# CRIMINAL JURISDICTION OVER INDIAN LANDS: A JOURNEY THROUGH A JURISDICTIONAL MAZE

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## INTRODUCTION

Jurisdiction over Indian land is often complicated by the conflicting claims of three sovereigns to law enforcement authority. The Indian tribes claim authority over their lands by virtue of their aboriginal sovereignty over both tribal members and the lands of the North American continent—a sovereignty recognized in part by early treaty[1] and case law.[2] The federal government's claim to jurisdiction arises from constitutional treatymaking[3] and commerce powers,[4] a judicially-created Indian trusteeship theory,[5] and, of course, the federal statutes passed in pursuance of the aforementioned powers.[6] The claims of jurisdiction by state authorities are generally based on assertions of inherent sovereignty[7] or federal statutory grant,[8] and occasionally from early treaties.[9]

This Article is the second in a series of three articles surveying the jurisdictional maze surrounding the problems of law enforcement on Indian lands.[10] It will trace the current chaotic allocation of law

1. For a discussion of the early treatymaking period, see Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 953-54 (1975).

2. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

3. U.S. CONST. art. II, § 2.

4. *Id.* art. I, § 8.

5. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Clinton, *supra* note 1, at 974-75, 983-85. *See also* United States v. Kagama, 118 U.S. 375 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

6. *See, e.g.*, 18 U.S.C. §§ 1151-1152 (1970); 18 U.S.C. §§ 1154-1165 (1970); 18 U.S.C. § 3243 (1970); 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976), *amending* 18 U.S.C. § 1153 (1970); 18 U.S.C.A. § 3242 (Supp. Pamphlet 1976), *amending* 18 U.S.C. § 3242 (1970).

7. *See* New York *ex rel.* Ray v. Martin, 326 U.S. 496, 500 (1946); United States v. McBratney, 104 U.S. 621, 624 (1882).

8. *See* 18 U.S.C. §§ 1162, 3243 (1970); 25 U.S.C. §§ 232, 980, 1321-1326 (1970). *See also* Act of June 30, 1948, ch. 759, 62 Stat. 1161; Act of May 31, 1946, ch. 279, 60 Stat. 229; Act of Feb. 21, 1863, ch. LIII, § 5, 12 Stat. 658.

9. *See* Treaty with the Chippewas, Mar. 19, 1867, art. 8, 16 Stat. 719 (subjecting the affected tribe to Minnesota law). *See also* Clinton, *supra* note 1, at 954.

10. The first Article in this series surveyed the historical growth of the statutory structure governing criminal jurisdiction over Indian lands and the judicial trends which helped to mold current jurisdictional approaches. Clinton, *Development of Criminal*

enforcement authority over Indian lands between federal, state, and tribal courts. First, the virtually irreconcilable federal statutory provisions mandating federal criminal jurisdiction over Indian lands will be explored, in an attempt to determine their application and the legal and constitutional limitations on their application. Next, the scope and nature of tribal court jurisdiction will be discussed, from both an historical and practical standpoint. Then, the scope of state criminal jurisdiction over Indians and Indian land will be briefly discussed. Attention will then be paid to the special problem of multiple prosecution presented by the tripartite jurisdictional scheme existing on Indian lands and the resolution of those problems. Finally, the task of adequately policing those Indian lands will be explored. As it is clear that the federal government has the power both to limit tribal jurisdiction[11] and to allocate jurisdiction between the state, the tribal governments, and itself,[12] it is the predominate federal jurisdictional authority to which this Article will first turn.

## I. FEDERAL JURISDICTION OVER INDIAN LANDS

### A. *The Federal Statutes: A Caveat*

Although the federal statutes affecting criminal jurisdiction over Indian lands are scattered throughout titles 18 and 25 of the United States Code, the statutes authorizing the exercise of federal criminal jurisdiction are few in number and are found primarily in title 18, sections 1151, 1153, and 3242.[13] Other sections in title 18 define certain specific crimes applicable only to Indian lands, however, and thus create federal jurisdiction with respect to such offenses.[14] If criminal jurisdiction over Indian lands were governed solely by these statutes, the jurisdictional pattern would be complex but coherent. However, these federal statutes do not exhaust the range of possible jurisdictional arrangements. First, the courts have carved exceptions

*Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975). The final paper in this series will be devoted to an analysis of suggested reforms in this area, including those envisioned by the proposed Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. (1975). *See also* S. 2010, 94th Cong., 1st Sess. (1975).

11. *See* United States v. Whaley, 37 F. 145 (C.C.S.D. Cal. 1888); 25 U.S.C. § 1302 (1970).

12. *See, e.g.*, 18 U.S.C. §§ 1162, 3243 (1970); 25 U.S.C. § 232 (1970). *See also* United States v. McBratney, 104 U.S. 621 (1882).

13. 18 U.S.C. §§ 1151-1152 (1970); 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976), *amending* 18 U.S.C. § 1153 (1970); 18 U.S.C.A. § 3242 (Supp. Pamphlet 1976), *amending* 18 U.S.C. § 3242 (1970).

14. *See, e.g.*, 18 U.S.C. § 1154 (1970) (dispensing intoxicants in Indian country); *id.* § 1155 (dispensing intoxicants in Indian country wherein any Indian school site is located); *id.* § 1163 (embezzlement or theft from Indian tribe); *id.* § 1164 (destroying reservation boundary or warning signs); *id.* § 1165 (unauthorized hunting, trapping, or fishing on Indian lands).

into the statutorily granted federal jurisdiction.[15] Second, Congress has enacted legislation applicable to specific reservations which either explicitly or implicitly alter the jurisdictional patterns created in the aforementioned statutes by conferring jurisdiction over Indian lands to the states.[16] Furthermore, while Congress occasionally specifies the relationship between these specific statutes and the federal jurisdictional statutes set forth above,[17] commonly the interrelationship is uncertain, creating the question of whether state criminal jurisdiction is exclusive or concurrent, complete or partial.[18] Third, in 1953 Congress required certain states and authorized other states to voluntarily assume criminal jurisdiction by express state legislative action.[19] Since 1968 consent from the affected tribe is required before voluntary assumption of criminal jurisdiction by the states is effective.[20] Federal statutory provisions also authorize the states to unilaterally retrocede any criminal jurisdiction assumed between 1953 and 1968.[21] Thus, exceptions abound to the federal jurisdictional patterns established by Congress. In order to ascertain the jurisdictional pattern for any particular reservation, it is necessary to consult not only all

15. *See* text & note 7 *supra.*

16. Finding and construing such legislation is no easy task. While some of these laws have been codified, *see, e.g.*, 18 U.S.C. §§ 1162, 3243 (1970); 25 U.S.C. §§ 232, 980 (1970), many federal statutes of vital importance to particular reservations remain buried in the Statutes at Large. *See, e.g.*, Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Sac and Fox Reservation in Iowa); Act of May 31, 1946, ch. 279, 60 Stat. 229 (Devil's Lake Reservation in North Dakota); Act of Feb. 21, 1863, ch. LIII, § 5, 12 Stat. 658 (Winnebago Indians residing within the boundaries of any state to be subject to state jurisdiction).

17. For example, 18 U.S.C. § 1162(c) (1970) states that sections 1152 and 1153 are not applicable within certain specified areas of Indian country.

18. *See* Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977). *See also* 18 U.S.C. § 3243 (1970) (confers partial criminal jurisdiction over Indian lands to State of Kansas). In *Youngbear*, the district court interpreted an act conferring jurisdiction on the State of Iowa

> over offenses committed by or against Indians on the Sac and Fox Indian Reservations in that State to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of any Indian reservation: *Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.*

Act of June 30, 1948, ch. 759, 62 Stat. 1161 (emphasis added). The federal district court found the proviso which reserved jurisdiction in the federal courts ambiguous; it was unclear whether the proviso created either concurrent jurisdiction in the state and federal courts over Indian offenses defined by United States law, or retained exclusive jurisdiction in the federal courts. 415 F. Supp. at 811. Disagreeing with the Iowa supreme court, State v. Youngbear, 229 N.W.2d 728 (Iowa), *cert. denied*, 423 U.S. 1018 (1975), the federal district court construed the proviso to retain exclusive jurisdiction in federal courts over offenses enumerated in 18 U.S.C. § 1153 (1970), *as amended*, 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976), 415 F. Supp. at 811-14 (on petition for writ of habeas corpus).

19. Act of Aug. 15, 1953, ch. 505, §§ 2, 6-7, 67 Stat. 588 (section 2 now 18 U.S.C. § 1162 (1970); § 6 replaced by 25 U.S.C. § 1323(b) (1970); § 7 expressly repealed by Act of Apr. 11, 1968, Pub. L. No. 90-284, § 403(b), 82 Stat. 73, 79)); *See* 25 U.S.C. § 1323(b) (1970).

20. 25 U.S.C. §§ 1321-1326 (1970). No tribe has to date consented to such an assumption of state criminal jurisdiction.

21. *Id.* § 1323(a).

relevant federal statutes, but also state statutes, and in some cases, tribal actions. Accordingly, the federal jurisdictional statutes discussed in this section do not fully describe all possible jurisdictional arrangements; rather they cover only those reservations for which the state has neither been granted nor assumed jurisdiction pursuant to federal authority.[22]

### B. *Indian Country: A Complex Statutory Term of Art*

Federal criminal jurisdictional statutes for Indian lands have long been described with reference to "Indian country." For many years, Indian country was geographically described,[23] but as the Indians were removed westward and their land holdings decreased, the geographic designation became obsolete and impractical.[24] Thus, in the late 19th century, the United States Supreme Court began treating the statutory phrase "Indian country" as a generic term describing most—but not all—land owned or occupied by Indian tribes.[25] In 1948 Congress gave "Indian country" a new statutory definition in section 1151 of title 18 in the United States Code, each portion of which either restates an aspect of prior case law or resolves a specific problem which had plagued the courts:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the

22. See text & notes 218-48, 326-53 *infra*. Needless to say, the plethora of potential exceptions to federal jurisdiction makes legal research in this area exceedingly difficult, resulting in great areas of uncertainty for police, prosecutors, courts, and even the affected tribes.

23. Act of June 30, 1834, ch. CLXI, § 1, 4 Stat. 729 (all lands west of the Mississippi River not within the States of Missouri or Louisiana or the Arkansas Territory and all lands east of the Mississippi to which Indian title had not been extinguished). *See also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 6 (1942).

24. Upon recodification of all federal law in 1883, Congress omitted this definition, thus implicitly repealing it. *See* F. COHEN, *supra* note 23. As no statutory definition existed between 1883 and 1948, "Indian country" was judicially defined. *See, e.g.*, United States v. McGowan, 302 U.S. 535 (1938); United States v. Chavez, 290 U.S. 357 (1933); Pronovost v. United States, 232 U.S. 487 (1914); United States v. Pelican, 232 U.S. 442 (1914); United States v. Sandoval, 231 U.S. 28 (1913); Clairmont v. United States, 225 U.S. 551 (1912). *See also* United States v. Fifty-Three Gallons of Whiskey, 108 U.S. 491 (1883).

25. In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a State, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of Congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it.

*Ex parte* Crow Dog, 109 U.S. 556, 561-62 (1883).

> jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[26]

The first clauses of sections 1151(a) and (b) merely restate prior law. Since the early definitions of Indian country were predicated in great part on aboriginal title, the removal of Indians to reservations in the 19th century prompted questions as to whether reservations created either by congressional act or Presidential proclamation were Indian country because they were not, in many instances, lands to which the tribe held aboriginal title. In *Donnelly v. United States*,[27] the Supreme Court rejected this distinction and specifically held that land set aside from the public domain by Executive order for use as an Indian reservation was Indian country.[28] That portion of section 1151(a) which includes within the definition of Indian country "all land within the limits of any Indian reservation under the jurisdiction of the United States Government" is a direct outgrowth of *Donnelly*. Not all lands presently occupied by Indian tribes are the product of the federal reservation policy, however, and thus some Indian lands are not technically reservations. In *United States v. Sandoval*,[29] decided the same year as *Donnelly*, the Supreme Court held that the lands of the Pueblo Indians, which were not federally owned reservations, but rather consisted of communally owned lands held in fee simple, were nonetheless Indian country since they were occupied by "distinctly Indian communities" which were "dependent tribes" recognized and protected by the federal government.[30] Section 1151(b) is a codification of *Sandoval*. The simple ownership of lands by a federally-recognized, dependent Indian tribe is sufficient to bring the lands so held within the ambit of the phrase "Indian country."

Section 1151(b) includes within the scope of Indian country all dependent Indian communities in the United States "whether within or without the limits of a state." Although the reasons for this language are not fully spelled out in the legislative history notes, its

26. 18 U.S.C. § 1151 (1970).
27. 228 U.S. 243 (1913). *See also* Pronovost v. United States, 232 U.S. 487 (1914) (The Flathead Indian Reservation within the State of Montana found to be Indian country).
28. 228 U.S. at 269.
29. 231 U.S. 28 (1913).
30. *Id.* at 46.

inclusion apparently is an effort to resolve a conflict in Supreme Court decisions as to whether land located within the boundaries of a state, whose enabling act or constitution does not contain a disclaimer of state jurisdiction over Indian lands, is subject to state or federal jurisdiction.[31] By enacting section 1151(b), Congress has put to rest any argument that Indian lands ceased being federal Indian enclaves when the state within which they are located was admitted to the Union without a disclaimer of jurisdiction.[32]

A number of the clauses contained in section 1151 are designed to clarify the vestigial impact on jurisdictional arrangements of the General Allotment Act of 1887,[33] and related programs. These programs altered the traditional communal ownership patterns for Indian lands by allotting and patenting specified parcles of land both within and without Indian reservations to individual Indians either in trust or in fee. For a time, these programs created problems of "checkerboard" jurisdiction within particular reservations,[34] as provisions in these acts vested the states with jurisdiction over the allotted land.[35] Moreover, since the Indian Reorganization Act of 1934[36] had indefinitely extended the trust period of lands still held under these allotment programs, many parcels of allotted land might have been left effectively in a checkerboard jurisdictional limbo. Although the courts

31. *Compare* New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); *and* United States v. McBratney, 104 U.S. 621 (1881), *with* Donnelly v. United States, 228 U.S. 243 (1913). *See also* United States v. Ramsey, 271 U.S. 467, 469 (1926).

32. While the phrase "whether within or without the limits of a state" appears only in subsection (b) of section 1151, this point regarding the unimportance of state sovereignty over land within its borders when a reservation is located within a state is equally applicable to all Indian reservations. Section 1151(b) provides the most expansive definition of Indian country and serves as an umbrella definition for reservations or Indian lands not otherwise described in 1151(a) or (c). *See* Youngbear v. Brewer, 415 F. Supp. 807, 809 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977). *But see* Tooisgah v. United States, 186 F.2d 93 (10th Cir. 1950) (decided on statutory grounds predating the adoption of the section 1151 definition); Williams v. State, 393 P.2d 887 (Okla. Crim. 1964); Ellis v. State, 386 P.2d 326 (Okla. Crim. 1963), *cert. denied*, 376 U.S. 945 (1964); *In re* Yates, 349 P.2d 45 (Okla. Crim. 1960) (all ignoring section 1151(b)). *See also* United States v. Cisna, 25 F. Cas. 422 (No. 14,795) (C.C.D. Ohio 1835); United States v. Bailey, 24 F. Cas. 937 (No. 14,495) (C.C. Tenn. 1834); State v. Foreman, 16 Tenn. 256 (1835); State v. Doxtater, 47 Wis. 278, 2 N.W. 439 (1879).

33. Ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-358 (1970)); *see* Clinton, *supra* note 1, at 966.

34. *Compare* United States v. Ramsey, 271 U.S. 467 (1926); United States v. Celestine, 215 U.S. 278 (1909); United States v. Rickert, 188 U.S. 432 (1903); *and Ex parte* Van Moore, 221 F. 954 (D.S.D. 1915), *with Ex parte* Nowabbi, 60 Okla. Crim. 111, 61 P.2d 1139 (1936); *and Ex parte* Moore, 28 S.D. 339, 133 N.W. 817 (1911). *See also* Letter from E. K. Burlew, Acting Secretary of the Interior, Mar. 16, 1940, *reprinted in* H.R. REP. No. 1999, 76th Cong., 3d Sess. 2 (1940) (describing the checkerboard pattern of state-federal jurisdiction created on Kansas Indian reservations by the allotment programs).

35. *See* Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 (1970)); Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390.

36. Ch. 576, § 2, 48 Stat. 984 (codified at 25 U.S.C. § 462 (1970)).

had addressed many of the problems created by the allotment program, the provisions in section 1151 are an effort to codify the results of litigation and promulgate clear statutory solutions to other difficulties. Specifically, section 1151 resolved many of the jurisdictional problems created by allotment, by expressly including within the definition of Indian country all allotted and patented land located within the limits of an Indian reservation and all Indian allotments to which Indian title has not been extinguished, even if not located within a reservation.[37]

37. The first important solution to the jurisdictional problems created by the allotment programs is found in section 1151(a), which includes within Indian country "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent.*" 18 U.S.C. § 1151(a) (1970) (emphasis added). This provision codifies prior case law holding that all land within the exterior boundaries of an Indian reservation remain Indian country despite the issuance of patents for parcels of land therein. *See* United States v. Celestine, 215 U.S. 278 (1909). *See generally* Beardslee v. United States, 387 F.2d 280 (8th Cir. 1967). Accordingly, section 1151(a) solves the potential problems of checkerboard jurisdiction within particular reservations created by the patenting of selected parcels therein. *See* Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358 (1962). This checkerboard jurisdiction problem had so plagued law enforcement on Indian reservations in Kansas prior to the enactment of section 1151 that Congress sought to cure the problem by partially vesting criminal jurisdiction in the state. 18 U.S.C. § 3243 (1970). *See* Letter from E. K. Burlew, *supra* note 34.

The second provision of section 1151 designed to cure residual jurisdictional problems left by the allotment program is the first clause of 1151(c), which brings within Indian country "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151(c) (1970). This provision assures that all allotted lands within Indian reservations to which trust title was indefinitely extended by the Indian Reorganization Act of 1934 will be considered Indian country for purposes of the federal jurisdictional statutes. See text accompanying note 36 *supra*. Even more important, however, is that 1151(c) contains no reference, unlike 1151(a), to a requirement that allotted land comprise property located within an established Indian reservation. The omission is deliberate. Section 1151(c) was intended to codify United States v. Pelican, 232 U.S. 442 (1914), where the Supreme Court held that allotted land within the Colville reservation which had been terminated as reservation land and placed in the public domain, was nevertheless Indian country, so long as an Indian held title to the allotted parcel. *Id.* at 449. Although *Pelican* strongly suggested that all allotted land to which Indian title had not been extinguished was Indian country, the pre-1948 case law in the state courts did not uniformly adhere to that principle. See text & notes 32, 34 *supra*. *See also Ex parte* Wallace, 81 Okla. Crim. 176, 162 P.2d 205 (1945); State v. Shepard, 239 Wis. 345, 300 N.W. 905 (1941). The codification of *Pelican* in section 1151(c) apparently ends any dispute as to whether lands allotted from the public domain, from former Indian reservations, are Indian country. All such allotments fall within the statutory definition. *See* DeCoteau v. District County Court, 420 U.S. 425, 428 (1975); *In re* Carmen's Petition, 165 F. Supp. 942, 945-46 (N.D. Cal. 1958), *aff'd sub nom.* Dickson v. Carmen, 270 F.2d 809 (9th Cir. 1959), *cert. denied*, 361 U.S. 934 (1960).

Congress has specifically included rights-of-way running through any Indian reservation or allotment within its definition of Indian country. This clarified prior case law as to whether state highways or railroad rights-of-way running through a reservation constituted Indian land for jurisdictional purposes. *Compare* United States v. Soldana, 246 U.S. 530 (1918); *In re* Konaha, 131 F.2d 737 (7th Cir. 1942); *and* People *ex rel.* Schuyler v. Livingstone, 123 Misc. 605, 205 N.Y.S. 888 (Sup. Ct. 1924), *with* Clairmont v. United States, 225 U.S. 551 (1912); *and Ex parte* Tilden, 218 F. 920 (D. Idaho 1914). Since jurisdiction over reservations not affected by special congressional legislation, see text & note 8 *supra*, is traditionally federal and tribal, the inclusion in the definition of highway rights-of-way restricts the authority of the state to enforce traffic and highway laws over such roads. *See* Ortiz-Barraza v. United States, 512 F.2d 1176, 1180 (9th Cir. 1975); *In re* Konaha, 131 F.2d 737 (7th Cir. 1942); State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963); State v. Begay, 63 N.M. 409, 320 P.2d 1017 (1958). *See generally* Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974) (North Dakota federal district

The cumulative breadth of the definition of Indian country found in section 1151 is evident. For example, the reservations of the Sac and Fox Tribe in Iowa and the Eastern Band of Cherokee in North Carolina both constitute Indian country[38] even though they were established de facto by the refusal of members of the tribes to comply with treaty provisions calling for their removal to other lands.[39] In *State v. Youngbear*,[40] the Iowa supreme court correctly stated that the appropriate test to determine whether a reservation is within the definition of Indian country set forth in section 1151 is not how the land was acquired, but rather whether the land has been set apart for the use and occupancy of Indians.[41] To be sure, this test does not mean that by simply congregating in any confined area, such as a hospital or apartment building, Indians can claim to be residing in Indian country.[42] Under section 1151(a) and (c), there must be federal

court had no federal question or diversity jurisdiction over a tort claim arising out of an automobile accident on the Standing Rock Indian Reservation); Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973) (North Dakota state courts had no jurisdiction over a tort claim for an automobile accident occurring on highways within the Turtle Mountain Indian Reservation); "Enforcement of State Financial Responsibility Laws Within Indian Country," 17 ARIZ. L. REV. 639, 831 (1975).

38. United States v. Hornbuckle, 422 F.2d 391 (4th Cir. 1970) (Eastern Band of Cherokee Reservation in North Carolina); Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977); State v. Youngbear, 229 N.W.2d 728 (Iowa), *cert. denied*, 423 U.S. 1018 (1975) (Sac and Fox Reservation in Iowa). *See also* United States v. Loosiah, 537 F.2d 1250 (4th Cir. 1976); United States v. Patron, 132 F.2d 886 (4th Cir. 1943); United States v. Wright, 53 F.2d 300 (4th Cir. 1931); State v. Ta-cha-na-tah, 64 N.C. 614 (1817).

39. The Sac and Fox had been required to leave most of Iowa by the Treaty with the Sac and Fox Indians, Oct. 11, 1842, art. III, 7 Stat. 596. However, many Sac and Fox remained in, or returned to, their former homes. In 1856 the Iowa General Assembly passed a statute purporting to give consent to certain members of the Sac and Fox Tribe to remain in Iowa despite the treaty. Ch. 30, § 1, [1856] Iowa Acts Extra Sess. 77. In 1896, Iowa ceded jurisdiction over this reservation to the federal government subject to certain limitations. Ch. 110, § 1, [1896] Iowa Acts 114. *See also* Act of June 10, 1896, ch. 398, 29 Stat. 321. Ultimately, Congress attempted to resolve the jurisdictional maze previously created, by the Act of June 30, 1948, ch. 759, 62 Stat. 1161. *See generally* Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977); State v. Youngbear, 229 N.W.2d 728 (Iowa), *cert. denied*, 423 U.S. 1018 (1975).

The Eastern Band of Cherokee Reservation exists despite the Treaty of New Echota of 1835, which extinguished Cherokee possessory rights in North Carolina and required the tribe to move beyond the Mississippi River. Treaty with the Cherokees, Dec. 29, 1835, art. 1, 7 Stat. 478. Article 12 of that treaty, however, permitted Cherokees who were adverse to removal and who desired to become citizens to remain and be entitled to certain preemption rights to parcels of the ceded land. Those preemption rights were, however, extinguished by a supplementary agreement. Treaty with the Cherokees, Mar. 1, 1836, art. 1, 7 Stat. 488. Approximately 1,200 Cherokees ultimately remained in North Carolina after the removal. They continued to reside in their ancestral homes and continued their tribal existence and way of life. Gradually this remnant of the Cherokee Nation in North Carolina was restored to its status as an Indian tribe; treaty funds were used to repurchase some of the tribe's land and the federal and state governments gradually began to recognize the group's status as an Indian tribe in the late 19th century. *See generally* United States v. Wright, 53 F.2d 300 (4th Cir. 1931).

40. 229 N.W.2d 728 (Iowa), *cert. denied*, 423 U.S. 1018 (1975). *See also* Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977).

41. 229 N.W.2d at 732.

42. United States v. Martine, 442 F.2d 1022, 1024 (10th Cir. 1971); State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (1974).

recognition of land as an Indian reservation or allotment, or, alternatively, under section 1151(b), the existence and dependent nature of the affected Indian community must be established.[43]

Once it is established that land has been set aside for an Indian tribe, another question which must be confronted is whether the land has been removed from the category of Indian lands, by termination, cession, extinguishment of Indian title, or otherwise. Courts are emphatic that only by a very clear expression of Congress can lands set aside for Indian use be terminated and removed from the definition of Indian country.[44] One recent finding of a clear congressional extinguishment of Indian land status is *DeCoteau v. District County Court.*[45] In *DeCoteau*, the Supreme Court found that the Lake Traverse Indian Reservation in South Dakota, created by treaty in 1867, had been terminated and returned to the public domain by an 1891 agreement, ratified by Congress, which ceded and conveyed all unallotted lands therein to the United States. Although the Court noted that it "does not lightly conclude that an Indian reservation has been terminated," congressional intent was found clearly to be to terminate the reservation.[46] Even though the Lake Traverse Reservation no longer existed and the non-Indian lands were subject to state jurisdiction, the *DeCoteau* Court recognized that the *allotted* Indian trust

43. A split formerly existed in the cases as to the extent to which lands held for Alaskan natives and their descendants are Indian country within the meaning of section 1151. *Compare* United States v. Booth, 161 F. Supp. 269 (D. Alas. 1958), *with In re* McCord, 151 F. Supp. 132 (D. Alas. 1957). *Cf. In re* Sah Quah, 31 F. 327 (D. Alas. 1886). However, since Congress chose to vest complete criminal jurisdiction over Alaskan natives in the state, that issue has little current vitality. 18 U.S.C. § 1162(a) (1970).

44. Antoine v. Washington, 420 U.S. 194 (1975); United States v. Celestine, 215 U.S. 278 (1909); Kills Plenty v. United States, 133 F.2d 292 (8th Cir.), *cert. denied*, 319 U.S. 759 (1943); United States v. Frank Black Spotted Horse, 282 F. 349 (D.S.D. 1922); State v. Molash, 86 S.D. 558, 199 N.W.2d 591 (1972); *In re* DeMarrias, 77 S.D. 294, 91 N.W.2d 480 (1958). Thus, in Mattz v. Arnett, 412 U.S. 481 (1973), the Supreme Court held that the Klamath River Reservation in California, originally established in 1855 by Executive order, was still Indian country, despite later congressional actions requiring the consolidation of California Indians into four reservations, none of which included the Klamath River Reservation, and despite the opening of the Reservation to white homesteading by a federal statute passed in 1892. After reviewing these and other legislative enactments impairing the territorial integrity of the Reservation, the Court found absent "clear termination language" necessary to end the Reservation's Indian lands status. *Id.* at 504. Similarly, in Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962), the Court found that a crime committed on the southern half of the Colville Reservation occurred in Indian country despite the opening of unallotted surplus land on that reservation to white homesteading in 1906, and irrespective of whether the land in question had been patented to an Indian or non-Indian. The Court ruled that so long as the land was located within the limits of an established reservation it did not cease to be Indian country until clearly separated therefrom by Congress. *Id.* at 359. *But see* DeCoteau v. District County Court, 420 U.S. 425 (1975).

45. 420 U.S. 425 (1975). *See also* Williams v. State, 393 P.2d 887 (Okla. Crim. 1964); Ellis v. State, 386 P.2d 326 (Okla. Crim. 1963), *cert. denied*, 376 U.S. 945 (1964); State v. Jameson, 77 S.D. 527, 95 N.W.2d 181 (1959).

46. 420 U.S. at 444.

lands were still within Indian country and subject solely to tribal and federal jurisdiction.[47]

In short, the definition of Indian country set forth in section 1151 is quite expansive. Once a reservation has been established, or a dependent Indian community shown to exist, it will remain Indian country until terminated by Congress, irrespective of the nature of the land ownership. Moreover, even if individual allotted parcels of land are not located within the reservation, they may still constitute Indian country if the Indian title thereto has not been extinguished. A finding that the land on which a crime was committed is Indian country will generally result in exclusive tribal and federal jurisdiction, thereby excluding the exercise of state authority. Hence, the expansiveness of the definition of Indian country is important in preserving policies of tribal self-government and the protective federal trusteeship over Indians.

### C. *Who is an Indian: A Problem of Jurisdictional Definition*

The language of sections 1152, 1153, and 3242 of title 18 of the United States Code not only limits the application of federal Indian criminal jurisdiction to Indian country; it also draws significant jurisdictional distinctions based on whether the victim or the accused is Indian. While the racial or cultural identity of the persons involved in the crime appears to be a relatively simple matter to ascertain, in fact, the question of Indian status for purposes of criminal jurisdiction is perplexing. No statutory definition currently exists to guide courts and practitioners in determining Indian status under the federal criminal jurisdiction statutes.[48]

47. *Id.* at 446. It should be noted, however, that the definition of Indian country affecting allotments contained in section 1151(c) requires that the Indian title not be extinguished, unlike the reference to the patenting of land contained in section 1151(a). Thus, allotted Indian land outside a reservation remains Indian country only so long as the Indian title continues to exist. *See* United States v. Mazurie, 419 U.S. 544 (1975); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962); Lufkins v. United States, 542 F.2d 476 (8th Cir. 1976). On the other hand, the sale of patented land to non-Indians within the limits of an established reservation does not withdraw the land from the definition of Indian country. *See* Hilderbrand v. Taylor, 327 F.2d 205 (10th Cir. 1964); Guith v. United States, 230 F.2d 481 (9th Cir. 1956); 18 U.S.C. § 1151(a) (1970).

48. While no statutory or regulatory definition of an Indian exists for federal jurisdictional purposes, 25 C.F.R. § 11.2(c) (1976) does define an Indian for purposes of the jurisdiction of the Courts of Indian Offenses. The definition includes "any person of Indian descent who is a member of any recognized Indian tribe now under federal jurisdiction." Statutory or regulatory definitions of an Indian have been created for purposes other than jurisdiction. *See, e.g.*, 25 U.S.C. § 345 (1970) (for allotment purposes, any person "in whole or in part of Indian blood or descent" included); *id.* § 302 (for nontreaty educational appropriation purposes a child must have no less than one-fourth Indian blood); 25 C.F.R. § 32.1 (1976) (educational benefit definition paralleling and explaining section 302 definition); *id.* § 34.3 (persons of one-fourth or more degree of Indian blood for vocational training programs); *id.* § 91.1(c) (for

Ethnologically, Indians or Native Americans are a racial category distinguishable from Caucasians, Blacks, Mongolians, or other races.[49] However, "Indian" as used in relevant federal jurisdictional statutes cannot be used to refer exclusively to a person of Indian blood. Both intermarriage and the adoption of ethnologically non-Indian people into Indian tribes[50] require that "Indian," when used in this context, take on a social as well as a racial meaning.[51] Otherwise, the status of persons of mixed blood would pose a difficult problem, as such persons have long been recognized by the federal government as Indians.[52]

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business loan purposes an Indian is a member of any Indian tribe, band, group, public, or community recognized by the federal government as eligible for Bureau of Indian Affairs services, and includes Alaskan natives); 42 C.F.R. § 36.12 (1975) (for health services the test is recognition as an Indian in the community in which he lives).

