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DEVELOPMENT OF CRIMINAL JURISDICTION OVER INDIAN LANDS: THE HISTORICAL PERSPECTIVE

Robert N. Clinton*

A number of developments have coalesced to refocus the attention of both the public and the legal community on the problems of criminal jurisdiction over Indian reservations in recent years. The United States Supreme Court has shown a surprising resurgence of interest in the problems of Native American law,[1] and Congress has been considering a revision of the federal criminal code that would work a major revision of criminal jurisdiction over Indian lands.[2] Furthermore, the increased political militancy among the nation's Native American population has highlighted the complexities of law enforcement jurisdiction on Indian reservation lands.

As with other areas of Indian law, the problem of criminal jurisdiction presents a complex and sometimes conflicting morass of treaties, statutes, and regulations. Congress has enacted a series of overlapping

* Associate Professor of Law, University of Iowa College of Law. B.A. 1968, University of Michigan; J.D. 1971, University of Chicago. Member of the Illinois and Iowa bars.

1. *See, e.g.*, DeCoteau v. District Court, 420 U.S. 425 (1975); Antoine v. Washington, 420 U.S. 194 (1975); United States v. Mazurie, 419 U.S. 544 (1975); Keeble v. United States, 412 U.S. 205 (1973).

2. *See* S. 1, 94th Cong., 1st Sess. §§ 101, 201, 203 (1975); S. 1400, 93d Cong., 1st Sess. §§ 101, 201, 203, 205 (1973); *cf.* S. 2010, 94th Cong., 1st Sess. (1975).

general criminal jurisdictional statutes[3] plus several jurisdictional statutes applicable only to one state or reservation.[4] Thus, in analyzing the criminal jurisdiction over any particular reservation, a review must be made of the treaty, statute, or executive order which established the reservation;[5] the general federal statutes applicable to all Indian reservations;[6] and any specific federal statutes applicable only to the reservation or state in question.[7] Additionally, in some situations the potential effect of state statutes and constitutional provisions[8] on the status of the reservation must be considered.

This Article is the first in a three-part series which will review the complexities of criminal jurisdiction over Indians and Indian lands. The first part will survey the historical development of such jurisdiction, including an examination of the early treaty arrangements, subsequent congressional legislation superseding the treaty provisions, and early decisions of the Supreme Court which shaped the contours of criminal jurisdiction over Indian lands.[9] It is only through a thorough examination of the historical development of this complex area that the interrelationships between the sources of jurisdictional law can be integrated and mastered. Accordingly, this Article will describe the historical development of criminal jurisdiction on Indian reservations and explore the reasons for the complexity of the present jurisdictional morass.[10]

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3. *See* 18 U.S.C. §§ 1152-1153 (1970).

4. *E.g.*, 18 U.S.C. § 3243 (1970) (Kansas Indian reservations); Act of Oct. 5, 1949, ch. 604, § 1, 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 (Devils Lake Reservation in North Dakota).

5. *E.g.*, Act of May 10, 1926, ch. 280, 44 Stat., vol. II, 496 (Mesa Grande Reservation); Act of June 5, 1872, ch. CCCX, 17 Stat. 228 (Great and Little Osage Reservation); Treaty with the Sioux, Apr. 29, 1868, art. II, 15 Stat. 636; Treaty with the Kickapoos, May 18, 1854, art. I, 10 Stat. 1078; Treaty with the Shawnees, May 10, 1854, art. I, 10 Stat. 1053; Exec. Order of Apr. 9, 1872, 1 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 916 (1904) (Colville Reservation); Exec. Order of Nov. 16, 1855, 1 C. KAPPLER, *supra* at 817 (Klamath River Reservation).

6. 18 U.S.C. §§ 1151-1153 (1970).

7. 18 U.S.C. § 1162 (1970); 25 U.S.C. §§ 564, 677, 691, 726, 841, 931 (1970). For further examples, see statutes cited note 4 *supra*.

8. *E.g.*, WASH. CONST. art. 26, ¶ 2; ARIZ. REV. STAT. ANN. §§ 36-1801, -1865 (1974); FLA. STAT. ANN. § 265.16 (1974).

9. The second Article in the series will explore the present jurisdictional maze created by the interaction of a number of almost unreconcilable federal statutes. The final Article will discuss possible reforms in the structure of criminal jurisdiction on Indian lands, including a review of the changes contained in proposed legislation revising the federal criminal code.

10. Because of the peculiar problems of property law involved in the issue of Indian hunting and fishing rights, this series of articles will exclude from consideration that aspect of criminal jurisdiction. However, a number of excellent discussions of these problems can readily be found in the legal literature. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 285-86 (1942); Comment, *Problems of State Jurisdiction Over Indian Reservations*, 13 DE PAUL L. REV. 74, 81-83 (1963); 48 N.D.L. REV. 729 (1972).

THE TREATY PERIOD: 1776-1871

The Treaties

From 1776 until approximately 1871 the federal government handled Indian affairs primarily by way of treaties with the various tribes.[11] This approach continued a pattern set during the Spanish, Dutch, and English colonial occupations of North America. Each of those nations treated the Indian tribes as sovereign powers and attempted to secure land and resolve disputes through traditional diplomatic and sometimes military means.[12] After the Declaration of Independence, the first treaty with the Indians negotiated by the new United States government was the treaty of September 17, 1778, with the Delaware Nation.[13] Like most of the treaties which followed it,[14] the 1778 treaty was couched in the language of international diplomacy. Article IV of that treaty confronted directly the problem of criminal jurisdiction, the parties agreeing that neither the United States nor the Delaware Nation would proceed alone to punish citizens of one of the contracting nations who committed crimes against citizens of the other.[15] Rather, such crimes were to be tried in "a fair and impartial trial . . . had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice . . . ."[16] Thus, the United States began its 90-year history of treaties with the Indians by treating the Delaware Nation as a fully sovereign nation[17] and by making arrangements for mutual cooperation in the area of criminal law enforcment.

In the treaties from 1778 until approximately 1796 criminal jurisdiction over Indians and Indian territory was resolved through reliance on the Indians' sovereignty and control over their own lands as well as through negotiated arrangements predicated upon the citizenship of the defendant or victim. Thus, many of the early treaties recognized the Indians' jurisdiction to deal with non-Indians who settled on Indian

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11. F. COHEN, *supra* note 10, at 33-67.
12. *Id.* at 46-47.
13. Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13. The Indian treaties are conveniently collected in chronological order in 2 C. KAPPLER, *supra* note 5. A chronological listing of the Indian treaties and agreements is also available in INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, A CHRONOLOGICAL LIST OF TREATIES AND AGREEMENTS MADE BY INDIAN TRIBES WITH THE UNITED STATES (1973).
14. *See* F. COHEN, *supra* note 10, at 39.
15. Treaty with the Delawares, Sept. 17, 1778, art. IV, 7 Stat. 14.
16. *Id.* The same section also stipulated that the procedure for such trials was to be fixed by Congress with the assistance of deputies of the Delaware Nation. There is no indication that Congress ever fixed such procedures or that any joint trials were held.

Another feature of article IV was its provision for extradition by either party of fugitive criminals or slaves. *Id.*
17. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548-50 (1832).

lands and committed crimes thereon.[18] Such jurisdictional grants apparently assumed that the Indian tribes were sovereign and possessed complete governmental powers over their own lands, including the powers to try non-Indians. Even these early treaties, however, began to encroach upon Indian territorial sovereignty, as many of them contained clauses providing for federal prosecution of Indians who committed serious crimes against non-Indians.[19] While these provisions probably envisioned that such crimes would occur outside of Indian territory,[20] they contained no exception for crimes committed by Indians against non-Indians on Indian lands. It is therefore apparent that these early treaties predicated criminal jurisdiction for serious offenses not only on land sovereignty concepts, but also on the citizenship of the perpetrator and victim of the offense. The latter approach, although somewhat inconsistent with an Indian sovereignty concept, was not entirely foreign to the sphere of international diplomacy.[21]

A more significant inroad on the sovereignty concept was made in the Treaty of January 9, 1789, with the Wyandot, Delaware, Ottawa, Chippewa, Pattawatima, and Sac Nations.[22] Article V of that treaty contained language permitting the territorial and state governments to prosecute Indians who committed the crimes of robbery and murder against non-Indians, irrespective of whether the crime was committed in Indian territory. The treaty also provided that American citizens who robbed or murdered Indians should be tried in the territorial or state courts, apparently referring to crimes committed in Indian territory as well as elsewhere.[23] Thus, the 1789 treaty established significant limitations on the right of tribes to enforce their own law against whites who committed crimes within their territory.[24]

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18. *See* Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Weeas, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, art. VI, 7 Stat. 52. *See also* Treaty with the Cherokees, July 2, 1791, art. VIII, 7 Stat. 40; Treaty with the Creeks, Aug. 7, 1790, art. VI, 7 Stat. 36; Treaty with the Shawnees, Jan. 31, 1786, art. VII, 7 Stat. 27; Treaty with the Chickasaws, Jan. 10, 1786, art. IV, 7 Stat. 25; Treaty with the Choctaws, Jan. 3, 1786, art. IV, 7 Stat. 22; Treaty with the Cherokees, Nov. 28, 1785, art. V, 7 Stat. 19; Treaty with the Wyandots, Delawares, Chippawas, and Ottawas, Jan. 21, 1785, art. V, 7 Stat. 17.

19. *See* Treaty with the Cherokees, July 2, 1791, art. X, 7 Stat. 40; Treaty with the Creeks, Aug. 7, 1790, art. VIII, 7 Stat. 37; Treaty with the Chickasaws, Jan. 10, 1786, art. V, 7 Stat. 25; Treaty with the Choctaws, Jan. 3, 1786, art. V, 7 Stat. 22; Treaty with the Cherokees, Nov. 28, 1785, art. VI, 7 Stat. 19; Treaty with the Wyandots, Delawares, Chippawas and Ottawas, Jan. 21, 1785, art. IX, 7 Stat. 17.

20. The treaties generally contained provisions forbidding non-Indians from settling in Indian territory. *See* treaties cited note 18 *supra.*

21. *But cf.* Treaty with China, July 3, 1844, art. XXI, 8 Stat. 596.

22. Art. V, 7 Stat. 29.

23. *Id.* Article VI of the treaty provided for state or territorial jurisdiction as well over any person, Indian or non-Indian, charged with horse stealing. *Id.* art. VI.

24. Nevertheless, article IX of the 1789 treaty continued the pattern of earlier agreements by inserting a clause which subjected to Indian law non-Indian citizens who settled on Indian land in violation of the treaty. Art. IX, 7 Stat. 30. With respect to non-Indians illegally residing on Indian land, articles IX and V were in conflict, since

Additional changes appear in treaties entered into after 1796. Provisions granting to the tribe criminal jurisdiction over non-Indians dwelling in Indian territory disappeared.[25] The trend was away from a land sovereignty notion of jurisdiction and toward a concept based primarily on the citizenship of the parties. Jurisdiction over serious interracial crimes was generally granted to the federal courts during this period.[26] Federal jurisdiction, which had previously been limited to situations in which the victim was a citizen of the United States,[27] was now extended to cases in which either the perpetrator or the victim was a citizen or resident of the United States.[28]

Until 1855 treaties did not generally provide a forum for the trial of intra-Indian or intratribal crimes, the prevailing assumption apparently being that such crimes were within the exclusive province of tribal self-government.[29] A few treaties, however, contained ambiguous provisions

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the latter purported to grant similar jurisdiction to state and territorial courts. A harmonious reading of these provisions would suggest that non-Indians who settled in Indian territory removed themselves from the protection of the federal government and consequently, any crimes they committed thereafter in Indian territory were subject to Indian law. On the other hand, non-Indians who merely raided Indian territory while residing outside remained subject to the judicial processes of the state or territorial courts.

Interestingly, although this treaty was the first ratified by the United States government under its new Constitution, which had established a federal judiciary, criminal jurisdiction was nonetheless granted to the state and territorial courts rather than to the federal courts. Subsequent to 1790, treaties subjecting Indians to the white man's law generally provided that they be tried in federal courts according to the laws of the United States. *See, e.g.*, Treaty with the Siounes and Ogallalas, July 5, 1825, art. 5, 7 Stat. 253; Treaty with the Poncars, June 9, 1825, art. 5, 7 Stat. 248; Treaty with the Creeks, Aug. 7, 1790, art. VIII, 7 Stat. 35. *But see* Treaty with the Quapaws, Aug. 24, 1818, art. VI, 7 Stat. 177; Treaty with the Sacs and Foxes, Nov. 3, 1804, art. V, 7 Stat. 85.

25. *Compare* treaties cited note 18 *supra with* Treaty with the Quapaws, Aug. 24, 1818, art. IV, 7 Stat. 177, *and* Treaty with the Sacs and Foxes, Nov. 3, 1804, art. VI, 7 Stat. 86.

26. *See* Treaty with the Choctaws, Sept. 27, 1830, arts. VI-VIII, 7 Stat. 334; Treaty with the Quapaws, Aug. 24, 1818, art. 6, 7 Stat. 177. *Cf.* Treaty with the Ioways, May 17, 1854, art. 11, 10 Stat. 1071; Treaty with the Delawares, May 6, 1854, art. 14, 10 Stat. 1051.

27. *See, e.g.*, Treaty with the Choctaws, Jan. 3, 1786, art. V, 7 Stat. 22; Treaty with the Cherokees, Nov. 28, 1785, art. VI, 7 Stat. 19; Treaty with the Wyandots, Delawares, Chippewas, and Ottawas, Jan. 21, 1785, art. IX, 7 Stat. 17.

28. *See, e.g.*, Treaty with the Cheyennes, July 6, 1825, art. V, 7 Stat. 256; Treaty with the Siounes and Ogallalas, July 5, 1825, art. 5, 7 Stat. 253; Treaty with the Tetons, Yanctons and Yanctonies, June 22, 1825, art. 5, 7 Stat. 251.

29. *See* Act of June 30, 1834, ch. CLXI, § 25, 4 Stat. 733; Act of Mar. 3, 1817, ch. XCII, § 2, 3 Stat. 383. *But see* Treaty with the Kickapoos, May 18, 1854, art. 9, 10 Stat. 1080; Treaty with the Shawnees, May 10, 1854, art. 14, 10 Stat. 1058; Treaty with the Delawares, May 6, 1854, art. 14, 10 Stat. 1051. *See generally Ex parte* Crow Dog, 109 U.S. 556 (1883).

