jurisdiction of the United States Court of Claims and the Indian Claims Commission; and the particular extensions of federal jurisdiction with respect to liquor laws.

jurisdictional scheme at present?; (4) What is the historical basis for this division of jurisdiction?; (5) What solutions can be offered in this jurisdictional context to promote Indian self-determination?

II. WHO IS AN INDIAN?

In order to be an Indian for the purposes of criminal jurisdiction, an individual must have some ethnic connection, some degree of Indian blood.[5] Statutes, case law, and administrative enactments have formulated diverse definitions of Indian status. The Indian tribes have also attempted to define their members. Often a definition appears in the constitution of the tribe or in its legal code.

Although a definitive meaning of the term "Indian" is impossible, the following considerations are relevant: an individual's residence; his degree of Indian blood; the particular law involved; tribal enrollment;[6] and the individual's opinion as to his own status.[7] Throughout Title 25 of the United States Code and the Code of Federal Regulations, which deal solely with Indians, definitions of "Indian" vary with different topics.[8] For example, one section dealing with courts of Indian offenses states that for the purpose of the enforcement of the regulations in the section, "an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction."[9] Another section dealing with the protection of Indians and the conservation of resources provides that the term "Indian" shall include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."[10]

State and federal courts have often grappled with the question of who is an Indian. In *State v. Phelps*,[11] an Indian was defined as a person with some degree of Indian blood who has not severed his tribal relationship and who claims to be an Indian. Adoptions, mixed-blood marriages, and emancipations present special problems. A white man adopted into a tribe, although he may thereafter live

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[5]NAT'L. AM. INDIAN COURT JUDGES ASS'N., JUSTICE AND THE AMERICAN INDIAN, *Examination of the Basis of Tribal Law and Order Authority*, Vol. IV, 9 (1974) [hereinafter cited as *Basis of Tribal Law and Order*].

[6]Enrollment is generally an internal matter in which each tribe designates who will qualify for membership. Failure of certain Indians to be enrolled as tribal members does not necessarily determine that they are not Indians. *Ex parte* Pero, 99 F.2d 28, 31 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939).

[7]*Basis of Tribal Law and Order, supra* note 5, at 15.

[8]*E.g.*, 25 C.F.R. § § 74.2(d), 109.18, 123.1(d), 242.2 (1974).

[9]25 C.F.R. § 11.2CA(c) (1974).

[10]25 U.S.C.A. § 479 (1963).

[11]93 Mont. 227, 19 P.2d 319 (1933).

with the Indians and adopt their way of life, is not an Indian for the purpose of criminal jurisdiction.[12] Half-breeds may be either Indian or non-Indian. If they are the illegitimate children of an unmarried Indian mother, not recognized, supported or cared for by their father, and grow up among Indian people, then they are Indians subject to governmental regulation.[13] On the other hand, a child of a non-Indian father and Indian mother reared under the father's supervision, independently of the Indian tribe, is not an Indian.[14] Emancipated Indians who have severed tribal relations are sometimes treated as non-Indians for the purpose of criminal jurisdiction.[15]

Determining whether an individual who has committed an offense on a reservation is an Indian produces many practical complications. Before a person comes before a tribal court, the field officer must determine the racial status of the defendant.[16] Many offenders, knowing the limitations of jurisdiction, falsely deny they are Indians. If only tribal law is involved, they are released. On the other hand, other individuals claim to be Indians when they technically fail to meet the requirements which vest jurisdiction in the tribe.[17] In either situation, the technicalities attending the determination of who is an Indian hinder the tribe's ability to effectively govern its territory.

Indian judges[18] suggest that the cumbersome definitions of "Indian" be eliminated so that tribal courts may exercise a greater degree of territorial jurisdiction. This need for uniformity and precision in definitions also exists in determining what is Indian country.

II. WHAT IS INDIAN COUNTRY?

The power to define Indian country rests exclusively in the federal government. This power is derived from three sources.[19] First, the Constitution gives the President[20] and Congress[21] powers over Indian

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[12]United States v. Rogers, 45 U.S. (4 How.) 567 (1846).
[13]United States v. Higgins, 103 F. 348, 352 (C.C.C.D. Mont. 1900).
[14]Vogel, *Who is an Indian in Federal Indian Law*, STUDIES IN AMERICAN INDIAN LAW, Vol. I, 48, 62 (1970).
[15]For the purpose of criminal jurisdiction, California placed the burden on an Indian defendant to prove that he was an Indian entitled to federal rather than state jurisdiction, holding: "While there is evidence that the defendant and the victim were 'Indians,' the use of this term, without more, shows only that persons were Indian by race and blood. That fact is insufficient to vest in the federal government exclusive jurisdiction over a crime committed in Indian country . . . " People v. Carmen, 43 C.2d 342, 349; 274 P.2d 521, 525 (1954).
[16]*Basis of Tribal Law and Order, supra* note 5, at 15.
[17]*Id.*
[18]*Id.* at 16.
[19]*See* Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 447-52 (1970).
[20]U.S. CONST., Art. II, § 2, cl. 2.
[21]U.S. CONST., Art. I, § 8, cl. 3.

affairs. The Supreme Court has construed these constitutional grants as giving broad authority to the federal government.[22] Second, the courts have described the federal government's relationship to the tribe as that of a guardian to a ward.[23] Third, federal authority is inherent in the federal government's ownership of Indian occupied land.[24]

Initially, Congress defined Indian country on a treaty by treaty basis, using metes and bounds descriptions. As more treaties were negotiated with Indian tribes, a general statutory definition was needed. The first Congressional procedure for determining Indian country was formulated in the Indian Intercourse Act of 1834.[25] As Indian titles were extinguished, the lands east of the Mississippi River would automatically cease to be Indian country. A change in designation of Indian country west of the Mississippi required legislation to fix the new boundaries.[26] This definition was consistent with the legislative policy of relocating Indians in the West.

From 1834 to 1948[27] the United States Supreme Court expanded the definition of Indian country. In *Donnelly v. U.S.*[28] the court held that any change in the definition of Indian country was acceptable, provided that Congress or the Executive could demonstrate some change of circumstances necessitating the revision. In the same year, 1913, the court in *U.S. v. Sandoval*[29] extended the definition of Indian country to reach the non-reservation lands of the Santa Clara Pueblo in New Mexico. In so doing, the Court relied upon the plenary power of Congress over Indians and reasoned that Congress had the power to decide what was Indian country.