The National American Indian Judges Association has proposed the addition of an overall definition of the term "Indian" to title 18:

*Proposed New Statute—18 U.S.C. Sec. 1150*

For the purpose of this title, the term "Indian" shall mean:

(a) any person who is an enrolled member of, or is or was entitled to be enrolled as a member of, any Indian tribe, recognized or which was at any time recognized by the United States Government.

(b) any person of Indian descent who is recognized by any Indian tribe, which is or was, at any time, recognized by the United States Government, as an American Indian for any purpose whatsoever, but not restricted to enrollment, tribal membership, or receipt of tribal benefits.

(c) any person, who is not a United States citizen, but is of Indian descent and who is within the territorial limits of Indian country as defined in Section 1151 of this title.

(d) any Eskimo, Aleut, or other member of an Alaskan aboriginal group.

4 NAT'L AM. INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN 61 (1974). The explanatory notes to this proposed statute elucidate its purposes:

1. The purpose of this statute is to provide law enforcement agencies with a working definition of the term "Indian" as used in chapter 53 of Title 18 of the United States Code. This is necessary because of the classifications imposed by other sections of this title and because of the present definitional limitations placed upon tribal courts. With the removal of these limitations, obviously this statute would not be needed for purposes of criminal jurisdiction.

2. Subparagraph (a) is intended to include those Indian members of terminated Indian tribes who were, or were entitled to be, enrolled as members of that tribe. Also included in this subparagraph are enrolled members or members entitled to be enrolled in presently existing tribes.

3. Subparagraph (b) is intended to include those members of Indian tribes that may occupy a status that does not fall under present statutory definitions for federal services to Indians. It is also intended to include those persons whom the Indian tribes recognize as "Indians."

4. It is the intention of subparagraph (c) to include those members of Canadian and Mexican Indian tribes who are on Indian land in this country, even if only temporarily.

5. The purpose of subparagraph (d) is to clarify the definitional problems involved with Alaskan natives.

*Id.* at 61-62. This definition, to some extent, would alter the present judicial definition of an Indian discussed in this section. See text accompanying notes 49-81 *infra.*

49. F. COHEN, *supra* note 23, at 2.

50. J. REID, A LAW OF BLOOD 189-90 (1970).

51. F. COHEN, *supra* note 23, at 2.

52. *See, e.g.*, Treaty with the Cheyennes and Arapachoes, Oct. 14, 1865, art. 5, 14 Stat. 703; Treaty with the Sock [*sic*] and Fox Indians, Aug. 4, 1824, art. 3, 7 Stat. 229; Treaty with the Wyandots, Senecas, Delewares, Shawanees, Potawatomees, Ottawas, and Chippeways, Sept. 29, 1817, art. 8, 7 Stat. 163. *See also* 25 U.S.C. § 163 (1970) (mixed-blood Indians included in membership roll of Indian tribes); *id.* § 184 (rights of children born of marriages between white men and Indian women); *id.* § 345 (authorizes action for allotments by persons who are in whole or part of Indian blood); *id.* § 479

Like Indian country, "Indian" has become a term of legal art, its definition dependent in part upon the purposes for which the distinction is drawn. Although early cases diverged regarding the acceptability of a genealogical test to determine Indian status,[53] today the accepted approach to determining the status of the accused or victim rejects genealogy and explores instead some of the social implications of Indian status. The classic discussion of the test for Indian status for criminal jurisdictional purposes may be found in *Ex parte Pero*.[54] In *Pero*, two persons convicted in state court of a crime committed on an Indian reservation applied for a writ of habeas corpus, contending that the state courts lacked jurisdiction over a crime committed by an Indian on an Indian reservation.[55] Moore, one of the petitioners, was the son of a fullblood Indian mother and a halfblood Indian father, both of whom resided on an Indian reservation.[56]

To resolve the issue of whether Moore was an Indian, thereby subject to exclusive federal jurisdiction, the Seventh Circuit explored prior cases which attempted to formulate a test for the determination of Indian status of persons of mixedblood, and which had collated three different tests: "(1) preponderance of Indian blood, (2) habits of the person, and (3) substantial amount of Indian blood plus a racial status in fact as an Indian."[57] The last test combines elements of the first two and avoids excessive reliance on the quantum percentage of Indian blood. Although the *Pero* court found Moore to be an Indian under any of these three tests,[58] after *Pero*, the general test for persons of mixedblood apparently is the last one,[59] requiring a person to have a

(definition of Indian for allotment and other limited purposes includes persons of one-half or more Indian blood). For a collection of treaties and statutes recognizing the rights of mixedblood Indians, see F. COHEN, *supra* note 23, at 3 n.14.

53. Some early cases followed English common law and held that the child of a mixed marriage assumed the status of the father. *See* United States v. Hadley, 99 F. 437 (C.C.D. Wash. 1900); United States v. Ward, 42 F. 320 (C.C.S.D. Cal. 1890). Others, while seemingly accepting the determination of Indian status by descent, rejected a test based solely on patrilineal descent. Alberty v. United States, 162 U.S. 499 (1896); Waldron v. United States, 143 F. 413 (C.C.D.S.D. 1905); United States v. Sanders, 27 F. Cas. 950 (No. 16,220) (C.C.D. Ark. 1847). Other courts formulated tests based on the amount of Indian blood or racial characteristics. *See, e.g., Ex parte* Pero, 99 F.2d 28, 31 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939); Vezina v. United States, 245 F. 411 (8th Cir. 1917); Sully v. United States, 195 F. 113 (8th Cir. 1912); Doe *ex rel.* LaFontaine v. Avaline, 8 Ind. 6 (1856); State v. Mendez, 57 Nev. 192, 61 P.2d 300 (1936). Recognizing that many Indian tribes internally resolved questions of status through matrilineal structures, several courts rejected imposition of the English common law rule on the tribes. *See, e.g.*, Waldron v. United States, *supra*; Davison v. Gibson, 56 F. 443 (8th Cir. 1893). *See also* 20 OP. ATT'Y GEN. 711 (1894).

54. 99 F.2d 28 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939).

55. *Id.* at 29.

56. *Id.* at 30.

57. *Id.* at 31.

58. *Id.*

59. Having its roots in the United States Supreme Court's decision in United States v. Rogers, 45 U.S. (4 How.) 567 (1846), the test has been frequently applied in 20th century cases. *See, e.g.*, United States v. Ives, 504 F.2d 935, 953 (9th Cir. 1974);

demonstrable but not fixed percentage of Indian blood[60] and be recognized as an Indian. Courts look to a number of factors to determine whether a person is recognized as an Indian, with no single factor dispositive. Recognition might be by society as a whole,[61] the Indian tribe,[62] or the federal government.[63] However, failure to be officially enrolled as a tribal member is not dispositive of Indian status for jurisdictional purposes.[64]

While the Indian blood plus racial status test is generally applied to ascertain whether persons of mixedblood are Indians, it cannot be assumed that all fullblood Indians are Indians for jurisdictional purposes. In *Ex parte Pero*,[65] Pero, the second petitioner, was a fullblood Indian of the Chippewa Tribe. He had been allotted land under the allotment program, and had received a certificate of competency removing the restrictions against alienating his land, prior to the commission of the charged crime.[66] Under the relevant allotment statutes, an Indian who received a patent on allotted land was made a citizen of the United States and subjected to the civil and criminal laws of the

United States v. Higgins, 103 F. 348 (C.C.D. Mont. 1900); *In re* Carmen's Petition, 165 F. Supp. 942, 947-48 (N.D. Cal. 1958), *aff'd sub nom.* Dickson v. Carmen, 270 F.2d 809 (9th Cir. 1959), *cert. denied*, 361 U.S. 934 (1960); United States v. Gardner, 189 F. 690 (E.D. Wis. 1911); State v. Attebery, 110 Ariz. 354, 519 P.2d 53 (1974); State v. Phelps, 93 Mont. 277, 19 P.2d 319 (1933); Fox v. Bureau of Revenue, 87 N.M. 1261, 531 P.2d 1234 (1975). *See also* F. COHEN, *supra* note 23, at 2-5.

60. Under the requirement that an Indian possess some percentage of Indian blood, tribal adoptions of ethnological non-Indians seemingly would not render the person in question an Indian for jurisdictional purposes. While this situation is probably nonexistent today, it posed a recurrent problem in some of the Supreme Court's 19th century cases. The Court at first rejected the view that racially non-Indian persons could become Indian through tribal adoption. United States v. Rogers, 45 U.S. (4 How.) 567 (1846). In Nofire v. United States, 164 U.S. 657 (1897), however, the Supreme Court held that a white man adopted by an Indian tribe was a tribal member for purposes of a federal statute reserving to the tribe exclusive jurisdiction to try intratribal offenses. *See also* Lucas v. United States, 163 U.S. 612 (1896); Alberty v. United States, 162 U.S. 499 (1896). Although the technical issue in *Nofire* was whether a person adopted by an Indian tribe was a member of the tribe for purposes of federal statutes vesting exclusive jurisdiction over intratribal crimes with the tribe, it would be peculiar to hold that a non-Indian adopted by an Indian tribe was a member of the tribe, but not an Indian, for jurisdictional purposes. Arguably, *Nofire* permits a person of non-Indian origin to become an Indian for jurisdictional purposes by tribal adoption and affiliation. Since *Nofire* has never been overruled, it calls into question the prong of the traditionally accepted test for Indian status which requires an Indian to be in part genetically descended from persons of Indian blood. At the very least, for purposes of ascertaining tribal court jurisdiction, tribal adoption of non-Indians might render such persons Indians. In this sense, "Indian" would wholly lose any biological meaning and become exclusively a term of social group identification and acceptance.

61. *See* People *ex rel.* Schuyler v. Livingstone, 123 Misc. 605, 205 N.Y.S. 888 (Sup. Ct. 1924).

62. *See Ex parte* Pero, 99 F.2d 28 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939); United States v. Gardner, 189 F. 690 (E.D. Wis. 1911).

63. United States v. Gardner, 189 F. 690 (E.D. Wis. 1911).

64. *Ex parte* Pero, 99 F.2d 28 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939); *In re* Carmen's Petition, 165 F. Supp. 942 (N.D. Cal. 1958), *aff'd sub nom.* Dickson v. Carmen, 270 F.2d 809 (9th Cir. 1959), *cert. denied*, 361 U.S. 934 (1960).

65. 99 F.2d 28 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939).

66. *Id.* at 30.

state in which he resided.[67] The *Pero* court concluded that a fullblood Indian who received a patent on allotted land might no longer be an Indian for purposes of the protective federal criminal jurisdiction. However, since Pero had never received a formal patent, but only an improvidently issued certificate of competency, he was nevertheless found to be an Indian.[68]

*Pero* indicates that more than mere racial identification is sometimes necessary to establish Indian status for jurisdictional purposes. The argument has been put forth that when the necessity for the protective federal jurisdiction over Indians has been served, and Indians are assimilated into the general population of the state through the allotment program or otherwise, they cease being Indians for jurisdictional purposes, even though identifiable as Indians on a racial level.[69] This result occurs as to Indians whose tribes were terminated from federal supervision under the termination program of the fifties and early sixties.[70] Indeed, some courts hold that any Indian, irrespective of whether he was a patentee under the allotment program or a member of a terminated tribe, will no longer be considered an Indian, if by examination of his habits and lifestyle it is clear that he has been "emancipated in some manner, as, for example, by severing tribal relations and taking on civilized habits."[71] From these cases emerges a test for In-

67. *Id.* at 32. *See* Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 (1970)); Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388. The Department of the Interior has repeatedly noted that these provisions apply only to the "allottee" and do not apply to the heirs of an allottee who may nevertheless have secured ownership of the allottee's patented lands. Patents in Fee, 61 I.D. 298, 302 (1954); Sisseton Reservation, 58 I.D. 455, 459 (1943). *But see* People v. Pratt, 26 Cal. App. 2d 618, 80 P.2d 87 (Ct. App. 1938).

68. 99 F.2d at 35.

69. Eugene Sol Louie v. United States, 274 F. 47, 49 (9th Cir. 1921); United States v. Kiya, 126 F. 879 (D.N.D. 1903); State v. Lott, 21 Idaho 646, 123 P. 491 (1912); *In re* Now-ge-zhuck, 69 Kan. 410, 76 P. 877 (1904); State v. Monroe, 83 Mont. 556, 274 P. 840 (1929); State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926); State v. Williams, 13 Wash. 335, 43 P. 15 (1895). *But see In re* Carmen's Petition, 165 F. Supp. 942, 948 (N.D. Cal. 1958), *aff'd sub nom.* Dickson v. Carmen, 270 F.2d 809 (9th Cir. 1959), *cert. denied,* 361 U.S. 934 (1960).

70. For example, 25 U.S.C. § 677v (1970) provides:

> Upon removal of Federal restrictions on the property of each individual mixed-blood member of the tribe, the Secretary shall publish . . . a proclamation declaring that the Federal trust relationship to such individual is terminated . . . . All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated, and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

*See* 25 U.S.C. §§ 803, 980 (1970). *See generally* United States v. Heath, 509 F.2d 16 (9th Cir. 1974).

71. People v. Carmen, 43 Cal. 2d 342, 349, 273 P.2d 521, 525 (1954); *see* State v. Attebery, 110 Ariz. 354, 519 P.2d 53 (1974); People v. Ketchem, 73 Cal. 635, 15 P. 353 (1887); State v. Bush, 195 Minn. 413, 263 N.W. 300 (1935); State v. Campbell, 53 Minn. 354, 55 N.W. 553 (1893); State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926); People *ex rel.* Schuyler v. Livingstone, 123 Misc. 605, 205 N.Y.S. 888 (Sup. Ct. 1924); State v. Nimrod, 30 S.D. 239, 138 N.W. 377 (1912); State v. Howard, 33 Wash. 250, 74 P. 382 (1903).

dian status based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive.

The totality of circumstances approach to defining Indian status is appealing, but it is open to question when used to exclude from Indian status either a fullblood Indian, or a mixedblood individual who is generally recognized as an Indian, solely because of membership in a terminated tribe, reception of a patent under the allotment program, or a non-Indian lifestyle. The assumption made to justify the totality of circumstances test is that special jurisdictional arrangements for Indians exist solely to protect them as individuals until such time as they take on the habits of civilization, and assimilate into the population as a whole. This position takes too narrow a view of the reasons for special jurisdictional arrangements and of the ebb and flow of federal Indian policy.

First, the special jurisdictional arrangements for Indians were created not only to protect them until they took on white ways, but also to assure a measure of tribal control over Indian lands. Until the enactment of the Federal Major Crimes Act in 1885,[72] neither state nor federal courts exercised jurisdiction over intra-Indian or intratribal crimes occurring on Indian lands.[73] Even when the federal government assumed jurisdiction over intra-Indian crimes committed on Indian lands, it chose to assume jurisdiction only over a limited list of serious crimes, leaving the residue of lesser crimes to tribal enforcement.[74] A continuing reason for the special jurisdictional arrangements for Indian lands is to assure some measure of tribal self-government and control over tribal lands, and this policy is applicable whether the person who committed the crime is emancipated, a member of a terminated tribe, or has received a patent.[75]

72. Ch. 341, § 9, 23 Stat. 362, 385, *as amended,* Act of May 29, 1976, Pub. L. No. 94-297, § 2, 90 Stat. 585 (codified at 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976)).

73. Jurisdiction was exercised exclusively by the tribes. *See Ex parte* Crow Dog, 109 U.S. 556, 567 (1883). *See also* Nofire v. United States, 164 U.S. 657, 662 (1897); Talton v. Mayes, 163 U.S. 376, 380-81 (1896).

74. 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976); *see* Sam v. United States, 385 F.2d 213 (10th Cir. 1967); Glover v. United States, 219 F. Supp. 19 (D. Mont. 1963); Iron Crow v. Ogallala Sioux Tribe, 129 F. Supp. 15 (D.S.D. 1955), *aff'd,* 231 F.2d 89 (8th Cir. 1956). *Compare* Talton v. Mayes, 163 U.S. 376 (1896), *with* United States v. Whaley, 37 F. 145 (C.C.S.D. Cal. 1888).

75. United States v. Burland, 441 F.2d 1199 (9th Cir.), *cert. denied,* 404 U.S. 842 (1971). *But see* United States v. Heath, 509 F.2d 16 (9th Cir. 1974). Heath was a Klamath Indian who killed a member of the Warm Springs Indian Tribe on the Warm Springs Reservation. On appeal of his conviction under 18 U.S.C. § 1153 (1970), *as amended,* 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976), defendant challenged the federal court's jurisdiction on the ground that he was not an Indian, thus negating a jurisdictional prerequisite to section 1153. 509 F.2d at 18. Noting that the Klamath Tribe had been terminated by Congress, the Ninth Circuit held that a member of that tribe was no longer an Indian for jurisdictional purposes. *Id.* at 19. However, since the crime occurred on the reservation of the nonterminated Warm Springs Indian Tribe, and the victim was an Indian, the federal trusteeship over that tribe and its lands suggests a

A second reason to reject the cases which suggest that Indian patentees, emancipated Indians, and members of terminated tribes are not Indians for jurisdictional purposes, is that these cases conflict with modern federal Indian policy. Today, although the Indians are no longer an illiterate group of tribes deemed uncivilized by the standards imposed on them by non-Indians, Indian reservations and efforts to further Indian self-government and tribal ties are still maintained by Congress and the President.[76] Whether an Indian has taken on a partially non-Indian lifestyle should not be dispositive of his status as an Indian. The reservation system itself imposed a non-Indian lifestyle on many of the nomadic, hunting tribes.[77] Yet, surely Congress envisioned that the special jurisdictional arrangements it promulgated for Indian lands would apply to such tribes despite their forced change in lifestyle.[78] Although the allotment statutes of the late 19th and early

continuing federal interest in jurisdiction, even though the person who committed the crime was a member of a terminated tribe. *See id.* at 20. The conviction was nevertheless upheld under section 1152, the interracial crime provision, despite the allegation of section 1153 jurisdiction in the indictment. *Id.*; see text & notes 89-133 *infra*.

Despite its conflict with the *Heath* decision, the position taken here is supported by 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976), which does not expressly draw distinctions based on tribal relationships, covering major crimes committed by an Indian in Indian country. It does not expressly require that the accused be a member of the tribe on whose lands the crime was committed; its terms purport to cover either intertribal or intratribal crimes. Thus, if a crime is committed in Indian country, it should make little difference for jurisdictional purposes that the perpetrator of the crime is an Indian patentee or the member of a terminated tribe, so long as he is identifiable racially and socially as an Indian. Cases like *Heath* appear to take too narrow a view of the purposes of federal jurisdiction over Indian lands in their definition of Indian status.

Of course, the crime must occur in Indian country. While patents within Indian reservations are Indian country under 18 U.S.C. § 1151(a) (1970), the lands formerly held by terminated tribes do not constitute Indian country. The termination statutes commonly provide for the transfer of Indian lands to a corporation or legal entity organized by the tribe and termination of the reservation along with its trust status. *See, e.g.*, 25 U.S.C. §§ 564e, 564g, 564r (1970). The lands of terminated tribes no longer constitute an Indian reservation within the definition of Indian country contained in section 1151(a). Furthermore, no argument can be made that terminated tribes constitute "dependent Indian communities" within the section 1151(b) definition of Indian country, since the termination acts declared the terminated tribes independent of the federal government and terminated federal services to them. *See* 25 U.S.C. § 564q (1970). For a member of a terminated tribe to commit a federal crime in Indian country, he must commit the crime on the lands of a nonterminated tribe. In such a case, if the accused had moved his residence to the Indian lands on which the crime was committed, his residence on the lands of the nonterminated tribe suggests that he was not totally emancipated, despite the enactment of a termination act covering his tribe. Hence, the accused remains in need of the protective federal and tribal jurisdiction.

76. *See* 25 U.S.C. §§ 903-903f (Supp. V, 1975) (restoration of federal supervision to the Menominee Tribe of Wisconsin); Message from President Nixon to Congress, H.R. Doc. No. 91-363, 91st Cong., 2d Sess. 2-3 (1970), in 116 CONG. REC. 23258 (1970).

77. *See generally* D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970); A. WALLACE, THE DEATH AND REBIRTH OF THE SENECA (1969).

78. Evidence that congressional policy does not envision that imposed changes in Indian lifestyle should deprive Indians of their Indian status for jurisdictional purposes is found in the inclusion within the definition of Indian country in 18 U.S.C. § 1151(a) (1970) of all patented lands within Indian reservations. It would certainly be ironic to hold that patented lands held by a person of Indian ancestry are Indian country, but that the landholder is not an Indian.

20th centuries, and the termination acts of the fifties and early sixties, purported to subject the affected Indians to state jurisdiction,[79] these provisions should be construed narrowly in accordance with the results intended by Congress. Congress expected that the reservations of the affected Indian tribes would be disbanded through the allotment or termination programs.[80] The disbanded lands would come within the law enforcement jurisdiction of the states in which they were located. Congress arguably did not intend that the affected Indians would cease being Indian for all jurisdictional purposes, which would have marked a sudden and radical departure from its previous policy.[81] Although the current law is more complicated, the inquiry in all cases where Indian status is in issue for jurisdictional purposes should be whether the person in question has some demonstrable biological identification as an Indian and has been socially or legally recognized as an Indian.

### D. *The Jurisdictional Statutes*

Federal criminal jurisdiction over Indian lands is governed by three types of statutes. First, statutes creating federal crimes applicable to the nation as a whole are also applicable to Indian lands.[82] Second, statutes which proscribe specified conduct occurring on Indian lands create a federal crime with one of the material elements being the occurrence of the crime in Indian country.[83] The third type of criminal statute affecting Indian lands specifically purports to structure the jurisdictional patterns for prosecution of certain crimes occurring thereon. The most pervasive and important of these statutes are, of course, sections 1152, 1153, and 3242 of title 18.[84] However,

79. *See* text & notes 67-71 *supra*.

80. *See* Patents in Fee, 61 I.D. 298, 304 (1954); F. COHEN, *supra* note 23, at 208.

81. The cases supporting the treatment of patentees, members of terminated tribes, or Indians with no tribal ties as non-Indians for jurisdictional purposes, see cases cited notes 69, 71 *supra*, are not universally accepted. For contrary views, see Davis v. United States, 32 F.2d 860 (9th Cir. 1929); *In re* Carmen's Petition, 165 F. Supp. 942 (N.D. Cal. 1958), *aff'd sub nom.* Dickson v. Carmen, 270 F.2d 809 (9th Cir. 1959), *cert. denied*, 361 U.S. 934 (1960); State v. George, 39 Ore. 127, 65 P. 604 (1901); *cf.* Rice v. Olson, 324 U.S. 786, 790-91 (1945).

82. *See* United States v. McGrady, 508 F.2d 13 (8th Cir. 1974); United States v. Consolidated Wounded Knee Cases, 389 F. Supp. 235, 243-44 (D. Neb. 1975). For example, an Indian who assaults a federal officer engaged in the performance of his official duties can be prosecuted in federal court, under 18 U.S.C. § 111 (1970), irrespective of whether the crime occurred on or off the reservation. *See, e.g.*, United States v. Camp, 541 F.2d 737 (8th Cir. 1976); Stone v. United States, 506 F.2d 561 (8th Cir. 1974); Walks on Top v. United States, 372 F.2d 422 (9th Cir.), *cert. denied*, 389 U.S. 879 (1967).

83. For example, 18 U.S.C. §§ 1154-1156, 1161 (1970), establish federal crimes for the introduction and possession of intoxicating liquors on certain Indian lands. Since such crimes are themselves federally defined, they need no special jurisdictional statute and may be prosecuted exclusively in the federal courts under the general grant of jurisdiction to the federal courts to hear all cases involving offenses against the United States. 18 U.S.C. § 3231 (1970).

84. 18 U.S.C. § 1152 (1970); 18 U.S.C. § 3243 (1970); 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976).

other federal statutes, codified[85] and uncodified,[86] are also important in shaping the jurisdictional patterns. Sections 1152, 1153, and 3242 are the statutes of general applicability which structure the federal jurisdiction over most Indian reservations.[87] This section will consequently deal primarily with these provisions.[88]

85. *See, e.g.*, 18 U.S.C. §§ 1162, 3243 (1970); 25 U.S.C. §§ 232, 980, 1321-1326 (1970).

86. Act of Oct. 5, 1949, ch. 604, 63 Stat. 705 (Agua Caliente Reservation in California); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Sac and Fox Reservation in Iowa); Act of May 31, 1946, ch. 279, 60 Stat. 229 (Devil's Lake Reservation in North Dakota).

87. Other federal statutes of this type are generally efforts to reshape the jurisdictional patterns described in sections 13, 1152, 1153, and 3242, either for a particular reservation or for all reservations in particular states. *See* 18 U.S.C. §§ 1162, 3243 (1970). Since the thrust of these statutes is to grant to certain states law enforcement jurisdiction which they would otherwise not possess, these federal statutes will be discussed in the section of this Article dealing with state jurisdiction over Indian lands. See text & notes 218-49, 325-54 *infra*.

88. A brief review of the reasons for the federal jurisdiction conferred in sections 1152, 1153, and 3242 is appropriate. As the first Article in this series demonstrated, federal jurisdiction over Indian tribes and lands emerged first in the treaties as an effort by the federal government to protect the interests of its settlers against the separate Indian nations. Clinton, *supra* note 1, at 953. The Indian nations were considered domestic dependent nations and their lands were not viewed by the federal government as part of the states or subject to state control. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). *But see* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). Federal jurisdiction was the logical choice in those situations where tribal jurisdiction was considered insufficient to protect the interests of non-Indian inhabitants. Many of the early treaties provided for federal trials of residents of the United States who committed crimes on Indian lands or conversely for Indians who committed crimes against non-Indians on Indian lands. *See, e.g.*, Treaty with the Cherokees, July 2, 1791, art. X-XI, 7 Stat. 39; Treaty with the Creeks, Aug. 7, 1790, art. VIII-IX, 7 Stat. 35; Treaty with the Wyandots, Delawares, Ottawas, Chippewas, Pottawatimas, and Sacs, Jan. 9, 1789, art. V, 7 Stat. 28; Treaty with the Shawnees, Jan. 31, 1786, art. III, 7 Stat. 26; Treaty with the Chickasaws, Jan. 10, 1786, art. V-VI, 7 Stat. 24; Treaty with the Choctaws, Jan. 3, 1786, art. V-VI, 7 Stat. 21; Treaty with the Cherokees, Nov. 28, 1785, art. VI-VII, 7 Stat. 18; Treaty with the Wyandots, Delawares, Chippawas, and Ottawas, Jan. 21, 1785, art. IX, 7 Stat. 16. However, as the removal policy failed and Indian lands after 1861 began to be incorporated within the exterior boundaries of newly created states, federal jurisdiction over Indian lands took on a new function—protecting the Indians against their hostile white neighbors. This protective function of federal jurisdiction emerged under the so-called wardship or trusteeship theory of federal power over the Indian tribes. *See* Kagama v. United States, 118 U.S. 375 (1886); Worcester v. Georgia, *supra*. This view postulated that the Indians had ceded land to the United States government and, in many instances, expressly placed themselves by treaty under the protection of the national government. Accordingly, the federal government had an obligation to protect them from their hostile neighbors in the states.

Although the helplessness and weakness of the Indian tribes are not as great today as in the 19th century, the necessity of maintaining a law enforcement mechanism for the Indian tribes which separate them from state control is still important today. First, juries in communities immediately adjacent to Indian reservations are likely to be more hostile to an Indian defendant, due to common racial prejudice, than a federal jury drawn from a broader cross section of the population. Second, the course of federal dealings with the Indian tribes is antithetical to the exercise of complete state control over their lands. In segregating the Indian nations on reservations, providing paternalistic protection for the tribes, and later encouraging the development of tribal self-government, the federal government has never fully prepared the Indian tribes economically or socially for complete integration into the social and legal fabric of the states. *See generally* R. MEYER, HISTORY OF THE SANTEE SIOUX (1967); W. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW (1971); J. WISE, THE RED MAN IN THE NEW WORLD DRAMA (1971). Indeed, it is quite doubtful that the Indians either desire or would benefit from such an integration, as the recent failure of federal termination policy all too graphically highlights. *See* 25 U.S.C. §§ 903-903f (1970) (resumption of federal supervision over Menominee Tribe of Wisconsin); H.R. REP. No. 93-572, 93d Cong., 1st Sess. 9 (1973);

### 1. *Section 1152: The Interracial Crime Provision*

Section 1152 is the successor of the first general federal jurisdictional statutes enacted for Indian lands.[89] These early statutes were enacted as jurisdictional implementations of treaties which prescribed limited federal control over the lands reserved for the Indians. The Indian tribes, in negotiating treaties with the federal government, generally reserved tribal sovereignty and jurisdiction over intratribal matters.[90] This pattern of Indian internal self-government was respected in all of the federal jurisdictional statutes until 1885.[91] Section 1152 reflects the limited goals of the early jurisdictional statutes, stating:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[92]

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S. REP. No. 93-604, 93d Cong., 1st Sess. 11-12 (1973); *Hearings on H.R. 7421 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 1-2 (1973); Preloznik & Felsenthal, *The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination*, 51 N.D.L. REV. 53 (1974). *See also* Ames & Fisher, *The Menominee Termination Crisis: Barriers in the Way of a Rapid Cultural Transition*, 18 HUMAN ORGANIZATION 101 (1959); Edgerton, *Menominee Termination: Observations on the End of a Tribe*, 21 HUMAN ORGANIZATION 10 (1962). Thus, even the modern course of dealing between the federal government and the Indian tribes dictates a continuance of the separation of Indian lands from state law enforcement control and, possibly, the continued maintenance of protective federal criminal jurisdiction. Finally, to subject Indian lands to the complete control of the states would violate the spirit of most of the treaties with the Indian tribes and clearly breach the express provisions of some of them. *See generally* Clinton, *supra* note 1, at 953-58. While the nation has been none too hesitant to violate its treaty commitments to the Indian nations, the rejection of treaty commitments calling for special law enforcement arrangements on Indian lands is tantamount to rejecting any continued recognition of the Indian tribes as separate social and political groups of people deserving special recognition and attention in the eyes of the law. Such a rejection of treaty commitments to the Indian tribes would, of course, be the final insult in the long history of broken treaty commitments. *See generally* D. BROWN, *supra* note 77; V. DELORIA, OF UTMOST GOOD FAITH (1971); K. KICKINGBIRD & K. DUCKENEAUX, ONE HUNDRED MILLION ACRES (1973); R. MEYER, *supra*.