A few of the treaties during this period, however, contained provisions granting the federal courts jurisdiction over crimes between Indians. Such provisions failed to indicate whether coverage was limited to intertribal crimes or also included crimes occurring within a single tribe. *See* Treaty with the Winnebagoes, Feb. 27, 1855, art. 10, 10 Stat. 1174; Treaty with the Chippewas, Feb. 22, 1855, art. IX, 10 Stat. 1169; Treaty with the Kaskaskias, Peorias, Piankeshaws and Weas, May 30, 1854, art. 10, 10 Stat. 1084; Treaty with the Kickapoos, May 18, 1854, art. 9, 10 Stat. 1080; *cf. Ex parte*

which might be construed as asserting complete criminal judisdiction over Indians by federal or state courts.[30] Many of the post-1855 treaties, perhaps in a renewed effort to guarantee tribal sovereignty at least over purely Indian affairs, specifically provided for Indian jurisdiction over intratribal crimes committed on the reservation.[31] For example, treaties with the Choctaw, Chickasaws, Creeks, and Seminoles expressly recognized these tribes' "unrestricted right of self-government" over matters affecting tribal members on Indian lands, at least to the extent that it did not conflict with federal laws regulating trade and intercourse with these tribes.[32] The Cherokee Nation, having a long history of interaction with white law as a result of its removal westward, was probably the most concerned about maintaining self-government over intratribal matters. In its treaty of July 19, 1866, the tribe agreed to the establishment of a federal district court for Indian Territory[33] and to the tribe's being subject to the jurisdiction of the nearest federal district court in the interim.[34] The Cherokees insisted, however, on the insertion in the

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Crow Dog, 109 U.S. 556, 566-67 (1883) (holding that such clauses do not grant the federal courts jurisdiction over an intratribal crime).

30. *See* Treaty with the Miami Indians, June 5, 1854, art. 9, 10 Stat. 1097; Treaty with the Kaskaskias, Peorias, Piankeshaws, and Weas, May 30, 1854, art. 10, 10 Stat. 1084; Treaty with the Kickapoos, May 18, 1854, art. 9, 10 Stat. 1080; Treaty with the Sacs and Foxes, May 18, 1854, art. 10, 10 Stat. 1076; Treaty with the Ioways, May 17, 1854, art. 11, 10 Stat. 1071; Treaty with the Shawnees, May 10, 1854, art. 14, 10 Stat. 1058; Treaty with the Shawnees, May 10, 1854, art. 14, 10 Stat. 1058; Treaty with the Delawares, May 6, 1854, art. 14, 10 Stat. 1051; Treaty with the Quapaws, Aug. 24, 1818, art. VI, 7 Stat. 177. *But cf. Ex parte* Crow Dog, 109 U.S. 556, 568-69 (1883). *See also* treaties cited in note 29 *supra.*

31. Treaty with the Creeks and Seminoles, Aug. 7, 1856, arts. XIV-XV, 11 Stat. 703-04; Treaty with the Choctaws and Chickasaws, June 22, 1855, arts. 6-7, 11 Stat. 612-13. This trend seems to have begun with three treaties negotiated in 1855 providing compensation for criminal conduct. While these provisions directly address inter-Indian, off-reservation crimes, they are silent as to intratribal offenses on the reservation. This silence may imply that such crimes were intended to be left entirely to the tribe. *See* Treaty with the Qui-nai-elts and Quil-leh-utes, Jan. 25, 1856, art. VIII, 12 Stat. 972-73; Treaty with the Yakamas, June 9, 1855, art. VIII, 12 Stat. 954; Treaty with the Makahs, Jan. 31, 1855, art. IX, 12 Stat. 940-41.

32. *See* Treaty with the Creeks and Seminoles, Aug. 7, 1856, art. XV, 11 Stat. 703-04; Treaty with the Choctaws and Chickasaws, June 22, 1855, art. 7, 11 Stat. 612-13. Indeed, the Creek and Seminole tribes were so concerned about jurisdictional matters that they insisted on inclusion of a provision assuring that their lands would never become part of or subject to the jurisdiction of any state or territory. *See* Treaty with the Creeks and Seminoles, Aug. 7, 1856, art. 4, 11 Stat. 700. *See also* Treaty with the Pottawatomies, Feb. 27, 1867, art. III, 15 Stat. 532.

33. Indian Territory is an historical term for the land west of the Mississippi reserved for the relocation of Indian tribes which had been removed from other sections of the country. The former Indian Territory is now contained within the state of Oklahoma. For a general discussion of its rather checkered history, see F. COHEN, *supra* note 10, at 53-60, 425-29.

34. Treaty with the Cherokees, July 19, 1866, art. VII, 14 Stat. 800-01. A federal court for the Indian Territory was not created until 1889, 23 years after this treaty with the Cherokees. Act of Mar. 1, 1889, ch. 333, 25 Stat. 783. Furthermore, the federal court initially created for the Indian Territory possessed only limited criminal jurisdiction over offenses against the laws of the United States not punishable by death or imprisonment at hard labor. *Id.* § 5. This jurisdiction was expanded in 1895 to encompass all offenses against the laws of the United States committed in Indian Territory. Act of Mar. 1, 1895, ch. 145, § 9, 28 Stat. 697.

treaty of a proviso ensuring their complete sovereignty over intratribal matters.[35]

These treaties complete the outline of the jurisdictional approaches taken by the federal government in treaties with the Indians until 1885 when Congress passed the Federal Major Crimes Act[36] and began to control criminal jurisdiction by statute. The later treaties continued and refined earlier patterns by indicating that the tribes had complete sovereignty and jurisdiction over intratribal crimes occurring on the reservations.[37] However, non-Indians who committed crimes on reservations were generally not subjected to tribal authority, but rather were to be tried in federal, state, or territorial courts. Finally, Indians who committed crimes off the reservation or against non-Indians were subject to applicable federal, state, or territorial laws.[38]

Thus, the treaty period saw a number of approaches to criminal jurisdiction over Indians and Indian territory. These approaches changed and were refined slowly, but the changes were not dramatic since many of the relevant treaty provisions merely tracked boilerplate jurisdictional provisions from prior treaties. This plethora of related but different jurisdictional provisions, while widely ignored after 1871, laid the foundation for the nation's chaotic approach to criminal jurisdiction over Indian lands.

The management of federal-Indian relations by treaty came to an end in 1871. The House of Representatives, resentful that the treaty mechanism afforded the Senate the primary role in regulating Indian matters, temporarily refused in 1976 to appropriate any further funds for the negotiation of new Indian treaties.[39] Soon thereafter this dispute came to a head in the debates over the Indian Appropriations Act of

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35. [T]he judicial tribunals of the [Cherokee] nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee nation, except as otherwise provided in this treaty.
Treaty with the Cherokees, July 19, 1866, art. XIII, 14 Stat. 803.

36. *See* 18 U.S.C. § 1153 (1970). *See also* F. COHEN, *supra* note 10, at 78.

37. *See, e.g.*, Treaty with the Navajos, June 1, 1868, art. I, 15 Stat. 667; Treaty with the Cheyennes, May 10, 1868, art. I, 15 Stat. 655; Treaty with the Crows, May 7, 1868, art. I, 15 Stat. 649; Treaty with the Choctaws and Chickasaws, Apr. 28, 1866, art. VIII, para. 8, 14 Stat. 773. *But see* Treaty with the Chippewas, Mar. 19, 1867, art. VIII, 16 Stat. 721; Treaty with the Camanches and Kioways, Oct. 18, 1865, art. I, 14 Stat. 717; Treaty with the Cheyennes and Arapahoes, Oct. 14, 1865, art. I, 14 Stat. 703. The two latter treaties contain clauses asserting complete federal jurisdiction over Indians, even for intratribal crimes, thereby divesting the tribes of jurisdiction and reversing the policy of tribal self-government.

38. *See, e.g.*, Treaty with the Navajos, June 1, 1868, art. I, 15 Stat. 667; Treaty with the Cheyennes, May 10, 1868, art. I, 15 Stat. 655; Treaty with the Crows, May 7, 1868, art. I, 15 Stat. 649; Treaty with the Choctaws and Chickasaws, Apr. 28, 1866, art. VIII, para. 8, 14 Stat. 773.

39. Act of Mar. 29, 1867, ch. XIII, § 6, 15 Stat. 9 (repealed 1867). *See generally* F. COHEN, *supra* note 10, at 66-67.

1871 and 1872.[40] The treaty period formally ended in 1871 when the House successfully included a provision in the Indian Appropriations Act which provided that no Indian tribe would thereafter be recognized as an independent nation with whom the United States could contract by treaty.[41] After passage of the Act, the federal government shifted to other modes of handling its relations with the Indian tribes.[42]

Statutes Affecting Criminal Jurisdiction During the Treaty Period

Although relations with the Indians were primarily handled by treaty until 1871, the treaty period was not without important federal legislation affecting criminal jurisdiction over the Indians and their lands. During the latter portion of the 18th century and the first half of the 19th century, Congress passed a series of temporary Indian trade and intercourse acts which were periodically revised and reenacted. Many of these acts contained provisions for federal prosecution for certain criminal offenses committed in Indian country, although in general they merely implemented the arrangements previously established in the treaties.

The first of these Indian trade and intercourse acts was passed by the First Congress in 1790 and provided for federal prosecution of United States citizens or residents who committed any crime or trespassed on Indian land.[43] This provision implemented similar arrangements contained in two earlier treaties.[44] In 1796 the Fourth Congress further refined these provisions by expressly defining prosecutable crimes and applicable sentences.[45] Furthermore, the 1796 Indian

40. *See generally* F. COHEN, *supra* note 10, at 66-67.

41. [H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

Act of Mar. 3, 1871, ch. CXX, 16 Stat. 566 (now 25 U.S.C. § 71 (1970)).

42. While 1871 spelled the end of the treaty period, this did not end congressional efforts to resolve Indian affairs by consensual agreements. Between 1871 and 1909 both houses of Congress ratified almost 100 agreements made between the federal government and the Indian tribes. *See* INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, *supra* note 13, at 29-34. *See generally*, F. COHEN, *supra* note 10, at 67. In the area of criminal jurisdiction, these agreements are not of great significance since few of them contain provisions affecting criminal jurisdiction over Indians or Indian territory.

43. Act of July 22, 1790, ch. XXXIII, §§ 5-6, 1 Stat. 138. While the Act provided a federal forum for the prosecution of residents of the United States who trespassed on Indian land, it incorporated state and territorial law as the applicable criminal code. *Id.; see* F. COHEN, *supra* note 10, at 364.

44. See Treaty with the Chickasaws, Jan. 10, 1786, art. VI, 7 Stat. 25; Treaty with the Cherokees, Nov. 28, 1785, art. VII, 7 Stat. 19. Neither of these treaties specified whether the trial was to be in state or federal courts, a matter resolved by the 1790 statute. *See also* discussion note 24 *supra*.

45. Act of May 19, 1796, ch. XXX, §§ 4, 6, 1 Stat. 470-71 (providing penalties for robbery, larceny, trespass, and murder).

Trade and Intercourse Act added additional provisions to the body of Indian criminal law by rendering it a crime to settle on or survey any lands which had been secured by treaty to any tribe[46] and by requiring punishment of death for the murder of Indians in Indian country by non-Indians.[47] The Act also provided for the apprehension and arrest, but not expressly the prosecution, of Indians who left their territory to commit murders or other violent crimes, or to steal or destroy horses or other property belonging to citizens of the United States.[48]

The 1817 revision of the Trade and Intercourse Act[49] significantly expanded federal criminal jurisdiction over Indian lands.[50] This Act provided that any Indian or other person who committed a crime "within any town, district, or territory, belonging to any nation or nations, tribe or tribes, of Indians" should be tried and punished in the federal or territorial courts in accordance with the laws governing crimes committed in places under the exclusive jurisdiction of the United States.[51] In expressly providing a federal forum for crimes committed by an Indian, Congress expanded federal jurisdiction for the first time to cases in which the defendant was an Indian, thereby further encroaching on Indian jurisdiction over their own lands. The Act, however, contained two significant exceptions. First, in accordance with the prevailing policy of permitting the tribe to resolve intratribal matters, the Act provided that federal jurisdiction would not "extend to any offence committed by one Indian against another, within any Indian boundary."[52] Thus, federal courts were given authority to try Indians who committed crimes in Indian territory only if the victim were non-Indian—a jurisdictional pattern commonly found in the contemporaneous treaties.[53] Additionally, the 1817 Act stated that it should not be construed to negate any contrary jurisdictional arrangements contained in prior treaties.[54] The substance of the 1817 Act was incorporated

46. *Id.* § 5, at 470.
47. *Id.* § 6, at 470-71.
48. *Id.* § 14, at 472-73. However, section 15, *id.* at 473, granted broad jurisdictional authority to federal and territorial courts over all offenses covered by the Act. *See also id.* § 6, at 470-71 (dealing with the murder of Indians by non-Indians while not on reservation property).
49. Act of Mar. 3, 1817, ch. XCII, 3 Stat. 383.
50. The 1802 Indian Trade and Intercourse Act, Act of Mar. 30, 1802, ch. XIII, 2 Stat. 139, had reenacted most of the 1790 provisions and remained the basic federal criminal law applicable to crimes committed on Indian lands until the 14th Congress revised the scope of federal jurisdiction in 1817.
51. Act of Mar. 3, 1817, ch. XCII, § 1, 3 Stat. 383. In this Act, Congress continued its policy of subjecting crimes committed in Indian country to federal, rather than state, prosecution. Intratribal crimes, however, were specifically excepted. *Id.* § 2.
52. *Id.*
53. *See* treaties cited note 26 *supra.*
54. Act of Mar. 3, 1817, ch. XCII, § 2, 3 Stat. 383. Several of the early treaties had contemplated tribal forums for crimes committed by white settlers on Indian lands. *See* treaties cited note 18 *supra.* This early congressional policy of respecting jurisdic-

into section 25 of the first permanent Indian Trade and Intercourse Act in 1834.[55] The meaning of section 25 of the 1834 Indian Trade and Intercourse Act was clarified by a provision tacked onto an unrelated 1854 statute,[56] which specified that section 25 should not be construed to make applicable to Indian country the laws of the District of Columbia.[57]

The final statutory gloss on federal Indian law during the treaty period came in several state enabling acts. Coincidental with the closing of the treaty period was the failure of the effort to push the Indians westward of the newly created states' boundaries. Accordingly, in 1861 Congress found that it needed to confront not only the problems of allocating law enforcement jurisdiction between the federal government and the tribes, but also the potential assertion of state authority over Indian lands located within the exterior boundaries of some of the new states. The solution adopted by Congress is found in the Enabling Act of the Kansas Territory.[58] Section 1 of that Act contained a reservation of federal authority and a prohibition of the extension of Kansas' jurisdiction over Indian lands within the state.[59] This provision

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tional arrangements negotiated with the tribes and formalized in treaty agreements was later inexplicably abandoned. See text & notes 66, 74-76 *infra*.

55. Act of June 30, 1834, ch. CLXI, 4 Stat. 729. Section 25, *id.* at 733, states:

> That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

Omitted from this section was the 1817 language preserving the jurisdictional patterns established by prior treaties. It was subsequently reinstated into successor statutes, however, and an analogous provision is now found in the last clause of 18 U.S.C. § 1152 (1970).

Other portions of the 1834 Act collected, often in amended form, many earlier criminal statutes.

