THE INDIAN STRONGHOLD AND THE SPREAD OF URBAN AMERICA

Environmental control, complex systems of communication, modern services, and our pyramiding population have made the urbanization of once forbidding land areas both practical and desirable. Herein lies a paradox; while technological accomplishment leads to the solution of one major social problem it creates yet another. The more successful we are in satisfying the dominant population's need for expansion,[1] the more problems that are created for a minority ethnic group — the American Indian. The Indians and their remaining preserves, once isolated from the general population, are now easily within the reach of urban expansion. Indeed, in many areas the non-Indian urban communities already meet and encroach upon Indian lands.

The famous resort city of Palm Springs, California, is partially situated on land owned by the Agua Caliente Indians. Phoenix, Arizona is rapidly approaching the several Indian reservations which surround it, and Scottsdale, Arizona, a suburb of Phoenix, already has inched onto the Salt River Reservation. This pattern is repeated in many of the nation's growing urban areas.[2]

How will the Indian suffer this exposure? What legal problems are posed by this contact? What solutions are there for the conflicts arising out of this inevitable association? These are the subjects of this comment. Before discussing the legal problems which this Indian-urban association poses, the Indian civilization should be examined. The threshold question concerns the "cultural gap" which the Indians will have to face in a highly competitive, disruptive urban society.

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[1] "Over the next 30 years, about 18 million acres of land will come into urban use for the first time . . . ." and in addition 2.25 million new housing units per year will be required. N.Y. Times, Dec. 15, 1968, § 1, at 70, col. 5-6.

[2] An incomplete list would include the following:

Arizona

Parker, located within the Colorado River Reservation; McNary, located within the White Mountain Apache Reservation; Chandler, Casa Grande, Coolidge, and Phoenix on the periphery of the Gila River Reservation; Coolidge, Casa Grande, and Tucson located near the Papago Reservation; Gila Bend, located near the Gila Bend Reservation; Phoenix, Mesa, and Scottsdale, located near or contiguous to the Salt River and Fort McDowell Reservations; Tucson, near the San Xavier Reservation; Yuma, near the Cocopa and Fort Yuma Reservations;

Montana

Billings, located near the Crow Reservation;

New Mexico

Farmington and Gallup, located near the Ute Mountain and Navajo Reservations; Albuquerque, located near Canyon Cito, Isleto, and Sandia Reservations; Ruidoso, located near the Mescalero Apache Reservation;

South Dakota

Pierre, located near the Crow Creek Reservation;

Washington

Spokane, located near the Spokane Reservation.

The above information was taken from a map of United States Indian reservations, on file at the Bureau of Indian Affairs Office, Phoenix, Arizona.

THE CULTURAL PROBLEM

Several generalizations can be safely made about the American Indians. Their culture[3] is rich in history, folklore, art, and religion; thus, it is grossly incorrect to label them "culturally deprived." Because Indians are products of an entirely different social system, the values of urban America and the Indian world are often conflicting.[4] The pre-contact Indian civilization shared little with the industrial culture's views on possession, private property, religion, and justice. The Indian viewed property as communal, lived a religion daily in nature, and considered justice a personal and individual matter — all of which contributed to rendering the Indian ill-equipped to compete and survive in an urban-industrial atmosphere.

The Effects of the White Man's Attitudes and Policies

It is interesting to examine, from the colonial period to the present, some of the attitudes of the "civilized" and "compassionate" majority.

> From the end of the Indian Wars to just before World War II the tribes were thought of as defeated nations, and were so treated and so held captive. The stringent military occupation did not end until little more than a generation ago. On one Western reservation the U.S. Army was not withdrawn until the 1920's . . . .
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> The tribes were not, however, merely defeated nations. Unique in modern history, they were wholly surrounded by the nation of their conquerers [sic], who, because of this untenable blot on their geographic map and because of their Puritan ethics, set out zealously to 'convert the heathen' and to 'civilize the savage.' Henceforth, the Indians were 'wards,' and the government was their 'guardian.'[5]

The colonists early assumed that it was their duty to "civilize" the natives of this continent. One method employed to accomplish this result was the "reservation," for it was considered, in the famous words of Judge Deady, "in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas and aspirations which distinguish the civilized from the uncivilized man."[6] The meaning of the term "civilize" is not at all clear. Early use seems synonymous with pacification, while subsequent references are closer to "acculturation" or "assimilation." The latter two, though sometimes used interchangeably, are more useful to this discussion if given separate and distinct meanings.

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[3] "Culture" here is used generally. Actually there are many Indian cultures, each with distinct characteristics.

[4] S. STEINER, THE NEW INDIANS 42, 151 (1968) [hereinafter cited as STEINER].

[5] *Id.* at 83. For a thorough discussion of the effects of federal Indian policy on Indian society, see Kelly, *Indian Adjustment and the History of Indian Affairs*, p. 559 *supra*.