89. Act of Mar. 27, 1854, ch. XXVI, § 3, 10 Stat. 269; Act of June 30, 1834, ch. CLXI, § 25, 4 Stat. 729; Act of Mar. 3, 1817, ch. XCII, 3 Stat. 383. Earlier statutes had provided federal jurisdiction for non-Indians who committed crimes on Indian lands. *See, e.g.*, Act of Mar. 30, 1802, ch. XIII, 2 Stat. 139; Act of May 19, 1796, ch. XXX, §§ 4-6, 14, 1 Stat. 469; Act of July 22, 1790, ch. XXXII, §§ 5-6, 1 Stat. 137. *See also* Act of Jan. 17, 1800, ch. V, § 2, 2 Stat. 6.

90. *See* Treaty with the Cherokees, July 19, 1866, art. 13, 14 Stat. 799; Clinton, *supra* note 1, at 953-54 & n.18.

91. In that year, Congress enacted the Federal Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (now codified as amended in 18 U.S.C. § 1153 (Supp. Pamphlet 1976)); see text & notes 152-92 *infra*.

92. 18 U.S.C. § 1152 (1970).

The actual statutory crimes covered by section 1152 are relatively easy to describe. The first paragraph extends to Indian country the body of criminal law applied "within the sole and exclusive jurisdiction of the United States, except the District of Columbia"; that is, the body of federally defined crimes which Congress has established for other federal enclaves, such as national parks and military installations, as well as for admiralty and maritime law. Insofar as these crimes are promulgated, and their punishment prescribed by federal statute, the coverage of section 1152 is ascertainable from the United States Code.[93]

Although the first paragraph of section 1152 appears to broadly grant complete and exclusive federal jurisdiction over Indian country,[94]

93. For examples of such federally defined crimes, see 18 U.S.C. § 7 (1970); 18 U.S.C. §§ 114, 661-662, 1111-1113 (1970); 18 U.S.C. §§ 1363, 1851-1856, 2031-2032, 2111 (1970); 18 U.S.C.A. § 113 (Supp. Pamphlet 1976); 18 U.S.C.A. § 1201 (Supp. Pamphlet 1976). The Assimilative Crimes Act, 18 U.S.C. § 13 (1970), also applies to areas within the sole and exclusive jurisdiction of the United States. This Act incorporates state criminal law into the federal criminal code and makes it applicable to federal enclaves, while retaining a federal forum for the trial of such crimes. *See generally* United States v. Sharpnack, 355 U.S. 286 (1958); Williams v. United States, 327 U.S. 711 (1946); United States v. Butler, 541 F.2d 730 (8th Cir. 1976); United States v. Burland, 441 F.2d 1199 (9th Cir.), *cert. denied*, 404 U.S. 842 (1971); Acunia v. United States, 404 F.2d 140 (9th Cir. 1968); United States v. Gul, 204 F.2d 740 (7th Cir.), *cert. denied*, 346 U.S. 825 (1953); United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950); United States v. Heard, 270 F. Supp. 198 (W.D. Mo. 1967); United States v. Davis, 148 F. Supp. 478 (D.N.D.), *appeal dismissed*, 244 F.2d 717 (8th Cir. 1957); Arquette v. Schneckloth, 56 Wash. 2d 178, 351 P.2d 921 (1960). *But see In re* Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958). Although the Assimilative Crimes Act is discussed in detail in the next section, see text & notes 134-51 *infra*, note that the potential application of state criminal law to Indian lands through section 1152 severely complicates the jurisdictional arrangements established by that section. By partially incorporating state law into the federal code, the Assimilative Crimes Act makes the potential federal crimes which can be committed on an Indian reservation turn in part on the law of the state in which the Indian reservation is located. Thus, even where the protective federal jurisdiction under section 1152 applies, the Assimilative Crimes Act affords the states some opportunity to define criminal offenses for Indian lands. See discussion note 88 *supra*.

94. The language used in section 1152 suggests that federal jurisdiction is exclusive, and consequently the state courts have no jurisdiction over described crimes. A few older cases, particularly in the state courts, have construed the "sole and exclusive jurisdiction" phrase in the first paragraph of section 1152 to define the limitations on federal jurisdiction rather than an exclusion of state courts from hearing these matters. *In re* Wilson, 140 U.S. 575 (1891); New York v. Dibble, 62 U.S. (21 How.) 366 (1858) (dicta); *Ex parte* Sloan, 22 F. Cas. 324 (No. 12,944) (D. Nev. 1877); United States v. Ward, 28 F. Cas. 397 (No. 16,639) (C.C. Kan. 1863); Marion v. State, 20 Neb. 233, 29 N.W. 911 (1886); Marion v. State, 16 Neb. 349, 20 N.W. 289 (1884); Goodson v. United States, 7 Okla. 117, 54 P. 423 (1898); *Ex parte* Nowabbi, 60 Okla. Crim. 111, 61 P.2d 1134 (1936); State v. Nimrod, 30 S.D. 239, 138 N.W. 377 (1912); State v. Harris, 47 Wis. 298, 2 N.W. 543 (1879); State v. Doxtater, 47 Wis. 278, 2 N.W. 439 (1879). The prevailing rule today is that the federal jurisdiction conferred by sections 1152 and 1153 is exclusive; where one of these sections applies, the state has no jurisdiction. Williams v. United States, 327 U.S. 711 (1946); *In re* Konaha, 131 F.2d 737 (7th Cir. 1942); *In re* Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958); *In re* Now-gezhuck, 69 Kan. 410, 76 P. 877 (1904); State *ex rel.* Bokas v. District Court, 128 Mont. 37, 270 P.2d 396 (1954); State v. Phelps, 93 Mont. 277, 19 P.2d 319 (1933); State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926); State v. Begay, 63 N.M. 409, 320 P.2d 1017, *cert. denied*, 357 U.S. 918 (1958); Herd v. United States, 13 Okla. 512, 75 P. 291 (1904), *aff'd sub nom.* Brown v. United States, 146 F. 975 (8th Cir. 1906); *In re* De Marrias, 77 S.D. 294, 91 N.W.2d 480 (1958); Arquette v. Schneckloth, 56 Wash. 2d 178,

the coverage of section 1152 is far more limited than the language suggests. Indeed, the major complications in ascertaining the jurisdiction conferred by section 1152 emerge from the numerous situations excepted from coverage. The second paragraph of the section contains a number of important exceptions. First, section 1152 exempts "offenses committed by one Indian against the person or property of another Indian." Intra-Indian crimes are not covered by section 1152, in furtherance of the treaty policy affording the Indian nations a measure of tribal self-government.[95] This policy was undermined substantially in 1885, however, with the enactment of the Federal Major Crimes Act.[96]

Second, excluded from the federal jurisdiction of section 1152 are crimes committed on Indian lands between non-Indians. This exception is not based on any language contained in section 1152 but rather is a judicially-created exception. Its roots are found in a trilogy of Supreme Court decisions spanning 65 years: *United States v. McBratney*,[97] *Draper v. United States*,[98] and *New York ex rel. Ray v. Martin*.[99]

351 P.2d 921 (1960). This result is consistent with the protective function of the federal jurisdiction.

95. See discussion note 88 *supra*.

96. Ch. 341, § 9, 23 Stat. 362, 385 (now codified as amended in 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976)). The Federal Major Crimes Act is discussed in a following section. See text & notes 152-98 *infra*.

97. 104 U.S. 621 (1881). McBratney was convicted of murder after trial in the federal court for the district of Colorado. The crime occurred within the Ute Reservation, which lies wholly within the boundaries of the State of Colorado. Both McBratney and the victim were white. McBratney successfully moved to overturn the judgment for want of jurisdiction. The Court stated:

> The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception [in its enabling act] as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States.

*Id.* at 624.

98. 164 U.S. 240 (1896). Draper was convicted of murder in federal court, the crime alleged to have been committed on the Crow Indian Reservation, within the boundaries of Montana. Both Draper and the deceased were Negroes. Addressing the issue of jurisdiction, the Court reaffirmed *McBratney*:

> In . . . *McBratney* . . . this court held that where a State was admitted into the Union, and the enabling act contained no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than Indians or against Indians, the state courts were vested with jurisdiction to try and punish such crimes.
>
> . . . .
>
> . . . *United States v. McBratney* is therefore decisive of the question now before us, unless the enabling act of the State of Montana contained provisions taking that State out of the general rule and depriving its courts of the jurisdiction to them belonging and resulting from the very nature of the equality conferred on the State by virtue of its admission into the Union.

*Id.* at 242-43. The Court then held that Montana's Enabling Act—which stated: "And said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States"—was insufficient to warrant a departure from the rule of equality of statehood. *Id.* at 243-44.

99. 326 U.S. 496 (1946). In *Martin*, the Supreme Court upheld the state court

In each case, the Supreme Court found that proper jurisdiction for a crime committed on Indian lands between non-Indians was in the state courts rather than the federal forum which the language of section 1152 seemingly provided.[100] The Court paid scant attention to the language of section 1152, relying instead on the inherent jurisdiction exercised by the states over Indian lands within their borders as a consequence of their admission to the Union without an express disclaimer of jurisdiction.[101] Although the logic of this argument would apply equally well to interracial or even intra-Indian crimes committed on Indian lands, the Supreme Court has applied the *McBratney* analysis only to crimes committed on Indian lands between non-Indians. Indeed, dicta in later cases suggests that the rationale in *McBratney* and *Draper* has little to do with state sovereignty. Rather, the cases suggest that the non-ward status of the accused and the victim divests the federal government of any interest in prosecution despite the occurrence of the crime in Indian country.[102] Accordingly, *McBratney* and its progeny are ex-

conviction of a non-Indian for murder of a non-Indian within the confines of the Allegany Reservation. *Id.* at 498-99.

100. *See also In re* Wilson, 140 U.S. 575 (1891); United States v. Ward, 28 F. Cas. 397 (No. 16,639) (C.C. Kan. 1863); United States v. Bailiey, 24 F. Cas. 937 (No. 14, 495) (C.C. Tenn. 1834); United States v. Consolidated Wounded Knee Cases, 389 F. Supp. 235 (D. Neb. 1975); *Ex parte* Sloan, 22 F. Cas. 324 (No. 12,944) (D. Nev. 1877). *But see* Pickett v. United States, 216 U.S. 456 (1910) (homicide between blacks committed on Indian reservation prosecuted under predecessors of section 1152); Barclay v. United States, 11 Okla. 503, 69 P. 798 (1902) (facts indicate that a murder between non-Indians was prosecuted on federal side of territorial court solely because the act was committed on an Indian reservation). Although neither *Pickett* nor *Barclay* involved an Indian reservation within the confines of a state, prosecution on the federal rather than the territorial side of the district court is nonetheless significant. The *McBratney* trilogy all but ignores the existence of the jurisdiction conferred by the predecessors of section 1152. See text & notes 106-08 *infra*; cf. Wheeler v. United States, 159 U.S. 523 (1895); Westmoreland v. United States, 155 U.S. 545 (1895).

101. *See* New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

> We think the rule announced in the *McBratney* case controlling and that the New York Court therefore properly exercised its jurisdiction. For that case and others which followed it all held that in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries.

*Id.* at 499; see discussion notes 120-21 *supra*.

102. United States v. Ramsey, 271 U.S. 467, 469 (1926); Donnelly v. United States, 228 U.S. 243, 271-72 (1913). In *Ramsey*, two white men were charged with murdering a fullblood Osage Indian upon a reservation. Discussing the issue of federal court jurisdiction, the Court stated:

> The authority of the United States under § 2145 to punish crimes occurring within the State of Oklahoma, not committed by or against Indians, was ended by the grant of statehood. [citing *McBratney* and *Draper*] But authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before . . . in virtue of the long-settled rule that such Indians are wards of the nation in respect of whom there is devolved upon the Federal Government "the duty of protection, and with it the power." . . . The guardianship of the United States over the Osage Indians has not been abandoned; they are still the wards of the nation . . . and it rests with Congress alone to determine when that relationship shall cease.

271 U.S. at 469.

In *Donnelly*, the defendant, a white man, was charged for a crime committed within the Hoopa Valley Reservation. Utilizing the logic of *McBratney*, he argued that when California was admitted to the Union, it received authority to punish crimes committed

pressly limited in application to crimes between non-Indians on Indian lands. While the analysis of the *McBratney* trilogy is certainly open to question,[103] it appears to be too well entrenched to be overruled.[104] The *McBratney* principle thus creates a judicial exception to section 1152 for crimes on Indian lands involving both a non-Indian accused and victim.

The combined impact of the *McBratney* trilogy and the express intra-Indian crime exclusion indicates that section 1152 jurisdiction is limited to interracial crimes, crimes in which an Indian is involved

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within its borders, even on land set aside for Indian reservations. 228 U.S. at 271. Rejecting this argument, the Court stated:

> Upon full consideration we are satisfied that offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper Cases*. This was in effect held, as to crimes committed *by* the Indians, in the *Kagama Case*, . . . where the constitutionality of the second branch of § 9 of the act of March 3, 1885, . . . was sustained upon the ground that the Indian tribes are the wards of the nation. This same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood.

*Id.* at 271-72 (citations omitted).

103. The *McBratney* trilogy relies on the idea that the grant of statehood alone, absent any congressional action to the contrary, permits the states to enforce their criminal laws on Indian reservations. This approach is inconsistent with Chief Justice Marshall's opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), which held that the State of Georgia could not impose its criminal laws on the Cherokee Nation even to try white missionaries. *Id.* at 561. Furthermore, *McBratney* and its progeny, in ignoring the language of section 1152 and its predecessors which purport to grant exclusive federal jurisdiction over crimes committed between non-Indians on Indian lands, circumvents the constitutional supremacy clause and preemption issues raised by the simultaneous exercise of section 1152 jurisdiction and the exercise of state jurisdiction. Even if state sovereignty vests the states with some jurisdiction over non-Indian crimes committed on Indian lands, it is a derogation of federal authority to hold that the federal courts do not even have concurrent jurisdiction over such crimes despite the clear language of section 1152. The Court sub silentio suggests that Congress has no power to create either exclusive or concurrent federal jurisdiction over non-Indian crimes occurring on Indian lands which, at best, is a questionable proposition. Finally, the Court has not consistently followed the strict holding of *McBratney*. For example, in Pickett v. United States, 216 U.S. 456 (1910), the Court upheld jurisdiction under the predecessor of section 1152 for the murder of a black by another black on an Indian reservation. The Indian reservation was located in a territory and not a state. The Court upheld jurisdiction on the federal, rather than territorial, side of the district court, suggesting that it construed a predecessor of section 1152 to cover a crime committed by a non-Indian against a non-Indian simply because the crime occurred on Indian land. *Id.* at 459. The reading of the statute in *Pickett* is more consistent with its express terms than the results of *McBratney*, *Draper*, and *Ray*. *But see In re* Wilson, 140 U.S. 575 (1891).

104. The *McBratney* trilogy has recently come under attack on fifth amendment due process grounds. United States v. Antelope, 523 F.2d 400 (9th Cir. 1975), *cert. granted*, 424 U.S. 907 (1976) (No. 75-661). In *Antelope*, the Ninth Circuit held that a section 1153 prosecution of Indians for murder denies them due process of law. *Id.* at 403. Section 1153, it is argued, affords Indians less rights by imposing a lesser burden of proof than non-Indians would be afforded in a state prosecution for the same crime brought by virtue of *McBratney*. Of course, the equal protection—due process attack on the *McBratney* trilogy does not challenge the continued vitality of *McBratney*, but only the effects of the disparate treatment it occasionally creates for Indians when compared to non-Indians. However, the Solicitor General, in arguing for a reversal of the Ninth Circuit's decision in *Antelope*, appears to be arguing that the *McBratney* principle is not constitutionally based. Rather, he argues that section 1152 can and should be construed to cover a wholly non-Indian crime committed on Indian land. Petitioner's Brief for Certiorari, United States v. Antelope, *supra*.

either as the defendant or the accused. One problem not confronted in the cases is how section 1152 is to be construed with reference to a crime involving multiple defendants or multiple victims.[105] For example, imagine an armed robbery of two persons, an Indian ($I_v$) and a white ($W_v$), committed on Indian lands by an Indian ($I_d$) and a white ($W_d$). Is the jurisdiction to be judged by a review of all the facts surrounding the crime or merely the crime charged in the indictment? If $W_d$ is charged separately with only the robbery of $W_v$, does the *McBratney* trilogy require state prosecution, even though $W_d$ might have been charged with the robbery of $I_v$ in federal court under section 1152? Can $W_d$ be charged with the robbery of both $W_v$ and $I_v$ in a multiple-count indictment in federal court? If the federal indictment of $W_d$ is properly drafted with a separate count each for the robbery of $W_v$ and $I_v$,[106] does the count charging the robbery of $W_v$ fail under the *McBratney* trilogy? Obviously, similar problems can be hypothesized in the indictment of $I_d$ due to the intra-Indian crime exception contained in section 1152.[107]

If these problems were to emerge in a civil context, many of them would rather clearly be solved by application of the doctrine of pendent jurisdiction.[108] However, since no analog of pendent jurisdiction exists for federal criminal jurisdiction,[109] the courts are faced with three possible solutions to the problems of the multidefendant or multivictim crime. First, the courts can look solely to the crime alleged in each count of the indictment. Under this approach, federal jurisdiction would exist under section 1152 only if that count alleged an interracial crime. Second, the courts could be required to determine from the face of the indictment, viewed as a whole, whether federal jurisdiction exists. Under this rule, an indictment of $W_d$ for the robbery of $W_v$

105. Similar problems may be posed under 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976).

106. FED. R. CRIM. P. 8(a); *see* United States v. Tanner, 471 F.2d 128, 138-39 (7th Cir. 1972); United States v. Warner, 428 F.2d 730, 735 (8th Cir. 1970). *But see* United States v. Scott, 74 F. 213 (C.C. Ky. 1895).

107. See text & notes 95-96 *supra*. The questions involved with the intra-Indian crime exception are, of course, of a different nature than the issues raised under the *McBratney* doctrine. If the defendant is an Indian and the crime involved is one of the 14 serious offenses enumerated in the Major Crimes Act, 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976), the issue posed is whether the federal crime should be charged under section 1152 or 1153. *See* discussion at note 157 *infra*. In either event, jurisdiction over the crime will be federal. On the other hand, where the accused is a non-Indian, the question posed in the multiple-victim crime is whether the jurisdiction for each count is properly state or federal.

108. *See generally* United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966); Hurn v. Oursler, 289 U.S. 238 (1933); 28 U.S.C. § 1338(b) (1970); Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759 (1972); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968).

109. *See* United States v. Gamaldi, 384 F. Supp. 529 (S.D.N.Y. 1974).

on Indian lands would still confer federal jurisdiction if coupled with an allegation of the simultaneous robbery of $I_v$, even if that allegation was contained in a separate count. Finally, the courts might look behind the indictment to the facts of the crime to ascertain jurisdiction. Thus, a federal indictment which charged $W_d$ with the robbery of $W_v$ on Indian lands might still be sustained under section 1152 if extrinsic evidence demonstrates the simultaneous robbery of $I_v$.

While jurisdiction is usually determined on the face of the pleadings,[110] several arguments support looking beyond the pleadings to resolve jurisdictional problems under section 1152. First, the issue is subject matter jurisdiction. As federal jurisdiction cannot generally be created by consensual arrangements or other manipulations,[111] an inquiry beyond the face of the indictment is necessary. Such an inquiry can be analogized to the judicial determination in a federal civil suit when a motion to dismiss is based on the lack of federal diversity jurisdiction.[112] The inquiry in a criminal case would, however, generally operate to preserve federal jurisdiction, due to the protective function the Indian jurisdiction rules are designed to have. Second, the problem of the multiple-defendant or multiple-victim indictment is one that springs in great part from *McBratney* and its progeny. Since the *McBratney* trilogy created a questionable exception to section 1152 jurisdiction, any approach to this problem which did not require the courts to pierce the face of the indictment would give too great a sweep to the holdings of those cases. Third, as the federal jurisdiction over Indian lands is intended to be protective in nature, it should be given an expansive interpretation under the maxim that Indian statutes are to be construed in favor of the Indian tribes.[113] Finally, the same policies of judicial economy which support the doctrine of pendent jurisdiction in the civil context[114] support an expansive construction of section 1152. Thus, the subject matter inquiry under section 1152 should not merely review the racial status of the accused and victim alleged in the indictment, but rather should pierce the indictment to ascertain

110. *See, e.g.*, United States v. Chin Doong Art, 180 F. Supp. 446 (E.D.N.Y. 1960); United States v. Westbrook, 114 F. Supp. 192, 199 (W.D. Ark. 1953); United States v. Quinn, 111 F. Supp. 870 (E.D.N.Y. 1953).

111. *See, e.g.*, Ahrens v. Clark, 335 U.S. 188, 193 (1948); United States v. Griffin, 303 U.S. 226, 229 (1938); United States v. Corrick, 298 U.S. 435, 440 (1936); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

112. *See, e.g.*, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 184 (1936); North Pac. S.S. Co. v. Soley, 257 U.S. 216, 221 (1921); Wetmore v. Rymer, 169 U.S. 115, 120 (1898); Harmon v. Superior Court, 307 F.2d 796, 798 (9th Cir. 1962); Continental Cas. Co. v. Musgrove, 305 F.2d 9, 11 (5th Cir. 1962).

113. Bryan v. Itasca County, 426 U.S. 373 (1976); Antoine v. Washington, 420 U.S. 194, 199-200 (1975); *see* Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968); Marlin v. Lewallen, 276 U.S. 58 (1928); Choate v. Trapp, 224 U.S. 665 (1912).

114. See text & note 108 *supra*.

whether on the facts of the situation, taken as a whole, an Indian was involved in the criminal incident in some significant way, either as a perpetrator or a victim.

A converse problem to the multiple-victim crime is the so-called victimless crime. Since the jurisdiction granted by section 1152 has been construed to turn on the racial characterization of the accused and victim, victimless crimes do not fit neatly into the jurisdictional pattern established therein. Few cases have expressly discussed the victimless crime problem under section 1152. The only United States Supreme Court decisions on point appear to be *In re Mayfield*[115] and *United States v. Quiver*.[116] In *Mayfield* the Court held there was no federal criminal jurisdiction under the predecessor of section 1152 for the crime of adultery when committed by an Indian.[117] Although Mayfield, a Cherokee, committed the adulterous act with a white woman,[118] the Court nevertheless held that the jurisdiction for the crime was exclusively tribal, as a result of treaty and statutory provisions reserving exclusive jurisdiction in the Cherokee Nation for crimes in which members of that tribe were the only parties.[119] Thus, the Court seemingly held that where an Indian was prosecuted for a consensual crime like adultery, the crime could not be considered interracial in character, even when the consenting party was a non-Indian.[120] In *Quiver*, the Court reaffirmed the principle of *Mayfield* in a case involving adultery between two Indians.[121] If the *Mayfield-Quiver* approach to victimless

115. 141 U.S. 107 (1891); *cf.* Alberty v. United States, 162 U.S. 499, 504 (1896).
116. 241 U.S. 602 (1916).
117. 141 U.S. at 111-12.
118. *Id.* at 108.
119. *Id.* at 113-16.
120. Indeed, that the accused's wife, who arguably would be considered the victim if adultery were not treated as a victimless crime, was also white, appeared to make little difference to the Court. *Id.* at 108, 113.
121. The Court considered in *Quiver* whether the federal courts had criminal jurisdiction over adultery when "it embraces adultery committed by one Indian with another Indian, on an Indian reservation." 241 U.S. at 603. The Court stated:

> [C]ounsel for the Government invite attention to the letter of the statute and urge that adultery is not an offense "by one Indian against the person or property of another Indian" and therefore is not within the exception in § 2146 of the Revised Statutes. It is true that adultery is a voluntary act on the part of both participants and strictly speaking not an offense against the person of either. But are the words of the exception to be taken so strictly? . . . Rape also is concededly an offense against the person and is generally regarded as among the most heinous, so much so that death is often prescribed as the punishment. Was it intended that a prosecution should lie for adultery where the woman's participation is voluntary, but not for rape where she is subjected to the same act forcibly and against her will? Is it not obvious that the words of the exception are used in a sense which is more consonant with reason? And are they not intended to be in accord with the policy reflected by the legislation of Congress and its administration for many years, that the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise? In our opinion this is the true view.

*Id.* at 605-06. The *Quiver* Court did not cite *Mayfield*.

and consensual crime is applied consistently, it suggests that section 1152 has no application to such crimes.[122] *Mayfield* and *Quiver* treat the accused as the sole party to a consensual or victimless crime. Since section 1152 only confers jurisdiction over bilateral interracial crimes, it has no application to consensual crimes under a *Mayfield-Quiver* analysis. If the crime is committed by an Indian, the jurisdiction is federal if the crime is enumerated within the grant of jurisdiction provided in section 1153,[123] or exclusively tribal if not set forth therein. On the other hand, if the accused is a non-Indian, consistent application of *Mayfield* and *Quiver* would suggest that the jurisdiction would be exclusively vested in the state courts under the *McBratney* trilogy.

Of course, extending the concept of a consensual crime too far under this analysis could do serious harm to the protective function that federal jurisdiction is designed to play under the Indian trusteeship theory. For example, a white accused of the statutory rape of a 14 year old Indian girl should be tried in federal court even if the accused can demonstrate that the girl "consented." The statute defining statutory rape[124] is obviously designed to protect young children and deems them incapable of consent. Furthermore, the federal jurisdiction over the crime in question is designed to protect Indians. In essence, the policies underlying federal jurisdiction suggest that the jurisdiction over this hypothetical case should be federal despite the allegation of the victim's consent. Accordingly, the consensual or victimless crime exception to section 1152 jurisdiction must be applied carefully to assure that the exception does not run afoul of the very policies which resulted in the grant of federal jurisdiction in section 1152.

The final exception to the federal jurisdiction conferred in section 1152[125] is the last clause of the statute, exempting from federal jurisdiction "any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respec-

122. *Compare* State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926) (suggesting that possession of peyote in Indian country may not be a crime punishable under the predecessor of section 1152), *with* United States v. Burland, 441 F.2d 1199 (9th Cir.), *cert. denied*, 404 U.S. 842 (1971) (section 1152 held applicable to a conviction for an Indian's passing a bad check to a non-Indian); *and* United States v. Sosseur, 87 F. Supp. 225 (W.D. Wis. 1949), *aff'd in part and rev'd in part*, 181 F.2d 873 (7th Cir. 1950) (section 1152 covers gambling offenses committed by an Indian on Indian lands).

123. The crime of incest, which conceivably is consensual, is included in the jurisdiction conferred by sections 1153 and 3242. As the jurisdiction conferred by these sections does not turn on an interracial crime, but rather requires only that the accused be an Indian, the conceptual problems with including victimless crimes under the coverage of sections 1153 and 3242 are nonexistent.

124. 18 U.S.C. § 2032 (1970); *cf.* Williams v. United States, 327 U.S. 711 (1946).

125. In addition, the second paragraph of section 1152 excepts from the federal jurisdiction otherwise provided in the section, "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe." 18 U.S.C. § 1152 (1970). For a discussion of this proviso and other multiple prosecution problems, see text & notes 355-72 *infra*.

tively."[126] Since section 1152 jurisdiction covers interracial crimes, the "treaty" exception applies only to tribal jurisdiction conferred by treaty over interracial crimes.[127] Furthermore, since no treaty has specified tribal jurisdiction for crimes committed by Indians against whites, the sole application of this treaty-savings clause is to jurisdictional structures conferring tribal jurisdiction over non-Indians who commit crimes on Indian land. Only nine treaties of this type, affecting 17 tribes, and covering non-Indian settlers on Indian land, were signed, all before the turn of the 19th century.[128] Although the leading commentator on Indian law, without reference to these specific treaties, concluded that none of the treaties which arguably fall within the treaty clause exception remain operative,[129] the clauses described above were clearly abrogated by later treaties for only 8 of the 17 affected tribes.[130] Treaties with six of the other tribes contain ambiguous provisions which can be read as abrogating either the tribal jurisdiction over non-Indians previously granted, or the prior treaty itself.[131] For the remaining three

126. This exception was designed as a savings clause to preserve contrary treaty arrangements from statutory abrogation. It dates back to 1817 when the first predecessor of section 1152 was enacted. Act of Mar. 3, 1817, ch. XCII, § 2, 3 Stat. 383.

127. The section 1152 treaty exception does not preserve treaty provisions which provided for jurisdictional structures inconsistent with the federal jurisdiction conferred by the Federal Major Crimes Act. *See* 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976). Thus, section 1153 supercedes any contrary prior treaty provision such as that found in the Treaty with the Cherokees, July 19, 1866, art. 13, 14 Stat. 799. *See generally* United States v. Consolidated Wounded Knee Cases, 389 F. Supp. 235, 243 (D. Neb. 1975); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CALIF. L. REV. 601 (1975).

128. These provisions typically read as follows:

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands alloted to the Wiandot and Delaware nations in this treaty, except on the lands reserved to the United States in the preceding article, such person shall forfeit the protection of the United States, and the Indians may punish him as they please.

Treaty with the Wyandots, Delawares, Chippawas, and Ottawas, Jan. 21, 1785, art. V, 7 Stat. 16; *see* Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, art. VI, 7 Stat. 49; Treaty with the Cherokees, July 2, 1791, art. VIII, 7 Stat. 39; Treaty with the Creeks, Aug. 7, 1790, art. VI, 7 Stat. 35; Treaty with the Wyandots, Delawares, Ottawas, Chippewas, Pattawatimas, and Sacs, and other Tribes, Jan. 9, 1789, art. IX, 7 Stat. 28; Treaty with the Shawnees, Jan. 31, 1786, art. VII, 7 Stat. 26; Treaty with the Chickasaws, Jan. 10, 1786, art. IV, 7 Stat. 24; Treaty with the Choctaws, Jan. 3, 1786, art. IV, 7 Stat. 21; Treaty with the Cherokees, Nov. 28, 1785, art. V, 7 Stat. 18.

129. F. COHEN, *supra* note 23, at 365. *See also* Criminal Jurisdiction of Indian Tribes over Non-Indians, 77 I.D. 113, 115 (1970).

130. Treaty with the Pottawatomies, Feb. 27, 1867, art. 13, 15 Stat. 531; Treaty with the Cherokees, July 19, 1866, art. XXXI, 14 Stat. 799; Treaty with the Creeks and Seminoles, Aug. 7, 1856, art. XVI, 11 Stat. 699; Treaty with the Choctaws and Chickasaws, June 22, 1855, art. 21, 11 Stat. 611; Treaty with the Chippewas, Feb. 22, 1855, art. IX, 10 Stat. 1165; Treaty with the Wyandots, Jan. 31, 1855, art. 6, 10 Stat. 1159; Treaty with the Cherokees, Dec. 29, 1835, art. 5, 7 Stat. 478.