56. Act of Mar. 27, 1854, ch. XXVI, §§ 3-6, 10 Stat. 270. Other provisions contained in this rider to the Act established criminal penalties for whites who burned buildings in Indian country which belonged to or were in the lawful possession of Indians, and vice versa, *id.* § 4, criminalized assaults by whites against Indians or by Indians against whites in Indian country, *id.* § 5, and exempted Indians from federal prohibitions regarding the introduction of liquor into Indian country. *Id.* § 3.

These riders were undoubtedly tacked onto this Act because the Arkansas federal courts affected by the Act had jurisdiction over the Indian Territory at that time. *See* Act of June 30, 1834, ch. CLXI, § 24, 4 Stat. 733.

57. Act of Mar. 27, 1854, ch. XXVI, § 3, 10 Stat. 270. *See* F. COHEN, *supra* note 10, at 76. The major provisions of this section, including the nonapplicability of the laws of the District of Columbia and the tribal-federal double jeopardy provisions, have since been incorporated into the present language of 18 U.S.C. § 1152 (1970).

58. Act of Jan. 29, 1861, ch. XX, 12 Stat. 126. For a discussion of the effect of congressional failure to include such a clause in an enabling act, see text accompanying notes 174-87 *infra*.

59. *Provided*, That nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of persons or property now pertaining to the Indians of said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall

soon became a model for the admission of other new states. Thus, after 1861 the enabling acts for most states having sizable Indian lands contained similar clauses.[60] Many state enabling acts also required the prospective state to insert in its constitution a disclaimer of jurisdiction over Indian lands which could not be modified without congressional consent. As a direct consequence many western state constitutions still contain such disclaimers.[61] The inclusion of a disclaimer in certain state enabling acts and constitutions is the source of a continuing problem in resolving matters of state jurisdiction over Indian reservations because of the potential negative implications carried by such provisions. Since many states were admitted to the Union both before[62] and after[63] 1861 without disclaimers these states arguably were given complete jurisdiction within their borders by the grant of statehood.[64]

The jurisdictional approaches taken in the statutes enacted during the treaty period generally paralleled those set out in the negotiated treaties. Thus, during this period Congress slowly encroached on the tribal jurisdiction over Indian territory by providing a federal forum for the trial of crimes committed on Indian lands in which either the victim or perpetrator of the crime was a non-Indian. While such enactments began, as did the treaties, by granting federal jurisdiction only where the alleged perpetrator of the crime was non-Indian, by the end of the treaty period both the treaties and the statutes also granted the federal courts criminal jurisdiction if a serious crime were committed by an Indian against the person or property of a non-Indian. Nevertheless,

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be excepted out of the boundaries, and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said State, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed.

Act of Jan. 29, 1861, ch. XX, § 1, 12 Stat. 127. This provision was apparently the direct result of an 1831 federal treaty with the Shawnee Indians who had been moved to Kansas. The treaty contained a provision guaranteeing that the Shawnees would never be included within or subject to the laws of any state or territory without their consent. Treaty with the Shawnees, Aug. 8, 1831, art. X, 7 Stat. 357. *See generally* The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866).

60. *See, e.g.*, Act of June 20, 1910, ch. 310, §§ 2, 20, 36 Stat. 558-59, 569-70 (Arizona and New Mexico); Act of June 16, 1906, ch. 3335, §§ 1, 7, 34 Stat. 267, 272 (Oklahoma, the territory of which also encompassed the remnant of that land known as Indian Territory); Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 677 (North Dakota, South Dakota, Montana, and Washington). This policy was continued in the admission of Alaska. Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339.

61. *See, e.g.*, ALAS. CONST., art. XII, § 12; ARIZ. CONST., art. XX, para. 4; MONT. CONST., art. I (adopting the provision of the enabling act); 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. *But cf.* 28 U.S.C. § 1360 (1970).

62. *See* Act of Feb. 26, 1857, ch. LX, 11 Stat. 166 (Minnesota); Act of Mar. 3, 1845, ch. XLVIII, 5 Stat. 742 (Florida and Iowa).

63. *See* Act of Mar. 3, 1875, ch. 139, 18 Stat. 474 (Colorado).

64. *Cf.* New York *ex rel.* Ray v. Martin, 326 U.S. 496, 499 (1946); Draper v. United States, 164 U.S. 240, 243 (1896); United States v. McBratney, 104 U.S. 621, 623-24 (1881).

during the treaty period both the statutes and the treaties generally reserved jurisdiction over even the most serious crimes to the tribes if both the perpetrator and the victim were Indians.[65] Furthermore, toward the end of the treaty period, Congress sought to protect both federal jurisdiction over interracial crimes and tribal jurisdiction over intra-Indian crimes from state encroachment by prohibiting the new states from exercising jurisdiction over Indian lands as a condition for their admission to statehood.

THE STATUTORY PERIOD: 1871 TO DATE

After the end of the treaty period in 1871, Congress began increasingly to rely on legislation as the primary vehicle for shaping Indian policy and law, in many cases enacting statutes which conflicted with preexisting treaty provisions.[66] In the area of criminal jurisdiction the major new trend was the increased subjection of the Indians to federal and later state criminal laws even for intratribal crimes.

The first attack on the practice of tribal self-government over intra-Indian crimes came in 1885 with the passage of the Federal Major Crimes Act.[67] This Act was the direct outgrowth of the United States Supreme Court's decision in *Ex Parte Crow Dog*,[68] decided two years

65. Certain treaties provided for federal jurisdiction as to crimes against "other Indians," but such provisions generally seemed to envision intertribal rather than intratribal crimes. *See* Treaty with the Snakes, Aug. 12, 1865, art. IV, 14 Stat. 683; 7 OP. ATT'Y GEN. 174, 179 (1855); text & note 29 *supra*.

66. See discussion notes 76, 116 *infra*.

67. The Act of Mar 3, 1885, ch. 341, § 9, 23 Stat. 385 stated:

> That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

Actually, the first codification and revision of United States statutes inadvertently asserted jurisdiction over intratribal crimes as a consequence of the unintentional omission of the jurisdictional exception contained in section 25 of the Indian Trade and Intercourse Act of 1834 for crimes committed by an Indian on the person or property of another Indian. *Compare* Act of June 30, 1834, ch. CLXI, § 25, 4 Stat. 733, *with* Act of Dec. 1, 1873, tit. XXVIII, ch. 4, § 2146, 18 Rev. Stat., pt. 1, at 374. That error was, however, cured when Congress ordered the reinsertion of the exception in 1875. Act of Feb. 18, 1875, ch. 80, 18 Stat. 318. The United States Supreme Court later held that this inadvertent omission of the intra-Indian offense exception by the reviser did not grant the federal government jurisdiction to try intratribal crimes. *See Ex Parte* Crow Dog, 109 U.S. 556, 558-59 (1883).

68. 109 U.S. 556 (1883). See text accompanying notes 153-59 *infra*.

earlier. In *Crow Dog* the Court, adhering to longstanding federal policy, held that the federal courts lacked jurisdiction to try Crow Dog, a Brule Sioux, for the murder of one of the Brule Sioux chiefs. The *Crow Dog* decision aroused the ire of Congress, the Department of the Interior, and the public. Consequently, a groundswell of support emerged in the Forty-eighth Congress for the extension of white man's law to intratribal crimes.[69] The House of Representatives, bowing to the pressure, voted to attach an amendment to the Indian appropriations act of 1885 to expand federal criminal jurisdiction to intra-Indian crimes committed on Indian lands. Specifically, the Act covered seven specified serious crimes—murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.[70] It granted jurisdiction to the territorial courts to try such crimes committed within the territory[71] by any

69. *See* 16 CONG. REC. 935 (1885).

70. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (quoted in note 67 *supra*). Since the enactment of the Federal Major Crimes Act in 1885, six crimes—incest, carnal knowledge of a female under age 16 not one's wife, assault with intent to commit rape, assault with a dangerous weapon, assault resulting in serious bodily injury, and robbery—have been added to its coverage, bringing the total number of serious offenses currently specified therein to 13. 18 U.S.C. § 1153 (1970). While Congress never expressly regulated tribal jurisdiction, it was clear from the debates over the enactment of the Federal Major Crimes Act that jurisdiction of lesser intra-Indian offenses not covered by the Act was left exclusively to the tribal courts.

The extension by Congress of federal jurisdiction to crimes committed on Indian reservations apparently includes every aspect of federal criminal procedure. *See In re* Long Visitor, 523 F.2d 443 (8th Cir. 1975) (holding that a federal grand jury's subpoena power extends to tribal reservations).

71. Under the Federal Major Crimes Act, the law of the territory was to be applied where an intratribal crime occurred within the territory. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385. Since the territories in the West had federal courts which also sat as territorial courts, *see generally In re* Wilson, 140 U.S. 575 (1891), these courts often suffered from confusion as to when they should exercise jurisdiction to enforce territorial law as a territorial court rather than imposing federal law and jurisdiction as a district court. In three late 19th century decisions the Supreme Court was forced to interpret this section of the Act and explore its implications. In *Ex parte Gon-Shay-Ee*, 130 U.S. 343 (1889), and *Ex parte* Captain Jack, 130 U.S. 343 (1889), the Court was presented with the question of which of the dual jurisdictions of the federal territorial court was extended to Indian reservations by the first portion of the Federal Major Crimes Act. It held that the jurisdiction committed by the Act to the territorial courts for the crimes specified therein was properly exercised by the territorial courts when sitting as courts enforcing territorial law under territorial procedure and was not a commitment of jurisdiction to enforce federal law.

In *In re Wilson*, 140 U.S. 575 (1891), the Court explored the impact of the Federal Major Crimes Act on the continued vitality of the federal courts' jurisdiction over other crimes committed on Indian lands which had been authorized by section 25 of the 1834 Indian Trade and Intercourse Act. The petitioner in *Wilson*, a black convicted of murdering another black on the White Mountain Indian Reservation, claimed that the enactment of the Federal Major Crimes Act divested the federal courts of section 25 jurisdiction since continued application of section 25 resulted in federal law and court procedure being applied to trials of whites or blacks who committed crimes on Indian lands located within a territory, while territorial law and procedure would apply to Indians for similar intra-Indian crime committed in the same place. This construction, the petitioner argued, would create an illegal distinction based on the race of the offender. Treating the matter as one of statutory construction, the Court rejected Wilson's argument and held that Congress had lawfully provided for the trial of two different classes of offenses in different courts. After *Wilson*, no significant challenge to predicating jurisdiction over Indian reservations on the race of the parties has been mounted in the Supreme Court. *But see* United States v. Big Crow, 523 F.2d 955

Indian "against the person or property of another Indian or other person"[72] and also granted jurisdiction to the federal district courts within the states for such crimes when committed on Indian reservations located within state boundaries.[73]

Unlike the amended provisions of section 25 of the 1834 Act, the Federal Major Crimes Act did not immunize Indians who had already been tried and punished by tribal authorities from further prosecution by the United States[74] or its territories. This omission was read as indicating that the Act had implicitly repealed tribal jurisdiction over the serious offenses which it covered.[75] The Federal Major Crimes Act thus apparently reversed the longstanding federal policy of permitting tribal self-government and punishment of intratribal offenses.[76]

(8th Cir. 1975); United States v. Antelope, 523 F.2d 400 (9th Cir. 1975), *cert. granted*, 96 S. Ct. 1100 (1976); United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1974); Gray v. United States, 394 F.2d 96 (9th Cir.), *cert. denied*, 393 U.S. 985 (1968); discussion note 196 *infra*. *See generally* Comment, *Indictment Under the "Major Crimes Act"—An Exercise in Unfairness and Unconstitutionality*, 10 ARIZ. L. REV. 691 (1968).

72. 23 Stat. 385. The language "another Indian or other person" used in the Federal Major Crimes Act to refer to the victim of the crime was the result of floor debate in the House. As originally proposed, the Federal Major Crimes Act covered only inter-Indian crimes since section 25 of the Indian Trade and Intercourse Act already granted jurisdiction to the federal courts to try crimes committed by Indians against non-Indians on or off the reservations. However, at the suggestion of one congressman the words "or any other person" were inserted, apparently as an effort to assure that such jurisdiction would be exercised, despite the recognition of all concerned that the federal government already had jurisdiction over such interracial crimes. 16 CONG. REC. 934 (1885). This insertion created a pleading anomaly which continues to exist to this day. Any Indian who commits a serious crime against a non-Indian on a reservation can be indicted under either 18 U.S.C. § 1152 (1970)—the successor to section 25 of the 1834 Indian Trade and Intercourse Act—or 18 U.S.C. § 1153 (1970)—the Federal Major Crimes Act. On the other hand, a non-Indian who commits the same offense against an Indian on an Indian reservation can only be charged under 18 U.S.C. § 1152 (1970). This anomaly not only poses pleading problems, but also may have some practical significance. See discussion note 196 *infra*.

73. In the case of a crime occurring on Indian lands within a state, criminal provisions applicable to areas within the exclusive jurisdiction of the United States were to be applied, an approach which had been taken for interracial crimes since 1817. Thus federal criminal law rather than that of the state was to be applied.

74. *See* Act of Mar. 3, 1817, ch. 341, § 9, 23 Stat. 385.

75. *Cf.* United States v. Whaley, 37 F. 145 (C.C.S.D. Cal. 1880). *See also* United States v. Cardish, 145 F. 242, 246 (E.D. Wis. 1906). *But see* Davis, *Criminal Jurisdiction over Indian Country in Arizona*, 1 ARIZ. L. REV. 62, 71 (1959). Apparently the Senate had rejected the predecessor of the Federal Major Crimes Act in 1874 precisely because it conflicted with the exercise of tribal jurisdiction:

> The Indians, while their tribal relations subsist, generally maintain laws, customs, and usages of their own for the punishment of offenses. They have no knowledge of the laws of the United States, and the attempt to enforce their own ordinances might bring them in direct conflict with existing statutes and subject them to prosecution for their violation.

S. REP. NO. 367, 43d Cong., 1st Sess. 2 (1874), *quoted in* F. COHEN, *supra* note 10, at 147 n.222. *But see* Talton v. Mayes, 163 U.S. 376 (1896) (suggesting that due to treaty provisions demanded by the Cherokees, discussed in text & notes 31-35 *supra*, the Federal Major Crimes Act did not divest the Cherokee tribal courts of jurisdiction over the serious offenses which that Act covered); text accompanying notes 189-90 *infra*.

76. While the enactment of the Federal Major Crimes Act apparently constituted a major policy shift in the federal government's approach to Indian law enforcement, the floor debate on the bill contains no suggestion of any major departure. Indeed, the debate was focused on filling what Congress thought was a gap in federal law which

For a considerable period following the enactment of the Federal Major Crimes Act, Congress seems to have either ignored or forgotten about this statute's existence.[77] In 1890 when Congress enacted the Organic Act for the Territory of Oklahoma, it granted jurisdiction to the territorial district court to try interracial crimes and intertribal crimes but expressly withheld jurisdiction over intratribal crimes.[78] Similarly in 1896 Congress accepted from the State of Iowa a grant of jurisdiction over the Sac and Fox Reservation containing a reservation to the state of criminal jurisdiction,[79] despite the fact that Iowa had already been deprived of whatever criminal jurisdiction over major intratribal offenses it might have possessed by the enactment of the Federal Major Crimes Act 12 years before. Thus, the history of the Federal Major Crimes Act, demonstrates the ill-conceived manner in which substantial portions of federal Indian law covering criminal jurisdiction have emerged. Major statutes have been enacted by Congress in the area of criminal jurisdiction in total disregard of prior treaty provisions and statutes. The result has been a myriad of inconsistent legislation which Congress has never fully harmonized.