[6] United States v. Clapox, 35 F. 575, 577 (D. Ore. 1888).

Acculturation is "the process by which the person or minority culture takes on important element habits of a dominant culture, i.e. time, savings, and work habits;"[7] or, in other words, it is the adoption by one culture of those things from another which the former considers of value and in the best interests of its people;[8] or, phrased still another way, it is "a process of intercultural borrowing marked by the continuous transmission of traits and elements between diverse peoples and resulting in new and blended patterns; *esp*: the resultant modifications occurring in a primitive culture through direct and prolonged contact with an advanced society — distinguished from *assimilation* . . . ."[9] The process of acculturation does not result in the dissolution of either culture, but assumes the continued existence of both. This concept seems similar to what modern Indian spokesman call "proper adaption," meaning "rejection of the melting pot."[10]

Assimilation, on the other hand, assumes the dissolution of the culture of the assimilated people and complete dominance by the assimilating society.[11]

> The B.I.A. at one time considered an Indian assimilated if he wore 'civilian dress.' More recently, William Zimmerman, Jr. . . . assistant commissioner of Indian Affairs in 1947, construed the attainment in terms of admixture of white blood, literacy, business ability, acceptance of non-Indian institutions, and acceptance of the tribesmen by whites. But even this wide-ranging definition falls short of the mark.[12]

A better definition would exclude the requirement of white blood, whatever that is, and include the remaining elements listed above. Since the process of assimilation contemplates that the traditions and mores of the assimilated society will be destroyed, the Indians should be able to *choose* to live in the "mainstream" rather than being forced to do so.[13] Although the decision is presented here as an objective one, unfortunately it is not. Objectivity on the part of the Indian is impossible since he is largely unaware of the ramifications of his decision.

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[7] The Urban Indian — An Overview Study, Phoenix, Arizona 3 (1968) (unpublished work in Phoenix College Dep't of Sociology).

[8] STEINER, *supra* note 4, at 134.

[9] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 13 (1965) (emphasis original) [hereinafter cited as WEBSTER]. Note also that this edition defines "assimilation" as "sociocultural fusion wherein individuals and groups of differing ethnic heritage acquire the basic habits, attitudes, and mode of life of an embracing national culture — distinguished from *acculturation*." *Id.* at 132. (emphasis original).

[10] STEINER, *supra* note 4, at 44.

[11] WEBSTER, *supra* note 9, at 132.

[12] W. BROPHY & S. ABERLE, THE INDIAN — AMERICA'S UNFINISHED BUSINESS 9-10 (1966) [hereinafter cited as BROPHY & ABERLE].

[13] "The Committee on Indian Affairs to the Commission on Organization of the Executive Branch of the Government recognized that assimilation has failed if shedding the old culture takes the joy out of life, produces a feeling of inferiority, and destroys the drive and the purpose of the Indian." *Id.* at 10-11.

It is suggested that acculturation, not assimilation, is the more desirable goal.[14] Such an approach would avoid "the assumption that has silently been acknowledged as an eternal truth for most of American History: that somehow, . . . the American Indian will ASSIMILATE and disappear."[15] Unfortunately, the federal government has consistently sought assimilation, not acculturation, a course of action which has resulted in many of the problems Indians face today.

> In the . . . first Congress, of 1778, one of the very first pieces of legislation concerned Indians . . . . [T]here are now more than five thousand federal statutes and two thousand federal court decisions relating to the status, control, and welfare of the Indians. Nowhere in history has the 'complex and unique legal character' . . . of a . . . people . . . been so meticulously and self-consciously defined. And redefined. And redefined.[16]

Indian programs have been experimental, and have purportedly reflected changing views on Indian policy. A closer look at these programs, however, reveals only changing attitudes toward the method of implementation, not the underlying philosophy.

> United States policy toward the Indian is embodied in countless treaties, statutes, judicial decisions, administrative regulations, and opinions of law officers in different federal departments. Six enactments, however, constitute the landmarks: the Northwest Ordinance of 1787, the Constitution of the United States, the Trade and Intercourse Act of 1834, the General Allotment Act of 1887, The Indian Reorganization Act of 1934, and House Concurrent Resolution 108 of 1953.[17]

The Northwest Ordinance,[18] the Constitution,[19] and the Trade and Inter-

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[14] Overlooking the obstacles in the way, an articulate group of whites has advocated that all Indians be thrust without delay into the mainstream of American life. The group has succeeded from time to time in securing federal legislation and regulations for opening Indian resources more freely to non-Indians, for banning tribal customs and ceremonials, and for transporting the children to be 'civilized' in distant boarding schools where the very use of their language was denied them. *Id.* at 9.

[15] STEINER, *supra* note 4, at 301.