131. Treaty with the Miamis, June 5, 1854, art. 4, 10 Stat. 1093; Treaty with the Kaskaskias, Peorias, Piankeshaws, and Wea's, May 30, 1854, art. 6, 10 Stat. 1082; Treaty with the Delawares, May 6, 1854, art. 14, 10 Stat. 1048; Treaty with the Miamies, Nov. 28, 1840, art. 11, 7 Stat. 582; Treaty with the Kickapoos, July 30, 1819, art. 4, 7 Stat. 200.

tribes, no subsequent treaty can be found abrogating the jurisdiction previously granted to them to try whites who "settle" upon lands owned by the tribe.[132] Insofar as any of these three tribes or their descendants continue to exist and have functioning tribal court mechanisms, or insofar as any of the other ambiguous cases are resolved against the abrogation of prior jurisdictional treaty clauses, certain tribal courts may have criminal jurisdiction over non-Indians who reside on their lands as a result of the last clause in section 1152. However, for most tribes that clause will have little operative relevance, since the treaties after 1800 generally failed to mention tribal court jurisdiction over non-Indians in any fashion.[133]

### 2. *The Assimilative Crimes Act and Indian Land*

While it is historically questionable that Congress ever intended to incorporate and apply state law to Indian lands through the Assimilative Crimes Act,[134] it is now well settled that this Act applies to Indian

132. *See* Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, art. VI, 7 Stat. 49; Treaty with the Wyandots, Delawares, Ottawas, Chippewas, Pattawatimas, and Sacs, Jan. 9, 1789, art. IX, 7 Stat. 28; Treaty with the Shawnees, Jan. 31, 1786, art. VII, 7 Stat. 26.

133. *See generally* Clinton, *supra* note 1, at 953-58.

134. Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13 (1970). That Congress did not intend to apply this statute to Indian lands can be gathered from an examination of the history of section 1152. While that section can be traced to the first Indian Trade and Intercourse Act of 1790, ch. XXXIII, §§ 5-6, 1 Stat. 137, the jurisdiction now found in section 1152 was first completely granted in 1817. The Act of Mar. 3, 1817, ch. XCII, 3 Stat. 383, required that the crime in question be such "by the laws of the United States" and only afforded such punishment as is provided "by the laws of the United States for the like offences." As the original Assimilative Crimes Act was not enacted until 1825, ch. LXV, § 3, 4 Stat. 115, the laws of the United States to which the 1817 Act referred could not have included the Assimilative Crimes Act. The 1834 recodification of the 1817 Act required that "the laws of the United States" provide for the punishment of the charged crime. Act of June 30, 1834, ch. CLXI, § 26, 4 Stat. 729. Even today, section 1152 perpetuates much of the original language of the 1817 Act by incorporating into Indian country "the general laws of the United States as to the punishment of offenses committed within the sole and exclusive jurisdiction of the United States, except the District of Columbia."

Further support for the view that the Assimilative Crimes Act was not originally intended to be applied to Indian lands is found in its own history. The original version of the Act expressly set forth the territory governed by it which did not include Indian lands. It covered only "any fort, dock-yard, navy-yard, arsenal, armory, or magazine, the site whereof is ceded to, and under the jurisdiction of, the United States, or on the site of any lighthouse, or other needful building belonging to the United States." Act of Mar. 3, 1825, ch. LXV, § 1, 4 Stat. 115. The next reenactment of the Assimilative Crimes Act, Act of Apr. 5, 1866, ch. XXIV, § 2, 14 Stat. 12, merely referred to "any place which has been, or shall hereafter be, ceded to, and under the jurisdiction of the United States." A further gloss may have been placed on that phrase by the reenactment of the Act on July 7, 1898, ch. 576, § 2, 30 Stat. 717, which covered "any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of

country. In *Williams v. United States*,[135] the Supreme Court assumed that the Assimilative Crimes Act applied to Indian lands, as a result of the incorporation of federal enclave law for Indian country through the predecessor of section 1152.[136] *Williams* indicates, however, that adoption of state law takes place only where no federally-defined crime covering the Act exists.[137] Thus, the state definition of a crime cannot be substituted under the Act in place of an applicable federal definition of the crime.[138] Ascertaining the extent to which the Assimilative Crimes Act applies is complex because of the limited fashion in which it is incorporated for Indian lands. In order to understand the application of the Act to Indian lands, both the types of crimes incorporated under it and the limited situations in which it will be applied on Indian lands will be examined.

The Assimilative Crimes Act basically incorporates lesser state crimes into the federal criminal code and applies those state crimes to federal enclaves, including Indian lands, located within the states. The Act fills gaps in the coverage of the federal criminal code.[139] The

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a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure." Thus, the language of many of the significant predecessors of section 13 suggests that Congress did not intend to apply the Act to Indian lands.

Moreover, a belief that Congress intended to apply the Act to Indian country is inconsistent with the prevailing federal Indian policy at the time these statutes were enacted. Both the 1817 enactment upon which section 1152 is based, and the 1825 provision from which section 13 was derived, were enacted at a time when prevailing federal Indian policy was calculated to keep the Indians out of the states through physical separation and later removal, and the states out of federal Indian policy and law enforcement, by leaving intratribal matters to the tribes and other matters to the federal government. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834, 139-249 (1962). Thus, to suggest that Congress wanted to permit the states to legislatively control Indian lands through their power to enact criminal statutes applicable to Indian lands via the Assimilative Crimes Act is simply inconsistent with the prevailing federal Indian policies. *See also* M. PRICE, LAW AND THE AMERICAN INDIAN 66-67 (1973).

135. 327 U.S. 711 (1946).

136. *Id.* at 713-14. *See generally* United States v. Butler, 541 F.2d 730 (8th Cir. 1976); United States v. Burland, 441 F.2d 1199 (9th Cir.), *cert. denied*, 404 U.S. 842 (1971); Acunia v. United States, 404 F.2d 140 (9th Cir. 1968); United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950); United States v. Davis, 148 F. Supp. 478 (D.N.D.), *appeal dismissed*, 244 F.2d 717 (8th Cir. 1957).

137. 327 U.S. at 717-19; *see* United States v. Butler, 541 F.2d 730 (8th Cir. 1976). In *Butler*, an Indian was charged in federal court with unlawful possession of a firearm on the Sioux Reservation. See 18 U.S.C. § 922(h) (1970). A separate count charged a violation of South Dakota law under the Assimilative Crimes Act. See S.D. COMPILED LAWS ANN. § 22-7-3 (1967). Before trial the government dismissed the federal count, but the defendant was convicted on the Assimilative Crimes Act count. The court of appeals reversed Butler's conviction, accepting his contention that "the [Assimilative Crimes Act] was improperly applied in this case because his act was 'made punishable by [an] enactment of Congress' within the meaning of the statute, so that resort to state law was not permissible." 541 F.2d at 732.

138. For example, in *Williams*, a white man was charged with statutory rape of an Indian girl on the Colorado River Indian Reservation. The Court refused to use the Arizona definition of rape, which applied whenever the victim was under 18 years of age, because the United States Code contained a statutory rape provision which only covered girls 16 years old or younger. 327 U.S. at 723-25.

139. Williams v. United States, 327 U.S. 711, 718 (1946). *But see* United States v.

lesser state crimes adopted under it have been held to cover minor misdemeanors,[140] including traffic offenses[141] and game law violations.[142] The Act thus adopts the state definition of lesser crimes for prosecutions in the federal courts arising out of certain criminal events on Indian lands. As a corollary, the states are granted certain criminal legislative powers over Indian reservations located within their boundaries which they would otherwise not have. The incorporation of state law under the Act is dynamic and on-going; the Act incorporates any state law "in force at the time of such act or omission" which is not defined by federal statute.[143]

Of greater complexity than ascertaining the crimes incorporated under the Assimilative Crimes Act is the problem of determining the situations in which it is applicable to Indian lands. The Act is applicable to Indian lands because it is incorporated into section 1152 as part of "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States."[144] In short, Assimilative Crimes Act jurisdiction on Indian lands is a type of double derivative jurisdiction. State law is incorporated into the federal code under it for special maritime and territorial areas and the law applicable to the special maritime and territorial areas is incorporated into and applied to Indian lands under section 1152. The direct application of the Act to Indian country is limited to those situations covered by section 1152.[145] Thus, it will not apply

Butler, 541 F.2d 730 (8th Cir. 1976) (Assimilative Crimes Act precludes assimilation of state law where any congressional enactment punishes the conduct charged, not just federal enclave laws).

140. *See* cases cited notes 141-42 *infra*; *cf.* Johnson v. State, 498 S.W.2d 198 (Tex. Crim. App. 1973) (dicta).

141. United States v. Wynn, 54 F.R.D. 72 (E.D. Pa. 1971); United States v. Gholson, 319 F. Supp. 499 (E.D. Va. 1970); United States v. Dreos, 156 F. Supp. 200 (D. Md. 1957).

142. United States v. Dowden, 139 F. Supp. 781 (W.D. La. 1956); *cf.* United States v. Hill, 266 F. Supp. 670 (S.D. Fla. 1965).

143. The constitutionality of this dynamic adoption process was upheld in United States v. Sharpnack, 355 U.S. 286 (1958), against a charge that the Act represented an unconstitutional delegation of legislative power to the states.

144. *See* Williams v. United States, 327 U.S. 711, 713 & n.3 (1946); *cf.* Acunia v. United States, 404 F.2d 140 (9th Cir. 1968).

145. 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976), *amending* 18 U.S.C. § 1153 (1970), contains no similar blanket adoption of state law, but rather expressly specifies the crimes which it applies to Indian country. However, problems akin to those posed in the Assimilative Crimes Act are posed under section 1153 for certain crimes. For example, prior to the 1976 amendments, section 1153 expressly required that the offenses of rape and assault with intent to commit rape be defined under the laws of the state in which the offense was committed. The length of sentence, however, was "at the discretion of the court." 18 U.S.C. § 1153 (1970), *as amended*, 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976). These provisions were peculiar historical anomalies, since the federal code now specifically defines both crimes. 18 U.S.C. §§ 113(a), 2031 (1970); *cf.* Henry v. United States, 432 F.2d 114 (9th Cir. 1970), *modified*, 434 F.2d 1283 (9th Cir.), *cert. denied*, 400 U.S. 1011 (1971); United States v. Red Bear, 250 F. Supp. 633 (D.S.D. 1966). Furthermore, prior to its amendment in 1976, section 1153 expressly stated that burglary, assault resulting in serious bodily injury, and incest, would be defined and punished in accordance with the laws of the state in which the crime was committed. 18 U.S.C. §

to a crime between non-Indians committed on Indian land,[146] or to intra-Indian crimes.[147] Therefore, the Act is only applicable to Indian lands for an interracial crime.[148]

A further problem is posed by victimless or consensual crimes, many of which will be lesser crimes defined by state rather than federal law. Consistent application of the *Mayfield-Quiver* doctrine[149] requires that consensual or victimless crimes not be incorporated under the derivative jurisdiction of the Assimilative Crimes Act and section 1152. However, in *United States v. Sosseur*,[150] the Seventh Circuit upheld the application of a Wisconsin anti-gambling statute to an Indian who operated slot machines in Indian country under tribal license.[151] The impli-

1153 (1970), *as amended*, 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976); *see* Acunia v. United States, 404 F.2d 140 (9th Cir. 1968); United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974); United States v. Gomez, 250 F. Supp. 535 (D.N.M. 1966).

The new Indian Crimes Act of 1976, Pub. L. No. 94-297, § 3, 90 Stat. 585, amends section 1153 to provide that rape, assault with intent to commit rape, and assault resulting in serious bodily injury are to be defined by federal law. However, even the amended statute defines and punishes burglary and incest in accordance with the law of the state in which the offense was committed.

146. Williams v. United States, 327 U.S. 711, 714 n.9 (1946); United States v. Dodge, 538 F.2d 770, 775-76 (8th Cir. 1976).

147. Acunia v. United States, 404 F.2d 140 (9th Cir. 1968). *See also* United States v. Davis, 148 F. Supp. 418 (D.N.D.), *appeal dismissed*, 244 F.2d 717 (8th Cir. 1957).

148. One further problem with ascertaining the extent of the Assimilative Crimes Act jurisdiction is posed by the question of whether the Act can ever be applied to an Indian defendant even for an interracial crime. While this problem is more fully explored in the next section, see text & notes 158-69 *infra*, it should be noted here that several good legal arguments support the view that federal prosecution of Indians must occur exclusively under 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976), into which the Assimilative Crimes Act is not incorporated. *Cf.* Henry v. United States, 432 F.2d 114 (9th Cir. 1970), *modified*, 434 F.2d 1283 (9th Cir.), *cert. denied*, 400 U.S. 1011 (1971). While United States v. Butler, 541 F.2d 730 (8th Cir. 1976); United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950); and United States v. Burland, 441 F.2d 1199 (9th Cir. 1971), clearly involve Federal Assimilative Crimes Act prosecutions of Indians, none of these address the fundamental questions posed by the overlap of the coverage of sections 1152 and 1153 which are vital to the resolution of the question whether the Act can be used to prosecute an Indian defendant for a crime occurring in Indian country.

149. United States v. Quiver, 241 U.S. 602 (1916); *Ex parte* Mayfield, 141 U.S. 107 (1891); see text & notes 134-38 *supra*. *Cf.* Alberty v. United States, 162 U.S. 499, 504 (1896) (explaining *Mayfield* on the basis that it involved a consensual crime without a victim). *But see* United States v. Pakootas, No. 4777 (D. Idaho, Sept. 30, 1963), discussed in THE AMERICAN INDIAN TRAINING PROGRAM, INC., MANUAL OF INDIAN LAW D-6 (1976). *See also* Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 403 (1974).

150. 181 F.2d 873 (7th Cir. 1950).

151. *Id.* at 874-75. The court accepted the contention that jurisdiction existed under section 1152. It found that the crime was not literally "committed by one Indian against the person or property of another Indian" as required by the intra-Indian crime exception of that section. In giving a technical, literal reading to section 1152, the Seventh Circuit may have been in error. First, the court ignored the fact that the Supreme Court had rejected such a narrow reading of a predecessor of section 1152 when it decided *Ex parte* Mayfield, 141 U.S. 107 (1891), and United States v. Quiver, 241 U.S. 602 (1916). See text & notes 115-23 *supra*. Second, the Seventh Circuit's approach to the intra-Indian crime exception ignores the purpose of that provision. See discussion note 88 *supra*. The early federal jurisdictional statutes included the intra-Indian crime exception to effectuate treaties and the federal policy that Indian tribes will be left to govern themselves in intratribal matters. Indeed, in *Sosseur*, the tribal council had licensed the accused to operate slot machines and other gambling devices on the reservation. 181 F.2d at 874. Although the gambling facilities were frequented by tourists, it

cations of *Sosseur* are troubling. Victimless or consensual crime statutes enacted by the states generally involve legislation of morals in one sense or another. To allow the states, through the Act, to make moral judgments for the tribes, undermines the purpose for continuing reservation policy—permitting the Indian tribes to maintain their own separate, evolving, cultural traditions and government. The result in *Sosseur*, insofar as it applies to victimless or consensual crimes, is an aberration in terms of Indian policy.

### 3. *The Federal Major Crimes Act: Jurisdiction Over Indian Defendants*

The Federal Major Crimes Act[152] was first enacted in 1885 to provide for federal jurisdiction over intra-Indian offenses.[153] The Act represented the first significant intrusion into the federal policy theretofor followed of affording the Indian tribes virtually complete self-government and jurisdiction over internal matters. Section 1153 now states:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.
>
> In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws

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can hardly be said they were the "victims" of the defendant's gambling operations. In giving a literal reading to the language of the intra-Indian crime exception, the court ignored, and indeed undermined, the purpose of that clause to further Indian self-government over internal matters occurring on Indian lands. *Cf.* United States v. Blackfeet Tribe of Blackfeet Indian Reservation, 369 F. Supp. 562 (D. Mont. 1973).

152. Ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976)).

153. *See generally* United States v. Consolidated Wounded Knee Cases, 389 F. Supp. 235, 241-43 (D. Neb. 1975); Clinton, *supra* note 1; Indian Civil Rights Task Force, *Development of Tripartite Jurisdiction in Indian Country*, 22 U. KAN. L. REV. 351 (1974); Kickingbird, *"In Our Image . . . , After Our Likeness:" The Drive for the Assimilation of Indian Court Systems*, 13 AM. CRIM. L. REV. 675 (1976).

of the State in which such offense was committed as are in force at the time of such offense.[154]

Today, the Federal Major Crimes Act is the major federal jurisdictional statute for offenses committed by Indians on Indian lands. Like the jurisdiction afforded under section 1152, the federal jurisdiction conferred by section 1153 is exclusive of state jurisdiction.[155] By its terms the Act provides a federal forum for the trial of 14 enumerated crimes when committed on Indian land by an Indian.[156] Unlike the jurisdiction conferred in section 1152, federal jurisdiction over offenses committed by Indians on Indian lands governed by section 1153 is not dependent on the race of the victim. The language of section 1153 covers Indian offenses against the person or property of "another Indian or other person."[157]

Of course, insofar as section 1153 covers offenses committed by an Indian against the person or property of a non-Indian, it overlaps the jurisdiction conferred by section 1152.[158] As a result of the 1976 amendments to section 1153, contained in the Indian Crimes Act of 1976, which adopted federal definitions of rape, assault with intent to commit rape, and assault resulting in serious bodily injury,[159] this overlap poses few continuing problems. Aside from the mechanical prob-

154. 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976), *amending* 18 U.S.C. § 1153 (1970).

155. United States v. Kagama, 118 U.S. 375, 377-78 (1886); *accord*, Keeble v. United States, 412 U.S. 205, 209-10 (1973); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 352, 359 (1962); Williams v. Lee, 358 U.S. 217, 220 n.5 (1958); City of New Town v. United States, 454 F.2d 121, 125 (8th Cir. 1972); *In re* Carmen's Petition, 165 F. Supp. 942 (N.D. Cal. 1958), *aff'd sub nom.* Dickson v. Carmen, 270 F.2d 809 (9th Cir. 1959), *cert. denied*, 361 U.S. 934 (1960); State *ex rel.* Irvine v. District Court, 125 Mont. 398, 239 P.2d 272 (1951); State v. Pepion, 125 Mont. 13, 230 P.2d 961 (1951). *But see* Robinson v. Wolff, 349 F. Supp. 514 (D. Neb.), *aff'd*, 468 F.2d 438 (8th Cir. 1972); *In re* McCoy, 233 F. Supp. 409 (E.D.N.C. 1964); Anderson v. Gladden, 188 F. Supp. 666 (D. Ore. 1960), *aff'd*, 293 F.2d 463 (9th Cir.), *cert. denied*, 368 U.S. 949 (1961); People *ex rel.* Schuyler v. Livingstone, 123 Misc. 605, 205 N.Y.S. 888 (Sup. Ct. 1924). *See also* State v. Lussier, 369 Minn. 176, 130 N.W.2d 484 (1964); State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926); *Ex parte* Cross, 20 Neb. 417, 30 N.W. 428 (1886); State v. George, 39 Ore. 127, 65 P. 604 (1901).

156. As a result of the 1976 amendments to section 1153, kidnapping was included for the first time; and all of the enumerated crimes except burglary and incest are now defined and punished by federal law. Indian Crimes Act of 1976, Pub. L. No. 94-297, § 3, 90 Stat. 585; see discussion note 145 *supra*. Section 1153 provides that burglary and incest shall be defined and punished in accordance with the state law where the offense was committed. As section 1153 provides that state law shall be the laws "in force at the time of such offense," the federal adoption of state law is dynamic, as is the Assimilative Crimes Act. See text & notes 143-45 *supra*.

157. *Cf.* United States v. Antelope, 523 F.2d 400, 402 (9th Cir. 1975), *cert. granted*, 424 U.S. 907 (1976) (No. 75-661); United States v. Cleveland, 503 F.2d 1067, 1071 (9th Cir. 1974); Gray v. United States, 394 F.2d 96 (9th Cir. 1967), *cert. denied*, 393 U.S. 985 (1968).

158. This is a point of confusion recently noted by the House Committee on the Judiciary in its report on the Indian Crimes Act of 1976. *See* H.R. REP. No. 94-1038, 94th Cong., 2d Sess. 3 (1976); *accord*, S. REP. No. 94-620, 94th Cong., 2d Sess. 2 & n.1 (1976).

159. Indian Crimes Act of 1976, Pub. L. No. 94-297, § 3, 90 Stat. 585.

lem of determining which statute to cite in the indictment,[160] the only continuing practical uncertainty created by the overlap of sections 1152 and 1153 for crimes committed by Indians in Indian country against the person or property of non-Indians revolves around the applicability of the Assimilative Crimes Act[161] to such crimes. If a prosecution for such a crime can be brought under section 1152, this Act will be fully applicable and will incorporate a substantial body of state law defining lesser crimes.[162] On the other hand, if such prosecutions of Indian offenders must be brought exclusively under section 1153, then the only state-defined crimes under which a federal district court can prosecute an Indian are the crimes of burglary and incest, which are enumerated in section 1153. Jurisdiction over all other lesser crimes would be preserved for tribal courts. While this question is surely close, several arguments support the latter approach to the problems created by the overlap between sections 1152 and 1153.

First, in at least one case that has thus far noted the problem, the court seems to suggest that section 1153 rather than section 1152 is the applicable statute for crimes committed on Indian lands by Indians against the person or property of non-In-

160. *See* Henry v. United States, 432 F.2d 114 (9th Cir. 1970), *modified*, 434 F.2d 1283 (9th Cir.), *cert. denied*, 400 U.S. 1011 (1971) (holding that Indian defendants should be prosecuted under section 1153 rather than section 1152).

The overlap in jurisdiction between sections 1152 and 1153 was created by the inclusion of the phrase "or other person" in the Federal Major Crime Act's description of the victim of the crime. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385. The initial reason for the inclusion of this language in the Act is unclear from the legislative history. The Act was proposed in the House as a floor amendment to an Indian appropriations bill. The amendment as originally proposed only covered intra-Indian crimes. During the debate, the following colloquy occurred which resulted in the modification of the amendment:

> MR. BUDD: Why not insert in the amendment after the words "another Indian," the words "or any other person?"
>
> MR. CUTCHEON: Indians are already capable of being convicted and punished for a crime committed upon any other person than an Indian.
>
> MR. BUDD: But it is not done.
>
> MR. CUTCHEON: If, however, an Indian commits a crime against an Indian on an Indian reservation there is now no law to punish the offense except, as I have said, the law of the tribe, which is just no law at all.
>
> MR. ELLIS: The language suggested by the gentleman from California [Mr. Budd] will not hurt the amendment.
>
> MR. CUTCHEON: I have no objection to the amendment at all, and will accept it as a modification. I think this provision ought to be inserted in this bill; otherwise I fear it will not become law during this Congress.

16 CONG. REC. 934 (1885). Obviously, this colloquy raises more questions than it answers. Representative Cutcheon was clearly aware that the predecessor of section 1152 already covered interracial crimes committed by Indians, and thought inclusion of the phrase "or any other person" was unnecessary. On the other hand, Representative Budd was clearly dissatisfied with the results achieved under the forerunner of section 1152 and wanted such crimes prosecuted under the statute which became the Federal Major Crimes Act. However, the crucial question of whether the Federal Major Crimes Act should constitute the exclusive statute under which Indian offenders could be federally prosecuted for crimes committed against non-Indians is unanswered by this legislative history.

161. 18 U.S.C. § 13 (1970).

162. See text & notes 134-48 *supra*.

dians.[163] Second, the legislative history of the recent amendments to section 1153 appears to accept the view that section 1153 is the applicable jurisdictional statute for any federal crime committed by an Indian.[164] The Indian Crimes Act of 1976 itself suggests that the only state-defined crimes which will be applied to Indians in federal courts are burglary and incest; the normal maxims of statutory construction should suggest that section 1153 would control over section 1152.[165] Third, applying section 1153 rather than section 1152 to crimes committed by Indians against non-Indians limits state legislative control over Indian lands in favor of tribal control and self-government—a result which is more consistent with modern federal Indian policy[166] and Supreme Court decisions.[167] Finally, such a construction avoids potentially serious equal protection and due process problems[168] about which Congress has already shown some concern.[169]

The operation of section 1153 is also very much dependent on a parallel provision of federal law.[170] Under section 3242 of title 18, all persons tried under section 1153 are to be tried "in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."[171] Section 3242 clearly affects many procedural mat-

163. *See* Henry v. United States, 432 F.2d 114 (9th Cir. 1970), *modified*, 434 F.2d 1283 (9th Cir.), *cert. denied*, 400 U.S. 1011 (1971). *But see* United States v. Butler, 541 F.2d 730 (8th Cir. 1976); United States v. Burland, 441 F.2d 1199 (9th Cir. 1971); United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950) (upholding Assimilative Crimes Act prosecutions of Indians under section 1152 without discussing the impact which the jurisdictional overlap between sections 1152 and 1153 has on the continued applicability of section 1152 to Indian defendants).

164. See reports cited note 158 *supra*.

165. *See generally* United States v. California, 297 U.S. 175 (1936); United States v. Tynen, 78 U.S. (11 Wall.) 88 (1870). In cases of overlap or conflict between federal statutes the later act governs. *See also* discussion note 218 *infra*.

166. *See* Message from President Nixon to Congress, H.R. Doc. No. 91-363, 91st Cong., 2d Sess. 2-3 (1970), in 116 CONG. REC. 23258 (1970). *See also* Des Moines Register, July 17, 1976, at 4A, col. 4.

167. *See* Bryan v. Itasca County, 426 U.S. 373 (1976); Fischer v. District Court, 424 U.S. 382 (1976).

168. *See* text & notes 199-216 *infra*. *See also* reports cited note 158 *supra*.

169. *See* reports cited note 158 *supra*.

170. Prior to 1976, the coverage of section 3242 was not coextensive with the crimes specified in section 1153. As a result of previous amendments to section 1153, unaccompanied by a simultaneous updating of section 3242, some of the crimes covered by section 1153 were not specifically enumerated in section 3242. For example, prior to 1976, kidnapping and assault resulting in serious bodily injury were not enumerated in section 3242. In Keeble v. United States, 412 U.S. 205 (1973), the Supreme Court took note of this "congressional oversight," and apparently concluded that the omission had no impact on a federal prosecution for assault resulting in serious bodily injury. *See id.* at 212 n.12. The Indian Crimes Act of 1976 resolves this inconsistency by eliminating the enumeration of crimes in section 3242, and simply cross-referring the coverage of that section to the crimes listed in section 1153. Pub. L. No. 94-297, § 4, 90 Stat. 586.

171. 18 U.S.C. § 3242 (1970). Section 3242 also incorporates the traditional district court jurisdictional statute, 18 U.S.C. § 3231 (1970) and venue rules, *id.* §§ 3232-3237; FED. R. CRIM. P. 18, for other federal crimes into section 1153 jurisdiction—a superfluous legislative statement in that section 1153 offenses are "offenses against the laws of the United States" therefore automatically covered by the jurisdictional statutes and venue

ters.[172] Furthermore, the requirement of section 3242 that section 1153 crimes be tried in the same manner as other federal offenses has recently taken on a substantive role. The crimes enumerated in section 1153 are exclusive in that a federal district court only has jurisdiction to entertain charges against Indians which are brought for one of the 14 specified crimes.[173] Although federal jurisdiction only runs to charges brought for one of the 14 enumerated offenses, this jurisdiction includes the power to convict and sentence Indians for lesser-included offenses under the Federal Major Crimes Act. This conclusion is primarily derived from section 3242 and *Keeble v. United States*.[174]

In *Keeble*, an Indian defendant was charged with the fatal assault of another Indian on the reservation of the Crow Creek Sioux. Although assault resulting in serious bodily injury was an enumerated section 1153 offense, and is now a federally-defined crime, at the time *Keeble* was decided, section 1153 incorporated the state law definition of the crime.[175] The defendant requested a jury instruction on simple assault, a lesser-included offense; the trial court denied the request since simple assault was not one of the enumerated offenses contained in section 1153. The Eighth Circuit affirmed; the Supreme Court reversed.[176] Although both statutory and due process arguments were pressed upon the Court,[177] the decision rested on the language of sec-

rules. Section 3242 also substantially incorporates the Federal Rules of Criminal Procedure into section 1153 prosecutions.

172. See discussion note 171 *supra*.

173. *See* Keeble v. United States, 412 U.S. 205 (1973); United States v. Jacobs, 113 F. Supp. 203 (E.D. Wis.), *appeal dismissed*, 346 U.S. 892 (1953). The enumeration of offenses in section 1153 was not an accident creating gaps in federal court jurisdiction. Rather, the often ignored reason for this listing of crimes was the deliberate effort to preserve exclusive tribal court jurisdiction over lesser offenses not covered by section 1153. A House amendment to an early Indian appropriations bill was rejected in 1884 by the Senate before the predecessor of section 1153 was passed because it would have extended total federal jurisdiction to Indian crimes. 15 CONG. REC. 5802-03 (1884); *cf.* Keeble v. United States, *supra*; State v. Jackson, 218 Minn. 429, 16 N.W. 2d 752 (1944). *See also* 16 CONG. REC. 485 (1885). Since tribal courts have not traditionally exercised jurisdiction over non-Indian defendants, no similar effort to reserve tribal court authority was necessary for section 1152. *See generally* Kickingbird, *supra* note 153.

174. 412 U.S. 205 (1973).

175. *See id.* at 213 n.13.

176. United States v. Keeble, 459 F.2d 757 (8th Cir. 1972), *rev'd*, 412 U.S. 205 (1973); *accord*, Kills Crow v. United States, 451 F.2d 323 (8th Cir. 1971), *cert. denied*, 405 U.S. 999 (1972).

177. By relying on section 3242 as the basis of its decision, the Court was able to avoid resolving these two important constitutional issues: First, whether the denial of the lesser-included offense instruction deprived the accused of due process of law in violation of the fifth amendment, because it discriminated against Indians. This argument had been expressly rejected by the Eighth Circuit. Kills Crow v. United States, 451 F.2d 323 (8th Cir. 1971), *cert. denied*, 405 U.S. 999 (1972); *cf.* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Second, the Court did not decide whether the denial of a lesser-included offense instruction was itself a violation of due process.