While Congress has not made many major changes in the federal

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it believed was created by the Supreme Court decision in *Ex parte* Crow Dog, 109 U.S. 556 (1883). *See* text accompanying notes 67-69 *supra*.

Probably the most remarkable portion of the debate in the House occurred when Representative Adoniram J. Warner of Ohio inquired of Representative Byron M. Cutcheon whether the proposed bill conflicted with any treaty provisions. Cutcheon replied, "Not that I am aware of." 16 CONG. REC. 936 (1885). Cutcheon's reply is rather surprising since the Federal Major Crimes Act conflicted not only with the spirit of almost every treaty negotiated during the treaty period but was also in plain conflict with the treaty provisions by which the United States had guaranteed certain tribes, including the Five Civilized Tribes, exclusive power to govern intratribal matters and to punish intratribal crimes. *See* Treaty with the Cherokees, July 19, 1866, art. XIII, 14 Stat. 803; Treaty with the Creeks and Seminoles, Aug. 7, 1856, art. XV, 11 Stat. 703-04; Treaty with the Choctaws and Chickasaws, June 22, 1855, art. 7, 11 Stat. 612-13. Despite the plain error in Cutcheon's response, no one challenged it, and the House promptly passed the amendment by the overwhelming vote of 68 to 2 without any committee review. 16 CONG. REC. 936 (1885). Although the Senate rejected the House amendment containing the Federal Major Crimes Act on procedural grounds, 16 CONG. REC. 1748-49 (1885), it was reinstated after protracted conference committee deliberations and became law on Mar. 3, 1885. 16 CONG. REC. 2385-88, 2533, 2569 (1885).

77. On at least one occasion the Supreme Court also ignored the existence of the Federal Major Crimes Act. In Nofire v. United States, 164 U.S. 657 (1897), the Court held that the federal courts lacked jurisdiction over an intra-Indian crime committed within Cherokee lands despite the seeming applicability thereto of the first clause of the Federal Major Crimes Act. *But see* Albert v. United States, 162 U.S. 499 (1896) (relied on in *Nofire*, holding that the treaty provisions guaranteeing tribal jurisdiction over offenses involving only Indians were not superseded). See also discussion in text & notes 31-35 *supra*.

78. Act of May 2, 1890, ch. 182, §§ 12, 30-31, 26 Stat. 88, 94-96.

79. *See* Act of June 10, 1896, ch. 398, 29 Stat. 331; ch. 110, § 3, [1896] Iowa Laws Reg. Sess. 114. Similarly, in 1903 Congress accepted the cession of South Dakota's purported criminal jurisdiction over Indian reservations within the state. Act of Feb. 2, 1903, ch. 351, 32 Stat. 793; *see* ch. 106, [1901] S.D. Sess. Laws, 7th Sess. 132; *cf.* Hollister v. United States, 145 F. 773 (C.C. 8th Cir. 1906); United States v. Ewing, 47 F. 804 (D.S.D. 1891); Act of Feb. 22, 1889, ch. 180, § 4, para. 2, 25 Stat. 677; S.D. CONST., art. 22.

criminal jurisdiction statutes since 1885,[80] other collateral statutory developments have had some impact on the operation of these federal statutes, particularly those relating to the scope of state jurisdiction over Indian reservations. The most important was the congressional effort during the late 19th and early 20th centuries to terminate Indian reservations through the General Allotment Act of 1887.[81] It was envisioned that the allotment system would bring Indians into the economic and social system of white society. Accordingly, section 6 of the Act declared Indians who were allotted lands under the Act or who severed their tribal relationships citizens of the United States.[82] More importantly, the same section provided for bringing Indians who received such allotments within the jurisdiction of the state courts.[83]

Ultimately Congress reversed the allotment policy in the Indian Reorganization Act of 1934.[84] Section 2 of this Act prevented state jurisdiction from attaching to the remaining unpatented Indian allotment lands.[85] While section 6 of the General Allotment Act could have effectuated a major change in criminal jurisdiction over Indian lands, the net impact of section 6 of the General Allotment Act on criminal jurisdiction over Indian lands was not substantial in shifting

80. The present federal jurisdictional statutes governing Indian reservations are a direct outgrowth of 19th century enactments. The provisions now found in 18 U.S.C. §§ 1152-1153 (1970) codify almost verbatim 19th century statutes. Section 1152 codifies the text of section 25 of the 1834 Indian Trade and Intercourse Act, as amended in 1854, and section 1153 codifies the Federal Major Crimes Act, as expanded. Section 1153 has, of course, been rewritten to eliminate the references to crimes committed in the territories, since all of the territories containing Indian lands have become states.

The only substantial addition to the statutes granting federal jurisdiction over Indian reservations is the definition of Indian country now found in 18 U.S.C. § 1151 (1970). This section resolved several issues which were then somewhat confused by specifically including within the scope of the term "Indian country" patented lands within the limits of an Indian reservation and dependent Indian communities within the limits of a state.

81. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-358 (1970)). This Act provided for the allotment of tribal lands to individual Indians in tracts of 80 or 160 acres, with the surplus to be sold to whites. *Id.* § 5, at 389-90. The title to the land so allotted was to be held in trust by the United States for 25 years, at the end of which time the tract was to be patented in fee to the Indian beneficiary. *Id.* In 1934, however, the trust period was extended indefinitely as to all land then unpatented. 25 U.S.C. § 462 (1970).

82. Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390 (codified at 25 U.S.C. § 349 (1970)).

83. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . .

Id.

In 1906 Congress amended this section in order to defer the time that an Indian allottee became subject to state law until the patent in fee on his land had actually issued. Act of May 8, 1906, ch. 2348, 34 Stat. 182. It was subsequently held that this act continued federal jurisdiction over allotted and unpatented lands. United States v. Pelican, 232 U.S. 442, 450-51 (1914). *See also* United States v. Celestine, 215 U.S. 278, 291 (1909).

84. See text & notes 89-90 *infra*.

85. Act of June 18, 1834, ch. 576, § 2, 48 Stat. 984 (codified at 25 U.S.C. § 462 (1970)).

authority to the states. Opinions of the Solicitor of the Department of the Interior have noted that under section 6 the heirs of an allotee are not subject to state criminal law[86] and furthermore, that section 6 was not intended to work an exception to the exclusive jurisdiction of the federal courts granted unter the Federal Major Crimes Act.[87]

Two statutes passed in the early 20th century gave contrary indications as to the future direction of congressional policy toward Indians. In 1924 Congress conferred United States citizenship on "all non-citizen Indians born within the territorial limits of the United States . . . ."[88] This enactment lent support to the argument that Indians, as citizens,

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86. 58 I.D. 455 (1943).

87. 61 I.D. 298, 303 (1954). Thus, in 1954 the acting solicitor of the Department of the Interior summarized the jurisdictional impact of section 6 of the General Allotment Act as follows:

> Such complexities and distinctions as these have rendered the grant of State jurisdiction over Indians contemplated by the General Allotment Act largely ineffective. The sponsors of that legislation assumed that the allotment of the Indians in severalty would be but the prelude to the termination of their tribal relations and the liquidation of Federal supervision over them. When that program failed to be carried out, and the Indians, despite the fact that they were now citizens, continued to maintain their tribal relations and the Government continued its guardianship over them, the subjection of the Indians to the jurisdiction of the States ceased to have much reality. State law-enforcement officers could not, after all, go around with tract books in their pockets, and being unable to distinguish a patent-in-fee Indian from a ward Indian, they did not commonly concern themselves with law violations by Indians, . . . and the theoretical jurisdiction of the States thus fell into innocuous desuetude. Thus, when it has been desired to confer on particular States criminal or civil jurisdiction over Indians, it has been accomplished by general statutes conferring such jurisdiction, irrespective of the tenure by which Indians held their lands.

Id. at 304.

Section 6 did not end federal efforts to terminate reservation government and exclusive federal jurisdiction over Indian reservations. In the Curtis Act, Act of June 28, 1898, ch. 517, §§ 26-28, 30 Stat. 504-05, Congress sought to abolish the tribal courts of Indian tribes in the former Indian Territory, now part of the state of Oklahoma, and declared Indian law unenforceable in federal courts. *See generally* Morris v. Hitchcock, 194 U.S. 384, 393 (1904); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Stephens v. Cherokee Nation, 174 U.S. 445 (1899). This Act was followed by agreements providing for total termination of the self-government of some of these tribes. Act of Mar. 3, 1903, ch. 994, § 8, 32 Stat. 1008 (Seminole agreement); Act of July 1, 1902, ch. 1375, § 63, 32 Stat. 725 (Cherokee agreement); Act of Mar. 1, 1901, ch. 676, §§ 42-47, 31 Stat. 872-73 (Creek agreement); Act of June 28, 1898, ch. 517, 30 Stat. 505-13 (Choctaw-Chickasaw agreement). All of the time limits set forth in these agreements, however, were subsequently extended in the Joint Resolution of Mar. 2, 1906, 34 Stat. 822 (extending termination of tribal government until the first distribution of tribal property). Finally, in 1936 the Oklahoma tribes were brought within the coverage of statutes providing for Indian self-government. 25 U.S.C. § 503 (1970). *See generally* F. COHEN, *supra* note 10, at 455.

Another effort to facilitate the expansion of state jurisdiction occurred in 1929 when Congress enacted a statute permitting state agents and employees to enter Indian reservations, allotments, and tribal lands in order to enforce state health, quarantine, and compulsory school attendance laws. Act of Feb. 15, 1929, ch. 216, 45 Stat. 1185 (now 25 U.S.C. § 231 (1970)). This Act implicitly gave the state legislatures powers to control Indian lands in such matters and granted the state courts jurisdiction to hear cases arising thereunder. *In re* Colwash, 57 Wash. 2d 196, 356 P.2d 994 (1960) (dicta). In 1949 this statute was amended to require tribal consent for such enforcement. Act of Aug. 9, 1946, ch. 930, 60 Stat. 962.

88. Act of June 2, 1924, ch. 233, 43 Stat. 253.

should be treated like non-Indians in matters of criminal jurisdiction and should therefore be subjected to state criminal law. In 1934, however, Congress passed the Indian Reorganization Act,[89] which attempted to stabilize the tribal governments and halt the alienation of Indian lands resulting from the allotment system. While this Act did not specifically treat the issue of criminal jurisdiction, it seemed to usher in a renewed reliance by the federal government on tribal institutions as the primary vehicle for Indian governance, thereby reversing the trend of the prior 50 or 60 years.[90]

The legislative direction became clear in 1940 when Congress enacted the first of a series of statutes granting criminal jurisdiction over Indian reservations to the states, thereby radically altering the law enforcement roles traditionally exercised by the federal government and the tribes. The earlier statutes amounted to ad hoc congressional efforts to alter the traditional law enforcement relationships for certain states and reservations.[91]

These piecemeal attempts at termination of the exclusive federal criminal jurisdiction over certain reservations inaugurated an era of renewed congressional efforts to terminate the special law enforcement relationship between the federal courts and the Indian reservations. Indeed, they represented only the first trickle of what soon became a flood of termination statutes during the 1950's.[92] Most of these termina-

89. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified in scattered sections of 25 U.S.C.).

90. *See generally* F. COHEN, *supra* note 10, at 84-87.

91. A 1940 congressional enactment granted the State of Kansas jurisdiction over crimes committed on Indian reservations within the state, but reserved to the federal courts jurisdiction to try crimes "defined by the laws of the United States committed by or against Indians on Indian reservations." 18 U.S.C. § 3243 (1970). In 1946 an almost identical statute was passed for the Devils Lake Reservation in North Dakota, Act of May 31, 1946, ch. 279, 60 Stat. 229; *see* State v. Lohnes, 69 N.W.2d 508, 517 (N.D. 1955) (holding that jurisdiction could not take effect unless the people consented and removed the disclaimer provision from the state constitution), and in 1948 the same approach was taken with reference to the Sac and Fox Reservation in Iowa. Act of June 30, 1948, ch. 759, 62 Stat. 1161. While 18 U.S.C. § 3243 (1970) was unclear as to whether the reservation of federal jurisdiction was exclusive or concurrent, the legislative history of the Act suggested that Congress intended to give the State of Kansas criminal jurisdiction over lesser offenses and to reserve exclusive jurisdiction over the serious offenses defined by federal law. *See* 86 CONG. REC. 5596 (1940); H.R. REP. No. 1999, 76th Cong., 3d Sess. 2 (1940). This is essentially the interpretation adopted in Youngbear v. Brewer, Civil No. 75-62 (N.D. Iowa, filed June 25, 1976).

The New York reservations were totally terminated from all special federal law enforcement supervision when Congress conferred nearly complete jurisdiction on the State of New York in 1948 without reserving any federal jurisdiction. Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1970)). Similarly in 1949 Congress granted the State of California complete civil and criminal jurisdiction over the Mission Indians' Agua Caliente Reservation. Act of Oct. 5, 1949, ch. 604, 63 Stat. 705. Section 1 of the act did, however, exempt the Agua Caliente reservation land from state taxation, encumbrance, or alienation.

92. On July 1, 1952, the House passed House Resolution 698 directing the Committee on Interior and Insular Affairs to report a list of tribes which were ready for ter-

tion statutes contained provisions expressly subjecting the members of terminated tribes to state law.[93] Thus, the termination policy of the 1950's and early 1960's envisioned the complete assimilation of Indian reservations into the states. The most significant, termination statute enacted during this period was Public Law 280,[94] which inaugurated sweeping changes by significantly expanding the scope of state criminal jurisdiction over Indian lands. Section 2 of the Act granted certain states complete criminal jurisdiction over most or all of the Indian reservations within their borders.[95] These reservations were also excepted from the operation of the two federal criminal jurisdictional provisions,[96] apparently in an effort to prevent multiple prosecutions for the same crimes.