[16] *Id.* at 263-64.

[17] BROPHY & ABERLE, *supra* note 12, at 17.

[18] The utmost good faith shall always be observed towards the Indian, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them. Ordinance of July 13, 1787, 32 JOURNALS OF THE CONTINENTAL CONGRESS 334, 340-41 (A. Hill ed. 1936).

[19] U.S. CONST. art. I, § 8, contains the only specific reference to Indian tribes, giving Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." The following constitutional provisions affect the Indians:

> art. I, § 8; The Congress shall have Power To . . . provide for the . . . general Welfare of the United States; . . . To establish an uniform Rule of Naturalization . . . To Establish . . . post Roads; . . . To constitute Tribunals inferior to the supreme Court; . . . To declare War . . .

course Act of 1834[20] were protective in nature and demonstrated recognition of the Indians' inability to function in contemporary society. This attitude was soon to be discarded when Congress, in 1887, passed the General Allotment (Dawes) Act.[21] Under this Act, the President was authorized to distribute tribal land to individual Indians in 40 to 160 acre allotments, the title to be held in trust by the Government for a minimum of 25 years.[22] After the minimum trust period, individuals, upon a showing of competency, could receive fee simple title; citizenship and the application of state laws accompanied the title.[23] The professed "public" purpose of the Act was to give to the Indian the Calvinist virtues of the small farmer obtained through hard work and private ownership. But the Indian was a tribal man, and due to his nature and lack of training and capital, the Act failed to make him a farmer. The Act was highly successful, however, in accomplishing one of its unarticulated purposes — "tribal land holdings were cut from approximately 138,000,000 acres to roughly 48,000,000 [by] 1934."[24]

The Indian Reorganization (Wheeler-Howard) Act[25] pursued a somewhat different course. Under the Act Indians were encouraged to reorganize on a tribal basis.

> By it the United States recognized the importance of Indian communal life as an agency for preserving and encouraging social controls and values on which the people could base innovations made by themselves . . . .
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> Besides stopping the alienation and allotment of tribal land, this act authorized appropriations to purchase new holdings, established a system of federal loans, confirmed Indian

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art. I, § 9; No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .
art. II, § 2; He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . .
art. III, § 1; The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
art. IV, § 3; New States may be admitted by the Congress into this Union; . . .
The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .

Note also that Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington were required by Congress to disclaim jurisdiction over Indian land before they were admitted to statehood. BROPHY & ABERLE, *supra* note 12, at 18.

Most of the American Indian land holdings and population are located west of the Mississippi River. The above states include over 50 percent of the Indian population and approximately 87 percent of the tribal and allotted land as of 1960. *Id.* at 215-17 (table No. 1).

[20] Ch. 161, 4 Stat. 729 (1834). This was "[a]n Act to regulate trade and intercourse with the Indian Tribes, and to preserve peace on the frontiers." *Id.*

[21] 25 U.S.C. § 331 (1964).

[22] *Id.*

[23] *Id.* at § 349.

[24] BROPHY & ABERLE, *supra* note 12, at 20; STEINER, *supra* note 4, at 162-63.

[25] 25 U.S.C. § 462 (1964).

> self-government, and provided for . . . tribal business organizations to be chartered as federal corporations.[26]

However, the more desirable provisions of the Act were relatively short-lived. Congress, in 1953, adopted House Concurrent Resolution 108, which marked a return to the policy of assimilation (by termination) which was implicit in the General Allotment Act.

The stated purpose of the resolution was to "free" Indians from federal control and supervision, making them subject to the same laws and privileges as other citizens.[27] The tragic consequences of implementing this purpose were soon to be apparent when Congress and the Executive acted to terminate the Menominee, Klamath and Paiute Tribes.[28] The reason for failure was the same in each instance — an acute lack of experience in living in mainstream America. The Indians were totally unprepared to deal with the problems that must be faced in everyday American life, and while the option of remaining under the Government's protection was available, sufficient information upon which an informed choice could be made was not.[29]

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[26] BROPHY & ABERLE, *supra* note 12, at 20-21.

[27] H.R. Res. 108, 83d Cong., 1st Sess. (1953).

[28] Ch. 303, 68 Stat. 250 (1954), *as amended* 25 U.S.C. § 891 (1964) (Menominee); 25 U.S.C. § 564 (1954) (Klamath); 25 U.S.C. § 741 (Paiute).

[29] *Menominee*:

The Menominees seemed ready and capable of successfully assimilating. The Indians purportedly wanted freedom from federal supervision, and effective leadership had enabled them to finance many of their activities for several years.