Allotted lands[30] were the next areas to be included in the federal determination of Indian country. Allotted lands resulted from the Dawes Act of 1887.[31] The Dawes Act provided for the division of tribal lands by allotment to individual Indians. To prevent alienation, the United States held the titles to such allotments in trust for twenty-five years.[32] Allotted lands were recognized as part of Indian country in 1914 in *U.S. v. Pelican*[33] and in 1921 in *U.S. v. Ram-*

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[22] United States v. Holliday, 70 U.S. (3 Wall.) 407, 417-18 (1866).
[23] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 9 (1831). For judicial application of the theory *see* United States v. Nice, 241 U.S. 591, 597-98 (1916); United States v. Kagama, 118 U.S. 375, 383-84 (1886).
[24] Johnson & Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 590-92 (1823); United States v. Kagama, 118 U.S. at 380.
[25] Act of June 30, 1834, ch. 161, 4 Stat. 729.
[26] *Basis of Tribal Law and Order, supra* note 5, at 20.
[27] *See* current statutory definition at 18 U.S.C. § 1151 (1970).
[28] 228 U.S. 243, 256-57 (1913).
[29] 231 U.S. 28 (1913).
[30] *Basis of Tribal Law and Order, supra* note 5, at 22.
[31] Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.
[32] *Basis of Tribal Law and Order, supra* note 5, at 24.
[33] 232 U.S. 442 (1914).

sey.[34] The Court in *Pelican* decided that allotments held in trust by the United States for Indian allottees were still of distinctively Indian character and would remain Indian country for the period of the trust. In *Ramsey* the Court held that restricted allotments[35] are part of Indian country until the restrictions are removed.

In 1938, the Supreme Court ruled in *U.S. v. McGowan*[36] that any lands purchased by the federal government and set apart for Indian use are within the definition of Indian country. This flexible standard meant that any lands the government designated for Indian use could be called Indian country.

In 1948, as part of an act to revise the entire U.S. Criminal Code, Congress enacted a comprehensive federal definition of Indian country. The definition[37] attempted to clarify the confusion that existed in the application of criminal laws to Indian country. This code provision adopted the guidelines expressed in *Donnelly*, *Sandoval*, *McGowan*, *Pelican*, and *Ramsey*, and is the current definition of Indian country. Under this law, three types of land constitute Indian country: (a) all lands within the limits of any Indian reservation; (b) all dependent Indian communities; and (c) all Indian allotments to which Indian titles have not been extinguished.

Federal involvement with the tribe is another guideline for determining Indian country. Before being classified as Indian country, the land which the Indians occupy must be subject to restrictions on alienation or other forms of federal regulations for protection of tenure, or it must be held by the United States with the beneficial interest in the Indians.[38]

The difficulty of applying these definitions in day-to-day situations causes many of the problems in Indian law today.[39] Problems often arise in areas of fragmented land ownership, the "checkerboard areas" where tribally owned or individually allotted Indian land is interspersed with non-Indian land. The only Indian country in checkerboard areas is the allotted Indian land and any other land designated for Indians.[40] Within these areas, the criminal jurisdiction

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[34] 271 U.S. 467 (1921).

[35] Restricted allotments are subject to a period of restriction on alienation, usually for twenty-five years.

[36] 302 U.S. 535 (1938).

[37] Indian country is statutorily defined at 18 U.S.C. § 1151 (1970) as " . . . (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

[38] KLEIN, *supra* note 3, at 10.

[39] *Basis of Tribal Law and Order*, *supra* note 5, at 25.

[40] *See, e.g.*, Toosiqah v. U.S., 186 F.2d 93, 97-99 (10th Cir. 1950); Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962); Ellis v.

changes as rapidly as land title changes. Law enforcement officers dealing with this impractical pattern of checkerboard jurisdiction find it necessary to search tract books to determine whether criminal jurisdiction is in the State government or the federal government.[41]

III. WHAT IS THE JURISDICTIONAL SCHEME AT PRESENT?

Jurisdiction over crimes committed in Indian country is allocated to federal courts, state courts, and tribal courts. The resolution of the question of state versus federal jurisdiction is generally a simple matter. The only thing that need be determined is the nature of the offense involved. If it is a federal offense, jurisdiction rests in the federal court. If it is a state offense, the state court has jurisdiction. Whether the offender is an Indian or a non-Indian makes no difference.[42]

The jurisdictional issue becomes considerably more complicated when the jurisdiction of tribal courts located on Indian reservations is considered. Certain general principles provide some guidelines.

A. FEDERAL JURISDICTION

A federal court has jurisdiction over all federal offenses with three exceptions. The exceptions codified at 18 U.S.C. 1152,[43] provide that federal jurisdiction does not extend (1) to offenses committed by one Indian against the person and property of another Indian; (2) to any Indian committing any offense in Indian country who has been punished under tribal law; and (3) to any case where by stipulations of a treaty the exclusive jurisdiction over such offenses rests in the tribal court. Notwithstanding 18 U.S.C. 1152, a separate statute, the Major Crimes Act,[44] provides that a federal court has exclusive jurisdiction over thirteen named offenses even if the offenses are committed by an Indian in Indian country. These offenses are murder, manslaughter, rape, carnal knowledge as defined in the statute, assault with intent to rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny. An important exception to the Major Crimes Act is that a federal court does not have exclusive jurisdiction over the thirteen enumerated crimes if a state has validly assumed jurisdiction over crimes on an Indian reservation.[45]

Page, 351 F.2d 250 (10th Cir. 1965).

[41] Seymour v. Superintendent, 368 U.S. 351, 358 (1962).

[42] *Basis of Tribal Law and Order*, *supra* note 5, at 4.

[43] 18 U.S.C. § 1152 (1970).

[44] 18 U.S.C. § 1153 (1970).

[45] States may assume jurisdiction pursuant to the provisions of Public Law 280 and the Indian Civil Rights Act of 1968. *See* note 46 and accompanying text.

B. STATE JURISDICTION

A state court has jurisdiction over all state offenses committed outside Indian lands, irrespective of the race of the offender. In addition, if the state has validly assumed jurisdiction over the reservation pursuant to Public Law 280,[46] a state court has jurisdiction over all state offenses even if these offenses are committed on Indian lands.