Sections 6 and 7 of Public Law 280 were also of major importance. Section 7 permitted states which did not have jurisdiction over civil or criminal cases arising out of reservation lands to assume such jurisdiction by state legislative enactment. Section 6 gave congressional consent to the removal of any state constitutional or statutory impediment to

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mination of federal supervision. H. Res. 698, 82d Cong., 2d Sess. (1952). Subsequently, on August 1, 1953, the full Congress passed House Concurrent Resolution 108 expressing the sentiment that special federal services to a number of Indian tribes and all special trust relationships with such tribes should be terminated as rapidly as possible. H.R. Cong. Res. 108, 67 Stat. B132. As a result, many tribes were then terminated by congressional action. *See, e.g.*, Act of Aug. 3, 1956, ch. 909, 70 Stat. 963; Act of Aug. 2, 1956, ch. 881, 70 Stat. 937; Act of Aug. 1, 1956, ch. 843, 70 Stat. 893. In 1954 a series of statutes was enacted which terminated not only federal judicial jurisdiction over Indian lands but also all federal supervision over and special services to the affected Indian reservations. These acts provided for the sale and distribution of tribal property of the affected tribes and consequent disestablishment of the tribes. *See* Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099 (codified at 25 U.S.C. § 741 (1970)) (certain tribes 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 tribes in Oregon); Act of Aug. 13, 1954, ch. 733, 68 Stat. 724 (codified at 25 U.S.C. § 691 (1970)) (various tribes located in western Oregon).

93. The provision found in the termination legislation for the Ponca Tribe of Nebraska is typical:

> [After the distribution of tribal assets and the issuance of a proclamation by the Secretary of the Interior terminating the federal trust relationship] 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.

25 U.S.C. § 980 (1970).

94. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified, as amended, in scattered sections of 18, 28 U.S.C.). *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A.L. REV. 535 (1975).

95. These states are California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. 18 U.S.C. § 1162 (1970). The original version of this Act excepted the Red Lake Reservation in Minnesota, the Warm Springs Reservation in Oregon, and the Menominee Reservation in Wisconsin from the transfer of jurisdiction. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, § 2, 67 Stat. 588. However, by the Act of Aug. 24, 1954, Pub. L. No. 83-661, ch. 910, 68 Stat. 795, the Menominee Reservation was brought within the scope of the jurisdictional transfer affected by the Act.

96. 18 U.S.C. §§ 1152-1153 (1970); *see id.* § 1162(c).

the assumption of such jurisdiction by authorizing the amendment or repeal of provisions disclaiming such jurisdiction.[97] Nothing in Public Law 280 required tribal consent prior to state assumption of criminal jurisdiction, a defect which greatly angered many tribes.[98] This omission was partially remedied in 1968 when Congress, as part of the Civil Rights Act of 1968, revised Public Law 280 to require tribal consent prior to any future state assumption of jurisdiction over tribal lands.[99] Although apparently no tribe has consented since 1968 to the assumption of state jurisdiction over its land, the amendment did not come in time to prevent a number of states from assuming criminal jurisdiction over Indian reservations, despite the desires of the affected tribe in many instances.[100]

While termination efforts seem to have dominated congressional Indian policy from 1940 through the early 1960's, there are signs that policy has shifted away from assimilation and toward tribal self-determination and an increased federal role. For example, in 1973 at the urging of the Menominee Tribe of Wisconsin, Congress restored federal supervision over the Menominee Reservation,[101] reversing the 1954 decision to terminate.[102] The legislative history of the bill reflects the fact that the termination effort for this tribe had been a fiasco, driving a prosperous and thriving Indian tribe to the brink of economic and cultural breakdown.[103] Yet, while its legislative history reflects the congressional intent to restore the federal trust relationship with this tribe and provide for the reestablishment of tribal self-government,[104] the Menominee Restoration Act did not affect that provision of Public

97. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 6-7, 67 Stat. 590.
98. *See generally* Goldberg, *supra* note 94, at 544-45.
99. 25 U.S.C. §§ 1321, 1326 (1970). These provisions applied only to states not required by section 2 of Public Law 280 to assume jurisdiction. *See* Goldberg, *supra* note 94, at 546.
100. *See* FLA. STAT. ANN. § 285.16 (1974) (enacted 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. CODE 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); WASH. REV. CODE ANN. §§ 37.12.010-.070 (1964); Act of Mar. 23, 1955, ch. 198, [1955] Nev. Laws 297 (now NEV. REV. STAT. § 41.430 (1973) (amended to remove jurisdiction over any reservation wherein the affected tribe has refused its consent)). See generally Goldberg, *supra* note 94, at 546-48. Apparently Indian opposition successfully stymied the referendum in which Wyoming attempted to assume jurisdiction, and defeated the initial efforts by Washington and South Dakota to extend their jurisdiction under Public Law 280. *Id.* at 547 n.56-58. Subsequently South Dakota three times attempted to expand its jurisdiction under Public Law 280, only to have these attempts nullified by judicial decisions and popular referendums. *See generally* Comment, *South Dakota Indian Jurisdiction*, 11 S.D.L. REV. 101, 105-09 (1966).
101. 25 U.S.C. §§ 903-903f (Supp. IV, 1974).
102. Act of June 17, 1954, ch. 303, 68 Stat. 250 (now 18 U.S.C. § 1162 (1970)).
103. *See generally* H.R. REP. No. 572, 93d Cong., 1st Sess. 3 (1973).
104. *See id.* 8-9.

Law 280[105] rendering the Menominee Reservation subject to all Wisconsin state criminal laws and exempting it from the operation of federal statutes specifically affecting Indian reservations.[106] This omission, while it has practical significance in further complicating questions of jurisdiction over this particular reservation, probably has little importance as an indicator of congressional policy trends.

The final legislative development in the area of criminal law which should be noted was the enactment in 1968 of the Indian Civil Rights Act.[107] In this Act Congress undertook to prescribe procedural requirements for prosecutions in tribal courts, extending certain constitutional protections to these proceedings.[108] For present purposes, however, the most important aspects of the 1968 Civil Rights Act were provisions limiting state and tribal jurisdiction over Indian lands.[109] As already noted, this 1968 legislation revised sections 6 and 7 of Public Law 280, which had permitted the states to assume criminal and civil jurisdiction over Indian reservations, to require tribal consent for future expansions of state jurisdiction. The Act also provided a method by which the states could retrocede, apparently without tribal consent, any jurisdiction which they had already assumed under Public Law 280.[110] It is apparent, therefore, that, while state jurisdiction over tribal lands was not prohibited by the 1968 Civil Rights Act, it was no longer viewed as a panacea for Indian jurisdictional problems, a reversal of the prevailing belief of preceding decades. At the same time, however, Congress indicated an unwillingness to restore primary criminal jurisdiction to the tribal courts. Another provision of the 1968 Act, while not expressly limiting the crimes cognizable in tribal courts, limited the punishments which the tribal courts could impose to six months' imprisonment or a $500 fine.[111] Thus the 1968 Act evidences a reinsertion of the federal government into a primary role in Indian criminal matters, a

105. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, § 2, 67 Stat. 588.

106. *See* Application of Nacotee, 389 F. Supp. 784, 786 (E.D. Wis. 1975); *cf.* Menominee Tribe v. United States, 391 U.S. 404 (1968).

107. Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 201-03, 82 Stat. 77-78 (codified at 25 U.S.C. §§ 1301-1303 (1970)). *See generally* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 HARV. L. REV. 1343 (1969).

108. 25 U.S.C. § 1302 (1970). The protections thus extended included most of those in the fourth, fifth, sixth, and eighth amendments. *See id.* Prior judicial decisions had held these safeguards inapplicable to Indian tribal proceedings. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (fifth amendment not applicable to Indian tribal laws or courts); Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (first amendment not applicable to Indian tribal laws absent congressional action). *But cf.* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965) (claim of due process violation in tribal court proceeding states a cause of action under Federal Habeas Corpus Act, 28 U.S.C. §§ 2241-2255 (1970)).

109. 25 U.S.C. §§ 1321-1326 (1970).

110. *Id.* § 1323.

111. *Id.* § 1302(7).

greater voice for the tribes themselves, and a deemphasis on state assumption of jurisdiction.

CONFLICT OF STATUTE AND TREATY: THE RATIONALIZATION FOR BROKEN TREATIES

As the foregoing discussion demonstrates, the statutes passed with reference to Indian criminal jurisdiction after 1871 all but ignored the prior treaty provisions on the same subject. Consequently, statutory enactments commonly abrogated prior treaty arrangements. Probably the greatest conflict of this type was the one already noted between the Federal Major Crimes Act and the treaties guaranteeing certain tribes the right of self-government and jurisdiction over all intratribal crimes.[112]

Such conflicts pose a significant question as to how Congress could so easily dispense with the tribal rights recognized in the treaties. The rationalization for such power is found in the doctrines developed by the federal judiciary to resolve conflicts between treaty provisions and statutes. With respect to both international treaties and treaties with the Indians, the longstanding doctrine indicates that a clear conflict between federal statutes and treaties is resolved in favor of the last in time.[113] This doctrine appears to have been first applied to Indian treaties in *The Cherokee Tobacco*[114] case, where the Court held that Congress could constitutionally tax tobacco grown by the Cherokee Nation despite a contrary prior treaty provision. It is clear that even Indian land and property rights granted in treaty provisions could be abrogated by subsequent statute or by condemnation, although such abrogation would

112. *See* text & notes 73-76 *supra.*

113. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); Thomas v. Gay, 169 U.S. 264, 271 (1898); Horner v. United States, 143 U.S. 570, 578 (1892); The Chinese Exclusion Case, 130 U.S. 581, 600-02 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); The Head Money Cases, 112 U.S. 580, 597-99 (1884); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870). *See also* Tag v. Rogers, 267 F.2d 664, 668 (D.C. Cir. 1959). For an excellent review of the complexities of the law surrounding treaty abrogation, see 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). *See also* F. COHEN, *supra* note 10, at 33-36.

A number of rationales have been advanced for the last-in-time doctrine. In The Head Money Cases, *supra*, for example, three explanations were advanced. The Court began its opinion by suggesting that the issue was essentially a political question and, accordingly, the judiciary could only inquire into the constitutionality of the subsequent statute, not its impact on the prior treaty. 112 U.S. at 598. Additionally, the Court noted that treaties and statutes are of equal constitutional force, thus equally subject to alteration by subsequent action. *Id.* at 598-99. Finally, the Court argued that since statutes are passed by both houses of Congress, while treaties are merely ratified by the Senate, any subsequent statute had a somewhat greater claim to legitimacy. *Id.* at 599. More recently, the last-in-time rule was explained as simply a recognition that the latest policy pronouncement from the legislative branch should govern. Tag v. Rogers, 267 F.2d 664, 668 (D.C. Cir. 1959).

114. 78 U.S. (11 Wall.) 616 (1870).

generally constitute a compensable taking under the fifth amendment.[115] Accordingly, the courts have held that the last-in-time doctrine permits Congress to abrogate by statute the jurisdictional arrangements which the Indian treaties had established for criminal law enforcement.[116]

The last-in-time rule clearly operates to render most of the Indian treaty provisions affecting criminal jurisdiction a nullity. Since Congress has virtually occupied the area of allocating criminal jurisdiction by subsequent statute, the prior treaty arrangements have little continuing impact on such problems. Today, the primary importance of the Indian treaties in the allocation of criminal jurisdiction is the background they provide for determining the issue of whether the locus of any crime is Indian country within the definition of section 1151 of the federal criminal code.[117] One other potential area for the reassertion of Indian treaty rights flows from the last clause in section 1152, which exempts from the federal jurisdiction conferred therein any crimes when "the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."[118] Since section 1152 does not cover intra-Indian crimes, few such provisions can be found, as the tribes were generally not given jurisdiction in the post-1796 treaties over crimes other than intra-Indian offenses. Some of the pre-1796 treaties may, however, contain provisions which fall within this exception to section 1152 jurisdiction.[119]

INDIAN CRIMINAL JURISDICTION IN THE SUPREME COURT: THE 19TH CENTURY EXPERIENCE

The Original Understanding: Cherokee Nation and Worcester

During the 19th century judicial decisionmaking played a major, independent role in the evolution of the criminal jurisdictional patterns which presently complicate law enforcement on Indian reservations.[120]

115. Nicodemus v. Washington Water Power Co., 264 F.2d 614, 617 (9th Cir. 1959); United States v. 5,677.94 Acres of Land, 162 F. Supp. 108 (D. Mont. 1958); Sioux Tribe v. United States, 146 F. Supp. 229, 236 (Ct. Cl. 1956). These cases, of course, suggest the rather interesting question of whether the abrogation of criminal jurisdiction constitutes a compensable taking under the fifth amendment.

116. Anderson v. Gladden, 293 F.2d 463, 465-66 (9th Cir. 1961) (providing that federal jurisdiction over the affected tribes, as created by Treaty with the Klamaths, Moadocs, and Yahooskins, Oct. 14, 1864, art. IX, 16 Stat. 709, could be, and was, abrogated by Public Law 280, 18 U.S.C. § 1162 (1970), which transferred complete criminal jurisdiction over the affected tribes to the State of Oregon).

117. 18 U.S.C. § 1151 (1970); *cf.* Seymour v. Superintendent, 368 U.S. 351 (1962).

118. 18 U.S.C. § 1152 (1970).

119. *But see* F. COHEN, *supra* note 10, at 146 & n.212, 365 (suggesting without support that no such treaties exist).

120. Since this Article relates primarily to the historical development of criminal jurisdiction over Indian reservations, this section will be confined to a discussion of the major 19th century Supreme Court decisions concerning federal criminal jurisdiction over Indian territory. Twentieth century cases will be examined in a subsequent article in the series.

Unlike the 20th century cases, which are concerned almost exclusively with constructions of federal statutes,[121] the 19th century cases played an important role in shaping jurisdictional approaches. Indeed, many of the current jurisdictional problems originated with a series of 19th century Supreme Court decisions delineating federal jurisdiction over Indian lands. The Supreme Court's first major pronouncement regarding state and federal governmental power over Indians came in Chief Justice Marshall's famous decision in *Cherokee Nation v. Georgia.*[122] That case involved an original injunctive action brought by the Cherokee Nation to prevent the state of Georgia from enforcing a state law which would have virtually disbanded the Cherokee Nation, annexed Cherokee land located within the state borders, and extended the laws of the state to the Cherokee lands.[123] The bill alleged that Georgia's purported annexation was unconstitutional as violating certain prior treaties with the Cherokee Nation and certain provisions of the Indian trade and intercourse acts passed by Congress. Using language which continues to have a pervasive impact on the analysis of federal power over Indians and their lands, the Court concluded that it lacked jurisdiction over the bill since the Cherokee Nation was not a "foreign State" within the meaning of article III, section 2, of the Constitution.[124]

Since the Court was forced into a judicial characterization of the Indian tribes in order to resolve the jurisdictional issue, Marshall used the opportunity to establish the cornerstone for a theory of exclusive federal power over the Indian tribes. He advanced two characterizations of the Indian tribes which were to play an important role in both justifying federal control over Indian affairs and excluding state initiatives in this area. First, recognizing that treatymaking with the Indian tribes cast them in the role of states capable of controlling their own destinies, Marshall argued that Indian tribes, since they resided within the boundaries of the United States, were "domestic dependent nations."[125] Thus, they were not "foreign" states within the meaning of article III of the Constitution, though they did exercise many of the attributes of sovereignty, including treatymaking powers.[126] Further-

121. *See, e.g.,* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Kennerly v. District Court, 400 U.S. 423 (1971); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965); New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

122. 30 U.S. (5 Pet.) 1 (1831).