Beneath the gloss, however, were facts that were bound to lead to disruption, confusion and failure. The tribe was awaiting receipt of a $1,500 per capita payment which previously had been allocated and stood ready in the United States Treasury. To expedite an agreement among the tribal members, the chairman of the Senate subcommittee informed the tribe that no action would be taken on the per capita distribution until the tribe had adopted a termination program. Thus, tribal consent to the program was in part obtained by financial coercion.

The general education, experience level and resources of the Menominees were insufficient to successfully bridge the gap from a reservation to a full-fledged Wisconsin county, with all its administrative complexities, service tasks and tax burdens. Civil and criminal jurisdiction were transferred to the state almost immediately, and state licensing requirements, sanitation standards, building codes, etc., were immediately applicable. As a result, the hospital was closed for failure to meet state health standards. There was widespread poverty, disease, no services, no high school or drugstore, and a severe lack of recreational facilities. The overall result was "cultural shock."

Since termination, the tribe has made some headway, but acute problems still exist. Had the Menominees been sufficiently prepared for a *gradual* transition, they would have had time to intelligently adjust to their peculiar situation.

Klamath:

The Government's relationship with the Klamaths was terminated August 13, 1954. The tribesmen had a choice of taking a fair share of tribal assets or continuing as a group. While 84 voted to continue as a group, 1,660 voted for distribution. It worked out poorly for both groups.

Each Indian voting to withdraw received $44,000 in cash. For these Indians, uneducated and unprepared to manage such funds, disaster was quick in coming. As soon as it became clear that large sums were to be distributed, white America jumped at the chance to separate the Indian from his money. Devious means such as usurious loans made before inheritances were conceived, and excessive attorneys' fees were not uncommon. Some Klamath Indians have used their money wisely; most did not. Ten years after the passage of the termination act, Mrs. Marie

Most other federal programs pursuant to House Concurrent Resolution 108, have had as a basis some plan for the use of existing Indian lands, and therefore cannot technically be labeled plans of termination. While the programs of the 1950's did not have the drastic effect on the Indian domain that the General Allotment Act did, Indian lands were further reduced by 2,595,413 acres during that period.[30]

Understandably, non-Indians with ambitious economic goals and visions of urbanization desire access to undeveloped Indian lands.[31] Farms, housing developments, shopping centers, factories, mines, recreation areas and countless other possibilities are envisioned. Ways into the stronghold are sought, and the pressure is increasing. Thus, the need for sound programs concerning the Indian and his land is more urgent today than ever before.

Cultural Shock

The association of the dominant American urban-industrial culture with the native American Indian culture is a ready source of problems, and Congress by perpetuating the Indian's status as a welfare class has increased the likelihood of Indian "cultural shock" upon coming into contact with urban society. Sociological and psychological problems may result merely from the fact that the Indian associates his physical characteristics with his minority status. Certainly the affluence of the majority culture will make the Indian's poverty seem more

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Norris, a Klamath leader stated: "If I had known what termination would have meant to all of us, I would have fought it tooth and nail." BROPHY & ABERLE, *supra* note 12, at 199. The total effect — "cultural shock."

Paiute:

The Paiute Reservation, which contained approximately 46,000 acres of land in the State of Utah, was terminated September 1, 1965. There is considerable evidence that prior to the congressional decision this 200-member band was not prepared for termination. The Secretary, however, recommended termination notwithstanding extremely low personal income, little or no education coupled with acute language difficulties, an obvious need for vocational training, and other ample advice to the contrary. The Paiutes failed to object for several reasons. They did not understand the significance or meaning of "termination" and did not realize the need for counsel. Even if they had realized the latter, the additional barrier of acute poverty would have prevented their obtaining the necessary legal advice.

After termination, the Walker Bank and Trust Company at Salt Lake City became the private trustee of the Paiute land. The Paiutes were too poor to make the 160-mile trip to Salt Lake City often enough to solve their problems. As a result, their land continued to be overgrazed under a lease made by the trustee at $1.20 per head below the value received for grazing rights on comparable non-Indian land.

These Indians had no understanding of the various registration requirements for welfare, voting, hunting and fishing, and social security. They were thereby unable to comply with government regulations and to qualify for services. The total effect was that these people had only an incredibly remote chance of successfully entering the "mainstream" — the result was "cultural shock." As could have been anticipated, their limited experience allowed only for personal disaster. BROPHY & ABERLE, *supra* note 12, at 193-207.

[30] *Id.* at 219 (table 3).

[31] "Indian lands" in this discussion refers to those lands both tribal and allotted which are still under the supervision of the federal government and not to those parcels owned in fee by individual Indians.

intense, for he will be constantly reminded by his clothing, his housing, his food (or the lack of it), his means of transportation, his lack of comparable services, and his language difficulties, that he is not a member of the society across the road, and that he probably will be rejected by it. His frustration with difficulties of communication may cause him to become introverted and his children to lag behind in school. His dejection and introversion may find release in family disharmony, excessive use of liquor, and a rising crime rate.