Without exploring the problem in any depth, the Supreme Court in *Keeble* also defended its expansion of section 1153 jurisdiction by stating: "No interest of a tribe is jeopardized by this decision." 412 U.S. at 214. This unsupported assertion is, at best, a

tion 3242, which requires Indian offenses heard under section 1153 to be tried in the same manner as other offenses within the exclusive jurisdiction of the United States. Since a non-Indian tried under section 1152 for the same crime would be entitled to the lesser-included offense instruction which Keeble was refused,[178] the Court concluded that refusal of the requested instruction deprived Keeble of his right under section 3242 to be tried in the same manner as other persons committing like crimes.[179]

Although *Keeble* mandated the issuance of a lesser-included offense instruction, "*Keeble* did not explicitly hold that jurisdiction for a conviction of and punishment for the lesser included offense existed in the federal court."[180] In *Felicia v. United States*,[181] the Court of Appeals for the Eighth Circuit rejected the argument that *Keeble* did not allow the district court to exercise jurisdiction to sentence for a lesser-included offense. Otherwise, the court stated, the lesser-included offense instruction would be "an exercise in futility."[182] Al-

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dubious conclusion. Either an acquittal or conviction on the lesser-included offense may prevent subsequent prosecution of the Indian offender in the tribal court. The Indian Civil Rights Act of 1968 prevents tribal courts from subjecting any person to double jeopardy. 25 U.S.C. § 1302(3) (1970); *cf.* Settler v. Lameer, 507 F.2d 231, 242 (9th Cir. 1974). Whether a subsequent tribal court prosecution of an Indian for a lesser-included offense, after either an acquittal or conviction in federal courts, constitutes double jeopardy is dependent upon whether the tribal courts are courts of the same sovereignty as the federal courts. *See* Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1952); United States v. Lanza, 260 U.S. 377 (1922). *See generally* Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961). While the federal courts have been badly divided on the question of whether the tribal courts are arms of the federal government, or constitute courts of an independent sovereignty, the better view suggests the latter approach. *Compare* Native Am. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959), *with* United States v. Kills Plenty, 466 F.2d 240, 247 (8th Cir. 1972) (Heaney, J., dissenting); *and* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965). *See generally* Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D.L. REV. 337, 343-44 (1969); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1344 (1969); text & notes 268-80 *infra*.

178. 412 U.S. at 209, 212. "If a non-Indian had committed this same act on an Indian Reservation, he would, of course, be tried in federal court under federal enclave law." *Id.* at 209 n.8.

179. *Id.* at 212.

180. Felicia v. United States, 495 F.2d 353, 354-55 (8th Cir.), *cert. denied*, 419 U.S. 849 (1974).

181. 495 F.2d 353 (8th Cir.), *cert. denied*, 419 U.S. 849 (1974).

182. *Id.* at 355.

> We conclude that the jurisdiction of the federal courts was not expanded by the *Keeble* decision but that jurisdiction over a lesser included offense is implicit in the statutes hereinafter set forth.
>
> . . . .
>
> . . . In short, since lesser included offenses are cognizable at federal law and at state law; since section 1153 provides that an Indian charged under the Major Crimes Act shall be subject to the same laws and penalties as all other persons committing any of those offenses; since the offenses must be defined *and punished* in accordance with South Dakota law; and since . . . *Keeble* implicitly recognized that federal courts have jurisdiction to convict and punish for a lesser offense included within the enumerated crimes of the Major Crimes Act . . . the district court . . . had jurisdiction to sentence Felicia.

*Id.* (emphasis in original).

though *Felicia* is consistent with *Keeble*'s command that a section 1153 prosecution be tried under section 3242 in the same manner as a section 1152 prosecution, a contrary result would, as one commentator has suggested, certainly be less intrusive on Indian tribal court jurisdiction.[183]

The impact of *Keeble* on practice under section 1153 is far from clear. At least three Justices suggested that only crimes defined by federal statute, like the assault involved in *Keeble*, are part of the lesser-included offense jurisdiction granted to the federal courts under section 1153.[184] On Indian policy grounds this view is appealing because of the adverse impact on tribal court jurisdiction an expansive reading of *Keeble* forbodes. On the other hand, there is a certain lack of logic to limiting *Keeble* solely to lesser-included crimes defined by federal statute. The offense actually charged in *Keeble*, assault resulting in serious bodily injury, was defined by state law under the pre-1968 version of section 1153.[185] To hold that only a federally-defined offense can be a lesser-included offense to a state defined crime seems anomalous. Moreover, limiting lesser-included offense instructions to federally defined crimes is inconsistent with the rationale in *Keeble*. Since the Court relied on section 3242 to assure that Indians were not denied the benefits which were available to non-Indians charged with the same offense, the equality demanded by the *Keeble* holding suggests that a lesser-included offense instruction should be available even when the lesser offense is not federally-defined. Since the Assimilative Crimes Act applies to prosecutions of non-Indians brought under section 1152,[186] lesser-included offense instructions on state defined crimes will always be available in such prosecutions. Arguably, section 3242 and the *Keeble* equality principle demand the same for Indian defendants.

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183. One commentator suggests that treating a verdict of guilty on the lesser-included offense as an acquittal "would still protect the defendant from an unjustified guilty verdict on the greater offenses," Vollmann, *supra* note 149, at 402, a consideration raised by the *Keeble* Court. 412 U.S. at 212-13.

184. Keeble v. United States, 412 U.S. 205, 215-17 (1973) (Stewart, Powell & Rehnquist, JJ., dissenting).

> It is a commonplace that federal courts are courts of limited jurisdiction, and that there are no common law offenses against the United States. "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense.". . . "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms.". . . And it is also clear that simple assault by an Indian on an Indian reservation, the purported "lesser included offense" in this case, comes within no federal jurisdictional statute.

*Id.* at 215-16 (citations omitted). *See also* Vollmann, *supra* note 149, at 401 n.108.

185. *See* text & note 175 *supra.*

186. See text & notes 134-48 *supra.*

If the lesser offense is not defined by federal statute, there are several alternative ways to determine its definition and punishment:[187] There is the law of the state in which the offense was committed, tribal law and order codes,[188] or the Code of Indian Tribal Offenses.[189] Several arguments can be made that state law governs the definition of lesser-included offenses in most instances.[190] First, for those crimes defined by state law under the express language of section 1153—burglary and incest—the adoption of state law arguably incorporates lesser-included offenses. Second, as *Keeble* requires equality of treatment between section 1152 and section 1153 prosecutions, state definition of lesser-included crimes under section 1153 comports with the effect of the Assimilative Crimes Act under section 1152. Third, the new paragraph in section 1153, adopting state law for any enumerated crime not defined by federal law, may apply to lesser-included offenses.[191]

An equally plausible argument can be made, however, that state definitions should be rejected in favor of the tribal law and order codes or the Code of Indian Tribal Offenses. First, adoption of tribal law will do less damage to the Indian tribal interests by furthering self-government and preventing an expansion of state legislative control over Indian law enforcement problems. Second, tribal law and order codes and the Code of Indian Offenses are directed toward Indian problems specifically, making them more palatable than the general state criminal codes. Adoption of tribal law in section 1153 prosecutions is not without difficulty, however. Tribal codes are often not readily avail-

187. *See generally* Jim v. CIT Financial Servs. Corp., 87 N.M. 362, 364, 533 P.2d 751, 753 (1975) (suggesting tribal law entitled to full faith and credit and therefore represents a potential source of law for resolution of choice of law questions in state courts).

188. *See* NAVAJO TRIBAL CODE tit. 17, §§ 101-835 (Equity 1970); *cf.* 25 C.F.R. § 11.1(d) (1976).

189. 25 C.F.R. §§ 11.38-87NH (1976). *See also id.* § 11.2(d). Tribal law and order codes and the Code of Indian Tribal Offenses are entirely separate and distinct forms of government. *See* 2 NAT'L AM. INDIAN COURT JUDGES ASS'N, *supra* note 48, at 28. *See also* text & notes 250-324 *infra.*

190. *See* Joe v. United States, 510 F.2d 1038 (10th Cir. 1974); United States v. Fire Thunder, 489 F.2d 938 (8th Cir. 1974).

191. The amended version of section 1153 contains a paragraph which states that any other offense included in section 1153 which is not defined and punished by federal law shall be defined and punished in accordance with the state law in force at the time of such offense. Indian Crimes Act of 1976, Pub. L. No. 94-297, § 2, 90 Stat. 585. The provision seems to be an overly cautious reaction to Acunia v. United States, 404 F.2d 140 (9th Cir. 1968), which held, under the pre-1968 version of section 1153, that the crime of incest could not be prosecuted under the Major Crimes Act. Incest was not defined federally and at that time no provision of the Major Crimes Act expressly incorporated state definitions of that crime. As all offenses enumerated in section 1153 except incest and burglary are now defined by federal law, and state law is expressly adopted for incest and burglary prosecutions, the newly added last paragraph serves no apparent purpose, unless it is a prospective protective device or a vehicle for defining lesser-included offenses. It is important to note, however, that this new provision only refers to the "above offenses" enunciated in section 1153. Thus, this new provision neither expressly covers the lesser-included crime problem created by *Keeble* nor does it incorporate the Assimilative Crimes Act into section 1153 jurisdiction.

able to the federal district courts, and reported decisions under either the tribal codes or the Code of Indian Offenses are virtually nonexistent. Moreover, under the Indian Civil Rights Act of 1968, tribal court jurisdiction is limited to punishments of no greater than 6 months imprisonment or a fine of 500 dollars or both.[192] Courts will be forced, provided the *Keeble* rationale is extended to allow federal jurisdiction over non-federal lesser-included offenses under section 1153, to grapple with these varying interests and decide under which law these crimes should be defined.

Further questions are posed by *Keeble* for section 1153 jurisdiction. Although *Keeble* indicates that federal prosecutors cannot initiate prosecutions for crimes not specifically enumerated in section 1153,[193] the impact of *Keeble* on procedure after the initiation of a section 1153 prosecution is unresolved. For example, the Court raised, but did not resolve, the issue whether the government could request and secure a lesser-included offense instruction in such a prosecution.[194] Another issue unresolved by *Keeble* is the district court's authority in a section 1153 prosecution to inquire whether an indictment charging the violation of one of the 14 enumerated crimes is really a facade to facilitate the creation of federal jurisdiction over a lesser charge. Yet another problem posed by *Keeble* is whether a district court has jurisdiction to accept a bargained plea of guilty to a lesser-included offense.

Plea bargaining apparently became common practice in section 1153 prosecutions after *Keeble*.[195] If the plea bargain is entered into after the prosecution is commenced, the *Keeble* requirement that section 1153 Indian defendants be treated in the same manner as non-Indians prosecuted under section 1152 apparently mandates federal jurisdiction to accept the plea. However, if the accused and the prosecutor agree on a guilty plea to a lesser offense before the formal charge under section 1153 is lodged, the timing suggests that the indictment on the greater charge is a facade or sham to expand jurisdiction beyond that conferred by section 1153.[196] Of course, the language of section 3242 only commands that Indians prosecuted under section 1153 "be tried . . . in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."[197] Read narrowly, the word "tried" may not cover the

192. 25 U.S.C. § 1302(7) (1970).
193. 412 U.S. at 214.
194. *Id.* at 214 n.14.
195. *See* Vollmann, *supra* note 149.
196. *See generally* text & note 111 *supra*.
197. 18 U.S.C.A. § 3242 (Supp. Pamphlet 1976).

entry of a guilty plea. In any event, federal judges must assure themselves of the factual basis for a guilty plea, including determining that jurisdictional requisites are met.[198] Federal judges are best advised to inquire into the timing of the plea negotiations in order to assure both that they have jurisdiction under section 1153, and to build a record for later collateral attacks on the conviction. This inquiry would further protect the interests of the Indian tribes by assuring that section 1153 does not unnecessarily divest the tribal courts of jurisdiction.

### 4. *Due Process Implications of Jurisdictional Patterns Based on Race*

The jurisdictional patterns created by the federal statutes discussed above are substantially governed by the race of the accused and, in some cases, the victim. Under the due process clause of the fifth amendment, racial classifications are inherently suspect,[199] and the jurisdictional patterns established by these statutes have been subject to constitutional scrutiny. The fact that jurisdictional patterns are structured according to racial status, however, does not necessarily render them unconstitutional;[200] racial classifications are invalid only if they serve no compelling governmental interest.[201] Most courts recognize that the federal guardianship in regard to Indians legitimately requires that Congress draw jurisdictional and policy lines for the Indian tribes along a racial axis, and accordingly hold that such distinctions are not per se unconstitutional.[202]

Racial distinctions based upon the trusteeship theory are justified only where racial status does not disadvantage the Indian ward. Once

198. *See* FED. R. CRIM. P. 11. *See also* North Carolina v. Alford, 400 U.S. 25 (1970); Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459 (1969).

199. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944).

200. Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. Morton v. Mancari, 417 U.S. 535, 552 (1974). *See also* cases cited note 202 *infra.*

201. United States v. Antelope, 523 F.2d 400, 403 (9th Cir. 1975), *cert. granted,* 424 U.S. 907 (1976) (No. 75-661); United States v. Analla, 490 F.2d 1204, 1208 (10th Cir.), *vacated on other grounds,* 419 U.S. 813 (1974); Kills Crow v. United States, 451 F.2d 323, 325 (8th Cir. 1971), *cert. denied,* 405 U.S. 999 (1972).

202. United States v. Analla, 490 F.2d 1204, 1208 (10th Cir.), *vacated on other grounds,* 419 U.S. 813 (1974); Kills Crow v. United States, 451 F.2d 323, 325 (8th Cir. 1971), *cert. denied,* 405 U.S. 999 (1972); United States v. Burland, 441 F.2d 1199, 1203 (9th Cir.), *cert. denied,* 404 U.S. 842 (1971); Gray v. United States, 394 F.2d 96, 98 (9th Cir. 1967), *cert. denied,* 393 U.S. 985 (1968).

a racial distinction puts an Indian defendant in a position inferior to that of an accused non-Indian, federal protection of Indian tribes is replaced by invidious discrimination. Federal courts have thus held that racial distinctions created by sections 1152 and 1153 violate the due process clause of the fifth amendment if an Indian accused is harmed by the classification in a manner not similarly affecting a non-Indian defendant committing the same act.[203] Of course, if the statutory scheme creates a potential discrimination, the fifth amendment due process clause is not violated. Due process is denied only when the Indian accused is actually harmed by the discrimination.[204]

The statutory equality principle which the *Keeble* Court found in section 3242 resolves many due process challenges in section 1153 prosecutions.[205] Other fifth amendment problems under section 1153 are resolved by the Indian Crimes Act of 1976. Prior to 1976, section 1153 adopted state law to define rape, assault with intent to commit rape, assault with a dangerous weapon, and assault resulting in serious bodily injury.[206] Non-Indian defendants accused of perpetrating these crimes against an Indian were tried under section 1152, however, where federal definitions of these crimes applied in whole or in part. This distinction in treatment, resulting from congressional inadvertence, sometimes operated to the disadvantage of Indian defendants, creating serious fifth amendment problems.[207] Since these crimes are now defined under section 1153 by federal law, such problems apparently are resolved. Although burglary and incest remain defined by state law pursuant to section 1153, they are also defined by state law in a prosecution brought under section 1152, since they are not defined in the federal code.[208] Thus, no inequality of treatment will result in prosecutions for burglary or incest.

Although fifth amendment issues still inhere in the choice of law for the definition of lesser-included offenses under *Keeble*,[209] the only

203. United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976); United States v. Antelope, 523 F.2d 400 (9th Cir. 1975), *cert. granted*, 424 U.S. 907 (1976) (No. 75-661); United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1974); United States v. Boone, 347 F. Supp. 1031 (D.N.M. 1972).

204. *See* United States v. Goings, 527 F.2d 183 (8th Cir. 1975); United States v. Maestas, 523 F.2d 316 (10th Cir. 1975).

205. Prior to *Keeble*, the unavailability to Indian defendants of lesser-included offense instructions was a common basis for due process challenges to section 1153 prosecutions. United States v. Joe, 452 F.2d 653 (10th Cir. 1971), *cert. denied*, 406 U.S. 931 (1972); Kills Crow v. United States, 451 F.2d 323 (8th Cir. 1971), *cert. denied*, 405 U.S. 999 (1972).

206. 18 U.S.C. § 1153 (1970), *as amended*, 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976).

207. *See* United States v. Goings, 527 F.2d 183 (8th Cir. 1975); United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976); United States v. Maestas, 523 F.2d 316 (10th Cir. 1975); United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1974); United States v. Boone, 347 F. Supp. 1031 (D.N.M. 1972).

208. H.R. REP. No. 94-1038, 94th Cong., 2d Sess. 5 n.10 (1976).

209. See text & notes 187-92 *supra*.

serious due process question left in the federal jurisdictional statutes governing Indian country concerns the judicially created non-Indian crime exception to section 1152 jurisdiction.[210] Indian defendants, rather than comparing their status with a non-Indian defendant tried under section 1152, have recently drawn a comparison with non-Indian defendants who would be tried in state courts under applicable state law because of the *McBratney* trilogy. This argument has generally not prevailed in the federal courts,[211] although the Ninth Circuit recently accepted it in *United States v. Antelope*.[212] In *Antelope*, Indian defendants claimed that the federal felony-murder provision,[213] applied to them in a section 1153 prosecution for the murder of a non-Indian, was unconstitutional. Idaho, the state in which the crime was committed, had no comparable felony-murder doctrine.[214] The appellants claimed that a white who committed the same crime would be tried in a state court under *McBratney*, where the prosecution would have a substantially heavier burden of proof.[215] Finding that the prosecution of the Indian defendants under section 1153 effectively reduced the prosecution's burden of proof "based solely on race," the court concluded that section 1153 was unconstitutional as applied.[216] *Antelope* thus introduces a new due process problem into the jurisdictional maze characterizing Indian law: choice of forum as a racial classification.

Analytically, the Ninth Circuit's decision in *Antelope* is troublesome. Unlike the problems formerly created when relevant comparisons were being drawn between prosecutions under sections 1152 and 1153, the due process claim in *Antelope* is more tenuous. Since the non-Indian defendant charged under section 1152 would be treated in exactly the same fashion as an Indian defendant charged under section 1153, the distinction created by *McBratney* based state prosecutions is not truly based on the race of the accused—a point largely ignored in *Antelope*. Consequently, any discrimination which occurs merely flows out of the difference in forum, which is surely not itself arbitrary or capricious. While the choice of forum in such cases does turn on the race of the victim, the defendant would seemingly lack standing to object to that particular discrimination. The defendant is simply not

210. See text & notes 97-107 *supra*.
211. United States v. Burland, 441 F.2d 1199, 1202-03 (9th Cir.), *cert. denied*, 404 U.S. 842 (1971); Mull v. United States, 402 F.2d 571, 573 (9th Cir. 1968), *cert. denied*, 393 U.S. 1107 (1969); Gray v. United States, 394 F.2d 96, 98 (9th Cir. 1968). *But see* Henry v. United States, 432 F.2d 114, 119 (9th Cir. 1970), *modified*, 434 F.2d 1283 (9th Cir.), *cert. denied*, 400 U.S. 1011 (1971).
212. 523 F.2d 400 (9th Cir. 1975), *cert. granted*, 424 U.S. 907 (1976) (No. 75-661).
213. 18 U.S.C. § 1111 (1970).
214. 523 F.2d at 403.
215. *Id.*
216. *Id.* at 406.

discriminated against on account of his or her race in such a situation.[217] Of course, should the Supreme Court uphold the Ninth Circuit's decision in *Antelope*, new due process problems would be created to replace those solved by *Keeble* and the 1976 amendments to section 1153.

### 5. *Exceptions to the Federal Statutory Scheme*

The federal jurisdictional scheme set forth in the statutory provisions already discussed establishes the criminal jurisdiction framework for many reservations. However, Congress has altered this jurisdictional scheme for some tribes by special legislation. In some instances, the relationship of the special legislation to the general statutory scheme is expressly stated by Congress; however, a number of ambiguities still remain.[218] The two most important exceptions to the general jurisdictional arrangement arise out of federal Indian policy enunciated during the fifties, as exemplified by Public Law 280[219] and the tribal termination acts.[220]

Public Law 280 worked a major change in the criminal jurisdictional scheme, by requiring six states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—to assume complete criminal and civil jurisdiction over most of the reservations located within their boundaries.[221] The Act also provided that within the affected reservations in these "mandatory" states, federal jurisdiction over crimes described in sections 1152 and 1153 would not apply.[222] Congress avoided concurrent federal-state jurisdiction, apparently because of the potential multiple prosecution implications which otherwise might ensue.[223]

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217. *Cf.* Giduldig v. Aiello, 417 U.S. 484 (1974).

218. Of course, courts will follow the "canon of construction applied over a century and a half by this Court . . . that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." Antoine v. Washington, 420 U.S. 194, 199-200 (1975). *See also* Bryan v. Itasca County, 426 U.S. 373 (1976); Menominee Tribe v. United States, 391 U.S. 404, 406 n.2, 412-13 (1968); Marlin v. Lewallen, 276 U.S. 58, 68 (1928); Choate v. Trapp, 224 U.S. 665, 675 (1912); *Ex parte* Crow Dog, 109 U.S. 556, 572 (1883).

219. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (now codified, as amended, in scattered sections of 18 & 28 U.S.C.).

220. *See, e.g.*, Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099 (codified at 25 U.S.C. §§ 741-760 (1970)) (various tribes in Utah); Act of Aug. 27, 1954, ch. 1009, 68 Stat. 868 (codified at 25 U.S.C. §§ 677-677aa (1970)) (mixedblood Utes of the Uintah and Ouray Reservation in Utah); Act of Aug. 23, 1954, ch. 831, 68 Stat. 768 (codified at 25 U.S.C. §§ 721-728 (1970)) (Alabama and Coushatta Tribes of Texas); Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (codified at 25 U.S.C. §§ 564-565 (1970)) (Klamath and other tribes in Oregon); Act of June 17, 1954, ch. 303, § 1, 68 Stat. 250 (codified at 25 U.S.C. §§ 891-902 (1970)) (Menominee Tribe of Wisconsin).

221. Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588 (now codified at 18 U.S.C. § 1162(a) (1970)).

222. *Id.* at 67 Stat. 589 (codified at 18 U.S.C. § 1162(c) (1970)). In addition to rendering federal criminal jurisdiction nugatory over the described reservations in the mandatory states, the Act also preserved Indian treaty rights and hunting, trapping, and fishing rights. *Id.* § 1162(b).

223. Where the state and federal governments have concurrent jurisdiction, the fifth

Public Law 280 not only compelled six states to assume jurisdiction, it also permitted the assumption of Indian jurisdiction by any other states that desired to do so.[224] The Act gave congressional consent to the assumption by the states of criminal and civil jurisdiction "by affirmative legislative action,"[225] and furthermore gave congressional consent to the amendment of state constitutions which contained disclaimers of jurisdiction over Indian lands, presumably a necessary predicate to the assumption of jurisdiction.[226] As originally enacted, Public Law 280 required no tribal consent for a state's discretionary assumption of jurisdiction. A number of states assumed such jurisdiction despite contrary desires on the part of resident Indian tribes.[227] However, Public Law 280 was amended by the Indian Civil Rights Act of 1968 to prospectively require tribal consent, and to allow retrocession of jurisdiction undertaken by either mandatory or discretionary states pursuant to Public Law 280.[228] No tribe has formally consented to the extension of state criminal jurisdiction over its lands. Five states—Nebraska, Nevada, Minnesota, Washington, and Wisconsin—have retroceded some of the criminal jurisdiction they assumed under Public Law 280.[229]

The effect of the voluntary assumption of state jurisdiction under Public Law 280 on the federal jurisdiction conferred by sections 1152

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amendment double jeopardy clause does not prevent the occurrence of multiple prosecutions. In Abbate v. United States, 359 U.S. 187 (1959), the Court concluded that "the prior Illinois conviction of the petitioners did not bar the instant federal prosecution." *Id.* at 196. Bartkus v. Illinois, 359 U.S. 121 (1959), allowed a state prosecution which followed a federal trial to stand. If concurrent state and federal Indian jurisdiction was utilized, Indians could be tried for the same crime twice simply because the offense was committed in Indian territory. This double prosecution might be invidiously discriminatory, a result Congress is encouraged to avoid. *See generally* Smith v. United States, 423 U.S. 1303 (1975); Benton v. Maryland, 395 U.S. 784 (1969); United States v. Knight, 509 F.2d 354 (D.C. Cir. 1974); United States v. Treadway, 312 F. Supp. 307 (E.D. Va. 1970).

224. Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588 (repealed 1970).

225. *Id.* at 67 Stat. 590.

226. *Id.* § 6. Although the language of section 6 clearly requires amendment of state constitutions to remove this type of impediment to jurisdiction, virtually all states that have assumed Public Law 280 jurisdiction have ignored this language, thereby calling into question the legality of their assumption of criminal jurisdiction under section 7. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A.L. REV. 535, 544-51 (1975); "Enforcement of State Financial Responsibility Laws Within Indian Country," *supra* note 37, at 836 n.38. *See also* discussion note 339 *infra*.

227. *See* Goldberg, *supra* note 226.

228. *See* Pub. Law No. 90-284, §§ 401-403, 82 Stat. 77.

229. 34 Fed. Reg. 14288 (1969) (Washington; Quinault Reservation); 35 Fed. Reg. 16598 (1970) (Nebraska; portion of the Omaha Reservation lying within Thurston County); 37 Fed. Reg. 7353 (1972) (Washington; Port Madison Reservation); 40 Fed. Reg. 4026 (1975) (Minnesota; Boise Forte Reservation); 40 Fed. Reg. 27501 (1975) Nevada; numerous tribes); 41 Fed. Reg. 8516 (1976) (Wisconsin; Menominee). *See generally* Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973); United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971).

and 1153 is unclear.[230] Arguably, the state jurisdiction conferred is exclusive. First, in enacting Public Law 280, Congress did not expressly preserve federal jurisdiction. Second, because of the potential multiple prosecution aspects of concurrent jurisdiction and its concomitant fifth amendment implications,[231] Congress has rather consistently frowned on concurrent state-federal jurisdictional arrangements for Indian lands.[232] Most important, section 7 of Public Law 280 originally indicated that jurisdiction could be assumed by states "not having jurisdiction with respect to criminal offenses . . . *as provided for in this Act.*"[233] Since section 2 of the Act expressly negated continued operation of sections 1152 and 1153 in the mandatory states,[234] the implication of the language of section 7 would suggest that the jurisdictional opportunities afforded discretionary states under section 7 included the same exclusive state jurisdictional structure provided for the mandatory states. While section 7 was later technically repealed[235] and section 1321 of title 25[236] substituted in its place, the alteration of language in section 1321 was not designed to change the jurisdictional outcome. Rather, like its predecessor, section 1321 appears to afford the state the opportunity, now only with tribal consent, to assume complete criminal jurisdiction over Indian lands exclusive of any assertion of federal jurisdiction under sections 1152 and 1153.

The termination acts[237] also significantly changed the operation of sections 1152 and 1153. The acts commonly provided that upon completion of the termination process "all statutes of the United States that affect Indians or Indian tribes because of their Indian status shall be inapplicable to them, and the laws of the several states shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction."[238] The acts clearly indicate that the termination process included the elimination of federal criminal jurisdiction for-

230. Unlike 18 U.S.C. § 1162 (1970), mandating that certain states assume jurisdiction, the sections of Public Law 280 relating to voluntary assumption do not expressly specify a relationship to sections 1152 and 1153.

231. *See* discussion note 223 *supra.*

232. *See* Youngbear v. Brewer, 415 F. Supp. 807, 812 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977). *See also* 18 U.S.C. § 1162(c) (1970); 25 U.S.C. § 232 (1970).

233. Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588 (emphasis added).

234. *Id.* § 2(c).

235. 25 U.S.C. § 1323(b) (1970).

236. *Id.* § 1321(a).

237. *See* text & note 220 *supra.*

238. *See* 25 U.S.C. § 980 (1970) (Ponca Tribe of Nebraska). To some extent, these provisions were superfluous, because of their overlap with Public Law 280. *Compare id.* (as to the Ponca tribe of Nebraska, "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction"), *with* 18 U.S.C. § 1162(a) (1970) (in Nebraska "the criminal law of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory").

merly exercised over the terminated Indian lands under sections 1152 and 1153.

A number of statutes enacted during the forties also created exceptions to the exclusive federal jurisdictional scheme described above.[239] The scope of some of these statutes is confusing. Three statutes passed during the forties covered all Indian reservations in Kansas,[240] the Sac and Fox Indian Reservation in Iowa,[241] and the Devil's Lake Reservation in North Dakota.[242] These acts were virtually identical in language and purported to grant the affected states criminal jurisdiction over offenses committed on Indian lands. However, each statute contained a proviso stating that the grant of jurisdiction to the states "shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."[243] As the federal jurisdiction which such a statute reserved traditionally was exclusive, the issue arose regarding the scope of the jurisdiction conferred on the states through these three acts. In *Youngbear v. Brewer*,[244] a federal district court construed the proviso contained in the Iowa Act to reserve exclusive jurisdiction to the federal courts over section 1153 crimes. The jurisdiction conferred on the state was only jurisdiction over lesser crimes not enumerated in section 1153 or defined by other federal statutes. This result was compelled by the legislative history of the acts,[245] the maxims of statutory construction concerning laws affecting Indians,[246] and the potential multiple prosecution problems which would be created by a contrary construction.[247]

Other isolated, idiosyncratic exceptions to the general federal statutory scheme can also be found.[248] In summary, although sections

239. For example, in the Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1970)), Congress granted the State of New York complete jurisdiction over all Indian lands within the state, apparently exclusive of any federal jurisdiction. Hunting and fishing rights, guaranteed to the New York Indians by custom, agreement, or treaty, were not affected by the Act. Similarly, Congress granted California complete and exclusive criminal jurisdiction over the Agua Caliente Reservation of Mission Indians. Act of Oct. 5, 1949, ch. 604, 63 Stat. 705. The Reservation land, however, was exempted from alienation, encumbrance, or state taxation. *See also* 18 U.S.C. § 1162(b) (1970).

240. Act of June 25, 1948, ch. 645, 62 Stat. 827 (codified at 18 U.S.C. § 3243 (1970)).

241. Act of June 30, 1948, ch. 759, 62 Stat. 1161. *See also* Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977); State v. Youngbear, 229 N.W.2d 728 (Iowa), *cert. denied*, 423 U.S. 1018 (1975).

242. Act of May 31, 1946, ch. 279, 60 Stat. 229. *See generally* State v. Lohnes, 69 N.W.2d 508 (N.D. 1955) (despite the statute, North Dakota does not have jurisdiction).

243. 18 U.S.C. § 3243 (1970).

244. 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977).

245. *Id.* at 812-13.

246. *Id.* at 811-12. See discussion note 218 *supra*.

247. 415 F. Supp. at 812. See discussion note 223 *supra*.