Congress enacted Public Law 280 in 1953. It dealt with three groups of states in different ways to meet the differing legal needs of the states. Public Law 280 ceded criminal and civil jurisdiction directly to one group of states.[47] It empowered a second group of states to take jurisdiction over reservations by enactment of appropriate state legislation.[48] A third group of states could amend their state constitutions to assume such jurisdiction.[49] Despite its constitutionality,[50] Indian leaders severely criticized the Act for its destructive impact on tribal sovereignty.[51] Even in matters solely involving Indians within Indian territory, state law superseded the tribe's authority.

The 1968 Indian Civil Rights Act[52] somewhat eased Public Law 280's impact by requiring tribal consent as a condition to any new assumption of state jurisdiction or any extension of previously assumed state jurisdiction over Indians or Indian tribes. Even with this amendment, Public Law 280 remains "one of the most severe pieces of federal legislation ever enacted in terms of its impact on tribal sovereignty."[53]

C. TRIBAL JURISDICTION

A tribal court has jurisdiction over all offenses committed on the reservation which violate tribal law.[54] Tribes may set up tribal courts

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[46] 18 U.S.C. § 1162 (1970); 28 U.S.C. § 1360 (1970).
[47] 28 U.S.C. § 1360(a) (1970) applying to Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.
[48] Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 589.
[49] Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 589.
[50] Public Law 280, 18 U.S.C. § 1162 (1970); 28 U.S.C. § 1360 (1970), was upheld in a case involving the state court prosecution of an Indian for the murder of another Indian. Robinson v. Sigler, 187 Neb. 144, 187 N.W.2d 756 (1971), *appeal dismissed*, 404 U.S. 987 (1971).
[51] Wendell Chino, President of the National Congress of American Indians, stated: "Public Law 280 gives to the various states the right to assume civil and criminal jurisdiction on Indian reservations without Indian consent, and as far as the American Indians are concerned, it is a despicable law. Public Law 280, if it is not amended, will destroy Indian self-government and result in further loss of Indian lands." *President Johnson Presents Indian Message to Congress*, 1 INDIAN RECORDS 28 (March 1968).
[52] 25 U.S.C. § § 1301-41 (1970).
[53] *Basis of Tribal Law and Order*, *supra* note 5, at 38.
[54] Felix Cohen notes in his treatise FEDERAL INDIAN LAW, "So long as the complete and independent sovereignty of an Indian tribe was recognized, its

according to their own practices and customs unless the federal government has withdrawn such authority from the tribes.[55] Most tribal codes limit jurisdiction to cases involving Indian offenders. If the state in which the reservation is located has assumed jurisdiction, the tribal court may have concurrent jurisdiction to the extent that tribal as well as state law has been violated.[56]

The present form of tribal governments stems from the 1934 Indian Reorganization Act.[57] Under this Act, courts of Indian offenses[58] are given jurisdiction over certain enumerated offenses.[59] As a practical matter, tribal courts have jurisdiction over only those offenses which would be characterized as misdemeanors under state or federal law. The Indian Civil Rights Act of 1968[60] limits the punishment which a tribal court may impose to a maximum imprisonment of six months or a fine of $500.00 or both.

Many difficulties arise from this jurisdictional allocation. Jurisdiction is divided among three separate authorities (federal, state, and tribal) on the basis of three variables (races of the offender and victim, nature of offense, and status or title of land where the offense was committed). The appendix to this article illustrates the diversity of the jurisdictional scheme in Indian country. The following sections deal with the historical origin of this scheme and the principles that must be considered in attempting to solve existing problems.

IV. WHAT IS THE HISTORICAL BASIS FOR THIS DIVISION OF JURISDICTION?

History demonstrates that the federal government has dealt with Indians by inconsistent policies. Indian policy has fluctuated between the polarities of isolation and integration. Such inconsistency has produced a confused body of law characterized by numerous shifts in policy. American Indians are governed in part by a body of

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criminal jurisdiction no less than its civil jurisdiction, was that of any sovereign power . . . such jurisdiction continues to this day, save as it has been expressly limited by the act of a superior government." F. COHEN, *supra* note 1, at 146.

[55] Dowling, *Criminal Jurisdiction over Indians and Post-conviction Remedies*, 22 MONT. L. REV. 165, 171 (1961).

[56] *Basis of Tribal Law and Order*, *supra* note 5, at 4.

[57] Act of June 18, 1934, ch. 576, 48 Stat. 984. The argument has been made that the federal government, through the Reorganization Act, so modified the self-government of Indians that the tribal governments are not expressions of tribal powers of self-government, but are agencies of the federal government. This argument was rejected in Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959), but was accepted in Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965) and Settler v. Yakima Tribal Council, 419 F.2d 486 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970).

[58] 25 C.F.R. § § 11.2CA-11.21 (1974).

[59] 25 C.F.R. § § 11.38-11.87NH (1974).

[60] 25 U.S.C. § 1302(7) (1970).

law distinct from that applicable to the rest of the nation. This body of law, a conglomeration of constitutional provisions, treaties, public laws, judicial decisions, and administrative regulations, is built upon two conflicting themes concerning the proper role of the Indian in the American social structure. These two themes may be characterized as the "separative premise" and the "assimilative premise."[61] The separative premise maintains that the Indian should be permitted to preserve his cultural identity and should not be forced to merge with the broader American community. It is marked by federal recognition of tribal sovereignty.[62] The assimilative premise maintains that the Indian should abandon his cultural identity and become part of the mainstream of American life. It carries the connotation of "civilizing" the Indian.[63]

Both separation and assimilation, in the extreme, produce negative results. On the one hand, total separation spells financial disaster for the Indian tribes whose native culture can no longer operate solely on the economic basis of an earlier century. On the other hand, total assimilation ignores the unique values of the tribal way of life, destroying Indian efforts toward self-determination. Equally as unsatisfactory as either of these hypothetical extremes is the reality of a government policy which throughout history has vacillated between separative and assimilative objectives.

The colonials initiated a separative policy in dealing with the Indians by treaties.[64] After the American revolution, the United States continued to deal with the Indian tribes as separate, sovereign nations.[65] As the federal government grew stronger, respect for the independence of American tribes diminished. The courts, the Congress, and the executive branch of the government often had separate

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[61] MacMeekin, *Red, White and Grey: Equal Protection and the American Indian*, 21 STAN. L. REV. 1236, 1237 (1969).

[62] *E.g.*, in his Seventh Annual Message to Congress of December 7, 1835, President Jackson announced, "All preceding experiments for the improvement of the Indians have failed. It now seems to be an established fact that they cannot live in contact with a civilized community and prosper . . . no one can doubt the moral duty of the Government of the United States to protect and if possible to preserve and perpetuate the scattered remnants of this race which are left within our borders. In the discharge of this duty an extensive region in the West has been assigned for their permanent residence." H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY, VOL. I, 260 (7th ed. 1963).