The foundation for these problems has already been created by many generations of dependence, a breakdown of pre-contact social patterns and the lack of an organization which could serve as an adequate substitute. The Indian, as an inhabitant of an administered community, was not taught how to make the non-Indian economy work for him, and thus he is confronted with an extremely difficult economic problem as well as having a tremendous emotional adjustment to make.

Because of the complex socio-psychological impediments, the Indian, in varying degrees, has lost the art of problem-solving. The ability of working together for the achievement of community goals, which is at the very heart of the success of the dominant American culture, is nearly non-existent among the Indian people.

THE LEGAL BARRIERS

One hundred twenty miles southeast of Phoenix lies Tucson, Arizona. Because of the desirable climate and large open land areas, population experts predict that the area between these two cities is likely to become a megolopolis of over two million people by the year 2000 A.D.[32] The needs of such a city will be great: land will have to be appropriated for streets; easements will have to be taken for utilities; zoning and long range planning capacity will have to be developed; waste and pollution ordinances will be required; traffic regulations will be needed, as will a police force and fire department; courts will be necessary for civil and criminal suits; and, of course, taxes will have to be levied to finance these services.

Recently the two cities have been connected by a freeway; logic and experience dictate that the population will distribute itself along this artery. Herein lies the problem. A substantial portion of the land which the freeway traverses is Indian land, part of the Gila Indian Reservation. In Arizona and other states, tribal Indians and their lands are immune from state jurisdiction,[33] and therefore exclusive state handling of the aforesaid problems by these states is less than likely.

[32] *Phoenix-Tucson Super City*, Arizona Republic, June 16, 1968 (Magazine), at 12.
[33] Kane, *Jurisdiction Over Indians and Indian Reservations*, 6 ARIZ. L. REV. 237 (1965).

Moreover, even states which have jurisdiction over Indian affairs have been at times unsuccessful in attempts to directly handle reservation problems.[34]

Traffic Problems

Assume that an Indian and a non-Indian, due to intoxication and the negligent driving of both, have an automobile accident on that portion of the Arizona freeway which is situated on the Gila Indian Reservation.[35] As a result, both are seriously injured and are cited for "driving while under the influence" and reckless driving. Later the non-Indian dies, Arizona charges the Indian with vehicular manslaughter, and the decedent's spouse initiates a wrongful death action in the Superior Court of Arizona. Considering Arizona's lack of jurisdiction over Indian lands,[36] is there any conceivable theory under which Arizona could prosecute the Indian or under which the Arizona court could hear the wrongful death action? If the non-Indian had survived, could he have been prosecuted? These questions evidence that Arizona's newest freeway is a fertile source of jurisdictional conflict between the Indian and non-Indian governments.

The doctrine of the 1832 case of *Worcester v. Georgia*[37] — that a state is powerless, in the absence of congressional authorization, to control on-reservation activities — has remained intact. While today the test for the validity of state jurisdiction is whether it interferes "with reservation self-government or impair[s] a right granted or reserved by federal law,"[38] as Justice Black pointed out in *Williams v. Lee*,

> the basic policy of Worcester has remained. Thus, suits by Indians against outsiders in state courts have been sanctioned . . . . And state courts have been allowed to try non-Indians who committed crimes against each other on a reserva-

[34] *E.g.*, the discussions on zoning, eminent domain, and taxation *infra*. Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin were given both criminal and civil jurisdiction over Indian country. 18 U.S.C. § 1162 (1964) (criminal); 28 U.S.C. § 1360 (1964) (civil). These provisions also gave permission to other states not having jurisdiction over Indian country to assume the same by affirmative legislative action; if, however, a state had been required to disclaim jurisdiction in its enabling act, before it could assume jurisdiction a constitutional amendment was required. Note, however, that sections 1162 and 1360 prohibit states having jurisdiction from alienating, encumbering or taxing Indian land, or from acting in any way inconsistent with any federal treaty, agreement, statute, or any regulation thereunder. Indian consent is now required before any state not having jurisdiction over Indian country at the time of the statute's enactment can assert jurisdiction, 25 U.S.C.A. § 1321-22 (Supp. 1969), but in all other aspects the jurisdiction problem remains unaffected.

[35] There is more than one way a state can acquire a right of way for a highway. Notes 55-80 and related text *infra*. Whichever way is used, a state, in the absence of congressional authorization, does not have jurisdiction over traffic offenses committed by an Indian on state highways running through Indian reservations. Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958).

[36] ARIZ. CONST. art. 20, para. 4.

[37] 31 U.S. (6 Pet.) 515 (1832).

[38] Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962).

tion .... *But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.*[39] (emphasis added).

It would seem, then, that Arizona, in the absence of congressional authorization, has no authority to prosecute Indians for traffic offenses committed on their reservations.