248. For example, a long line of state and federal decisions hold, contrary to the

1152, 1153, and 3242 set forth a general jurisdictional scheme for Indian lands, a number of exceptions to that scheme exist, not found in the language of those statutes. Accordingly, close attention must be paid to Public Law 280, the Indian Civil Rights Act, special congressional statutes, and idiosyncratic decisions for any particular reservation over which jurisdiction is at issue.[249]

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language of section 1152 and the judicial gloss placed on section 1153, that there is concurrent state and federal jurisdiction over the Eastern Band of Cherokee Reservation in North Carolina. *See, e.g.*, Eastern Band of Cherokee Indians v. United States, 117 U.S. 288, 309 (1886); *In re* McCoy, 233 F. Supp. 409, 412 (E.D.N.C. 1964); State v. McAlhaney, 220 N.C. 387, 389, 17 S.E.2d 352, 354 (1941). This result was apparently dictated by the peculiar history of that reservation. *See also* discussion note 39 *supra*.

249. In view of the maze of federal Indian jurisdictional statutes, it is advisable to exercise the greatest care to see that charges thereunder have been properly pleaded and proven. In this regard, a brief review of the pleading and practice requirements under these statutes is in order. As the situs of the crime and the racial status of the accused and victim are jurisdictional prerequisites, they must be adequately pled in the indictment, or the court lacks jurisdiction over the prosecution. Wheeler v. United States, 159 U.S. 523 (1895); Westmoreland v. United States, 155 U.S. 545 (1895); *see* Gourneau v. United States, 390 F.2d 320 (8th Cir. 1968); Gunville v. United States, 386 F.2d 184, 185 (8th Cir. 1967); United States v. Ward, 42 F. 320 (C.C.S.D. Cal. 1890). Moreover, the government must prove those jurisdictional facts as part of its burden of proof. Lucas v. United States, 163 U.S. 612, 617 (1896); Famous Smith v. United States, 151 U.S. 50 (1894); United States v. Ives, 504 F.2d 935 (9th Cir. 1974), *vacated on other grounds*, 421 U.S. 944 (1975). Like other elements of the crime, the prosecution must prove jurisdictional facts beyond a reasonable doubt. *Cf.* Mullaney v. Wilbur, 421 U.S. 684 (1975); *In re* Winship, 397 U.S. 358, 364 (1970).

Whether the prosecution is under section 1152 or section 1153, the government must allege and prove that the crime occurred in Indian country. United States v. Ives, *supra*; United States v. Jewett, 438 F.2d 495 (8th Cir.), *cert. denied*, 402 U.S. 947 (1971); Gourneau v. United States, *supra*; Azure v. United States, 248 F.2d 335 (8th Cir. 1957); Phelps v. United States, 160 F.2d 626 (9th Cir. 1947). Of course, where criminal jurisdiction over Indian lands has been extended to the states, it is not necessary to allege that the crime occurred on Indian lands. The state's jurisdiction is plenary. *Cf.* State v. Buckaroo Jack, 30 Nev. 325, 96 P. 497 (1908). If the crime occurred on a federally recognized reservation it should be sufficient to name the reservation in the indictment for section 1151(a) jurisdiction. However, if the government is relying on either sections 1151(b) or 1151(c) for jurisdiction over lands located outside of a formally established reservation, more specificity as to the history or status of the land in question is probably desirable. The issue of whether the particular land on which the alleged crime occurred is Indian country within the meaning of section 1151 is a question of law; whether the crime actually occurred on the land is a question of fact.

In prosecutions under either section 1152 or 1153, allegations and proof regarding the relevant racial status of the accused is required. Since section 1153 applies to crimes by Indians committed against the person or property of "another Indian or another person," the racial status of the victim is irrelevant to jurisdiction. The racial status of the victim is relevant to prosecutions brought under section 1152, however, and allegations and proof of that status are required. Lucas v. United States, *supra*; Westmoreland v. United States, *supra* at 548; Famous Smith v. United States, *supra* at 55; United States v. Heath, 509 F.2d 16, 20 (9th Cir. 1974). Although the question of racial status appears to be similar to the issue regarding the status of Indian land, apparently racial status is a factual question, decided by the trier of fact. *See* Westmoreland v. United States, *supra* at 549.

It is not necessary for the government in a section 1152 prosecution to negate each of the three section 1152 exceptions to jurisdiction. Of course, jurisdictional allegations may negate the intra-Indian crime exception to section 1152. *See* Lucas v. United States, *supra* at 616; Famous Smith v. United States, *supra* at 55; United States v. Ives, *supra* at 953; *cf.* Phelps v. United States, *supra* at 627 (attack on indictment for alleged failure to present evidence of racial status to grand jury).

The double jeopardy clause of section 1152 must apparently be raised by the accused, and any argument under the treaty exception to section 1152 should be properly raised, if relevant, by the defendant. *See also* United States v. La Plant, 156 F. Supp. 660 (D. Mont. 1957). As jurisdictional issues go to the heart of the federal court's

## II. Tribal Court Jurisdiction Over Criminal Matters: An Important Vestige of Tribal Sovereignty

### A. *Introduction: The History and Origin of Tribal Courts*

Effective Indian tribal law enforcement mechanisms existed long before the Native American tribes came into contact with European colonists. The clan or extended family often served as the primary institutions for the imposition of sanctions for the violation of tribal law.[250] However, the creation of courts, in the European sense, which meted out punishment for offenses based on evidence presented at formal hearings, occurred among the Indian tribes primarily as an outgrowth of their contact with European civilization. As early as 1808 the Cherokees began an evolution in tribal law and structure which, by 1898, when the Cherokee tribal courts were abolished, had created a sophisticated judicial mechanism which mixed traditional Cherokee values with Anglo-American judicial procedure.[251] Thus, the tribal court as it exists today is ironically both an important vestige of tribal sovereignty and a result of partial Indian adoption of Anglo-American jurisprudential structures and practices.

Although the tribal court mechanism grew during the 19th century in part out of the exercise of Indian tribal sovereignty over internal tribal matters, a substantial impetus to growth of tribal courts came with the establishment of the Courts of Indian Offenses in 1883 as part of an effort by the Secretary of the Interior to force the Indian tribes to abandon traditional "heathenish" practices.[252] In that year, the Commissioner of Indian Affairs issued, without statutory authorization, a series of regulations which established Courts of Indian Offenses, staffed by Indian judges, and created a criminal and civil code for the affected reservations.[253] This system was in part designed to break down traditional tribal governmental structures. Thus, the courts and the judges initially appointed to them were often not held in the highest esteem on the reservations.[254] At their peak, around 1900, Courts of Indian Offenses could be found on approximately two-thirds of the reservations.[255] Only the Five Civilized Tribes, the Indian tribes of

subject matter jurisdiction, they can be raised at any time, and the criminal rule requiring timely objections at trial is not applied. *Cf.* United States v. Heath, *supra* at 19; Gavin v. Hudson & M.R.R., 185 F.2d 104 (3rd Cir. 1950); United States v. Guyette, 382 F. Supp. 1266 (E.D. Va. 1974); Dean Oil Co. v. American Oil Co., 147 F. Supp. 414, 416 (D.N.J. 1956). *See also* Fed. R. Crim. P. 12(b)(2).

250. *See generally* K. Llewellyn, The Cheyenne Way (1941); J. Reid, A Law of Blood (1970).

251. *See generally* R. Strickland, Fire and the Spirits (1975).

252. W. Hagan, Indian Police and Judges 107-09 (1966).

253. *Id.*

254. *See id.* at 114-15.

255. *Id.* at 109.

New York, the Osage, the Pueblos, and the Eastern Cherokees were exempted from the coverage of the Court of Indian Offenses.[256]

Today the tribal courts are basically of three types. First, traditional tribal courts enforcing unwritten tribal customs still exist among nearly 20 Pueblos in New Mexico.[257] These courts follow traditional governmental patterns in having the tribal governing body serve as a dispute-resolution forum with the governor of the tribe presiding.[258] Second, the Courts of Indian Offenses are still provided for in federal regulations.[259] The regulations indicate that such courts were intended primarily as a stopgap measure where the enforcement of tribal law or custom had broken down and no other adequate substitute had been provided.[260] Federal regulations further establish a Code of Indian Offenses covering crimes ranging from peyote violations to attempted rape.[261] The regulations provide that once a tribal law and order code has been adopted, and approved by the tribe and the Secretary of the Interior, all provisions in the regulations dealing with Courts of Indian Offenses are inapplicable to the tribe, except for the regulations dealing with the qualifications, appointment, and removal of judges, and those dealing with the Indian police.[262] Since the regulations are designed to encourage tribes to set up their own courts, it is not surprising that there remain only a few Courts of Indian Offenses established pursuant to federal regulation.[263] Most reservation courts, approximately 50 at the present time, accordingly fall into the third category—tribal courts.[264] These courts are established by the tribes themselves under their own self-governing powers, but are externally limited in their powers by federal regulations relating primarily to the appointment, qualifications, and removal of judges,[265] and the provi-

256. *Id.*
257. 46 WASH. L. REV. 541, 544-45 (1971).
258. *Id.* at 545.
259. 25 C.F.R. §§ 11.1-11.37CA (1976).
260. *See id.* § 11.1(b).
261. *Id.* §§ 11.38-11.87NH.
262. *Id.* § 11.1(d).
263. *See* 2 NAT'L AM. INDIAN COURT JUDGES ASS'N, *supra* note 48, at 28 (stating that there are presently 19 Courts of Indian Offenses or "C.F.R. courts," 51 tribal courts, and 18 traditional courts). Other published materials evidence some confusion, however, regarding the number of Courts of Indian Offenses and tribal courts in existence. Kane, *The Negro and the Indian: A Comparison of Their Constitutional Rights*, 7 ARIZ. L. REV. 244, 248-49 (1966), indicates that 12 Courts of Indian Offenses, 53 tribal courts, and 19 traditional courts exist. However, the source cited by the author lists only five Courts of Indian Offenses and 51 tribal courts. *Hearings on the Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 242-46 (1961) [hereinafter cited as *1961 Hearings*]. It does appear, however, that the listing provided in the *1961 Hearings* is incomplete. The regulations continue to provide for a Court of Indian Offenses for the Coeur d'Alene Reservation, but that court is not listed in the *1961 Hearings*. *Compare* 25 C.F.R. § 11.2CA (1976), *with 1961 Hearings, supra.*
264. See discussion note 263 *supra.*
265. 25 C.F.R. §§ 11.3-.4 (1976).

sions of the Indian Civil Rights Act of 1968.[266] These courts enforce the written law and order codes adopted by the tribal government and approved by the Secretary of the Interior.[267]

The source of tribal court power is a problem which has perplexed American courts[268] and commentators.[269] One possible reason for the confusion is that the history of tribal courts indicates that they emerged both from the exercise of tribal sovereignty, as in the case of the Cherokee judicial system, and under pressure of imposed regulation by the federal government. To complicate the matter, federal statutes have never expressly authorized the creation of tribal courts or the Courts of Indian Offenses. Rather, what little federal statutory law exists regarding tribal courts has sought to limit their power,[270] thereby de facto recognizing their existence and legality. Even the federal regulations governing the Courts of Indian Offenses were, as their authors seemingly recognized, [271] promulgated without statutory authority, leaving these courts in an anomalous legal position.[272]

The dispute as to whether the source of tribal court power lies in tribal sovereignty or is delegated by federal authority is an important legal issue. First, the question of whether tribal courts represent

266. 25 U.S.C. §§ 1301-1303 (1970). *See generally* Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600, 618 (1976); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969) [hereinafter cited as Note, *The Indian Bill of Rights*]; Note, *An Interpretation of the Due Process Clause of the Indian Bill of Rights*, 51 N.D.L. REV. 191 (1974) [hereinafter cited as Note, *An Interpretation*].

267. 2 NAT'L AM. INDIAN COURT JUDGES ASS'N, *supra* note 48, at 28.

268. *Compare* United States v. Quiver, 241 U.S. 602 (1916) (indicating that the tribe is the source of tribal court authority), *with* United States v. Mullen, 71 F. 682 (D. Neb. 1895) (indicating that the source of authority is the Interior Department). *See generally* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965). A recent Ninth Circuit decision explicitly holds that an Indian tribal court is virtually an arm of the federal government, precluding a federal conviction after a tribal conviction for the same offense, under the fifth amendment double jeopardy clause. United States v. Wheeler, 545 F.2d 1255 (9th Cir. 1976).

269. *See generally* Powers of Indian Tribes, 55 I.D. 14 (1934); Solicitor's Memorandum, Apr. 27, 1939, in *1961 Hearings, supra* note 263, at 260; Fretz, *The Bill of Rights and American Indian Tribal Governments*, 6 NAT. RESOURCES J. 581 (1966); Martone, *American Indian Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600 (1976); Note, *The Indian Bill of Rights, supra* note 266; Note, *Indian Tribal Courts and Procedural Due Process: A Different Standard?*, 49 IND. L.J. 721 (1974) [hereinafter cited as Note, *Indian Tribal Courts*].

270. 25 U.S.C. §§ 1301-1303 (1970).

271. *See* W. HAGAN, *supra* note 252, at 107-11.

272. Authority for these courts could conceivably be found in 25 U.S.C. § 2 (1970), which sets out a general grant of power for the management of all Indian affairs and all matters arising out of Indian relations. Unfortunately, the section does not mention anything about the creation of tribal courts or other tribal governmental institutions, and on its face appears only to envision the promulgation of regulations relative to the bilateral relations between Indian tribes and the federal government. *See generally* Iron Crow v. Ogallala Sioux Tribe, 129 F. Supp. 15, 18 (D.S.D. 1955), *aff'd*, 231 F.2d 89 (8th Cir. 1956) (suggesting that section 2 authorized the regulations now found in 25 C.F.R. §§ 11.1-.306 (1976)); United States v. Clapox, 35 F. 575 (D.C. Ore. 1888).

a third sovereignty in the administration of criminal justice or are merely arms of the federal government has important implications for double jeopardy and collateral estoppel issues posed by multiple prosecutions of Indian offenders in federal and tribal courts.[273] Second, if the tribal courts are arms of the federal government, the full panoply of criminal guarantees secured to a criminal defendant in a federal trial may very well apply to the accused in a tribal court. While the 1968 Indian Bill of Rights seeks to statutorily guarantee some of these rights, its coverage does not appear to be coextensive with federal constitutional rights.[274] Third, if the tribal courts are considered mere extensions of the federal government, a number of important statutory and constitutional problems might emerge regarding their legality.[275] Finally, viewing the tribal courts as the progeny of the federal government rather than exertions of tribal self-governmental powers, renders them substantially more susceptible to federal interference and even abolition.

The better view would suggest that tribal courts are the product of the exercise of tribal powers of self-government rather than the stepchildren of the federal government. First, the example of the development of Cherokee courts indicates that tribal court mechanisms did emerge among some tribes as a product of the exercise of tribal sovereignty before the federal government imposed the Courts of Indian Offenses on the tribes. Second, while the cases are not unanimous, the weight of authority strongly suggests that the tribal courts are not arms of the federal government but rather the product of federally recognized tribal authority.[276] Even the Department of the Interior appears to subscribe to the view that the source of tribal court powers is the tribe and not Washington.[277] Third, federal statutes do not authorize

273. *See* discussion note 223 *supra;* text & notes 355-71 *infra.*

274. For example, the fifth amendment grand jury right is not included in 25 U.S.C. § 1302 (1970). A further example is the sixth amendment right to counsel; a tribal court must allow a defendant to employ counsel, but at his own expense. *Id.*

275. The tribal court system is prescribed by regulation rather than by statute, *id.* §§ 11.1-.37CA (1976), raising a number of administrative law questions regarding its legality. *See* B. SCHWARTZ, ADMINISTRATIVE LAW § 11 (1976); discussion note 272 *supra.* Additionally, if tribal courts are viewed as arms of the federal government, constitutional problems emerge as to what type of courts they are. They clearly are not article III courts. They do not seem to be article I or administrative courts either, as presumably both article I courts and administrative courts have to be created by federal statute; the tribal courts were not so created. *See generally* Note, *Indian Tribal Courts, supra* note 269, at 730-32. The question then arises whether a federal court can exist which is neither an article III nor article I court, nor a statutorily-created administrative tribunal.

276. *See, e.g.,* United States v. Quiver, 241 U.S. 602 (1916); Talton v. Mayes, 163 U.S. 376, 381-85 (1896); Native Am. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959). *But see* United States v. Wheeler, 545 F.2d 1255 (9th Cir. 1976); Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); Iron Crow v. Ogallala Sioux Tribe, 129 F. Supp. 15, 18 (D.S.D. 1955), *aff'd,* 231 F.2d 89 (8th Cir. 1956); United States v. Mullin, 71 F. 682 (D. Neb. 1895); United States v. Clapox, 35 F. 575 (D.C. Ore. 1888).

277. Powers of Indian Tribes, 55 I.D. 14, 19-30, 64 (1934); Solicitor's Memorandum,

or create the tribal courts, they merely regulate the exercise of their admitted power. Thus, the origin of the tribal courts cannot be found in the exertion of federal legislative power. Although regulations govern the qualifications, appointment, and removal of all tribal judges,[278] and require the approval of the Secretary of the Interior for tribal law and order codes and court systems,[279] that approval appears to be primarily supervisory, and does not denigrate the tribal origin of such codes and courts or convert them into federal laws and instrumentalities. Thus, the reservation courts, whether traditional, tribal, or Courts of Indian Offenses,[280] appear to be institutions whose authority and powers stem from tribal sovereignty. Indeed, the tribal courts are often the single most important vestige of tribal sovereignty on the reservations.

### B. *Tribal Court Jurisdiction*

The criminal jurisdiction of the tribal courts is even more unclear than their legal status. It is relatively simple to describe the criminal jurisdiction traditionally exercised by the tribal courts; the more interesting legal question is the scope of jurisdiction which the tribal courts could exercise should the tribes choose to enlarge their jurisdictional base. Although the criminal jurisdiction exercised by the tribal courts has traditionally been limited,[281] a number of recent developments have

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Apr. 27, 1939, *in 1961 Hearings, supra* note 263, at 260. *See also* Crosse, *Criminal and Civil Jurisdiction in Indian Country*, 4 ARIZ. L. REV. 57, 58 (1962).

278. *See* 25 C.F.R. §§ 11.3-.4 (1976).

279. *See id.* § 11.1(d)-(e).

280. The operation of the Courts of Indian Offenses presents the strongest argument that such courts are arms of the federal government. Since Courts of Indian Offenses, unlike the traditional or tribal courts, were created and operate pursuant to federal regulations, they may be viewed as arms of the federal government, although the cases do not unanimously support this view. See cases cited note 276 *supra*.

281. Today the tribal courts generally exercise jurisdiction only over crimes committed by Indians within the confines of the reservation. *See* 4 NAT'L AM. INDIAN COURT JUDGES ASS'N, *supra* note 48, at 4, 40. *See also Ex parte* Kenyon, 14 F. Cas. 353, 355 (No. 7720) (C.C.W.D. Ark. 1878); *1961 Hearings, supra* note 263, at 267. Furthermore, the jurisdiction exercised is generally over lesser crimes not enumerated within the federal jurisdiction afforded by section 1153. Kerr, *Constitutional Rights, Tribal Justice and the American Indian*, 18 J. PUB. L. 311, 318 (1969). The limitation of tribal jurisdiction to lesser offenses is now required by the congressional statement that the sentencing power of tribal courts may not exceed imprisonment for a term of 6 months or a fine of 500 dollars, or both. 25 U.S.C. § 1302(7) (1970). Even before that, several cases suggested that the enactment of the Federal Major Crimes Act in 1885 divested the tribes of jurisdiction over the offenses enumerated therein, and the traditions of the tribal courts and the Courts of Indian Offenses were built up around those cases. *See* United States v. Whaley, 37 F. 145 (C.C.S.D. Cal. 1880). *See also* United States v. Cardish, 145 F. 242 (E.D. Wis. 1906). Several recent cases also suggest that tribal court jurisdiction over serious crimes was divested by the enactment of the Federal Major Crimes Act. *See, e.g.*, Sam v. United States, 385 F.2d 213 (10th Cir. 1967); Glover v. United States, 219 F. Supp. 19 (D. Mont. 1963); Iron Crow v. Ogallala Sioux Tribe, 129 F. Supp. 15, 18 (D.S.D. 1955), *aff'd*, 231 F.2d 89 (8th Cir. 1956); *cf.* United States v. La Plant, 156 F. Supp. 660 (D. Mont. 1957).

combined to raise questions regarding the potential reach of tribal court powers. For example, a significant demand has emerged for the expansion of tribal court power to reach non-Indians who commit offenses on Indian land.[282] This demand is part of the broader effort by many tribes to secure greater control over their lands from the federal government. While the treaties with the Indian tribes after 1810 generally provided forums other than tribal courts for the trial of criminal offenses committed by non-Indians on Indian lands,[283] nothing in the modern federal statutes or regulations expressly prohibits the exercise of jurisdiction over non-Indians for offenses committed within the geographical area served by the court.

The Department of the Interior has long taken the position that tribal courts have no jurisdiction over non-Indians unless the defendant consents to the exercise of such jurisdiction.[284] However, that position appears to be based on case authority decided when tribal adjudication was still following traditional forms.[285] With the modernization of Indian courts, their adoption of many aspects of Anglo-American procedure and law, and the enactment of the Indian Civil Rights Act, most of the traditional concerns regarding Indians trying non-Indians would appear to be minimized or totally resolved. Thus, some Indian tribes have recently sought to enlarge their tribal criminal jurisdiction to include non-Indians,[286] and have succeeded.[287]

The case of *Settler v. Lameer*[288] has also recently called into ques-

282. *See Hearings on S.1 and S.1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess., pt. 7, at 5888, 5890 (1973). *See also* 4 NAT'L AM. INDIAN COURT JUDGES ASS'N, *supra* note 48, at 40 & n.7.

283. *See* Clinton, *supra* note 1, at 953-58.

284. Solicitor's Memorandum *cited in 1961 Hearings, supra* note 263, at 263.

285. *See Ex parte* Kenyon, 14 F. Cas. 353, 355 (No. 7,720) (C.C.W.D. Ark. 1878).

286. *See* Quechan Tribe v. Rowe, 531 F.2d 408 (9th Cir. 1976); Long v. Quinault Tribe, Crim. No. C75-677 (W.D. Wash., filed Sept. 2, 1975).

287. In Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), the court ruled that the Suquamish Tribe has jurisdiction to try a non-Indian for assaulting a tribal officer and resisting arrest on the Suquamish Reservation. *Id.* at 1010-12. Reasoning that the Suquamish Tribe was once a sovereign nation, and that the power to punish lawbreakers is an attribute of sovereignty, the court examined whether any treaties or congressional acts had withdrawn this power from the tribe. *Id.* Neither section 1152, nor the Civil Rights Act of 1968, nor Public Law 280, manifested an intent to prohibit Indian tribes from prosecuting non-Indians for violation of tribal law. *Id.* at 2039.

> Finally, we consider whether the exercise of criminal jurisdiction by the Suquamish in cases such as this one would interfere with or frustrate the policies of the United States. The sections of the tribal law and order code under which Oliphant is charged do not punish conduct otherwise privileged or authorize actions otherwise illegal under federal law. Thus no explicit conflict exists. Moreover, the federal government has been encouraging Indian tribes to adopt law and order codes, set up tribal courts, and exercise authority over reservation lands. . . . Tribal criminal jurisdiction over non-Indians, as limited by the Indian Bill of Rights, is a small but necessary part of this policy.

*Id.* (footnote and citation omitted).

288. 507 F.2d 231 (9th Cir. 1974). *See generally* Note, *Indian Law—Tribal Off-Reservation Jurisdiction*, 1975 WIS. L. REV. 1221.

tion the traditionally assumed limitation of tribal court jurisdiction to offenses committed on Indian lands. In *Settler*, the Ninth Circuit upheld the jurisdiction of a Yakima tribal court to punish tribal members for off-reservation fishing violations, pursuant to a tribal ordinance which specifically purported to cover such offenses.[289] The court's decision was based in great part on a liberal construction of treaty rights of the Yakima Tribe[290] which guaranteed members the right to fish at sites off the reservation in areas now within the State of Washington.[291] Thus, unlike a state whose criminal jurisdiction extends only to crimes committed within its boundaries,[292] the jurisdiction of a tribal court may at times include off-reservation conduct by tribal members. Since the decision in *Settler* turned primarily on the construction of the treaties with the Yakima Tribe, rather than on any extensive exploration of the inherent scope of tribal sovereignty, its implications for the off-reservation crimes jurisdiction of tribal courts in a nontreaty context are unclear. Since the states usually have jurisdiction over such offenses, any significant expansion of tribal court jurisdiction along these lines could pose serious problems of multiple prosecutions of Indians for the same offense.[293]

The limitation of tribal court jurisdiction to lesser offenses is also open to substantial question. While Congress limits the *punishment* a tribal court may impose upon conviction to 6 months imprisonment or a fine of 500 dollars or both,[294] nothing in the federal statutes or regulations prevents the tribe from prosecuting serious crimes of the type enumerated in the Federal Major Crimes Act.[295] While a few

289. 507 F.2d at 238.
290. *Id.*
291. Treaty with the Yakimas, June 9, 1855, art. III, 12 Stat. 951.
292. *See* State v. Volpe, 113 Conn. 288, 294, 55 A. 223, 226 (1931).
293. *See* text & notes 355-71 *infra.*
294. 25 U.S.C. § 1302(7) (1970).
295. In fact, the Code of Indian Offenses promulgated by the Department of the Interior overlaps the Federal Major Crimes Act. Despite the fact that section 1153 expressly covers larceny, 25 C.F.R. § 11.42 (1976) proscribes theft, rendering that offense punishable in the tribal courts.

Further evidence that the enactment of the Major Crimes Act was not intended to extinguish concurrent tribal jurisdiction over serious offenses is found in the legislative history of that Act. As originally proposed in the House, the provision required that Indians committing eight serious offenses be tried in federal courts "in the same manner [as non-Indians] and *not otherwise.*" 16 CONG. REC. 934 (1886) (emphasis added). Representative Budd of California objected to the italicized language because he feared it might deprive the tribal courts of concurrent jurisdiction over major offenses:

> I desire to suggest another modification of the amendment—to strike out the words "and not otherwise." The effect of this modification will be to give the courts of the United States concurrent jurisdiction with the Indian courts in the Indian country. But if these words be not struck out, all jurisdiction of these offenses will be taken from the existing tribunals of the Indian country. I think it sufficient that the courts of the United States should have concurrent jurisdiction in these cases.

*Id.* That the Major Crimes Act was ultimately passed without the "not otherwise"

older cases suggest that the promulgation of that Act divested the tribes of jurisdiction over the offenses enumerated therein,[296] neither the language nor the history of the Act support that view. Indeed, the Supreme Court's decision in *Talton v. Mayes*[297] appears to refute that position. In *Talton,* the Court let stand the murder conviction of a Cherokee Indian by the Court of the Cherokee Nation, even though the record indicated that the defendant was convicted in 1892—7 years after the Federal Major Crimes Act was initially enacted.[298] Thus, *Talton* supports the view that the tribal courts can try serious offenses if granted such power by the tribes, so long as they do not impose criminal sanctions exceeding the limits specified by Congress.[299] Thus, while the present scope of tribal criminal jurisdiction is generally limited to relatively minor crimes committed by Indians on the reservation, the potential reach of such jurisdiction may be substantially broader.

### C. *Tribal Court Practice and the Indian Civil Rights Act of 1968*

Practice and procedure in the tribal courts has traditionally been somewhat less formal than practice in federal or state courts. The judges, while generally members of the tribe, usually have not been trained in law.[300] The applicable federal regulation requires only that a tribal judge be a member of a tribe served by the court, never have been convicted of a felony, and not have been convicted of a misdemeanor within the preceding year.[301] Consequently, in 1968, of the approximately 70 nontraditional tribal courts, only five were staffed by at least one judge who was a licensed attorney.[302] One commen-

phrase is thus strong evidence that Congress intended the tribal courts to retain concurrent jurisdiction over serious offenses.

296. See discussion note 281 *supra.*

297. 163 U.S. 376 (1896).

298. *Id.* at 381-82. *But see* F. COHEN, *supra* note 23, at 363 n.29 (raising a question as to whether the Major Crimes Act was originally intended to apply to the "Indian territory").

299. The Department of the Interior has at various times apparently recognized the power of the tribal courts to exercise concurrent jurisdiction over offenses punishable by the federal courts. One review of tribal court jurisdiction by the Office of the Solicitor of the Department of the Interior before the enactment of the Indian Civil Rights Act found no limitation on the power of a tribal court "to try and punish an Indian for an offense committed on unrestricted land within a reservation." Solicitor's Memorandum, Apr. 27, 1939, in *1961 Hearings, supra* note 263, at 267. The states, on the other hand, will generally not have any jurisdiction over an offense cognizable in a tribal court, absent some special congressional grant of authority. *See* Note, *The Indian Bill of Rights, supra* note 266, at 1343 n.3, 1348-51.

300. *See* 2 NAT'L AM. INDIAN COURT JUDGES ASS'N, *supra* note 48, at 34-35; Note, *The Indian Bill of Rights, supra* note 266, at 1357.

301. 25 C.F.R. § 11.3(d) (1976).

302. Letter from Harry Anderson, Assistant Secretary of the Interior, to Lewis Sigler, Consultant to Commission on Interior and Insular Affairs, Mar. 28, 1968, in *Hearings on the Rights of Members of Indian Tribes Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs,* 90th Cong., 2d Sess. 29 (1968).

tator has noted that the lack of legal training is not a substantial handicap "since most of the tribal cases deal with traditional and customary law, where legal expertise is not required."[303] While that statement may be true in civil cases, in the criminal area the nontraditional tribal courts enforce written law and order codes which tend to incorporate many common law principles for which legal training would be very useful.[304] Additionally, legal training may be important in assisting tribal judges to cope with the meaning of the quasi-constitutional limitations placed on the tribal courts by the Indian Civil Rights Act. Efforts to provide legal training for tribal court judges have recently been undertaken.[305]

Hearings in the tribal courts are informal. Records are rarely kept, and trial by jury, while available, is generally waived.[306] A study conducted in the early sixties indicated that only 58 jury trials were held in all tribal courts throughout the nation in 1960 and 1961.[307] Counsel in tribal courts are seldom professionally trained.[308] While the structure of the Courts of Indian Offenses provides for an en banc appellate structure,[309] appeals mechanisms for the tribal and traditional courts are either chaotic or unavailable.[310] Consequently, in 1961, of the 44,537 cases, both civil and criminal, which came before the tribal courts, appeals were taken in only 33 cases.[311]

The enactment of the Indian Civil Rights Act in 1968[312] was designed to cure the perceived abuses of judicial power by the tribal courts in denying established federal constitutional rights to Indians.[313]

303. 46 WASH. L. REV. 541, 545 (1971). *See also* Brakel, *American Indian Tribal Courts: Separate? 'Yes,' Equal? 'Probably Not,'* 62 A.B.A.J. 1002 (1976).

304. *See generally* 2 NAT'L AM. INDIAN COURT JUDGES ASS'N, *supra* note 48, at 34-35.