123. This legislation seems to have been sparked at least in part by the discovery of gold on Cherokee land. *See* 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 191 (1922).

124. 30 U.S. (5 Pet.) at 19. Marshall also suggested that the matter raised by the Cherokee Nation was nonjusticiable because it was essentially a political question. *Id.* at 19-20.

125. *Id.* at 17.

126. Justice Thompson in his dissenting opinion advanced the argument that not

more, since they had acknowledged their dependency by entering into treaties placing themselves within the protection of the United States, the Indian tribes were "in a state of pupilage. Their relation to the United States resemble[d] that of a ward to his guardian."[127] Thus, Marshall laid the foundation for the subsequent trusteeship or guardianship theory of federal power over Indian tribes and lands which continued to play a significant role in American Indian affairs after treatment of the Indian tribes as sovereign nations was ended by Congress in 1871.[128]

One year later, in the case of *Worcester v. Georgia*,[129] Marshall was able to apply the principles developed in *Cherokee Nation*. The case involved another attempt by Georgia to extend her laws to Cherokee territory. In contrast with *Cherokee Nation*, however, jurisdiction presented no problem, as the case came to the court on a writ of error seeking review of a criminal conviction. Worcester, a white missionary authorized to enter Cherokee lands by federal law, had been convicted of violating Georgia statutes which required any white residing within the limits of the Cherokee Nation to secure a license from the governor of Georgia and to take a loyalty oath. Since these statutes were part of Georgia's efforts to annex the Cherokee Nation and to extend her laws to Cherokee land, the *Worcester* Court had to determine the constitutionality of Georgia's unilateral efforts to annex Indian lands. Such a determination necessarily involved a delineation of the respective powers and jurisdiction exercised by the state and federal governments over Indian country.

In reversing Worcester's conviction, the Court seized upon the *Worcester* case to ensure exclusive federal power and jurisdiction over Indian affairs. After reviewing the history of the colonial experience with the Indians and many of the treaties made with them since the Revolution, Chief Justice Marshall reaffirmed the holding of *Cherokee Nation* that the Indian tribes were nations with distinct boundaries, exercising most of the attributes of self-government.[130] They were characterized by the Court as distinct political communities, retaining all their original natural rights except insofar as they had been relinquished

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only was the Cherokee Nation a sovereign state, but also a foreign state for purposes of the Constitution, since this Indian tribe was never conquered and had full ownership of its lands. *Id.* at 53-54.

127. *Id.* at 17.

128. For a general discussion of the guardianship theory, see Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975). *But see* Note, *Sovereignty, Citizenship and the Indian*, 15 ARIZ. L. REV. 973 (1973).

129. 31 U.S. (6 Pet.) 515 (1832).

130. "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . . The very term 'nation' so generally applied to them, means 'a people distinct from others.'" *Id.* at 559.

in prior treaties with the federal government.[131] Thus, Marshall forcefully concluded that:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, *in which the laws of Georgia can have no force*, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. *The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.*
>
> The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity.[132]

Marshall's opinion in *Worcester* not only was a forceful assertion of the federal government's exclusive control of Indian affairs, but also spelled out the theoretical cornerstone of that power. Marshall reasoned that the Constitution was adopted in order to resolve conflicting claims between the federal government and the states which existed under the Articles of Confederation.[133] Among the enumerated powers given to Congress was the regulation of intercourse with the Indian tribes. This power was plenary in nature; no authority had been left to the states.[134] Without congressional authorization, therefore, the states had no jurisdiction over the Indian nations or their lands.

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131. *Id.* at 556. The only exception to Indian tribal sovereignty which Marshall admitted was the tribes' inability to engage in diplomatic and commercial intercourse with European nations. *Id.* at 559.

132. *Id.* at 561 (emphasis added).

133. *Id.* at 557-59.

134. *Id.* at 559. Marshall anchored the plenary congressional power over Indian matters on the tripartite sources of the war powers, the treaty powers, and the commerce clause. *Id.* at 558-59.

Another significant aspect of Chief Justice Marshall's opinion forms the basis for an important maxim for the construction of any treaty or statute affecting Indian matters. Pointing out that article IX of the Treaty of Hopewell, which contained a provision granting Congress "the sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs* in such a manner as they think proper," Treaty with the Cherokees, Nov. 28, 1785, art. IX, 7 Stat. 20 (emphasis added), Marshall hypothesized an argument that this language negated the existence of Cherokee self-government and sovereignty; however, he immediately rejected this and related arguments based on other language of the treaty, 31 U.S. (6 Pet.) at 553-54, since he noted that the Indians who signed the treaty could not write and probably could not read. They were not, as Marshall put it, "critical judges of our language." *Id.* at 551. Thus, Chief Justice Marshall established a standard of interpretation requiring that treaties and statutes affecting Indians be interpreted, if possible, in a fashion which does not prejudice the interests of the Indians and a corollary maxim requiring specific language to indicate any significant departure from traditional relationships in the area of Indian affairs. *See also* Antoine v. Washington, 420 U.S. 194, 199-200 (1975); Squire v. Capoeman, 351 U.S. 1, 7 (1956); United States v. Nice, 241 U.S. 591, 599 (1916); United States v. Celestine, 215 U.S. 278, 290-91 (1909); Rockbridge v. Lincoln, 449 F.2d 567, 571 (9th Cir. 1971); United States v. Labbitt, 334 F. Supp. 665, 668 (D. Mont. 1971); United States v. 9,345.53 Acres of Land, 256 F. Supp. 603, 607

Rogers and McBratney: The Erosion of Federal Jurisdiction

Chief Justice Marshall's approach to Indian problems was soon challenged by a unanimous Supreme Court in the 1846 case of *United States v. Rogers*.[135] The *Rogers* case involved the issue of whether a white man who had voluntarily removed himself to Cherokee country, made his home there, and joined the Cherokee Nation with its assent was subject to federal prosecution for the murder of another white who had been similarly incorporated into the Cherokee Tribe. Rogers claimed that he fell within the proviso contained in section 25 of the 1834 Indian Trade and Intercourse Act which exempted intra-Indian crimes from the scope of federal jurisdiction. Thus the Supreme Court only needed to decide whether this jurisdictional exception applied to persons adopted by the Indian tribes. On this question, the Court ruled that adoption by the Cherokee did not bring the defendant within the jurisdictional exception since "[h]e was still a white man, of the white race . . . ."[136] His responsibilities to the laws of the United States were therefore held to be undiminished by his new allegiance to the Cherokee Nation. It is not the holding of *Rogers*, however, that is of particular significance. Rather it was Chief Justice Taney's dicta that was to have profound repercussions for Indian criminal jurisdiction.

In discussing the nature of criminal jurisdiction over Indian lands and the congressional power to alter such jurisdiction, Taney made a number of comments which manifested a radically different approach to the Indian tribes than that adopted by Marshall. The Chief Justice argued that all Indian lands within the confines of the United States belong to the United States and not to the tribes, the land having only been "assigned to them by the United States, as a place of domicile for the tribe [which] they hold and occupy . . . with the assent of the United States, *and under their authority*."[137] He then stated that the Indian tribes were never acknowledged or treated as independent nations by European governments. Rather, the colonial powers had divided up the continent "as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control."[138] From this line of reasoning, Taney reached

(W.D.N.Y. 1966), *rev'd on other grounds sub nom.* United States v. Devonian Gas & Oil Co., 424 F.2d 464 (2d Cir. 1970).

For an interesting discussion of the historical and political setting of *Worcester*, see 2 C. WARREN, *supra* note 123, at 189-239.

135. 45 U.S. (4 How.) 566 (1846).

136. *Id.* at 573. The Court later partially abandoned this position, but without explicitly overruling *Rogers*. *See* Nofire v. United States, 164 U.S. 657 (1897).

137. 45 U.S. (4 How.) at 571; *cf.* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 588-89 (1823).

138. 45 U.S. (4 How.) at 571.

two conclusions that undermined accepted doctrines concerning Indian criminal jurisdiction.

First, in discussing the congressional power to enact section 25 of the 1834 Indian Trade and Intercourse Act, Taney indicated that Congress could, if it so desired, punish intratribal crime, contrary to the concept of Indian tribal sovereignty theretofore adhered to by Congress and recognized in *Worcester*.[139] While the Indian treaties of this period recognized the power of the federal courts to try Indians and whites for interracial crimes, Taney's remarks went significantly beyond the powers previously recognized, although his conclusion purported only to restate existing law. Second, the language of the *Rogers* opinion suggests that the Court was prepared to accept the exercise of state jurisdiction, apparently to the exclusion of federal control, over Indian lands located within the boundaries of any state, even though *Worcester* had clearly rejected such an approach:

> [W]e think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and *where the country occupied by them is not within the limits of one of the states*, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.[140]

It thus appeared that Chief Justice Taney had gone beyond the necessities of the case in *Rogers* to undermine the analysis and holding in *Worcester* without even citing it. Thus, divergent views developed quite early in the Court's decisions over the scope of state power over Indian land located within the borders of the states.

Although the *Rogers* case potentially heralded significant new departures in the area of criminal jurisdiction over Indian lands, its promise was not quickly fulfilled. Between 1846 and 1881, the Supreme Court had few occasions to discuss the problems of law enforcement on Indian lands. Indeed, it did not return to the problem of criminal jurisdiction over Indian lands in any significant fashion until its enigmatic decision in *United States v. McBratney*.[141] *McBratney* involved a question of federal jurisdiction to try a white defendant for the murder of another white within the boundaries of the Ute Reservation located in the state of Colorado. There was persuasive statutory authority for upholding federal jurisdiction in *McBratney*. The jurisdiction originally conferred by section 25 of the 1834 Indian Trade and

139. *Id.* at 572.
140. *Id.* (emphasis added).
141. 104 U.S. 621 (1881).

Intercourse Act[142] had been incorporated into the revised statutes and was still in effect. Consequently, the federal statutes provided that for all crimes other than intra-Indian the sole and exclusive jurisdiction of the United States extended to Indian country.[143] Additionally, the 1868 treaty with the Ute Indians provided that "[i]f bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will . . . proceed at once to cause the offender to be arrested and punished according to the laws of the United States . . . ."[144] While this treaty provision was not strictly applicable in *McBratney* because the crime was not against "the person or property of the Indians," it suggested a persuasive analogy for upholding federal jurisdiction where both parties were white.

Nevertheless, the Supreme Court held in *McBratney* that the federal courts lacked jurisdiction over the offense. Rather, jurisdiction was held to be exclusively vested with the State of Colorado. Most commentators have construed the Court's decision in *McBratney* to suggest that the federal jurisdiction over Indian reservations created by section 25 of the 1834 Indian Trade and Intercourse Act did not extend to crimes committed between non-Indians on Indian lands.[145] A close reading of the language in *McBratney*, however, indicates that the Court's analysis may have been far broader, with potentially sweeping implications. Justice Gray's opinion for the court was based on the failure of Congress to require a disclaimer of jurisdiction over Indian lands in Colorado's Enabling Act. The Court interpreted the absence of such a requirement as indicating that Congress had intended to grant complete and exclusive jurisdiction over Indian lands to Colorado.[146] Such an approach was not simply an argument for excluding non-Indian crimes from federal jurisdiction over Indian country. Rather, it implied that jurisdiction over a state's Indian lands was completely and exclusively vested with that state unless Congress had required a disclaimer in the

142. Act of June 30, 1834, ch. CLXI, § 25, 4 Stat. 733; *see* text accompanying note 55 *supra*.

143. 104 U.S. at 621-22.

144. Treaty with the Utes, Mar. 2, 1868, art. VI, 15 Stat. 620, *quoted at* 104 U.S. at 622.

145. *See, e.g.*, F. COHEN, *supra* note 10, at 365; Davis, *supra* note 75, at 70; Comment, *Criminal Jurisdiction over Non-Trust Lands Within the Limits of Indian Reservations*, 9 WILLAMETTE L.J. 288, 294 & n.41 (1973).

146. The Court held that the Enabling Act

> necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith . . . . Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words.

104 U.S. at 623-24.

state's enabling act.[147] Strict adherence to this approach would have radically altered the jurisdictional arrangements established by both the treaties and federal statutes and would have totally undermined the federal policy of permitting the tribes to exercise jurisdiction over intra-tribal matters.[148]

A strict application of *McBratney* would suggest that most states were granted complete and exclusive criminal jurisdiction over Indian reservations by Congress' simple act of conferring statehood on them. Under this view section 25 of the 1834 Indian Trade and Intercourse Act would be rendered a virtual nullity by the various state enabling acts. The Supreme Court has never adopted the full implications of the opinion,[149] however, although it has relied upon *McBratney* as recently as 1946.[150] Furthermore, Congress, in reenacting section 25 of the 1834 Act in various subsequent revisions,[151] did not accept the view that its adoption of the various state enabling acts effectively repealed section 25. Indeed, under the *McBratney* analysis, such subsequent reenactments could be seen as repealing any grant of jurisdiction

147. However, the Court specifically reserved the question as to the effect of Colorado's admission into the Union upon jurisdiction over intra-Indian crimes specifically governed by treaty. *Id.* at 624. *See* Donnelly v. United States, 228 U.S. 243, 271-72 (1913); Draper v. United States, 164 U.S. 240, 247 (1896). Justice Gray's reasoning, however, would logically point toward a preemption of such jurisdiction by the state. The Court did state that jurisdiction was retained by the United States to the extent necessary to carry out treaty provisions that remained in force. 104 U.S. at 624.

148. Although a few circuit court opinions cited in Justice Gray's opinion arguably supported his analysis, *see* United States v. Ward, 28 F. Cas. 397, 399 (No. 16,639) (C.C.D. Kan. 1863); United States v. Cisna, 25 F. Cas. 422, 425-26 (No. 14,795) (C.C.D. Ohio 1835), his conclusion ultimately rested on the misapplication and reinterpretation of a number of prior Supreme Court precedents. For example, Gray's opinion relied upon The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) (denying Kansas the power to tax Indian lands), for the proposition that whenever Congress desired to withhold jurisdiction over Indian lands from the states, it expressly included a disclaimer requirement in the state enabling act. 104 U.S. at 623-24.

Concededly, the Kansas Enabling Act contained such a provision, but the Court's opinion in *The Kansas Indians* is clearly not predicated on whether or not there was a disclaimer. Rather, a close reading of that opinion indicates that it is merely an application of the principle established in Worcester v. Georgia, 30 U.S. (5 Pet.) 1 (1831), that states lack jurisdiction over tribal Indian lands:

> Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, *and their property is withdrawn from the operation of State laws.*

72 U.S. (5 Wall.) 737, 757 (1867) (emphasis added).

149. *See* Seymour v. Superintendent, 368 U.S. 351, 355-91 (1962); Williams v. United States, 327 U.S. 711, 714 n.10 (1946). *But see* Draper v. United States, 164 U.S. 240 (1896) (holding that the provision in the Montana Enabling Act which read "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States" did not effectively reserve federal criminal jurisdiction, and therefore the *McBratney* doctrine operated to vest Montana with the sole jurisdiction over the Crow Indian Reservation in a case of murder of a non-Indian by another non-Indian).