Can the Superior Court of the State of Arizona hear the claim of the surviving spouse for wrongful death? For the reasons stated above, this question must be answered in the negative, with one qualification: where an Indian brings a suit against a non-Indian in a state court (which has long been sanctioned)[40] a cross-claim by the surviving spouse for the wrongful death of her husband should be litigated and the decision binding upon both parties. Although Indian trust land is unavailable for satisfaction of a judgement,[41] there is no reason for refusing judgement against an Indian who has submitted to jurisdiction.

Finally, if the non-Indian had survived could he have been prosecuted criminally for driving while under the influence and for reckless driving? There would be little question had the charges not arisen out of an accident *involving an Indian*, notwithstanding its occurrence on a reservation. States have jurisdiction to punish offenses committed by non-Indians within a reservation,[42] but if the crime is against an Indian or Indian property, the right to prosecute rests in the federal government, and jurisdiction remains in the tribe or in other courts as Congress has dictated.[43] Thus Arizona would be without jurisdiction to prosecute the non-Indian offender in this case.

Zoning Ordinances

Logically, legislative designs for improvement of the health, educa-

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[39] 358 U.S. 217, 220 (1958).

[40] *E.g.*, Williams v. Lee, 358 U.S. 217, 220 (1958); United States v. Candelaria, 271 U.S. 432 (1926); Felix v. Patrick, 145 U.S. 317 (1892); Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948); Smith v. Temple, 152 N.W.2d 547 (S.D. 1967).

[41] Kane, *Jurisdiction Over Indians and Indian Reservations*, 6 ARIZ. L. REV. 237, 252-53 (1965).

[42] Williams v. Lee, 358 U.S. 217, 220 (1958); State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963).

[43] Non-Indians committing crimes against Indians are tried in federal courts. *See* 18 U.S.C. §§ 437-39, 1151-63 (1964); Assimilative Crimes Act, 18 U.S.C. § 13 (1964). Specifically, 18 U.S.C. § 1152 (1964) provides:

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

See generally Comment, *Indictment Under the "Major Crimes Act" — An Exercise in Unfairness and Unconstitutionality*, p. 691 *supra*.

tion and welfare of the community can hardly be effective where a large contiguous area and population is not subject to regulation. Yet, Indian communities are not subject to state zoning regulation and, in fact, often have conflicting rules.

In the mid 1960's, the city of Palm Springs, California, attempted to zone land of the Agua Caliente Indians, located in the city, which had been leased to non-Indians. Palm Springs could well have expected success in any litigation arising out of the attempt since California has both criminal and civil jurisdiction over Indian country.[44] Before the city completed legal proceedings, however, the Secretary of the Interior directed that the state and local laws and ordinances governing land use and development (with certain exceptions) were applicable to the Agua Caliente Reservation.[45] Thus, one of the early opportunities to litigate the question of the authority of state and local governments to impose zoning regulations on Indian land was avoided. The Department of Interior subsequently finalized its policy on zoning, stating "local county ordinances on building and zoning do not apply to Indian lands *unless* said ordinances have been approved by the area director . . . ."[46] This policy applies to any state, regardless of whether it has jurisdiction over Indian country.

The first court decision on the zoning question is the Washington case of *Snohomish County v. Seattle Disposal Company.*[47] Washington had taken advantage of 28 *United States Code* section 1360 (1964), which allowed states to assume civil jurisdiction over Indian country by affirmative legislative action, or by a state amending its constitution if it had been required to disclaim jurisdiction in its enabling act.[48] The Seattle Disposal Company had leased Indian land which it used as a garbage dump. The plaintiff, Snohomish County, brought suit to enjoin the company on the ground that it had not obtained a conditional use permit as required by a county zoning ordinance, and that the county zoning ordinance applied to the Indian land because of Washington's assumption of civil jurisdiction. The company and the tribe (as intervenor) moved for and were granted summary judgment. On appeal, the Supreme Court of Washington affirmed on the basis that the application of the ordinance would burden the land, depreciating

[44] 18 U.S.C. § 1162 (1964) (criminal); 28 U.S.C. § 1360 (1964) (civil). But note both provisions prohibit encumbering of Indian lands. See Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 425 P.2d 22, *cert. denied,* 389 U.S. 1016 (1967), where the Supreme Court of Washington held an attempted application of a county use permit ordinance to be a forbidden encumbrance within the meaning of § 1360 since it would constitute a burden on the land.

[45] 30 Fed. Reg. 8172 (1965). *See generally* R. SCHLESINGER, THE CALIFORNIA INDIAN LEASE (1967).

[46] 30 Fed. Reg. 8172 (1965) (emphasis added).

[47] 70 Wash. 2d 668, 425 P.2d 22, *cert denied,* 389 U.S. 1016 (1967).