[63] *E.g.*, in his First Annual Message on December 6, 1881, President Arthur criticized the policy of "dealing with the various Indian tribes as separate nationalities, of relegating them by treaty stipulations to the occupancy of immense reservations in the West, and of encouraging them to live a savage life, undisturbed by any earnest and well-directed efforts to bring them under the influences of civilization." H. COMMAGER, *supra* note 62, at 557.

[64] F.P. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 34 (Cambridge 1962).

[65] Margold, *Foreword* to F. COHEN, FEDERAL INDIAN LAW at *xxii* (1971 reprint of 1942 work).

and totally different policies regarding Indians.[66] These divergent policies led to the first major judicial interpretation of tribal sovereignty.

In *Cherokee Nation v. Georgia*,[67] the U.S. Supreme Court, with Chief Justice Marshall delivering the opinion,[68] held that an Indian tribe or nation in the United States was not a foreign state. This 1831 case expressed two concepts. First, the Court acknowledged some encroachment upon tribal sovereignty to the extent that Indian tribes were "domestic *dependent* nations" (emphasis added); second, the Court stated that the new relationship "resembles that of a ward to his guardian."[69]

Although the Court in *Cherokee Nation v. Georgia* did reduce the scope of the concept of tribal sovereignty, it did so only in relation to the federal government and not in relation to the state of Georgia. *Worcester v. Georgia*,[70] decided in 1832, confirmed the existence of Indian tribal sovereignty in relation to state authority. The U.S. Supreme Court held that the Cherokee Nation was a distinct community in which the laws of Georgia were not applicable.

Taken together, *Cherokee Nation* and *Worcester* show the presence at an early date of separative and assimilative policy. First, in relation to the federal government, the tribes were "wards," subject to the plenary power of the federal government. This characterization diminished tribal sovereignty, representing the tribes as dependent on the federal government and thus assimilated into the broader pattern of American society. On the other hand, *Worcester* stated that in relation to individual states, the tribes retain their right of self-government to the exclusion of state authority. Thus, with

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[66] Perhaps the most glaring example of the inconsistencies involved the Cherokee Nation and Georgia in the 1830's. A great deal of the territory of the Cherokee Nation lay within the boundaries of the state of Georgia. Pressure was mounting to force the Cherokees to leave their lands. The Georgia Cherokees considered this remedy, but after learning the fate of other tribes who had moved, they decided to stay. The Georgia legislature then extended its jurisdiction over Indian territory, hoping to appropriate the Indian lands. This situation eventually led to the first major judicial confrontation involving tribal sovereignty. *Basis of Tribal Law and Order, supra* note 5, at 29.

[67] 30 U.S. (5 Pet.) 1 (1831).

[68] Marshall wrote: " . . . the relation of Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations . . . they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

"They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 16-17.

[69] *Id.*

[70] 31 U.S. (6 Pet.) 515, 561 (1832).

respect to the tribes' relation to the states, the separative premise applied.

The ambivalence of federal Indian policy is demonstrated through a survey of legislation and case law dealing with the division of criminal jurisdiction in Indian country. One conclusion is reached: a consistent policy is needed to end the detrimental effect of a history of fluctuation between separation and assimilation.

A. EARLY LEGISLATION UNDER THE COMMERCE POWER

The first act of Congress specifically defining substantive rights and duties in the field of Indian affairs was the Trade and Intercourse Act of July 22, 1790.[71] This act dealt with crimes non-Indians committed against Indians within any town, settlement, or territory belonging to any nation or tribe of Indians. Such offenders were to be subject to the same punishment as if the offenses had been committed against a non-Indian within the jurisdiction of the offender's state or district. The procedure applicable in cases involving crimes against the United States was applied to such offenses. Thus, the 1790 Act provided a statutory basis for the exercise of federal jurisdiction over non-Indian offenders committing crimes with Indian victims in Indian country. Although it had the effect of decreasing tribal sovereignty, the 1790 Act was in effect separative, recognizing the differences between Indian and Anglo-American judicial systems. Non-Indians, it was believed, should not be subjected to the justice of the tribes.[72] Indians, it was believed, should not be subject to the White Man's system. Thus, the 1790 Act recognized a division along racial lines.

A subsequent Trade and Intercourse Act of May 19, 1796 reinforced this policy.[73] The Act contained a provision for the punishment of an Indian committing a crime outside Indian country. The non-Indian victim had to make application to the offender's tribe for satisfaction of the wrong. If that course of action failed, then only the President of the United States could redress the wrong. The President had the authority to withhold monetary benefits from the offender's tribe. Like the 1790 Act, the Act of 1796 clearly recognized the difference between Indian and non-Indian values and mores. The cultural differences between the Indians and Anglo communities were thought to preclude making either race subject to the other's rules regulating and punishing behavior.[74] The Indian was subject to Indian law; the White Man was subject to the White Man's

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[71] Act of July 22, 1790, ch. 33, 1 Stat. 137.
[72] KLEIN, *supra* note 3, at 17.
[73] Act of May 19, 1796, ch. 30, 1 Stat. 469.
[74] KLEIN, *supra* note 3, at 17.

laws. At this stage, although the systems were separate, Anglo-America did not attempt to impose its values on the Indian. This imposition came later in an Act of March 3, 1817.[75]

In the 1817 Act, Congress exchanged a separative philosophy for an approach which was in effect assimilative. The act augmented the role of the federal government in Indian country, and represented the first Congressional expression of a preference for the Anglo-American rather than the Indian system of justice. The act provided for federal jurisdiction over Indians as well as non-Indians in Indian country when the offender and the victim were not of the same race or when the crime involved both a non-Indian perpetrator and a non-Indian victim. By such legislation, Congress stated that when an Indian dealt with a non-Indian, non-Indian standards would apply.