150. New York *ex rel.* Ray v. Martin, 326 U.S. 496, 498 (1946).

151. *See* 18 U.S.C. § 1152 (1970).

contained in the enabling acts. In short, while *McBratney*, like *Rogers*, contained the seed of an expansive role for the states in Indian criminal jurisdiction and the concomitant restriction of federal jurisdiction in this area, its operation seems to have been confined to crimes committed by a non-Indian on the person or property of another non-Indian on Indian lands.[152]

Crow Dog and Kagama: Jurisdiction Over Intra-Indian Crime

The Supreme Court again denied the exercise of federal criminal jurisdiction in *Ex parte Crow Dog*,[153] but this time in favor of tribal sovereignty and jurisdiction. The *Crow Dog* case involved an intratribal murder on the Sioux reservation in Dakota Territory, involving two members of the Sioux Nation. Crow Dog had been indicted, tried, and convicted in the District Court for the Territory of Dakota, sitting as a territorial district court. His conviction had been affirmed by the Supreme Court of the Dakota Territory. Bringing the case before the United States Supreme Court on writ of habeas corpus, Crow Dog successfully claimed that jurisdiction over the crime in question was exclusively vested with tribal authorities because an intra-Indian crime was not an offense under the laws of the United States.

Since the criminal activity in *Crow Dog* did not occur within the confines of a state, the Court was not faced with the problem confronted in *McBratney*.[154] Rather, the question before the Court was whether

152. *See* New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); *cf.* United States v. Ramsey, 271 U.S. 467, 469 (1926). Donnelly v. United States, 228 U.S. 243, 271 (1913), expressly purported to reject the broad potential scope of *McBratney* and limit the application of that case to crimes committed solely between non-Indians on Indian lands. The Court's language in New York *ex rel.* Ray v. Martin, *supra*, however, is not so limited. For example, Justice Black, speaking for a unanimous Court, stated:

> 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 the right to exercise jurisdiction over Indian reservations within its boundaries.

326 U.S. at 499. Nothing in Justice Black's opinion suggested that the power of the states over Indian reservations within their boundaries was limited by the race of either the defendant or the victim. It should be noted, however, that dictum in *Donnelly* may be read as limiting the *McBratney* rule to non-Indian offenses. 228 U.S. at 271. *New York ex rel. Ray v. Martin*, like *Donnelly*, did not involve an intratribal offense but rather concerned the murder of a non-Indian by a non-Indian.

153. 109 U.S. 556 (1883).

154. It should be noted that an undiscussed *McBratney* issue lurked beneath the surface in *Crow Dog*. The organic law for the Dakota Territory, Act of Mar. 2, 1861, ch. LXXXVI, § 2, 12 Stat. 239, contained a partial disclaimer of territorial jurisdiction. However, that disclaimer provided only:

> [N]othing in this act contained shall be construed . . . to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Dakota, until said tribe shall signify their assent to the president of the United States to be included within said territory . . . .

section 25 of the 1834 Indian Trade and Intercourse Act or the treaties with the Brule Sioux extended federal jurisdiction to an intratribal murder.[155] The court found federal jurisdiction lacking since the murder committed by Crow Dog came within the intratribal crime exception to section 25,[156] and no other statute or treaty conferred jurisdiction over such a crime on the federal courts.[157]

Neither the Treaty of Fort Laramie with the Sioux and others, Sept. 17, 1851, 11 Stat. 749 (the text of which is found in 2 C. KAPPLER, *supra* note 5, at 594), nor the Treaty with the Sioux, Apr. 29, 1868, 15 Stat. 635, contained a provision of the type contemplated in the Organic Act. Accordingly, applying the doctrine of *McBratney* broadly, it was at least arguable that the failure of Congress to expressly exempt criminal jurisdiction over the Sioux in enacting the organic law for the Dakota Territory conferred complete criminal jurisdiction on the territorial courts—a result opposed to that reached by the Court in *Crow Dog*.

155. Another issue confronted in *Crow Dog* was whether the Sioux Reservation constituted Indian country for purposes of section 25 jurisdiction. The question arose because Congress had repealed the original definition of Indian country contained in section 1 of the 1834 Indian Trade and Intercourse Act by not including it in the Revised Statutes of 1874. United States v. Le Bris, 121 U.S. 278, 280 (1887); *Ex parte* Crow Dog, 109 U.S. 556, 560-61 (1883); tit. LXXIV, § 5596, 18 Rev. Stat., pt. 1, at 1085. That definition was basically a geographic designation of all lands west of the Mississippi River which were not within the states of Missouri and Louisiana or the Territory of Arkansas, and all lands east of the Mississippi River to which Indian title had not been extinguished and which were not within the limits of any state. Act of June 30, 1834, ch. CLXI, § 1, 4 Stat. 729. As new states were formed west of the Mississippi, this definition had proved burdensome, and Congress repealed it without supplying any substitute, 109 U.S. at 560-62. Accordingly, the Court was left without statutory guidance to discern the scope of the term "Indian country" as that phrase was used in section 25 of the 1834 Act. Act of June 30, 1834, ch. CLXI, § 25, 4 Stat. 733; see note 80 *supra*. Recognizing that a geographic designation was no longer possible given the rapidly changing boundaries of the Indian lands, the Court treated the phrase as a generic category and attempted to supply a rule for determining the scope of Indian country:

> 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 expected 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.

Id. at 561-62. This definition represented a complex and not altogether successful effort to reconcile in one pronouncement the contradictory jurisdictional approaches taken in the prior cases. The exclusion of Indian lands lying within the states contained in this definition appears to be an effort to preserve *McBratney*, although the Court did recognize that the commerce power over the Indians permitted federal regulation of Indian lands lying within the states. The sheer complexity of this definition revealed the quagmire that had been created in the area of criminal jurisdiction over Indian lands. While the Court's definition has subsequently been abandoned in favor of a far different statutory definition, 18 U.S.C. § 1151 (1970), *Crow Dog* remains historically important as the first case to treat Indian country as a generic term rather than a geographic designation.

Applying its own definition to the Sioux Reservation, the Court had no trouble reaching the conclusion that the scene of the crime was within Indian country. The crime had not taken place within a state and had occurred on lands to which the Indian title had not been extinguished. Accordingly, the crime occurred in Indian country for purposes of section 25 jurisdiction. 109 U.S. at 562.

156. Act of June 30, 1834, ch. CLXI, § 25, 4 Stat. 733.

157. The Court's opinion, however, suggested that a clear treaty provision which

While *Crow Dog* seemed to indicate a renewed Supreme Court interest in protecting tribal sovereignty over intra-Indian affairs, that concern was not widely shared by other branches of government. The congressional reaction to *Crow Dog* was the rapid passage of the Federal Major Crimes Act, a statute asserting jurisdiction over serious intra-Indian offenses.[158] In *United States v. Kagama*,[159] the court was presented with a constitutional challenge to this Act. In that case Mr. Justice Miller, delivering the opinion of the Court, upheld the assertion of federal jurisdiction over two Indians charged with committing an intratribal murder on the Hoopa Valley Reservation in the State of California. In addition to raising the question of whether Congress could constitutionally regulate intratribal matters, *Kagama* posed the collateral questions of whether Congress could regulate jurisdiction over Indian lands lying within a state and the scope of state criminal jurisdiction over Indian lands. The Court was thus required to delineate the respective roles of the federal government, the tribes, and the states in enforcing criminal law on Indian lands.

The Court had little trouble determining that Congress could unilaterally end its traditional deference to tribal sovereignty and jurisdiction over intratribal matters. Relying on dicta in *Ex parte Crow Dog*,[160] the Court stated that Congress could constitutionally extend federal jurisdiction to cover intratribal matters.[161] In justifying its decision, however, the Court rejected the argument that the congressional power to regulate commerce gave Congress the authority to exercise criminal jurisdiction over Indian lands.[162] Rather, the decision was

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envisioned federal jurisdiction over the offense in question could have granted federal jurisdiction without the aid of further legislation. 109 U.S. at 567. Consequently, the Court carefully reviewed the provisions of the Treaty with the Sioux, Apr. 29, 1868, 15 Stat. 635, and the 1876 agreement with the Sioux, Northern Arapahoes, and Cheyennes, Feb. 28, 1877, ch. 72, 19 Stat. 254, in order to determine whether they contained any provisions granting the federal courts jurisdiction over intra-Indian crimes. Although the 1868 treaty did contain a provision contemplating federal prosecution of any Indian who committed a crime against any white, black, or Indian, subject to the authority of and at peace with the United States, Treaty with the Sioux, *supra*, art. I, the Court properly construed this provision as referring only to Indians of other tribes and found that the provision did not grant jurisdiction over an intratribal murder. 109 U.S. at 567-68. Furthermore, a provision of the 1876 agreement which rendered the Sioux subject to the laws of the United States was held insufficient to extend federal jurisdiction to cover the intratribal murder in question because the applicable United States laws excluded intra-Indian crimes from their jurisdictional coverage. *Id.* at 568-69.

158. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (codified, as amended, 18 U.S.C. § 1153 (1970)).

159. 118 U.S. 375 (1886).

160. *See Ex parte* Crow Dog, 109 U.S. 556, 571-72 (1883).

161. 118 U.S. at 382-83.

162. "[W]e are not able to see, in . . . these clauses of the Constitution and its amendments any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians . . . ." *Id.* at 379.

based upon a reinterpretation of the legal status of the Indian tribes and their relationship to the federal government. Purporting to rely on *Cherokee Nation v. Georgia*,[163] the Court held that Indian tribes were neither states nor nations, and had only some of the attributes of sovereignty.[164] The opinion ignored Marshall's characterization of the Indian tribes in *Cherokee Nation* as "domestic dependent nations,"[165] emphasizing instead that portion of the *Cherokee Nation* opinion which characterized the Indians as wards of the nation.[166] Recognizing that the 1871 abandonment of treatymaking with the Indian tribes represented a congressional decision to govern the Indian tribes by statute, the Court indicated that Congress was empowered to enact such statutes, despite the absence of express constitutional authorization, merely because of its guardianship over the tribes. Apparently, this power derived from the relationship, rather than being express or even implied in any of the grants of power contained in article I of the Constitution. Marshall's characterization of the Indians as dependent wards of the United States had blossomed into an independent source of congressional power.

In reaching this decision, the Court highlighted the long history of ill feelings between the tribes and states. The Indians' position was characterized as that of helplessness, requiring protection by the federal government.[167] This appeal to history appeared to justify not only the federal government's regulation of law enforcement on Indian lands located within the states, but also the exclusivity of such regulation.[168] Thus, the *Kagama* dicta undermined the state jurisdictional arguments advanced in *Rogers* and *McBratney*. As a result of *Kagama*, the primary criminal jurisdiction over Indian lands for serious offenses has generally remained with the federal government.[169] Furthermore, the strong language in *Kagama* opposing the extension of state authority over the Indian tribes caused later courts to construe the Federal Major Crimes Act as a grant of exclusive jurisdiction to the federal courts over

163. 30 U.S. (5 Pet.) 1 (1831).
164. 118 U.S. at 382.
165. 30 U.S. (5 Pet.) at 17.
166. 118 U.S. at 382.
167. *Id.* at 384. The Court also noted:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its law on all the tribes.

Id. at 384-85.
168. *See id.* at 383-84.
169. *But see* New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946) (murder of non-Indian by non-Indian).

all specified crimes when committed on Indian lands,[170] although *Kagama* had only addressed this question in dicta.[171]

Jurisdictional Problems in the Late 19th Century

Several of the later 19th century Indian criminal jurisdiction decisions reflect the Court's increasing inability to reconcile the conflicting case law and statutory interpretations surrounding Indian criminal jurisdiction.[172] Of particular significance was *United States v. Le*

170. *See, e.g.*, Application of Konaha, 131 F.2d 737, 739 (7th Cir. 1942); *Ex parte* Pero, 99 F.2d 28 (7th Cir. 1938); *In re* Carmen, 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).

The *Kagama* Court seems to have suggested that jurisdiction over section 25 crimes, unlike jurisdiction over Federal Major Crimes Act offenses, may have been left to the states. 104 U.S. at 383. While dicta in *McBratney* and *Rogers* support this construction of section 25, *see* United States v. McBratney, 104 U.S. 621, 623-24 (1881); United States v. Rogers, 45 U.S. (4 How.) 566, 572 (1846), this interpretation of the scope of section 25 did not ultimately prevail. Although the Supreme Court cases remained somewhat divided and imprecise on this issue, *compare* Williams v. United States, 327 U.S. 711 (1946), *and* United States v. Pelican, 232 U.S. 442 (1914), *with* New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946), the vast weight of subsequent judicial authority favored application of section 25 jurisdiction to Indian reservations within the boundaries of the states. *See, e.g.*, Williams v. United States, 327 U.S. 711 (1946); United States v. Chavez, 290 U.S. 357 (1933); United States v. Pelican, 232 U.S. 442 (1914); United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950).

171. Other dicta in *Kagama*, however, contained a potential negative implication suggesting that the federal jurisdiction conferred by section 25 of the 1834 Indian Trade and Intercourse Act, now 18 U.S.C. § 1152 (1970), did not extend to crimes committed on Indian lands lying within the boundaries of a state, a tacit recognition of the continued vitality of *McBratney*:

> But the [*Crow Dog*] court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal [section] 2146 of the Revised Statutes [section 25 of the 1834 Indian Trade and Intercourse Act, as amended], which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the act now under consideration [the Federal Major Crimes Act] was designed to remove that objection, *and to go further by including such crimes on reservations lying within a State.*

118 U.S. at 383 (emphasis added).

172. The cases immediately following *Crow Dog* and *Kagama* added little to the development of the law surrounding Indian criminal jurisdiction. Rather they tended to involve efforts to delineate the interrelationships among various jurisdictional statutes which by that time had become an undecipherable labyrinth. *See, e.g., In re* Johnson, 167 U.S. 120 (1897); United States v. Pridgeon, 153 U.S. 48 (1894); *In re* Mills, 135 U.S. 263 (1890). For example, the reservation of tribal jurisdiction over intratribal matters by treaty provided the Court an opportunity in *In re* Mayfield, 141 U.S. 107 (1891), to reaffirm the federal policy of furthering Indian self-government. *Mayfield* involved the question of whether the federal courts had jurisdiction over the crime of adultery, committed on Indian land by an Indian with a white woman. While the crime appeared to be interracial in nature and falling within the jurisdiction of the federal courts granted in section 25 of the 1834 Indian Trade and Intercourse Act, the Court held that the crime was exclusively within the jurisdiction of the tribal courts. The decision was based on the reservation of exclusive jurisdiction to tribal courts in criminal cases where members of the Cherokee Nation were the only parties. *Id.* at 116. Thus, Justice Brown, writing for the Court, stated that where an Indian was prosecuted for a consensual crime such as adultery, the crime could not be considered interracial in nature even if the consenting party were white. In such a case the defendant could be considered the only party for purposes of jurisdiction. *Id.* A later case, Alberty v. United States, 162 U.S. 499, 504 (1896), construed *Mayfield* as applying only to consensual crimes, where there is no victim. In other cases, both the perpetrator and the victim were held to be parties to the crime. Nofire v. United States, 164

Bris[173] in which the Court held the Red Lake and Pembina Indian Reservation within the State of Minnesota to be Indian country for purposes of federal statutes prohibiting the introduction of liquor into Indian country. In light of *McBratney* this result was somewhat remarkable, since the State of Minnesota was admitted to the Union without disclaiming state jurisdiction over Indian lands.[174] Yet Chief Justice Waite's opinion for the Court failed to cite *McBratney* and made no reference to the Minnesota Enabling Act. Rather, the Court simply relied on the definition of Indian country found in *Ex parte Crow Dog*[175] and held that the Red Lake and Pembina Reservation fell within that definition.[176] In so holding, the Court also ignored that portion of the *Crow Dog* definition which excluded from the scope of Indian country any Indian lands located within the states.[177] In short, during the late 19th century two parallel lines of authority for dealing with the respective jurisdictional roles of the federal and state governments relative to reservation crimes appeared to be developing. One line of authority, based on *McBratney* and *Rogers*, viewed state jurisdiction as complete where the state had been admitted to the Union without statutory limitations on its jurisdiction over Indian lands. The other line of cases, including *Kagama* and *Le Bris*, suggested that federal jurisdiction over Indian reservations was exclusive and existed irrespective of the location of the reservation.