[48] WASH. REV. STAT. ANN. § 37.12.010-021 (1964). Note that those states not

its value, thereby constituting a forbidden "encumbrance" within the meaning of section 1360, which provides in part:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto . . . .

Judge Hale dissented on three grounds:

1) Zoning laws are not encumbrances on land but rather are an exercise of the police power to protect the health, safety and welfare of the public.

2) Any immunity which Indian reservations may have from state regulations ought not extend to activities which affect the citizenry at large.

3) Indian immunity should not cover non-Indian lessees or their assigns.[49]

The United States Supreme Court denied certiorari in *Snohomish*, with Justices Douglas and White dissenting.[50] The dissenting Justices felt that application of the ordinances would be no more a burden or encumbrance on Indian land than is a state's right to tax oil production of a non-Indian lessee of Indian land, and that there might be merit in Judge Hale's position that Indian immunity should not be allowed to frustrate state programs to check air and water pollution.[51] They further felt that state control in the above areas may be permissible under 25 *United States Code* section 231 (1964) notwithstanding the label "zoning" instead of "sanitary regulations."[52] Section 231 provides:

> The Secretary of the Interior . . . shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations . . . .

Finally, the dissenters felt that 25 *Code of Federal Regulations* section 1.4 (1964) which prohibits the application of local zoning ordinances to

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having jurisdiction over Indian lands must now obtain Indian consent before asserting jurisdiction. 25 U.S.C.A. §§ 1321-22 (Supp. 1969).

[49] Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 425 P.2d 22, 27, *cert. denied*, 389 U.S. 1016 (1967).

[50] Snohomish County v. Seattle Disposal Co., 389 U.S. 1016 (1967).

[51] *Id.* at 1019-20.

[52] *Id.*

Indian country, may be invalid as unduly restricting state authority granted by sections 1360 and 231.[53]

Notwithstanding the dissents in *Snohomish County,* it seems clear that Congress will have to act before the states will be assured of zoning power. The type of act available is limited only by congressional imagination. To illustrate, on November 2, 1966 Congress granted long term leasing authority to the San Xavier and the Salt River Pima-Maricopa Indian Reservations in Arizona.[54] Section 416(2)(a) of the Act requires a lessee to covenant not to "commit or permit on the leased land any act which causes waste or nuisance or which creates a hazard to health of persons or to property, wherever such persons or property may be." The same section also allows suit in federal district court, or in some instances in the appropriate Arizona court, by the state "or any political subdivision thereof contiguous with . . . [these reservations] to abate or enjoin any violation of the covenant required under section 2(a) . . . ." Section 416(3)(b) provides for development of the reservations under regulations similar to those applied to contiguous non-Indian land. Section 416(b) also provides that:

> The Secretary of the Interior shall, before he approves any lease . . . and *if he determines* that such lease will substantially affect the governmental interests of a municipality . . . notify the appropriate authorities of any municipality contiguous to the San Xavier or Salt River Pima-Maricopa Reservation . . . of the pendency of the proposed lease and, *in his discretion,* furnish them with an outline of the major provisions of the lease which affect such governmental interests and shall consider any comments on the terms of the lease affecting the municipality, or on the absence of such terms from the lease, that such authorities may offer within such reasonable period, but not more than thirty days, as the Secretary may prescribe in his notice to them. (emphasis added).

At least the act does manifest a congressional intent to develop Indian land in harmony with surrounding areas by giving some voice to local government.

Eminent Domain and Rights of Way

The need for land, easements, and rights-of-way creates another major legal problem confronting urban growth on reservation land — a problem not amenable to solution by state action alone.

Tribal land and land which has been allotted to individual Indians under the General Allotment Act[55] (the fee to which remains in the federal government) are both subject to the federal power of eminent domain, but are *not* subject to state or local condemnation unless Con-

[53] *Id.*
[54] 25 U.S.C.A. § 416 (Supp. 1969).
[55] 25 U.S.C. § 331 (1964).

gress has specifically provided.[56] While tribal land is thus far immune to state condemnation, allotted land is not. Title 25 of the *United States Code* section 357 (1964) provides:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and money awarded as damages shall be paid to the allottee.

The United States as trustee of allotted lands is an indispensable party in condemnation proceedings against the land; and, while the United States may not be sued in a state court unless Congress gives express consent, section 357 does give implied consent to state condemnation suits in federal courts.[57]

In 1948, Congress passed a broad right-of-way statute, which empowered the Secretary of the Interior

> to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.[58]

This enactment is limited, however, by the Secretary's own regulations which provide that the grant cannot take place without prior written consent of the individual Indian or the tribal council, depending upon whether the land is allotted or tribal. The process also differs from the usual condemnation procedure in that the right-of-way obtained is in the nature of an easement or permit for a term with the right of reversion in the Indian owner upon abandonment or expiration of the term.[59] This procedure is, of course, supplemental to the right of eminent domain as set out above, and does not preclude a condemnation proceeding should the Secretary be unable to obtain the owners consent.