305. *See id.* Beginning in 1971, the National American Indian Court Judges Association, under a grant from the Law Enforcement Assistance Administration, commenced regular training programs in an effort to improve the quality of the tribal court bench. *Id.*; Brakel, *supra* note 303, at 1003. *See also* McLaughlin, *Who Owns the Land: A Native American Challenge*, 6 JURIS DOCTOR, Sept., 1976, at 17, 20. One critic of tribal courts has noted that the relatively short tenure of many tribal judges, often 2 to 4 years, has frustrated such legal training programs and precluded the accumulation of practical experience and expertise. Brakel, *supra.*

306. 46 WASH. L. REV. 541, 545 (1971). *See generally* Brakel, *supra* note 303.

307. *1961 Hearings, supra* note 263, at 250.

308. Kerr, *supra* note 281, at 322.

309. 25 C.F.R. § 11.6 (1976). *See also id.* §§ 11.6C-.6CA.

310. 46 WASH. L. REV. 541, 546 (1971).

311. *1961 Hearings, supra* note 263, at 250-52.

312. Pub. L. No. 90-284, §§ 201-203, 82 Stat. 177 (codified at 25 U.S.C. § 1301-1303 (1970)).

313. *See generally* S. REP. No. 841, 90th Cong., 1st Sess. 6 (1967); STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 89th CONG., 2d SESS., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN (Comm. Print 1966); STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 88th CONG., 2d SESS., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN (Comm. Print 1964); *Hearings on the Constitutional Rights of the American Indian, S.961-68 and S.J. Res. 40, Before the Subcomm. on Constitutional Rights of the Senate*

Until the enactment of the 1968 legislation, the tribal courts were not generally considered arms of the federal government and consequently were not bound by federal constitutional limitations.[314] In many instances, the abuses found in tribal court procedure stemmed primarily from informality. While the 1968 Act apparently accepted the view that tribal courts were not arms of the federal government, and therefore not inherently bound by constitutional limitations, it imposed a statutory list of constitutional-type guarantees. In addition to the strict limitations it places on tribal court sentencing power,[315] the Indian Bill of Rights also requires tribal courts to respect rights against unreasonable searches and seizures, the privilege against self-incrimination, double jeopardy guarantees, rights to confrontation and against cruel and unusual punishment, equal protection and due process,[316] and the right to trial by a jury of not less than six persons for offenses punishable by imprisonment.[317]

In addition to safeguarding certain quasi-constitutional rights, the Indian Civil Rights Act also guaranteed Indians access to the writ of habeas corpus in the federal courts to challenge "the legality" of their detention under any tribal court judgment.[318] Since federal habeas

*Comm. on the Judiciary*, 89th Cong., 1st Sess. 2 (1965); *Hearings on the Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 234-35 (1962); 87th Cong., 1st Sess., pt. 2, at 285-86 (1963); 87th Cong., 2d Sess., pt. 3, at 511-12 (1963); 88th Cong., 1st Sess., pt. 4, at 815 (1964); Note, *The Indian Bill of Rights, supra* note 266, at 1355-60.

314. See text & note 276 *supra*.

315. 25 U.S.C. § 1302(7) (1970).

316. The insertion of due process protection into the Indian Civil Rights Act raises the perplexing question of whether the due process protection envisioned by 25 U.S.C. § 1302 (1970) is limited to the type of minimum procedural due process guarantees set forth in Goldberg v. Kelly, 397 U.S. 254 (1970), or whether it envisions all of the elements of due process which the Supreme Court has held applicable to the states in criminal trials. *See* Peters v. Kiff, 407 U.S. 493 (1972). *See generally* Note, *Indian Tribal Courts, supra* note 269; Note, *An Interpretation, supra* note 266.

317. 25 U.S.C. § 1302 (1970). Congressional insistence on simultaneously limiting tribal court sentencing power and guaranteeing quasi-constitutional rights in tribal court proceedings has created the anomalous situation that Indians tried in tribal courts have, in some ways, greater protection than persons tried in state or federal courts. Under the constitutional standard, a jury is only required if the possible punishment for the offense exceeds 6 months. Baldwin v. New York, 399 U.S. 66, 69 (1970). Since section 1302(7) limits a tribal court sentence of imprisonment for any crime to no more than 6 months, a jury trial would never be required in tribal court if the constitutional standard were applicable. However, section 1302(10) guarantees a trial by jury of not less than six persons if the offense is "punishable by imprisonment."

Another distinction between the Indian Civil Rights Act and the federal constitutional standard for the availability of procedural guarantees exists with respect to the right to counsel. Under prevailing constitutional standards, appointed counsel must be made available for trial before an incarcerative sentence can be imposed. Argersinger v. Hamlin, 407 U.S. 25 (1972). The Indian Civil Rights Act guarantees the right to counsel in all cases, but only at the defendant's expense. 25 U.S.C. § 1302(6) (1970). Although not required to do so by statute or constitution, the law and order codes of a number of tribes make nonprofessional, uncompensated tribal counsel available to an Indian accused. *See* Settler v. Lameer, 507 F.2d 231, 240 n.23 (9th Cir. 1974).

318. 25 U.S.C. § 1303 (1970).

corpus jurisdiction is generally limited to the review of federal issues,[319] the grant to the federal courts of jurisdiction to review legality of detentions ordered by tribal courts was presumably not a plenary grant of appellate jurisdiction to review all legal issues raised by the case. Surely, the federal court has no authority to review or decide issues of tribal law. Such jurisdiction would seriously conflict with traditional federal policies favoring tribal autonomy. Rather, the review by the federal court would seem to be limited to reviewing the tribal court's jurisdiction, and assuring compliance with the provisions of the Indian Bill of Rights and any other applicable federal statute or regulation.

The Indian Civil Rights Act of 1968 was obviously an effort to impose certain Anglo-American legal structures and guarantees on the functioning of the Indian tribal courts.[320] To some extent, that effort was inconsistent with the thrust of modern federal Indian policy which seems designed to assure that the Indian tribes control their own destiny and are free to evolve as a separate cultural tradition with a separate land base.[321] Thus, the Indian Bill of Rights did not receive an entirely favorable reception either among the Indian tribes[322] or the commentators.[323]

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319. 28 U.S.C. § 2241 (1970).

320. Kerr, *supra* note 281, at 326.

321. In a message from President Nixon to Congress, July 8, 1970 in H.R. Doc. No. 363, 91st Cong., 2d Sess. 2-3 (1970), the former President said: "Self-determination among the Indian people can and must be encouraged without the threat of eventual termination." The President went on to indicate that the goal of the new national Indian policy was "to strengthen the Indian's sense of autonomy without threatening his sense of community." *Id.*

322. *See* Kerr, *supra* note 281, at 333-34. *See also* Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. LEGIS. 557, 614 (1972).

323. *See* Coulter, *Federal Law and the Indian Tribal Law: The Right to Civil Counsel and 1968 Bill of Rights*, 3 COLUM. SURVEY OF HUMAN RIGHTS L. 49, 88-93 (1970) [now entitled COLUM. HUMAN RIGHTS L. REV.]; Note, *Indian Bill of Rights*, 5 SW. U.L. REV. 139, 163 (1973).

The problems with the Indian Bill of Rights were to some extent highlighted in Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974), the off-reservation fishing case. See text & notes 288-93 *supra*. One of the claims which the Settlers made in their federal habeas corpus attack on their tribal convictions for illegal off-reservation fishing was that they were denied the right to counsel in the tribal court because the Law and Order Code of the Yakima Indian Nation prohibited the appearance of "professional attorneys" in the Yakima Tribal Court. 507 F.2d at 240. The Code did, however, provide for representation by members of the Tribe. This type of provision is common in tribal law and order codes, *id.* at 240 n.23, probably because the judges in most tribal courts are not attorneys and the proceedings are deliberately informal. Given that sort of court structure, the tribes have commonly sought to avoid having their judicial structures burdened with Anglo-American legal technicalities by banning professional attorneys. Note, *Indian Tribal Courts, supra* note 269, at 724. For a critique of this position, see Brackel, *supra* note 303, at 1006. The Ninth Circuit was able to avoid the question whether such a proscription violated 25 U.S.C. § 1302(6) (1970), because the Settlers were convicted in the tribal court prior to the enactment of the Indian Civil Rights Act of 1968. Nonetheless, the court specifically recognized the existence of a legal question of as to whether the furnishing of nonprofessional tribal counsel to indigent defendants would comply with the Act. 507 F.2d at 242 n.24. This important question, of course, dramatizes the conflict between the Indian Civil Rights Act and the federal policy of tribal self-determination, and the inherent conflict stemming from tribal desires for legal institutions which diverge from traditional Anglo-American molds.

As a consequence of the limitations it places on the functioning of tribal courts, the Indian Civil Rights Act of 1968 threatens to divest the tribes of the necessary leeway to mold their tribal governments and courts to meet the exigencies of tribal law, the state of tribal development, and the desires of the tribal community. The judicial construction given to the Indian Bill of Rights employed in the Act must therefore be shaped in light of the federal concern for Indian self-government and cultural autonomy. For this reason, several courts have suggested that quasi-constitutional rights guaranteed in the Act will sometimes take on a meaning different from the established rights secured by the constitutional Bill of Rights.[324]

## III. STATE JURISDICTION OVER INDIANS AND INDIAN LANDS

A major thrust of federal Indian policy until about 1940 was to keep the states out of Indian affairs by precluding state jurisdiction over Indian lands.[325] The constitutions of many of the Western States contain express disclaimers of jurisdiction over Indian lands, which were required by Congress as a condition of admission to the Union.[326] As a result of the policy of fencing the states out of Indian affairs, a state can assume criminal jurisdiction over Indian lands only by express congressional grant.[327] The requirement of congressional consent to the exercise of state jurisdiction applies only to jurisdiction over crimes committed within Indian country. The states have jurisdiction regardless of a disclaimer provision, by virtue of their admission to the Union on an equal footing with sister states, over crimes committed by or against Indians outside of Indian lands.[328]

324. *See* Jacobson v. Forest County Potawatomi Community, 389 F. Supp. 994, 995 (E.D. Wis. 1974); Janis v. Wilson, 385 F. Supp. 1143, 1150 (D.S.D. 1974), *remanded*, 521 F.2d 724 (8th Cir. 1975); McCurdy v. Steel, 353 F. Supp. 629 (D. Utah 1973). *But see* Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1047 (10th Cir. 1976). The extent to which the rights granted by the Act to the criminally accused will be shaped by this approach remains as yet undetermined. Most of the cases thus far decided under the Act have involved challenges to the functioning of tribal councils or the civil judgments of tribal courts, rather than attacks on tribal court operation in the criminal sphere. *See* Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971); Lohnes v. Cloud, 366 F. Supp. 619 (D.N.D. 1973). *But see* Big Eagle v. Anderea, 508 F.2d 1293 (8th Cir. 1975); Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).

325. For a discussion of the reasons for keeping the states out of Indian matters, see note 88 *supra*.

326. ALAS. CONST. art. XII, § 12; ARIZ. CONST. art. XX, para. 4; MONT. CONST. art. I; N.M. CONST. art. XXI, § 2; N.D. CONST. art. XVI, § 203; OKLA. CONST. art. I, § 3; S.D. CONST. art. XXII; WASH. CONST. art. XXVI, § 2.

327. *See* Antoine v. Washington, 420 U.S. 194, 205 (1975); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 359 (1962); *cf.* United States v. McGowan, 302 U.S. 535, 538-39 (1938); Perrin v. United States, 232 U.S. 478, 483 (1914); Whyte v. District Court, 140 Colo. 334, 337, 346 P.2d 1012, 1014 (1959), *cert. denied*, 363 U.S. 829 (1960); Boyer v. Shoshone-Bannock Indian Tribes, 92 Idaho 257, 260, 441 P.2d 167, 170 (1968). The only generally recognized exception to this rule is the judicially-created state jurisdiction over crimes committed on Indian lands which involve only non-Indians—the *McBratney* doctrine. See text & notes 97-104 *supra*.

328. *See, e.g.*, De Marrias v. State, 319 F.2d 845, 846 (8th Cir. 1963); *In re* Wolf, 27

Despite the prevailing federal policy of maintaining exclusive federal control over Indian lands, congressional consent to the assumption of state jurisdiction can be found in treaties made during the late 18th and early 19th centuries.[329] Moreover, the General Allotment Act of 1887[330] envisioned the eventual patenting of all Indian lands and the demise of special federal jurisdiction. The allotment program was successful in divesting the Indian tribes of ownership of two-thirds of the land base they held in 1887,[331] but had little long term effect on the transfer of jurisdiction to the states over the remaining Indian land. Although section 6 of the Act[332] provided that an Indian receiving a patent on land would become subject to state jurisdiction when the patenting process was completed, later legislation limited the effect of this provision. In 1934 Congress extended indefinitely the trust periods on all allotted Indian land remaining unpatented.[333] Moreover, section 6 applied only to the patentee and did not affect jurisdiction over the land. Thus, even if land within an established reservation was patented, the transfer of jurisdiction to the state under section 6 died with the Indian patentee. His successors in interest were not covered by the Act, and jurisdiction over the land remained exclusively federal and tribal as long as the land remained Indian country.[334]

During the fifties Congress greatly accelerated the states' role in criminal jurisdiction over Indian lands.[335] Public Law 280 required six

F. 606, 610 (D.C. Ark. 1886); Pablo v. People, 23 Colo. 134, 135, 46 P. 636, 637 (1896); Hunt v. State, 4 Kan. 51, 55-56 (1866); State v. Big Sheep, 75 Mont. 219, 238, 243 P. 1067, 1071 (1926); State v. Spotted Hawk, 22 Mont. 33, 44, 55 P. 1026, 1028 (1899); State v. Williams, 13 Wash. 335, 339, 43 P. 15, 16 (1895); People *ex rel.* Schuyler v. Livingstone, 123 Misc. 605, 611-12, 205 N.Y.S. 888, 894 (Sup. Ct. 1924).

329. *See* Treaty with the Winnebagoes, Feb. 21, 1863, § 5, 12 Stat. 658, 660; Treaty with the Quapaws, Aug. 24, 1818, art. 6, 7 Stat. 176; Treaty with the Sacs and Foxes, Nov. 3, 1804, art. 5, 7 Stat. 84; Treaty with the Wyandots, Delawares, Ottawas, Chippewas, Pattawatimas, and Sacs, Jan. 9, 1789, art. V, 7 Stat. 29.

330. Ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-358 (1970)).

331. *See* F. COHEN, *supra* note 23, at 216, *quoting Hearings on H.R. 7902 of the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 15-18 (1934) (memorandum by Commissioner Collier).

332. Ch. 119, § 6, 24 Stat. 388, 390 (codified at 25 U.S.C. § 349 (1970)).

333. Act of June 18, 1934, ch. 576, § 2, 48 Stat. 984 (codified at 25 U.S.C. § 462 (1970)).

334. Patents in Fee, 61 I.D. 298, 303 (1954); Sisseton Reservation, 58 I.D. 455 (1943). The statutory definition of Indian country found in section 1151 recognizes this result by including patented land within a reservation and Indian allotments.

335. Congress commenced the granting of consent to the assumption of partial or complete state criminal jurisdiction over Indian lands in a substantial fashion during the forties when it passed five statutes aimed specifically at altering the jurisdictional schemes for all reservations in New York and Kansas, the Devil's Lake Reservation in North Dakota, the Sac and Fox Reservation in Iowa, and the Agua Caliente Reservation in California. Act of Oct. 5, 1949, ch. 604, 63 Stat. 705 (California); Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1970)) (New York); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Iowa); Act of June 25, 1948, ch. 645, 62 Stat. 827 (codified at 18 U.S.C. § 3243 (1970)) (Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (North Dakota). *But cf.* State v. Lohnes, 69 N.W. 2d 508 (N.D. 1955). The statutes for New York reservations and the Agua Caliente Reservation appear to grant to the affected states complete and exclusive jurisdiction over included Indian lands. *See*

states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—to assume complete and exclusive civil and criminal jurisdiction, except as to hunting and fishing rights, over all or most of the Indian lands within their boundaries.[336] Additionally, sections 6 and 7 of the Act permitted other states to discretionarily assume such jurisdiction.[337] Although federal law has now been amended to permit the discretionary assumption of state jurisdiction only with formal tribal consent,[338] this change came only after Florida, Idaho, Montana, Nevada, Utah, and Washington had assumed criminal jurisdiction over some or all of the reservations within their boundaries.[339]

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Act of Oct. 5, 1949, ch. 604, 63 Stat. 705 (Agua Caliente Reservation); Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1970)) (New York). *See also* New York *ex rel.* Ray v. Martin, 326 U.S. 496, 500 (1946) (decided prior to the enactment of section 232). The statutes for the Devil's Lake Reservation, the Sac and Fox Reservation in Iowa, and the Kansas reservations were apparently intended to grant the affected states only jurisdiction over lesser crimes not enumerated in the Federal Major Crimes Act. *See* 86 CONG. REC. 5596 (1940); H.R. REP. No. 1999, 76th Cong., 3d Sess. 2 (1940). Jurisdiction over Federal Major Crimes Act offenses, at least on the Sac and Fox Reservation in Iowa, has been held to remain exclusively federal, despite the grant of state jurisdiction. Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977).

336. Act of Aug. 15, 1953, ch. 505, §§ 2, 4, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (1970)).

337. *Id.* §§ 6-7, 67 Stat. 590. Section 7 afforded congressional authorization for the assumption of civil and criminal jurisdiction by express legislative enactment. Section 6 granted congressional consent to the repeal of disclaimers of jurisdiction over Indian lands which Congress had previously required a number of Western States to insert in their constitutions as a condition of their admission to the Union. See text & note 326 *supra*; *cf.* Goldberg, *supra* note 226.

338. Act of Apr. 11, 1968, Pub. L. No. 90-284, § 401, 82 Stat. 78 (codified at 25 U.S.C. § 1321(a) (1970)).

339. *See* FLA. STAT. ANN. § 285.16 (West 1974) (enacted in 1962); IDAHO CODE § 67-5101 to -5103 (1973) (originally enacted in 1963, providing for limited criminal jurisdiction, with provisions for its extension with tribal consent); MONT. REV. CODES ANN. §§ 83-801 to -806 (1966) (criminal jurisdiction over the Flathead Indian Reservation with provisions for extension to the Confederated Salish and Kootenai Indian Tribes with their consent); Act of Mar. 23, 1955, ch. 198, [1955] Nev. Stats. 297, *as amended*, NEV. REV. STAT. § 41.430 (1973) (amended to remove jurisdiction over any reservation wherein the affected tribe has refused its consent); UTAH CODE ANN. §§ 63-36-9 to -36-21 (Supp. 1975); WASH. REV. CODE ANN. §§ 37.12.010-.12.070 (1964) (assuming civil and criminal jurisdiction over selected subject matter). *See also* ARIZ. REV. STAT. ANN. §§ 36-1801, -1856 (1974) (air and water pollution control); N.D. CENT. CODE §§ 27-19-02, -19-06 (1974). Tribal opposition stymied Wyoming's efforts to assume jurisdiction under Public Law 280, and a combination of judicial decisions and tribal opposition repeatedly thwarted South Dakota's efforts in the same direction. *See* Goldberg, *supra* note 226, at 546-48; Comment, *South Dakota Indian Jurisdiction*, 11 S.D.L. REV. 101, 105-09 (1966).

Most of the states which discretionarily assumed criminal jurisdiction over Indian lands failed to remove disabling disclaimers of jurisdiction from their state constitutions as seemingly envisioned by section 6 of Public Law 280. S. REP. No. 644, 83d Cong., 1st Sess. 6-7 (1953); 99 CONG. REC. 10782 (1953). *See generally* Goldberg, *supra*, at 568-75. That failure may raise significant questions as to the legality of the jurisdictional assumptions by these discretionary states. *Compare* State v. Lohnes, 69 N.W.2d 508 (N.D. 1955), *with* Tonasket v. State, 84 Wash. 2d 164, 525 P.2d 744 (1974); and State *ex rel.* McDonald v. District Court, 159 Mont. 156, 496 P.2d 78 (1972). While a discretionary state might argue that amendment is unnecessary because jurisdiction over Alaska, a mandatory state, was transferred without modification of its constitutional disclaimer, such an argument ignores the plain language of section 6 and the fact that by failing to carry out the proscribed constitutional amendment, the discretionary states have generally avoided a referendum on the jurisdictional issue in which the tribes and other interested citizens could play a significant role. Indeed, South

Federal law now requires a majority vote of the adult tribal Indians voting in a special election called for such purpose before a state may assume civil or criminal jurisdiction.[340] To date, no such tribal consents have been secured. However, since the tribal consent provision only applies prospectively, it has no application to the jurisdictional transfers of the six mandatory states and the six states which discretionarily assumed jurisdiction under Public Law 280.

Federal law also permits the retrocession of all or any portion of the civil or criminal jurisdiction assumed by a state under Public Law 280.[341] The Secretary of the Interior is apparently vested with discretion to refuse or accept either part or all of a retrocession offer by a state.[342] For example, in 1969 Nebraska attempted to retrocede all Indian criminal jurisdiction over the Winnebago and Omaha Indian Reservations, except for traffic offenses.[343] The Secretary of the Interior only accepted and published notice of the retrocession of jurisdiction for the Omaha Indian Reservation.[344] The Nebraska legislature then attempted to completely cancel the cession of jurisdiction because the United States had not accepted all of the jurisdiction offered in the original cession.[345] Although the state supreme court supported the Nebraska effort to cancel the cession,[346] the federal courts held that the Secretary of the Interior has discretion to accept or refuse all or any part of the jurisdiction which the state originally offered to retrocede.[347] In *United States v. Brown*,[348] the district court noted that the retrocession provisions contained no clause requiring tribal consent, and

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Dakota's efforts in this direction were thwarted by tribal opposition. *See* Goldberg, *supra* note 226, at 546-48.

340. 25 U.S.C. § 1326 (1970). Legislation has been introduced in Congress which would permit the tribes to decide for themselves, in all cases, the jurisdictional arrangements they would prefer for their lands. S. 2010, § 101, 94th Cong., 1st Sess. (1975).

341. 25 U.S.C. § 1323 (1970).

342. Under Exec. Order No. 11,435, 33 Fed. Reg. 17339 (Nov. 21, 1968); 3 U.S.C. § 301 (1970), the Secretary of the Interior is designated as the appropriate official to receive retrocessions, which must be published in the Federal Register. Once the Secretary of the Interior has accepted the retrocession, it becomes binding, apparently irrespective of possible defects in the state enactment process. Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973); United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971). To date, five states have retroceded some or all of their Public Law 280 criminal jurisdiction. See text & note 229 *supra*.

343. Neb. Leg. Resol. 37, 80th Sess. (1969), *quoted in* United States v. Brown, 334 F. Supp. 536, 544 (D. Neb. 1971); *see* State v. Goham, 187 Neb. 35, 44-48, 187 N.W.2d 305, 311-12, *cert. denied*, 404 U.S. 1004 (1971), *reaffirmed*, 191 Neb. 639, 216 N.W.2d 869 (1974).

344. 40 Fed. Reg. 27501 (1974).

345. Neb. Leg. Resol. 16, 82nd Sess. (1971), *quoted in* United States v. Brown, 334 F. Supp. 536, 545 (D. Neb. 1971).

346. State v. Goham, 187 Neb. 35, 187 N.W.2d 305, *cert. denied*, 404 U.S. 1004 (1971), *reaffirmed*, 191 Neb. 639, 216 N.W.2d 869 (1974).

347. Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb.), *aff'd*, 460 F.2d 1327 (8th Cir. 1971), *cert. denied*, 409 U.S. 1107 (1973); United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971).

348. 334 F. Supp. 536 (D. Neb. 1971).

that the two tribes involved had differing desires on jurisdictional transfer.[349] The court then reasoned that the Secretary of the Interior could refuse part of the jurisdiction offered by Nebraska in order to accommodate the desires of the individual Indian tribes involved.[350] Whether an exercise of the Secretary's discretion against the wishes of the tribe could survive a challenge, however, is unclear from the opinion.

In addition to the state jurisdiction over Indian lands afforded by treaty and Public Law 280, the termination acts,[351] idiosyncratic claims to state jurisdiction,[352] and other statutes[353] appear in the jurisdictional pattern. Thus, in many specifics, Congress has agreed to the assumption of state jurisdiction, and a plethora of exceptions can be found to the rule that criminal jurisdiction over Indian land is exclusively federal. Since exceptions to the normal federal jurisdictional pattern often turn on obscure actions applicable only to a particular reservation, complete research into the jurisdictional pattern for any particular reservation is exceedingly difficult.[354]

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349. *Id.* at 542.

350. *Id.* at 542-43.

351. *See, e.g.*, Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099 (codified at 25 U.S.C. § 741 (1970)) (certain bands of the Paiute Tribe in Utah); Act of Aug. 27, 1954, ch. 1009, 68 Stat. 868 (codified at 25 U.S.C. § 677 (1970)) (Utes of the Uintah and Ouray Reservation in Utah); Act of Aug. 23, 1954, ch. 831, 68 Stat. 768 (codified at 25 U.S.C. § 721 (1970)) (Alabama and Coushatta Tribes of Texas); Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (codified at 25 U.S.C. § 564 (1970)) (Klamath Tribe in Oregon). The termination statutes generally stated that all statutes of the United States affecting Indians because of their status as Indians would have no further force or effect, and the law of the states would apply to the terminated tribe and its members. See text & notes 220, 237-38 *supra*.

352. North Carolina has long and successfully laid claim to concurrent jurisdiction over crimes committed on the reservation of the Eastern Band of the Cherokee. *See, e.g., In re* McCoy, 233 F. Supp. 409 (E.D.N.C. 1964); State v. McAlhaney, 220 N.C. 389, 17 S.E.2d 352 (1941); State v. Wolf, 145 N.C 440, 59 S.E. 40 (1907); State v. Ta-Cha-Na-Tah, 64 N.C. 614 (1870). See discussion note 248 *supra*.

New Mexico has a statute, the language of which tracks the language of the Federal Major Crimes Act, 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976), purporting to assert state jurisdiction over seven serious crimes committed either within or without an Indian reservation. N.M. STAT. ANN. § 41-21-7 (1953) (originally enacted by the territorial legislature in 1889). Insofar as this statute asserts state criminal jurisdiction over offenses committed on any Indian reservation in New Mexico, it is both ineffective and unconstitutional. First, New Mexico was admitted into the Union with an irrevocable disclaimer of jurisdiction over Indian lands which is violated by the statute. Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557; *see* Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 359 (1962). Second, Congress did not consent to the exercise of jurisdiction by New Mexico over Indian lands. The New Mexico statute was enacted long before the promulgation of Public Law 280, and New Mexico has taken no affirmative legislative action to assume jurisdiction thereunder. Despite state statutes to the contrary, New Mexico appears to be without valid criminal jurisdiction over the substantial Indian lands located within its borders. *But cf.* N.M. STAT. ANN. §§ 12-14-1 to -14-13 (1953) (air pollution); *id.* §§ 75-34-1 to -34-39 (1953) (water pollution); 70 OP. N.M. ATT'Y GEN. 5 (1970).

353. For example, see 25 U.S.C. § 231 (1970), which permits state agents and employees to enter Indian country to enforce state laws and regulations dealing with health, sanitation, quarantine, and educational conditions. Moreover, section 231 permits the states to enforce state compulsory school attendance laws on Indian lands, provided prior tribal consent is obtained. Thus, Congress has given blanket consent to the exercise of state jurisdiction over any reservation for certain limited health and education purposes.

354. In order to facilitate this process, the Appendix, *infra* p. 577, lists the states

## IV. MULTIPLE PROSECUTION PROBLEMS AND THE TRIPARTITE JURISDICTIONAL ARRANGEMENTS FOR INDIAN COUNTRY

Overlapping federal, state, and tribal jurisdiction over Indian lands poses a potential for the multiple prosecution of defendants for the same act.[355] Since the prevailing definitions of the fifth and fourteenth amendment double jeopardy guarantees do not treat the multiple prosecution of defendants by different sovereignties as a violation of these constitutional provisions,[356] such multiple prosecutions for crimes on Indian lands would not appear to violate any constitutional double jeopardy proscription.[357] This result may create serious problems for a defendant brought before two different tribunals. Similar problems also arise with respect to collateral estoppel issues.[358]

An exception to the federal jurisdiction conferred by section 1152—the interracial crime statute—is the clause in the second paragraph of the statute exempting "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe."[359] This provision provides limited protection for Indians from multiple punishment by both tribal and federal court structures.[360] However, this statutory double jeopardy provision does not cure all potential multiple prosecution problems which might be created by sec-

exercising jurisdiction over lands which would otherwise be Indian country, and describes the extent and source of their jurisdiction.

355. *See, e.g.*, United States v. DeCoteau, 516 F.2d 16 (8th Cir. 1975); United States v. De Marrias, 441 F.2d 1304 (8th Cir. 1971); United States v. Barnhart, 22 F. 285 (C.C. Ore. 1884).

356. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); United States v. Lanza, 260 U.S. 377 (1922).

357. While certain federal statutes and regulations limit the tribal courts, 25 U.S.C. §§ 1301-1303 (1970); 25 C.F.R. §§ 11.1-.21, 11.33-.306 (1976), federal law is not the origin of tribal court power. Rather, the tribal court structure results largely from the inherent sovereignty of the tribes. *See generally* Talton v. Mayes, 163 U.S. 376 (1896); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974); United States v. Kills Plenty, 466 F.2d 240, 243 n.3 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); Iron Crow v. Ogallala Sioux Tribe, 231 F.2d 89 (8th Cir. 1962); text & notes 268-80 *supra*. Consequently, tribal court adjudications will not, absent a statutory prohibition, bar subsequent federal prosecutions under prevailing constitutional double jeopardy tests. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436 (1970); Walker v. Florida, 397 U.S. 387 (1969); Bartkus v. Illinois, 359 U.S. 187 (1959); Moore v. Illinois, 55 U.S. (14 How.) 13 (1853); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847). *But see* United States v. Wheeler, 545 F.2d 1255 (9th Cir. 1976). *See generally* Clayton, *Indian Jurisdiction and Related Double Jeopardy Questions*, 17 S.D.L. REV. 341 (1972).

358. *See* United States v. DeCoteau, 516 F.2d 16, 18 (8th Cir. 1975); United States v. Kills Plenty, 466 F.2d 240, 243 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

359. 18 U.S.C. § 1152 (1970).