The 1817 Act, however, did not vest jurisdiction in the federal government when an Indian committed the offense against another Indian in Indian country.[76] Congress maintained its separative approach toward intra-racial crime by Indians by the Act of June 30, 1834.[77] The House Committee Report accompanying the 1834 Act expressed the reason for vesting jurisdiction in the tribe.[78] The report recognized tribal sovereignty over strictly internal matters. The language of this 1834 document shows Congressional recognition of essential differences between the Indian tribal cultures and the Anglo-American way of life.[79]

In 1854,[80] by amending the 1834 Act, Congress again shifted focus. If an Indian committed a crime against a non-Indian and was punished by the local law of the tribe, federal courts lack jurisdiction. Although the expressed reason behind this amendment was the legislative intention to avoid double jeopardy,[81] the amendment sig-

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[75] Act of March 3, 1817, ch. 92, 3 Stat. 383.

[76] F. COHEN, *supra* note 1, at 71.

[77] Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729. The act included "That so much of the law of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force and effect in the Indian country: *Provided*, the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

[78] The report stated: "It will be seen that we cannot, consistently with the provisions of some of our treaties, and to the territorial act, extend our criminal laws to offences committed by or against Indians of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens." *As quoted in* F. COHEN, FEDERAL INDIAN LAW, *supra* note 1, at 74.

[79] *See* text *supra* note 78, at 78.

[80] Act of March 27, 1854, ch. 26, § 3, 10 Stat. 269.

[81] Such reasoning was articulated in the later case of U.S. v LaPlant, 156 F. Supp. 660, 662 (C.D. Mont. 1957), which held that where the Indian defendants had been convicted in the tribal court, they could not thereafter be prosecuted in federal district court for the same crime, since to do so would place them in double jeopardy. *See also* Clayton, *Indian Jurisdiction and Related Double Jeopardy Questions*, 17 S.D. L. REV. 341 (1972).

naled a retreat from the assimilation of the Indian into the non-Indian jurisdictional pattern.

B. *EX PARTE CROW DOG* AND THE MAJOR CRIMES ACT

Congress had specifically exempted from federal jurisdiction those crimes in which both the perpetrator and the victim were Indians.[82] A public outcry against this existing system arose in 1883 when the Supreme Court made its controversial ruling in *Ex Parte Crow Dog.*[83] The case involved a particularly sensational murder of one Sioux Indian by another on a reservation. The court held that the federal district court lacked jurisdiction to try the offender and that sole jurisdiction was in the Sioux tribe. With the release of Crow Dog, the public brought pressure upon Congress to extend federal jurisdiction over such violent crimes.[84] Congress responded on March 3, 1885 by enacting the Major Crimes Act,[85] granting federal jurisdiction over seven enumerated offenses[86] irrespective of the races of offender and victim.

The federal exercise of jurisdiction under the 1885 Act was promptly challenged in *U.S. v. Kagama.*[87] Upholding the constitutionality of the Major Crimes Act, the Supreme Court permitted further federal encroachment on Indian tribal sovereignty. The *Kagama* decision relied on the guardian-ward relationship expressed in the *Cherokee Nation* case.[88] Although the Major Crimes Act did not expressly terminate tribal jurisdiction over the enumerated crimes, courts have held that federal jurisdiction is exclusive.[89]

The Major Crimes Act represented a significant step toward assimilation of tribal culture.[90] For the first time, federal policy imposed

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[82] F. COHEN, *supra* note 1, at 71.
[83] 109 U.S. 556 (1883).
[84] Koons and Walker, *Jurisdiction over Indian Country in North Dakota*, 36 N.D. L. REV. 51, 54 (1960).
[85] Act of March 3, 1885, ch. 341, § 9, 23 Stat. 385.
[86] Through amendment the major crimes now number thirteen and are codified at 18 U.S.C. § 1153 (1970).
[87] 118 U.S. 375 (1885).
[88] *See* note 67 and accompanying text.
[89] Sam v. U.S., 385 F.2d 213, 214 (10th Cir. 1967).
[90] United States v. Whaley, 37 F. 134 (C.C.S.D. Ca. 1888) illustrates the change in the jurisdictional scheme brought about by the Major Crimes Act. The Indian defendants in *Whaley* were charged with the killing of Juan Baptista, also an Indian, on the Tule River Indian Reservation. The deceased was an Indian doctor, who in the course of his treatment of tribal members had been so unsuccessful as to induce the belief on the part of the tribe that he had been systematically poisoning his patients. Finally, one Indian, Hunter Jim, a favorite with the tribe, became seriously ill under the doctor's treatment. The members of the tribe held a council and informed the doctor that if Hunter Jim died, the doctor would also die. Jim did die. A council was held and the four defendants were appointed to carry into effect the council's resolution. The next morning

Anglo-American values on solely Indian matters committed on Indian land. This Act ignored the difference between the Indian and the Anglo-American systems of justice and favored the Anglo-American standards over those of the tribes. The preferred Anglo standards, however, were to be implemented through the federal, rather than the state, courts. Although federal authority had clearly superseded tribal authority at the time of the Major Crimes Act, the states were still restricted by the federal government from exerting their jurisdiction over crimes in Indian country.[91]

C. THE INDIAN REORGANIZATION ACT

By the late 1920's, the federal government had reduced the sovereignty of the Indian tribes to the point it appeared almost nonexistent.[92] In 1927, a survey was made for the Secretary of the Interior. This survey focused on the living conditions of American Indians. The study reached the conclusion that the administration of justice in Indian country was unsatisfactory[93] and that a causative factor was the constant erosion of tribal self-government by the assimilative approach of the federal government.

In response to this report, Congress again switched approach by passing a number of bills designed to remedy past wrongs.[94] The most comprehensive was the Act of June 18, 1934,[95] commonly referred to as the Indian Reorganization Act. The Act was an effort to restore some degree of sovereignty to tribal governments by "vesting such tribal organization with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations."[96] Under the authority of the Indian Reorganization Act, tribes developed constitutions and Courts of Indian Offenses were established with authority to try misdemeanor crimes.[97]

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the doctor was shot. If this homicide had been committed prior to the passage of the Major Crimes Act, the federal court would have lacked jurisdiction. The tribal council, since it directed the acts of the defendants, would have granted an acquittal.

[91] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

[92] The General Allotment Act, the Dawes Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, allowed the President of the United States to distribute the commonly held land of Indian tribes among the individual members. In this manner, Congress hoped to bring the Indians into the mainstream of American life by instilling the pride of individual ownership and converting Indians into an agrarian society. Subsequent history clearly shows that the plan failed. The result was a massive deprivation of Indian tribal lands. The Dawes Act removed one of the most basic attributes of sovereignty from Indians — their land. W. BROPHY & S. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 19-20 (1966).

[93] BROOKINGS INSTITUTION, THE PROBLEM OF INDIAN ADMINISTRATION 743 (1971 reprint of 1928 report).