The parallel and conflicting nature of the cases dealing with jurisdiction over Indian lands located within the states was dramatically highlighted by two decisions rendered in the 1890's with opposite results. In *United States v. Thomas*,[178] the Court upheld federal juris-

U.S. 657 (1897); Lucas v. United States, 163 U.S. 612 (1896); Alberty v. United States, *supra*.

The *Mayfield* opinion is also significant for its reaffirmation of the federal policy of furthering tribal self-government. Indeed, the preemptive Federal Major Crimes Act, passed a full 6 years prior to the *Mayfield* opinion, is not even noted in the Court's opinion. Justice Brown's failure to mention the Federal Major Crimes Act in his opinion, and his emphasis on the tribal right of self-government, reflect the Court's dislike of the Act and its determination to ignore the statute whenever possible:

> The policy of Congress has evidently been to vest in the inhabitants of the Indian Country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy and construe the acts of the legislative authority in consonance therewith.

141 U.S. at 115-16. Such an attitude was probably the result of the significant conflict between the Federal Major Crimes Act and the prior federal policy permitting the tribal courts' exclusive jurisdiction over intratribal disputes, a policy the Court recognized and favored.

173. 121 U.S. 278 (1887).
174. Act of May 11, 1858, ch. XXXI, 11 Stat. 285.
175. *See* 109 U.S. 556, 561-62 (1883). The text of the definition is contained in note 155 *supra*.
176. 121 U.S. at 280.
177. 109 U.S. at 561.
178. 151 U.S. 577 (1894).

diction over an intratribal murder occurring on the La Court Oreilles Indian Reservation within the State of Wisconsin. Though Wisconsin was admitted to the Union without a disclaimer of jurisdiction over Indian lands,[179] the Court made no reference to *McBratney* or to any potential argument in favor of state jurisdiction based on a *McBratney*-type construction of the Wisconsin Enabling Act. Indeed, the potential argument in favor of state jurisdiction was stronger in *Thomas* than in *McBratney* since the crime occurred within one of the township sections which the Wisconsin Enabling Act granted to the states for school purposes.[180] Yet the Court relied on *Kagama* and held that the Federal Major Crimes Act granted jurisdiction to the federal courts over the crime in question.

In contrast, the Court in *Draper v. United States*[181] applied a *McBratney* analysis to find that the federal courts lacked jurisdiction over a crime committed on the Crow Reservation in the State of Montana. While Montana's Enabling Act contained a provision which specified that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . ,"[182] the Court ruled that this disclaimer did not take the case out of the operation of the *McBratney* rule because it did not necessarily indicate an intention by the United States to retain absolute and exclusive jurisdiction over all offenses occurring on the Crow lands.[183] The *Draper* opinion made clear that the Court was attempting to read such disclaimers out of existence wherever possible in the interests of equality among the states: "As equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise treated."[184]

While *Draper* might be distinguished from *Thomas*, *Kagama*, and *Le Bris* on the grounds that, as in *McBratney*, both the defendant and the murder victim were non-Indian,[185] the Court does not appear to have relied on such a rationale.[186] The Court did concede, however, that if the crime were intra-Indian, exclusive jurisdiction would be

179. Act of May 29, 1848, ch. L, 9 Stat. 233.
180. 151 U.S. at 583.
181. 164 U.S. 240 (1896).
182. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 677.
183. 164 U.S. at 245. This narrow construction of the disclaimer had broad implications since North Dakota, South Dakota, and Washington were admitted to the Union in the same act and therefore had identical disclaimers.
184. *Id.* at 244.
185. Arguably, *Thomas* and *Draper* are also distinguishable based on differences in the applicable treaties. The treaty with the Chippewas, involved in *Thomas*, gave the Indians absolute title to the land in question, subject only to the jurisdiction of the United States. The Crow treaty, on the other hand, contained no similar provision to guide the *Draper* Court.
186. *See id.* at 241-42.

vested in the federal courts under the Federal Major Crimes Act.[187] In light of the analysis in *McBratney* favoring the most recent Congressional action and the fact that Montana's Enabling Act postdated the Federal Major Crimes Act, this unexplained concession was somewhat surprising. Nevertheless, it did serve to narrow the gap slightly between the two parallel lines of authority regarding state jurisdiction over Indian lands.

The final case of the 19th century created another note of uncertainty in the allocation of criminal jurisdiction over Indians. The primary question in *Talton v. Mayes*[188] was whether constitutional grand jury requirements applied to the Cherokee courts in an intratribal murder case. In finding the tribal government not subject to the Bill of Rights, the Court tacitly recognized the jurisdiction of tribal courts over serious intratribal crimes, notwithstanding the enactment of the Federal Major Crimes Act. While it has often been asserted that the enactment of the Act divested the tribal courts of jurisdiction over the crimes specified therein,[189] the Supreme Court's acceptance of Talton's conviction for murder by the Cherokee court, resulting in imposition of the death sentence, would appear to refute that contention.[190]

CONCLUSION

This survey of the development of criminal jurisdiction over Indian reservations has revealed the complex legal dynamics which created the present, confused jurisdictional patterns for Indian reservations. In working out these jurisdictional arrangements, Congress and the courts have been forced to balance three conflicting claims: the tribal demands for self-government, the demands of the states for control of Indian lands located within their borders, and the pressures for unified federal control.[191] Two basic historical trends in the accommodation of these pressures are evident.

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187. *Id.*

188. 163 U.S. 376 (1896).

189. See United States v. Whaley, 37 F. 145 (C.C.S.D. Cal. 1888); F. COHEN, *supra* note 10, at 363. Several relatively recent cases have also suggested the enactment of the Federal Major Crimes Act divested the tribal courts of jurisdiction over the specified crimes. *See, e.g.*, Sam v. United States, 385 F.2d 213, 214 (10th Cir. 1967); Glover v. United States, 219 F. Supp. 19, 20 (D. Mont. 1963); Iron Crow v. Ogallala Sioux Tribe, 129 F. Supp. 15, 20 (D.S.D. 1955), *aff'd*, 231 F.2d 89 (8th Cir. 1956).

190. *See* Indian Civil Rights Task Force Memorandum in *Hearings on S. 1 and S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. X, at 7452-58 (1974), which suggested, without reliance on *Talton*, that tribal courts retain concurrent jurisdiction over crimes specified in the Federal Major Crimes Act.

To the extent that such concurrent jurisdiction exists, it was limited by Congress in the 1968 Civil Rights Act to the imposition of penalties not exceeding imprisonment for 6 months or a $500 fine. 25 U.S.C. § 1302(7) (1970).

191. Since this Article is concerned with the present legal impact of the historical developments which shaped the jurisdictional patterns over Indian lands, it has not at-

First, there has been constant diminution in the scope of tribal self-government. While the first Indian treaty with the Delaware nation in 1778 recognized tribal sovereignty and provided that the Delaware nation should play an equal role in the prosecution of crimes occurring on Indian lands, most subsequent treaties granted jurisdiction to the federal courts when any party to the crime was non-Indian. The tribal court's complete jurisdiction over intratribal crime was generally recognized by the federal government during the treaty period, but the diminution of tribal sovereignty signaled by the abandonment of treaty-making in 1871 resulted in intrusions by the federal government into even intratribal offenses. Thus, the passage of the Federal Major Crimes Act in 1885, while not expressly ousting the tribal courts of jurisdiction over serious crimes, had that result in most cases.[192] Jurisdiction of the tribal courts was further restricted by the 1968 Civil Rights Act, which limited the punishments tribal courts could impose to 6 months imprisonment, a $500 fine, or both.[193]

Diminution of tribal authority has also resulted from efforts to terminate tribal existence in favor of state control of Indian lands. Beginning with the General Allotment Act of 1887 the Congress has periodically attempted to disestablish the tribes and terminate all federal relationships with them. These efforts stem from the second major jurisdictional pressure—the desires of the states to control Indian peo-

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tempted any extensive analysis of the economic, social, and political pressures which generated those developments. However, at the risk of gross oversimplification, it should be noted that the demands for federal and state control over Indian lands stemmed in great part from desires to control, occupy, and appropriate Indian lands and natural resources. *See* 2 C. WARREN, *supra* note 123, at 190-91 (suggesting that Georgia's efforts to assert jurisdiction over Cherokee land were sparked by the discovery of gold thereon). *See generally* D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970). To some extent the dispute between federal and state governments over jurisdiction was a contest to determine who would control these resources. However, the demand for federal jurisdiction was in part an effort to protect the Indian tribes from their hostile white neighbors. As the United States Supreme Court noted in United States v. Kagama, 118 U.S. 375 (1886):

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. **Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.** From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Id. at 383-84 (italics in original, boldface added).

Another force which operated to encourage encroachments on tribal jurisdiction was the missionary zeal of part of the American public and their desire to "civilize" the natives. This motivation was particularly evident in the history of the Federal Major Crimes Act. *See* discussion & authorities cited notes 67-69 *supra*. *See generally* V. DELORIA, CUSTER DIED FOR YOUR SINS 101-24 (1969).

192. *See generally Hearings on S. 1 and S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. VII, at 5892-95 (1974).

193. 25 U.S.C. § 1302(7) (1970).

ples and Indian resources which lie within their boundaries. While the 1934 Indian Reorganization Act put a stop to the termination efforts brought about by the General Allotment Act of 1887, the policy reemerged after 1952 as the focus of congressional policy towards the Indians. The recent termination statutes greatly expanded the scope of state criminal jurisdiction over Indian reservations. However, the 1968 amendment to Public Law 280 requiring tribal consent for any assumption of state jurisdiction indicates a retreat from the policy of termination.[194]

These trends have affected not only congressional policy but also the decisions of the Supreme Court. For example, the Court's parallel lines of authority relating to state jurisdiction over Indian reservations probably were a judicial reaction to the cyclical pressures for state control over Indian lands. The results reached by the Court in such decisions were not always consistent with the then prevailing congressional policy, but they did indicate that the demands for state control were being heeded, at least part of the time, by the Court as well as by Congress.

This historical review also reveals that the statutes governing Indian criminal jurisdiction have never been systematically reviewed and integrated by Congress. Rather, the present statutes in the area continue much of the language of the original 19th century acts.[195] The problems created by the cumulative addition of the Federal Major Crimes Act to the jurisdiction already conferred by section 25 have never been fully resolved.[196] The haphazard, ad hoc growth of these

194. While there are signs that the latest cycle of termination efforts is drawing to a close, Congress is presently considering a revision of title 18 of the United States Code which would significantly expand state jurisdiction over Indian lands. S. 1, 94th Cong., 1st Sess., § 205 (1975). By stating that federal criminal jurisdiction does not preempt the exercise of state jurisdiction, the proposed bill would end the presumption of exclusivity of federal jurisdiction over Indian lands and expand the powers of the states to enforce their criminal laws on Indian reservations. Thus, it is clear that the pressures for state control over Indian lands have not been entirely put to rest. *But see* S. 2010, 94th Cong., 1st Sess. (1975).

195. For example, 18 U.S.C. § 1152 (1970) contains basically the language of section 25 of the 1834 Indian Trade and Intercourse Act, as amended in 1854. And the Federal Major Crimes Act is codified in substantially its original form in 18 U.S.C. § 1153 (1970), although it has been rewritten to eliminate the now useless provisions for territorial jurisdiction.

196. For example, Congress has never resolved the rather bizzare fact that two separate statutes cover serious crimes committed by Indians against non-Indians. 18 U.S.C. § 1152 appears to cover all crimes on Indian reservations except crimes "committed by one Indian against the person or property of another Indian." Thus, section 1152 covers a crime committed by an Indian against a non-Indian unless "the exclusive jurisdiction of such offenses is or may be secured to the Indian tribes respectively," which is not generally the case. On the other hand, as a result of an ill-considered floor amendment to the Federal Major Crimes Act, 18 U.S.C. § 1153 (1970) covers crimes by an Indian "against the person or property of another Indian *or other person*" (emphasis supplied). This overlap of coverage may sometimes pose significant problems. Since the crime and punishment for violation of the Federal Major Crimes Act is determined by state statute for certain crimes, while the law applicable to section 1152 of-

jurisdictional statutes, without systematic review by Congress, has created a complex labyrinth which many practitioners and courts find virtually impossible to master. This Article, by providing the historical context from which this labyrinth emerged, hopefully provides an historical guide through the jurisdictional maze that presently exists. It is to the complexities of this jurisdictional maze which the second in this series of articles will turn.

fenses is usually federal law, this overlap may result in uncertainty as to the proper choice of law for an Indian offender. For example, section 1153 would apply the law of the state for the crimes of rape and burglary, while in any prosecution of an Indian for the rape of a non-Indian under section 1152 the provisions of 18 U.S.C. § 2031 (1970) would presumably apply and might result in different punishments. *Cf.* Williams v. United States, 327 U.S. 711 (1946); United States v. Heath, 509 F.2d 16, 20 (9th Cir. 1974); Henry v. United States, 432 F.2d 114 (9th Cir. 1970), *cert. denied*, 400 U.S. 1011 (1971).

Another problem is posed by the racial classifications inherent in sections 1152 and 1153. In United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975), the court of appeals held that the conviction of an Indian under the Federal Major Crimes Act, which resulted in a more severe punishment than a non-Indian would receive for the same offense, violated the fifth amendment's equal protection requirement. *Id.* at 957. *Contra*, United States v. Analla, 490 F.2d 1204 (10th Cir.), *vacated and remanded on other grounds*, 419 U.S. 813 (1974). *But cf.* United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1974). *See generally* discussion note 71 *supra*.