360. *See generally* United States v. Kills Plenty, 466 F.2d 240 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); United States v. De Marrias, 441 F.2d 1304 (8th Cir. 1971); United States v. La Plant, 156 F. Supp. 660 (D. Mont. 1957); Clayton, *supra* note 357. Since the tribal courts do not generally exercise criminal jurisdiction over whites who commit crimes on Indian lands, the practical implications of the tribal court double jeopardy clause in section 1152 are quite limited. Furthermore, section 1153, which also covers many major crimes committed on Indian lands by Indians, contains no similar double jeopardy clause. *Cf.* United States v. De Marrias, *supra*.

tion 1152 jurisdiction. First, the exception only applies to Indians punished by tribal courts. Should a state court attempt to assert jurisdiction over a white who has committed a crime against an Indian on an Indian reservation, neither an acquittal nor a conviction in the state court would bar federal prosecution.[361] Second, the double jeopardy prohibition contained in section 1152 only applies to Indians punished by tribal courts; a prior acquittal in the tribal court will not necessarily bar subsequent federal prosecution.[362]

A number of other legal limitations may, however, operate to minimize the potentiality of multiple prosecutions. The structure of the federal jurisdictional statutes helps to minimize risks of multiple prosecutions. First, since federal jurisdiction over Indian offenders is limited to the 14 crimes enumerated in section 1153, and tribal courts have generally exercised jurisdiction only over lesser crimes not enumerated in section 1153, the potential for overlapping jurisdiction between the tribe and the federal courts has been substantially minimized. However, the recognition of federal jurisdiction under the *Keeble* rationale,[363] to cover lesser-included offenses to those enumerated in the Federal Major Crimes Act, increases the problems of overlap. Second, federal jurisdiction over Indian lands, where it exists, is generally exclusive of state jurisdiction.[364] The exception to federal jurisdiction for wholly non-Indian crimes which was wrought by *McBratney* and its progeny provides for state jurisdiction, but exclusive of any federal authority.[365] Furthermore, even when Congress has granted criminal jurisdiction to the states under Public Law 280, the termination acts, or special legislative grant, it has generally granted complete jurisdiction over Indian land, exclusive of any continuing overlapping federal jurisdiction.[366] The only clear exception to the pattern of affording either exclusive state or federal jurisdiction over Indian lands is the situation with respect to the Eastern Band of Cherokee Reservation in

361. *Cf.* United States v. Barnhart, 22 F. 285 (C.C. Ore. 1884).

362. *See* United States v. La Plant, 156 F. Supp. 660 (D. Mont. 1957). Although section 1152 neither prevents federal prosecution of an offender acquitted by the tribal courts, nor prevents tribal prosecution after either federal conviction or acquittal, it may, in that it reflects federal Indian policy, have utility in controlling such duplicitous prosecutions for the same offense.

363. *See* Keeble v. United States, 412 U.S. 205 (1973); text & notes 174-83 *supra*. The expansion of tribal jurisdiction to cover offenses committed by non-Indians on Indian lands also increases the overlap between tribal jurisdiction and the authority of the state and federal courts, thereby increasing the possibilities for multiple prosecutions. *Cf.* Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976).

364. *See, e.g.*, Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962); Williams v. Lee, 358 U.S. 217 (1959); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

365. *See* text & notes 97-104 *supra*.

366. *See* text & notes 335-54 *supra*.

North Carolina, where federal and state judicial decisions have clearly indicated that the jurisdiction is concurrent.[367]

The Indian Civil Rights Act of 1968 also provides some limited guarantees against multiple prosecutions because it expressly binds the tribes to respect the guarantees against double jeopardy.[368] However, that protection is probably only a useful guarantee against multiple *tribal* prosecutions. As already noted, the prevailing constitutional standard does not treat multiple prosecutions by different sovereignties as violative of the constitutional proscription.[369] Tribal involvement in a prosecution of an Indian after the completion of a federal or state prosecution for the same offense would not appear to violate the statute, presuming the tribal courts are not considered arms of the federal government but courts of a different sovereignty.[370] While it is conceivable that the statutory double jeopardy guarantee of the Indian Civil Rights Act might be construed to grant greater rights than the constitutional provision, such a result would be at odds with the federal government's professed policy of respecting Indian self-government and autonomy. Thus, the statutory double jeopardy guarantee appears to have only a limited usefulness in preventing multiple prosecutions in tribal courts for the same offense.

Further important constitutional limitations on multiple prosecutions are found in the due process clause of the fifth amendment and the equal protection clause of the fourteenth amendment. Under modern jurisdictional structures, the situations in which multiple prosecutions can arise from overlapping jurisdiction almost exclusively involve Indian defendants. The major problems of jurisdictional overlap emerge out of the present relationship of the Federal Major Crimes Act, enlarged by *Keeble*, and tribal court jurisdiction, or, in some disputed instances, state jurisdiction.[371] Since the risk of multiple prose-

367. *In re* McCoy, 233 F. Supp. 409, 412 (E.D.N.C. 1964); State v. McAlhaney, 220 N.C. 387, 389, 17 S.E.2d 352, 354 (1941); State v. Ta-Cha-Na-Tah, 64 N.C. 614, 615 (1870). *See also* discussion notes 37, 39 *supra*. The statutes enacted during the forties for all Kansas reservations, the Sac and Fox Reservation in Iowa, and the Devil's Lake Reservation in North Dakota are also ambiguous. *See* text & notes 240-47 *supra*. One district court has recently construed the statute affecting the Sac and Fox Reservation to preclude overlapping or concurrent jurisdiction, expressly citing potential multiple prosecution problems as a reason for rejecting the contrary position. Youngbear v. Brewer, 415 F. Supp. 807, 812 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977).

368. 25 U.S.C. § 1302(3) (1970).

369. See text & note 356 *supra*.

370. *See* United States v. Kills Plenty, 466 F.2d 240, 243 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); text & notes 268-80 *supra*.

371. New Mexico has asserted jurisdiction over Indians committing the offenses of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, whether committed on or off the reservation. N.M. STAT. ANN. § 41-21-7 (1953). North Carolina has claimed concurrent jurisdiction over the Eastern Band of Cherokee Reservation under the Treaty of New Echota. See discussion note 352 *supra*.

cution for the same offense falls almost exclusively on Indian defendants under the present federal statutes,[372] any multiple prosecution seems to be the product of an unconstitutional racial classification in violation of the due process clauses.[373] Arguably, any effort to prosecute an Indian in more than one jurisdiction for the same offense will be found to advance no compelling or substantial government interest and therefore will be held unconstitutional. Thus, while potential multiple prosecution problems might be posed by overlaps in the jurisdiction over Indian lands, either statutory or constitutional limitations appear to prevent most of the serious risks of multiple prosecutions.

## V. POLICING AUTHORITY IN INDIAN COUNTRY

Most of the discussion in this Article has dealt with the jurisdiction of the various criminal courts which affect Indian country. Scant attention has been paid by the commentators to the question of policing authority in Indian country. One reason for this lack of discussion may be the relative paucity of case authority on the subject. This last section will tackle a preliminary inquiry into this important subject.

While one answer to the problems of policing authority might suggest that the jurisdiction of the various police agencies should merely follow the established judicial jurisdictional arrangements, this approach provides much too simplistic an answer. For many large reservations, the federal authorities, such as the Federal Bureau of Investigation [FBI], will have jurisdiction over general federal crimes and crimes made cognizable by the federal courts under sections 1152 and 1153, the state courts will have some limited authority under *McBratney* and its progeny, and the tribal courts will have some jurisdiction. Thus, to simply suggest that police of a given governmental unit have complete policing authority anywhere the courts of that governmental unit may have jurisdiction is to suggest that federal, state, and tribal police will normally all have policing authority on most Indian land, a wholly unsatisfactory answer, both from the standpoint of duplication of law enforcement resources, and the federal and tribal desires for Indian autonomy. Furthermore, since the police agencies will not commonly know the appropriate jurisdiction for a crime until they have investigated it, to suggest that they ought to follow judicial jurisdictional patterns gives them little guidance.

372. The wholly non-Indian crime is prosecuted exclusively in state courts under *McBratney*. The jurisdiction over a crime committed by a non-Indian against the person or property of an Indian is exclusively federal under section 1152, unless jurisdiction over the reservation in question has been exclusively transferred to the state.

373. *See* United States v. Antelope, 523 F.2d 400 (9th Cir. 1975), *cert. granted*, 424 U.S. 907 (1976) (No. 75-661).

Thus, the better approach to resolving questions of police authority is to isolate the various types of police forces and to analyze for each the basis of its authority and the necessity of its intervention into Indian country. On this basis, the FBI and other related federal law enforcement agencies have obviously played an important policing role on most nonterminated reservations.[374] As already noted, they not only investigate and enforce general federal crimes, but also the crimes specially made cognizable by the federal courts as a result of their occurrence in Indian country.[375] However, since FBI agents are not regularly assigned to many reservations, the primary frontline responsibility for investigating and enforcing federal and other laws in Indian country often falls to other police agencies, including the tribal police.[376]

Tribal police forces are basically of two types. The first type of tribal police force is the Bureau of Indian Affairs' Indian Police. This police force is established and governed by federal regulations.[377] The "Bureau" or "Indian" Police are the modern remnant of the infamous Indian Police set up by the Indian Office during the late 19th century to police the reservations and to serve as an alternative governmental structure to the traditional chiefs and tribal councils.[378] Today, the duties of an officer of the Indian Police are set forth in the federal regulations[379] and require the officer to "report and investigate *all* violations of *any* law or regulation coming to his notice or reported for attention."[380] Thus, under the regulations, the Indian police have jurisdiction over not only tribal offenses, but state and federal offenses as well.[381] That authority extends to Indians and non-Indians alike.[382] Furthermore, in limited circumstances, such as off-reservation fishing sites reserved by treaty, the Indian police may have certain off-reservation jurisdiction as well.[383] When engaged in the lawful discharge of his law enforcement responsibility, an Indian policeman appointed and acting under the federal regulatory provisions is considered a federal

374. *See, e.g.*, United States v. Crow Dog, 399 F. Supp. 228, 235 (N.D. Iowa 1975); United States v. Red Feather, 392 F. Supp. 916, 919 (D.S.D. 1975); United States v. Banks, 383 F. Supp. 368, 374 (D.S.D. 1974); United States v. Jaramillo, 380 F. Supp. 1375, 1378 (D. Neb. 1974).

375. *See* 18 U.S.C. § 1152 (1970); 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976).

376. *Cf.* United States v. Leeds, 505 F.2d 161, 162 (10th Cir. 1974); Walks on Top v. United States, 372 F.2d 422 (9th Cir.), *cert. denied*, 389 U.S. 879 (1967); United States v. One 1941 4-Door Buick Sedan, 64 F. Supp. 905 (D. Minn. 1946).

377. 25 C.F.R. § 11.301-.306 (1976).

378. *See generally* W. HAGAN, *supra* note 252, at 25-50.

379. 25 C.F.R. § 11.304(b) (1976).

380. *Id.* § 11.304(b)(3) (emphasis added).

381. *See* Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976); Walks on Top v. United States, 372 F.2d 422 (9th Cir.), *cert. denied*, 389 U.S. 879 (1967).

382. *See* Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976).

383. *Cf.* Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974). *See generally* text & notes 288-93 *supra*.

officer, at least for purposes of federal criminal statutes prohibiting assaults on federal officers.[384]

The second type of tribal police force is set up by tribal authority under a law and order code adopted by the tribe and approved by the Secretary of the Interior.[385] While the Code of Federal Regulations states that the federal regulations governing Indian police shall continue in effect after the adoption and approval of a law and order code "as long as the . . . Indian police are paid from appropriations made by the United States or until otherwise directed,"[386] the courts have recognized that the tribes have validly established separate tribal police forces which are not a part of the so-called Bureau or Indian Police.[387] These police forces apparently also have jurisdiction to investigate, report, and enforce all offenses—federal, state, or tribal—and may, like the Bureau Police, exercise policing authority over non-Indians on Indian land.[388] Their authority over non-Indians apparently stems from the tribes' inherent authority to restrict or control access to Indian lands and to exclude unwelcome nonmembers.[389] Unlike the Bureau Police, however, a tribal law officer is presumably not a federal officer for any purpose when engaged in the lawful performance of his duties.[390]

This review of police force authority leads to the question of the authority of state, county, or municipal police on Indian lands. Obviously, such law enforcement officers have complete authority over any terminated reservation or reservation to which complete or substantial criminal jurisdiction has been transferred to the state by congressional act. However, as to reservations on which the state's sole prosecution authority is *McBratney*-based jurisdiction over non-Indian offenses, the state policing agencies probably do not have, or at least should not have, any lawful authority. This conclusion flows from several observations. First, the federal policy with respect to such reservations remains the minimization of the state's role in tribal life, and the exclusion of state law enforcement officers from such reservations is obviously consistent with that policy. Second, there is no necessity in most instances for state authority over such reservations, since the Bureau or tribal police would have authority on most such reservations to investi-

384. Walks on Top v. United States, 372 F.2d 422 (9th Cir.), *cert. denied*, 389 U.S. 879 (1967). *But see* United States v. Mullin, 71 F. 682 (D. Neb. 1895). *See also* Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 412 (9th Cir. 1976) (Wallace, J., concurring).

385. 25 C.F.R. § 11.1(d) (1976).

386. *Id.*

387. *See* Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975).

388. *See id.*

389. *See id.* at 1180; *cf.* Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974); Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969); 1 OP. ATT'Y GEN. 465 (1821).

390. *Cf.* Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975).

gate and report the offense to relevant state prosecutorial authorities. Of course, for smaller reservations where neither Bureau nor tribal police exist, a different conclusion may be indicated. However, alternative jurisdictional arrangements have often already been expressly made by Congress for many such small reservations.[391] Third, the inherent tribal authority to exclude unwelcome outsiders from the reservation conceivably might lawfully be used to keep state law enforcement officers off the reservation should the tribe so desire.[392]

Of course, the exclusion of state law enforcement officers from some Indian reservations should not hamper the prosecution of offenders. Law enforcement agencies of various jurisdictions are perfectly free to share information and evidence and to turn the results of their inquiries over to the proper prosecutorial officials.[393] Since federal, state, and tribal police are all bound by the constraints of the fourth and fifth amendments, no major evidentiary admissibility problems should be posed by such interjurisdictional transfers of evidence.[394] Indeed, it appears that evidence secured by police officers erroneously acting beyond their lawful jurisdiction on Indian land is nevertheless admissible.[395] In fact, a solution to the problem of scarce tribal resources has already been suggested which would be compatible with the recommendations made here—cross-deputization of officers of the different jurisdictions, empowering one police agency to act on behalf of another.[396]

## CONCLUSION

Criminal jurisdiction over Indian land has developed into a complex and confusing maze of federal, state, and tribal jurisdiction. In general, federal jurisdiction is preeminent, specifically covering inter-

391. *See* Act of June 30, 1948, ch. 759, 62 Stat. 1161. The legislative history of this statute indicates that the statute was enacted largely because of letters submitted to Congress indicating the dissatisfaction of the Department of Justice and the Department of the Interior with law enforcement on the Sac and Fox Reservation over crimes not defined by federal law. *See* S. REP. No. 1490, 80th Cong., 2d Sess. 1 (1948); H.R. REP. No. 2356, 80th Cong., 2d Sess. 1 (1948).

392. *See* Williams v. Lee, 358 U.S. 217, 219 (1959). *See also* Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976); Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975).

393. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 658 (1961); Elkins v. United States, 364 U.S. 206, 211 (1960); United States v. Sellers, 483 F.2d 37, 43 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); United States v. McDowell, 475 F.2d 1037 (9th Cir. 1973); State v. Allard, 313 A.2d 439 (Me. 1973).

394. Malloy v. Hogan, 378 U.S. 1 (1964); Mapp v. Ohio, 367 U.S. 643 (1961). *See also* 25 U.S.C. § 1302(2) (1970).

395. *See* Emery v. United States, 127 F.2d 561, 564 (8th Cir. 1942).

396. *See* 4 NAT'L AM. INDIAN COURT JUDGES ASS'N, *supra* note 48, at 42-46. This alternative takes into account the limited resources and facilities available to tribal police, while assuring the state and federal authorities of a means of enforcing their laws. For the tribe, there is the added advantage of maintaining its cultural integrity.

racial crimes committed on an Indian reservation, 14 major crimes if committed by an Indian on a reservation, and certain assimilative crimes within Indian country. Federal jurisdiction is itself complicated by the ambiguous definitions currently used for determining who is an Indian and what is Indian country, by idiosyncratic federal statutes, and by established judicial exceptions, the most pervasive of which is the *McBratney* rule, holding that state courts have jurisdiction over crimes committed by and against non-Indians on a reservation.

Aside from *McBratney*, state power over Indians in Indian country is limited and dependent on congressional authorization. With the vacillation of federal Indian policy through the formative years have come drastic shifts in congressional approval of state jurisdiction. Today, through Public Law 280, special congressional actions, and the termination of certain tribes or reservations, many states share in the jurisdictional pie. Often couched in terms of inherent sovereignty, the Indian tribes are said to retain any jurisdiction that Congress has not expressly reserved for the federal courts or transferred to the states. In general, tribal courts have exercised a limited scope of jurisdiction, perhaps more limited than they can and may exercise in the future.

A substantial dovetailing of the respective jurisdictions of these three sovereignties can be found; but the potential for overlap is both present and confusing. Some of the complexity of this jurisdictional maze is a necessary product of the attempt to simultaneously meet the conflicting demands of the Indian tribes for autonomy and the demands of the states for control over lands within their boundaries. Much of the complexity, however, is an out-dated relic from the historical ebb and flow of federal Indian policy. The need for reform of the relevant statutes is abundantly clear. The direction that reform should take, however, is far from clear. It is to the question of reform which the third and last in this series of Articles will turn.

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Editors Note: Since this Article went to press, the Supreme Court has decided two cases of importance in this area. In Rosebud Sioux Tribe v. Kneip, 97 S. Ct. 1361 (1977), a divided Court reaffirmed and expanded on Decoteau v. District County Court, 420 U.S. 425 (1975), discussed at notes 45-47 *supra*, by finding a congressional intent to terminate portions of the Rosebud Sioux Reservation from agreements and acts opening the affected areas to non-Indian settlement. This holding calls into question the Indian county status of many reservations or portions thereof which were opened to settlement as part of the allotment process. In United States v. Antelope, 45 U.S.L.W. 4361 (U.S., Apr. 19, 1977), a unanimous Court rejected the Ninth Circuit's finding of a denial of equal protection and due process in the trial of Indian defendants under the Federal Major Crimes Act. Part 4 of the Court's opinion basically adopts the analysis suggested at pp. 547-48 *supra* and holds that the discrimination in question is not a racial classification but rather one based on choice of forum. On the other hand, Part 3 of the Court's opinion, in suggesting that the jurisdictional term "Indian" is not a racial classification, seems to approve in dicta a definition which is not solely based on racial ancestry and social recognition, as suggested herein, but which also requires some political and legal recognition of the tribe of the defendant by the federal government. Thus, the Court cites approvingly United States v. Heath, 509 F.2d 16 (9th Cir. 1974), which is criticized in note 75 *supra*. This definition will complicate determinations of criminal jurisdiction, but will also make successful fifth amendment challenges to the jurisdictional scheme less likely, since it will require the application of a rational basis, rather than compelling interest, standard of review.

# APPENDIX

## STATES HAVING CRIMINAL JURISDICTION OVER INDIAN COUNTRY

| *State* | *Reservation* | *Extent of Jurisdiction* | *Authority* | *Cases** |
|---|---|---|---|---|
| Alaska | All Indian country, except that on the Annette Islands. The Metlakatla Indian Community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which state jurisdiction has not been extended. | Complete and exclusive criminal jurisdiction. | Act of Nov. 25, 1970, 84 Stat. 1358, *amending* 18 U.S.C. § 1162 (1970). | |
| Arizona | All Indian tribal lands, reservations, and allotments. | Exclusive jurisdiction limited to enforcement of criminal laws relating to air and water pollution. | ARIZ. REV. STAT. ANN. § 36-1801 (1974) (pursuant to Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588). | |
| California | All Indian country. | Complete and exclusive criminal jurisdiction. | 18 U.S.C. § 1162 (1970). *See also* Act of Oct. 5, 1949, ch. 604, § 1, 63 Stat. 705 (Agua Caliente Reservation). | |
| Florida | All Indian reservations. | Complete and exclusive criminal jurisdiction. | FLA. STAT. ANN. § 285.16 (West 1975) (pursuant to Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588). | |
| Idaho | All Indian country (as defined in 18 U.S.C. § 1151 (1970)). | Exclusive jurisdiction limited to enforcement of laws relating to:<br>A. Compulsory school attendance<br>B. Juvenile delinquency | IDAHO CODE §§ 67-5101 to -5103 (1973) (pursuant to Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588). | |

## APPENDIX (Continued)

| *State* | *Reservation* | *Extent of Jurisdiction* | *Authority* | *Cases** |
|---|---|---|---|---|
| Idaho (cont.) | | C. Dependent, neglected, and abused children<br>D. Insanity and mental illness<br>E. Public assistance<br>F. Domestic relations<br>G. Operation and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivision thereof. | | |
| Iowa | Sac and Fox Reservation | Limited criminal jurisdiction, with federal courts retaining exclusive jurisdiction over those offenses defined by the laws of the United States, specifically including the offenses enumerated in the Federal Major Crimes Act. | Act of June 30, 1948, ch. 759, 62 Stat. 1161. | Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977). *But see* State v. Youngbear, 229 N.W.2d 728 (Iowa), *cert. denied*, 423 U.S. 1018 (1975). |
| Kansas | All Indian reservations. | Same as Iowa. | Act of June 25, 1948, ch. 645, §§ 3242-3243, 62 Stat. 827; 18 U.S.C. § 3243 (1970). | *Cf.* Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74, No. 76-1746 (8th Cir. Feb. 9, 1977). |
| Minnesota | All Indian country, except the Red Lake Reservation. Minnesota has retroceded all criminal jurisdiction over the Bois Forte Indian Reservation. | Complete and exclusive criminal jurisdiction. | Originally assumed: Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588; 18 U.S.C. § 1162 (1970). State offer of retrocession by the Governor on Aug. 20, 1973, pursuant to ch. 625, 1973 Minn. Laws 1051. Federal acceptance of retrocession: 40 Fed. Reg. | |

| State | Reservation | Extent of Jurisdiction | Authority | Cases* |
|---|---|---|---|---|
| Minnesota (cont.) | | | 4026 (1973) pursuant to 25 U.S.C. § 1323 (1970). *See also* Act of Feb. 21, 1863, ch. LIII, § 5, 12 Stat. 658, 660 (state jurisdiction over the Winnebago Indians removed from Minnesota in any state in which they reside). | |
| Montana | Flathead Indian Reservation. | Complete and exclusive criminal jurisdiction. | MONT. REV. CODES ANN. § 83-801 (1966) (pursuant to Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588). | |
| Nebraska | All Indian country within the state. However, jurisdiction as to that portion of the Omaha Indian Reservation lying in Thurston County has since been retroceded. | Complete and exclusive criminal jurisdiction over all but that portion of the Omaha Reservation within Thurston County. State jurisdiction over the Omaha Indians within Thurston County limited to criminal offenses involving operation of motor vehicles on public roads and highways. | Originally assumed: Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588; 18 U.S.C. § 1162 (1970). State offer of retrocession, Neb. Leg. Res. 37, 80th Sess. (1969), *quoted in* United States v. Brown, 334 F. Supp. 536, 544 (D. Neb. 1971). Federal acceptance of retrocession: 35 Fed. Reg. 16598 (1970), pursuant to 25 U.S.C. § 1323 (1970). | Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1971), *cert. denied*, 409 U.S. 1107 (1973); United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971). *But see* State v. Goham, 216 N.W.2d 869 (Neb. 1974) (attempted retrocession invalid). |
| Nevada | All Indian country, except that prior to effective date of the Nevada statute (90 days after July 1, 1955), a county could petition the governor to exclude the Indian country within that county from state jurisdiction. | Complete and exclusive criminal jurisdiction. | Originally assumed: NEV. REV. STAT. § 41.430 (1973) (pursuant to Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588). *See* Memo from W.B. Benge, Chief, Branch of Law and Order, Bureau of Indian | |

(For footnotes see page 583)

## APPENDIX (Continued)

| *State* | *Reservation* | *Extent of Jurisdiction* | *Authority* | *Cases** |
|---|---|---|---|---|
| Nevada (cont.) | The governor could then exclude such Indian country from State jurisdiction by issuing a proclamation to that effect before the effective date of the statute. Eight counties requested exclusion because of budgetary limitations.<br>Nevada has since retroceded jurisdiction over the following reservations:<br>Winnemucca Colony<br>Elko Colony<br>Ruby Valley<br>South Fork<br>Odgers Ranch<br>Battle Mountain<br>Goshute Reservation<br>Reno Sparks Colony<br>Washoe Tribal Farm<br>Washoe Pine Nut allotments<br>Dresserville Colony<br>Carson Colony<br>Duckwater<br>Yomba<br>Lovelock Colony. | | Affairs, to Commissioner of Indian Affairs, Nov. 7, 1955). State offer of retrocession by letter of Governor, June 5, 1974, pursuant to S.B. 579, ch. 474, 1975 Nev. Stats. 751; S.B. 491, ch. 601, 1973 Nev. Stats. 1051. Federal acceptance of retrocession: 40 Fed. Reg. 27501 (1974) pursuant to 25 U.S.C. § 1323 (1970). | |
| New Mexico | All Indian Reservations. | New Mexico claims jurisdiction over Indians committing the following offenses, whether on or off the reservation:<br>A. Murder<br>B. Manslaughter<br>C. Rape<br>D. Assault with intent to kill | N.M. STAT. ANN. § 41-21-7 (1953). | |

| State | Reservation | Extent of Jurisdiction | Authority | Cases* |
|---|---|---|---|---|
| New Mexico (cont.) | | E. Arson<br>F. Burglary<br>G. Larceny<br>[The validity of this assertion of jurisdiction is questionable, since Congress has made these offenses triable in federal courts when committed on Indian reservations, thus presumably excluding state jurisdiction. 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976)]. | | |
| New York | All Indian reservations. | Complete but concurrent criminal jurisdiction. | Act of July 2, 1948, 62 Stat. 1224; 25 U.S.C. § 232 (1970). | |
| North Carolina | Eastern Band of Cherokee. | Complete and exclusive criminal jurisdiction. | | *In re* McCoy, 233 F. Supp. 409 (E.D.N.C. 1964); Treaty with the Cherokees, Dec. 29, 1835, art. 1, 7 Stat. 478. |
| North Dakota | Devil's Lake Indian Reservation. | Limited criminal jurisdiction, with federal courts retaining exclusive jurisdiction over those offenses defined by the laws of the United States, specifically including the offenses enumerated in the Federal Major Crimes Act. North Dakota has also enacted a Public Law 280 statute assuming jurisdiction with Indian consent, but no tribe has yet consented. | Act of May 31, 1946, ch. 279, 60 Stat. 229. *See also* N.D. CENT. CODE §§ 27-19-01 to -19-13 (1974). | *But see* State v. Lohnes, 60 N.W.2d 508 (N.D. 1958) (jurisdiction as mandated by 1946 Act refused). |
| Oklahoma | All former reservations and possibly trust allotments (Jurisdiction over Osage Reservation remains federal).[397] | Complete and exclusive criminal jurisdiction, but unresolved questions remain regarding allotments to which | | Ellis v. Page, 351 F.2d 250 (10th Cir. 1965); Tooisgah v. United |

(For footnotes see page 583)

## APPENDIX (Continued)

| *State* | *Reservation* | *Extent of Jurisdiction* | *Authority* | *Cases** |
|---|---|---|---|---|
| Oklahoma (cont.) | | Indian title has not been extinguished. | | States, 186 F.2d 93 (10th Cir. 1950); Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388.[398] |
| Oregon | All Indian country except the Warm Springs Reservation. | Complete and exclusive criminal jurisdiction. | Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588; 18 U.S.C. § 1162 (1970). | |
| Utah | All Indian reservations. | Complete and exclusive criminal jurisdiction. | UTAH CODE ANN. §§ 63-36-9 to -36-21 (Supp. 1975) (pursuant to Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588). | |
| Washington | All Indian reservations, except jurisdiction over Quinault and Port Madison Reservations retroceded. | Complete and exclusive criminal jurisdiction on non-trust land; jurisdiction over trust land is limited to criminal offenses involving the following unless a majority of the tribe has requested complete State jurisdiction.[399]<br>A. Compulsory school laws<br>B. Public assistance<br>C. Domestic relations<br>D. Mental illness<br>E. Juvenile delinquency<br>F. Dependent children<br>G. Operation of motor vehicles on public roads. | Originally assumed: Ch. 240, 1957 Wash. Laws 941 (pursuant to Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588; ch. 36, 1963 Wash. Laws 346; WASH. REV. CODE §§ 37.12.010, -.12.021 (1964)).<br>State offer of retrocession by proclamation of the Governor on Aug. 15, 1968 (Quinault) and Aug. 26, 1971 (Port Madison).<br>Federal acceptance of retrocession: 34 Fed. Reg. 14288 (1969); 37 Fed. Reg. 7353 (1972), pursuant to 25 U.S.C. § 1323 (1970). | |
| Wisconsin | All reservations, except Wisconsin has retroceded jurisdiction over the Menominee Reservation. | Complete and exclusive criminal jurisdiction. | Originally assumed: Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588; 18 U.S.C. § 1162 (1970). | |

| *State* | *Reservation* | *Extent of Jurisdiction* | *Authority* | *Cases** |
|---|---|---|---|---|
| Wisconsin (cont.) | | | State offer of retrocession by proclamation of the Governor on Feb. 19, 1976.<br>Federal acceptance of retrocession: 41 Fed. Reg. 8516 (1976) pursuant to 25 U.S.C. § 1323 (1970). | |

* Case authority is cited only where decision provides an explanation for an otherwise unclear jurisdictional scheme.

397. United States v. Ramsey, 271 U.S. 467 (1926).

398. Toosigah v. United States, 186 F.2d 93 (10th Cir. 1950), holds that the federal government has no jurisdiction under 18 U.S.C. § 1151 (a) (1970) and 18 U.S.C.A. § 1153 (Supp. Pamphlet 1976) for crimes committed on trust allotments located on disestablished Indian reservations in Oklahoma. Federal jurisdiction is however predicated on a broader definition of Indian country than that provided by section 1151(a). Specifically 18 U.S.C. § 1151(c) (1970) provides for federal jurisdiction over "all Indian allotments, the Indian titles to which have not been extinguished." *Tooisgah*, decided after the enactment of section 1151(c) but under preexisting law, ignores the jurisdictional issue presented by section 1151(c). Ellis v. Page, 351 F.2d 250 (10th Cir. 1965), reaffirms state jurisdiction on the basis of *Tooisgah* but in so doing specifically notes that no claim was presented to the court under section 1151(c). 351 F.2d at 252. Thus it is unclear whether Oklahoma does indeed have jurisdiction over serious crimes committed by or against Indians on trust allotments to which Indian title has not been extinguished. Such jurisdiction appears to be exclusively federal as a result of the definition of Indian country contained in 18 U.S.C. § 1151(c). *Cf.* United States v. Pelican, 232 U.S. 442 (1914).

399. No published listing of the presently-included trust lands appears to be available. *See* Comment, *Extent of Washington Criminal Jurisdiction Over Indians*, 33 WASH. L. REV. 289, 301 n.42 (1958); 36 WASH. L. REV. 156, 157 n.6 (1960). Current information on the status of any reservation should be available from the Washington Governor's office.