[94] *Basis of Tribal Law and Order, supra* note 5, at 36.

[95] Act of June 18, 1934, ch. 576, 48 Stat. 984.

[96] S. REP. NO. 1080, 73rd Cong., 2d Sess. (1934).

[97] *See* note 58 and accompanying text.

The Indian Reorganization Act was an attempt by Congress to encourage separative policy with the Indian tribes. It represented a salvaging effort to recognize again that some degree of sovereignty rested in the tribe. In retrospect, its effect was not significant.

D. LATER DEVELOPMENTS — FEDERAL AND STATE INFRINGEMENTS ON TRIBAL SOVEREIGNTY

Two subsequent developments diminished the efforts of the Indian Reorganization Act to establish a policy supportive of tribal sovereignty and Indian self-determination. First, application of the Assimilative Crimes Act[98] augmented federal criminal jurisdiction in Indian country. Second, Public Law 280[99] critically impeded Indian efforts toward self-determination by its severe impact on tribal self-government.

In 1946, *Williams v. United States*[100] held that the Assimilative Crimes Act applied to Indian reservations. The Assimilative Crimes Act supplements the specific criminal laws Congress has enacted for areas within the borders of a state which are under the exclusive or concurrent jurisdiction of the United States. Under the Assimilative Crimes Act, the federal courts apply the criminal law of the state in which the enclave is located. The act provides for assimilation of both offense and punishment.[101] The Assimilative Crimes Act has intruded on tribal sovereignty and represents another federal policy retreat from the separative viewpoint of the Indian Reorganization Act to an assimilative approach for dealing with tribal Indians. For example, in *U.S. v. Sosseur*[102] the tribal council granted the defendant Indian a license to place slot machines on the reservation. The trial court applied the Assimilative Crimes Act, and the defendant was convicted under a Wisconsin antigambling statute. The United States Court of Appeals for the Seventh Circuit upheld the conviction,[103] and the defendant was sentenced under the more rigorous state law rather than under the more lenient law of the tribe.

Public Law 280, discussed previously,[104] might be characterized as the most far-reaching expression of an assimilative policy by the federal government. Congress has granted permission for the states to assume criminal jurisdiction in Indian country. Public Law 280, like the Assimilative Crimes Act, represents a new phase in federal Indian policy in that state authority supersedes tribal authority. Prior to the passage of the Assimilative Crimes Act and Public Law 280, Congress

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[98] 18 U.S.C. § 13 (1970).
[99] *See* note 46 and accompanying text.
[100] 327 U.S. 711, 713 (1946).
[101] U.S. v. Sosseur, 181 F.2d 873 (7th Cir. 1950).
[102] *Id.*
[103] 181 F.2d at 875.
[104] *See* note 46 and accompanying text.

had adhered to the separative premise in matters concerning the states' relationship to the tribes. With the enactment of these two statutes, the federal government reversed its previous policy so that Indian matters were assimilated into state as well as federal jurisdiction.

The jurisdictional stakes are considerably higher today than they were when Public Law 280 was enacted.[105] The past decade has seen the advancement of Indian interests by the tribes themselves and by Congress. Indian leaders advocate a policy of self-determination with emphasis on the integrity of the tribe. Amendments to Public Law 280 adopted in 1968, brought the law more in conformity with current policy by rendering all future assertions of state jurisdiction under the Act subject to the affected Indians' consent and by authorizing states to return jurisdiction to the federal government.[106]

The model for federal Indian policy seems to be changing from one favoring state power with minimum protection for Indian interests to one favoring tribal autonomy with minimum protection for state interests.[107] The historical ambiguities and the tension between isolation and integration still persist. This article considers that a preliminary step toward improvement of the now confused jurisdictional scheme must be the determination and maintenance of a clear policy regarding the proper role of the Indian in American society. Until such a fundamental decision is made, Indian jurisprudence will be troubled by the ambiguities of the divergent goals of separation or assimilation.

The final section of this article discusses some of the specific problems of the current jurisdiction scheme and suggests considerations to be made in seeking solutions. In terms of a separative versus an assimilative approach, this writer contends that a primarily separative approach is preferable. Three reasons support this conclusion: (1) the general fault of the assimilative approach is that it is based on what the non-Indian considers best for the Indian. This policy ignores basic cultural differences and arbitrarily imposes cultural norms on a people with a historically different social structure; (2) the administration of criminal jurisdiction in Indian country will be more effective if tribal courts are given greater authority in that the government closest to the governed will be more responsive to the needs of the people and can thus implement more specific, more effective programs; and (3) the Indian people within the last decade have exhibited a growing desire for preservation, or more appropriately in some cases, resurrection of their Indian identity.

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[105] Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 539 (1975).
[106] 25 U.S.C. § § 1321-26 (1970).
[107] Goldberg, *supra* note 105, at 539.

V. WHAT SOLUTIONS CAN BE OFFERED IN THIS JURISDICTIONAL CONTEXT TO PROMOTE INDIAN SELF-DETERMINATION?

Criminal jurisdiction in Indian country is determined by an inconsistent and complex body of law that is often incomprehensible to the people who live under it. The existing jurisdictional scheme has eroded tribal sovereignty and continues to impede the Indian effort toward self-determination.

The magnitude of this subject prohibits identification of all of the existing problems, much less the proposal of comprehensive solutions. Attention is limited to a few of the defects with emphasis placed on concerns relevant to Indian self-determination.

(1) One disadvantage of a three-fold division (federal, state, tribal) of criminal jurisdiction is the resultant confusion and duplication of law enforcement efforts.[108] Most of the problems in this area are problems of definition. Application of the rules governing jurisdiction may prove difficult in multi-racial offenses, difficult in cases where the race of the offender or victim is unknown, and difficult when the status of the place of the crime as Indian land is unclear.[109]

Basic jurisdictional problems occur in determining who is an Indian and what is Indian country. To deal more effectively with these problems, the Congress should eliminate the cumbersome definitions of Indian so that tribal courts may exercise a greater degree of territorial jurisdiction.[110] Since the Indian tribe bears the burden of territorial violations, it must be impowered to prosecute such offenses

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[108] As many as six law enforcement agencies operate in the area including the Bureau of Indian Affairs, tribal police, the Federal Bureau of Investigation, state police, county police, and municipal police.

[109] *E.g.*, the case of *People v. Carmen* required two trials and seven appellate opinions or orders to resolve the issue of whether California or the federal district court had jurisdiction. 36 C.2d 768, 228 P.2d 281 (1951). The case first reached the California Supreme Court in 1951 and a second trial was granted. In 1954, after a second trial again resulted in a guilty verdict, the defendant again appealed to the California Supreme Court, raising the issue of a want of jurisdiction because both the defendant and murder victim were Indians. The California Supreme Court held that California courts had jurisdiction, noting, " it may not be assumed that any special circumstances existed which would deprive the state of jurisdiction." 43 C.2d 342, 349, 273 P.2d 521, 525 (1954). In 1957, Carmen sought a writ of habeas corpus from the California Supreme Court on the basis of the state court's lack of jurisdiction over him as an Indian. The writ was denied, 48 C.2d 851, 313 P.2d 817 (1957). In 1958, Carmen's writ of habeas corpus was granted by a federal district court, 165 F. Supp. 942 (N.D. Cal. 1958). The federal district court held that where the defendant was Indian by blood and the locus of the murder was on an Indian allotment, title to which was still held in trust, the state court lacked jurisdiction to try the defendant since exclusive jurisdiction was in the federal courts under the Ten Major Crimes Act. In Dickson v. Carmen, 270 F.2d 809 (9th Cir. 1959) the judgment of the district court was affirmed and the Supreme Court denied certiorari, 361 U.S. 934 (1959) and a petition for re-hearing, 361 U.S. 973 (1960).

[110] *Basis of Tribal Law and Order*, *supra* note 5, at 16.

without the impediments of determining the race of the offender. This would have the effect of clarifying the bounds of state and federal jurisdiction as well.

One solution to the problems which the definition of "Indian country" poses is that in checkerboard areas, *i.e.*, areas in which Indian land is interspersed with non-Indian land, the definition should reflect the predominate character of the land.[111] For example, land primarily occupied by Indians should be classified as Indian country for the purposes of allocating criminal jurisdiction. Similarly, land occupied primarily by non-Indians should be excluded from the definition of Indian country. This proposal would increase the scope of tribal authority in non-reservation land inhabited by Indians with the desirable effect of encouraging Indian self-government and tribal institutions.

(2) A second major criticism of the existing jurisdictional scheme concerns the impact of Public Law 280. Indian leaders have leveled sharp criticism at the effect of Public Law 280 on Indian self-government.[112] Some Indian leaders have referred to lands under state jurisdiction as lawless no man's land. The states have failed to assume the responsibilities of Public Law 280, while at the same time, the states have impeded Indian efforts toward tribal sovereignty.[113]

The three-fold approach of Public Law 280 has resulted in a lack of national uniformity in state-tribal relations. California has jurisdiction with respect to all reservations for both criminal and civil matters. On the other hand, Mississippi exercises no jurisdiction under Public Law 280, and thus all reservations in Mississippi are under federal jurisdiction.[114] More confusion is added by a provision which permits retrocession of any measure of jurisdiction to the federal government after once assumed by a state pursuant to Public Law 280.[115] Although this measure was to provide the means of returning jurisdiction to the Indians via the federal government, an insufficient amount of effort has been spent on plans to prepare the various tribes to use the retrocession provision to their advantage.[116]

(3) A major question which remains unanswered is the extent to which Indian tribal courts may exercise criminal jurisdiction over non-Indians committing offenses in violation of tribal law on Indian

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[111] *Id.* at 26.
[112] Wendell Chino, *supra* note 51.
[113] *Id.*
[114] NAT'L. AM. INDIAN COURT JUDGES ASS'N., JUSTICE AND THE AMERICAN INDIAN, *The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations, Vol. I*, 88 (1974).
[115] This provision was added by the 1968 Civil Rights Act and is codified at 25 U.S.C. § 1323(a) (1970).
[116] *See* Goldberg, *supra* note 105, at 558 for a thorough analysis of retrocession aspects of Public Law 280.

reservations. An 1878 circuit court decision, *Ex Parte Kenyon*,[117] held that the Cherokee Nation did not have jurisdiction over a non-Indian citizen of the United States residing in Kansas. The court stated that the offender must be an Indian before the tribal court has jurisdiction.[118]

The *Kenyon* decision is regarded as having "heavily damaged"[119] Indian sovereignty. *Kenyon* is still relied upon as authority for denying tribal courts criminal jurisdiction over non-Indian offenders.[120] Several Indian tribes have recently challenged this holding and have, on their own initiative, assumed jurisdiction over non-Indians within their reservations.[121] The tribes have sought to justify this assumption of jurisdiction by enacting ordinances which stipulate that any person who enters the reservation by virtue of his entry impliedly consents to the jurisdiction of tribal courts.[122]

In a recent study on justice and the American Indian, the National American Indian Court Judges Association conducted a series of interviews with reservation Indians between July 1, 1972 and December 1, 1973.[123] These surveys showed that many Indian leaders and law enforcement officials believe that Indian policy and courts must have jurisdiction over non-Indians. Indians often express resentment concerning the double standard which results when non-Indians are not made subject to tribal laws. The situation is most pronounced when the non-Indian accomplice of an Indian offender goes free while the Indian is punished under tribal law for a tribal misdemeanor. The net effect is to engender in tribal members a mistrust of the law which is manifested by hostility, frustration, and a feeling

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[117] 14 F. Cas. 353 (no. 7720) (C.C.W.D. Ark. 1878). Kenyon was a non-Indian married to a Cherokee. When his wife died, Kenyon left Cherokee territory, taking with him a horse which his wife had owned. This taking occurred before tribal procedures to settle his wife's estate had been completed. While outside of the Cherokee jurisdiction, Kenyon sold the horse. He later returned to the Cherokee Nation and was there tried for and convicted of theft. The court in *Kenyon* held that the Cherokee Nation did not have jurisdiction over a non-Indian citizen of the United States residing in Kansas.

[118] 14 F. Cas. at 355.

[119] *Basis of Tribal Law and Order, supra* note 5, at 32.

[120] *Id.* at 39.

[121] The first Indian tribes to pass implied consent ordinances were the Salt River Pima-Maricopa Indian Community, ORDINANCE S.R.O. 11-72 Salt River Pima-Maricopa Community Council; the Gila River Indian Community, ORDINANCE NO. 12-72 Gila River Indian Community Council; and the Quinault Indian Tribe of the state of Washington, 25 QUINAULT TRIBAL CODE OF LAWS, ch. 5.05.03 (1973). *See, Basis of Tribal Law and Order, supra* note 5, at 50.

[122] *E.g.*, the SALT RIVER ORDINANCE NO. S.R.O. 11-72 reads in part, "Any person who enters upon the Salt River Indian Community shall be deemed to have impliedly consented to the jurisdiction of the Tribal Court and therefore is subject to prosecution in said Court for violations of the Salt River Pima-Maricopa Indian Community Law and Order Code."

[123] *Basis of Tribal Law and Order, supra* note 5, at 8.

that the law is blatantly unfair.[124]

The implied consent ordinances are a desirable means to remedy some of the jurisdictional confusion. The Solicitor General of the Department of the Interior has challenged the legality of such ordinances.[125] Thus, the viability of this Indian-initiated remedy is hindered by the 1878 *Kenyon* ruling and the recent 1970 opinion of the Solicitor General. Opposition to implied consent ordinances is not justified. A state can legislate for its general welfare by the means of implied consent jurisdiction over non-residents.[126] Indian tribes, recognized as sovereign dependent nations,[127] should be allowed to promote tribal welfare by obtaining implied consent jurisdiction over non-Indians on reservations.

(4) Funding for criminal justice administration in Indian country is limited. The three governments operating in this area (federal, state, tribal) experience distinct problems.

Distances, investigation difficulties, and limited personnel for reservation caseloads hinder the federal government. Indians complain that those who commit the most serious offenses often go unpunished or receive only the "misdemeanor" sentences of the tribal courts.[128] State governments often fail to provide adequate enforcement services for reservations because the taxes normally available to fund law enforcement cannot be collected in Indian country.[129] The tribes lack monetary and personnel resources sufficient to operate their own effective judicial systems. Indian tribes vary dramatically in customs and traditions, in the amount of land in the reservation, and in the economic assets available to the tribe. Programs to augment tribal resources toward more effective tribal courts are lacking at both the state and federal level.

Federal policy in its reliance on state jurisdiction (where the state has assumed jurisdiction under Public Law 280) and federal jurisdiction ignores the tribal courts' potential to function most effectively as the authority most directly involved with the affairs of the Indian reservation. A change in policy is suggested. Remedial action would require increased federal funding for tribal judicial systems and training programs for tribal personnel. These efforts would conceivably offer two benefits. First, by dealing directly with the needs of the

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[124] *Id.* at 52.

[125] The Solicitor General took the position that Indian tribal courts do not have jurisdiction over non-Indians who commit offenses within the boundaries of the tribe's jurisdiction. *Basis of Tribal Law and Order, supra* note 5, at 39.

[126] *E.g.*, states have passed laws by which non-residents impliedly consent to the jurisdiction of the state with regard to service of process and intoxication tests for drivers.

[127] 31 U.S. (6 Pet.) 515, 561 (1832).

[128] KLEIN, *supra* note 3, at 56.

[129] Comment, *South Dakota Indian Jurisdiction*, 11 S.D. L. REV. 101, 115 (1966).

tribal community, the administration of justice would be more effective. Second, this would encourage the tribes in their effort to promote internal sovereignty.

CONCLUSION

This complex scheme of criminal jurisdiction is a problem unique to Native Americans living on Indian lands. As citizens of the federal, state, and tribal governments, Indians must deal with multiple and conflicting assertions of authority. The problems existing in the division of jurisdiction require legislative and judicial attention, attention that recognizes tribal integrity and the Indian goal of self-determination.

Federal policy is slowly moving away from the approach of implementing programs based upon what the non-Indian considered to be in the best interests of the Indian. The new approach recognizes that the traditions, cultural values, and legal systems of Native Americans should be preserved and respected. With a view toward preservation and respect, governmental policy can creatively address Native Americans and can support them in their quest to be themselves.

> We shall learn all these devices
> the White Man has.
> We shall handle his tools
> for ourselves.
> We shall master his machinery, his inventions,
> his skills, his medicine, his planning;
> But we'll retain our beauty
> And still be Indian.[130]

Carol A. Huddleston

[130] Poem by David Martin Nez in S. STEINER, THE NEW INDIANS 131 (1968).

APPENDIX

Jurisdictional Allocation and the Effect of Public Law 280

The following list, which is a partial listing of the many possibilities involved, is offered for illustrative purposes only to indicate how the variables in a specific case can be used to determine the selection of the proper court for jurisdictional purposes:

Defendant	Victim	Type of Offense	Locus of Crime	Court
Indian	Indian	Misdemeanor, tribal	Reservation	Tribal
"	"	Misdemeanor, state	Off Reservation	State
"	"	Misdemeanor, federal	Off Reservation	Federal
"	"	"Major Crime" (18 U.S.C. § 1153)	Reservation	Federal*
"	"	Felony, state	Off Reservation	State
"	"	Felony, federal	Off Reservation	Federal
Indian	Non-Indian	Misdemeanor, tribal	Reservation	Tribal
"	"	Misdemeanor, state	Off Reservation	State
"	"	Misdemeanor, federal	Off Reservation	Federal
"	"	"Major Crime" (18 U.S.C. § 1153)	Reservation	Federal*
"	"	Felony, state	Off Reservation	State
"	"	Felony, federal	Off Reservation	Federal
Non-Indian	Indian	Misdemeanor, tribal	Reservation	Tribal**
"	"	Misdemeanor, state	Off Reservation	State
"	"	Misdemeanor, federal	Reservation	Federal
"	"	Misdemeanor, federal	Off Reservation	Federal
"	"	"Major Crime" (18 U.S.C. § 1153)	Reservation	Federal*
"	"	Felony, state	Off Reservation	State
"	"	Felony, federal	Off Reservation	Federal
Non-Indian	Non-Indian	Misdemeanor, tribal	Reservation	Tribal**
"	"	Misdemeanor, federal	Reservation	Federal
"	"	Felony, state	Reservation	State***
"	"	Felony, federal	Reservation	Federal

*Assuming state has *not* assumed valid jurisdiction over the reservation. In the event the United States declines to prosecute, the cases are sometimes referred back to tribal court. There is divergence of opinion on the legality of this procedure. In most cases, when the United States Attorney declines to prosecute no further action is taken. If tribal court action may properly be taken, the charge must be reduced consistent with the tribal law and order code and the Indian Civil Rights Act of 1968.

**Assuming tribal law and order permits jurisdiction over non-Indian offenders.

***Assuming state *has* assumed valid jurisdiction over reservation.

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