Congress has also empowered the Secretary of the Interior

> to grant permission . . . to the proper State and local authorities

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[56] U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 642 (1958) [hereinafter cited as FEDERAL INDIAN LAW].

[57] *See* Minnesota v. United States, 305 U.S. 382, 388-89 (1939). Note that "allotted" lands are "restricted" lands in the sense that the Indian allottee owns the beneficial interest while the federal government holds the fee in trust. 25 U.S.C. §§ 331, 462 (1964).

[58] 25 U.S.C. § 323 (1964).

[59] 25 C.F.R. §§ 161.3, .19 (1968). Frison, *Aquisition of Access Rights and Rights of Way on Fee, Public Domain, and Indian Lands*, 10 ROCKY MT. MIN. L. INST. 217, 258 (1965).

> for the opening and establishment of public highways . . . through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.[60]

Under this provision the Indian owner's consent is not needed before permission can be granted, but a state still cannot act unilaterally to acquire a right-of-way across Indian land.

Taxation

In 1943 the Supreme Court noted that "[s]ince Oklahoma has become a State . . . tax losses resulting from tax immunity of Indians have totaled more than $125,000,000, a sum only slightly less than the bonded indebtedness of the State."[61] While Indians do pay some state taxes,[62] their most important asset — land — is immune from taxation.

Since legal title to Indian land is held in trust by the federal government, state and local governments are unable to tax such property.[63] Indian lands do provide some tax revenue, however. State and local as well as federal governments are generally free to tax non-Indian property located on Indian lands, including buildings, improvements and personal property.[64] Thus, mines, oil and gas lines, and railroads located on Indian land leased by non-Indians are large sources of tax revenue.[65]

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[60] 25 U.S.C. § 311 (1964).

[61] Oklahoma State Tax Comm'n v. United States, 319 U.S. 598, 609 (1943).

[62] FEDERAL INDIAN LAW, *supra* note 56, at 843-87 contains a complete discussion of Indian taxation.

[63] *Id.* at 846-48. One other barrier exists in some state constitutions. *E.g.*, ARIZ. CONST. art. 20, para. 5, provides that Arizona shall not tax "any lands or other property within an Indian Reservation owned or held by any Indian . . . ."

[64] Thomas v. Gay, 169 U.S. 264 (1898). The question of whether the value of a non-Indian's possessory interest in Indian property can be subjected to a possessory interest tax has not yet been settled. It seems states could successfully analogize such a case to those which sustain state taxation of interests in government-owned property held by parties which do not themselves enjoy tax immunity. *See* United States v. City of Detroit, 355 U.S. 489 (1958), where Mr. Justice Black stated:

> We see no essential difference so far as constitutional tax immunity is concerned between taxing a person for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his own private ends. *Id.* at 493.

See also United States v. Town of Muskegon, 335 U.S. 484 (1958). *But cf.* Oklahoma State Tax Comm'n v. Texas Co., 336 U.S. 342 (1949).

[65] The Buck Act, now 4 U.S.C. § 105-110 (1964), in which Congress permitted States to levy sales or use taxes within certain federal areas, has been interpreted by what appears to be the only court to consider the question before this case, and by the Interior Department, as not applying to Indian reservations . . . . *Cf.* 4 U.S.C. § 109 (1964), excepting taxes on Indians from the scope of the Act. We think this interpretation was correct. Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 691 n.18 (1965) (an Indian trader trading on the reservation with reservation Indians is immune from state gross receipt taxes).

See also Williams v. Lee, 358 U.S. 217 (1958), where the Court prohibited state interference with a tribal right to self-government. This case may preclude state taxation of on-reservation activities, the power to tax being an inherent part of government.

Nevertheless, before Indian tribes can expect substantial assistance from state and local agencies in developing Indian land, a greater indigenous contribution will have to be made. A limited, but more extensive tax burden could possibly be a part of that contribution.

THE SOLUTIONS

It goes without saying that there is no simple solution to these cultural and legal problems. The goal of any program should be to give the Indians the opportunity to obtain a working knowledge of life in non-Indian America while preserving pride in their Indian heritage. Basic to any attempt should be the preservation of Indian lands. Indian land holdings are still substantial, and properly managed can provide the resources and the protection needed for an orderly and mutually beneficial exposure to non-Indian America. Also basic to a workable solution is the need for a reevaluation of the prevailing assimilationist attitude.

Such a reevaluation must lead to the conclusion that meaningful solutions can be found only through full participation and agreement among all concerned — the Indians, federal, state, and local governments. The first step in achieving this necessary participation and agreement is the creation of a legal framework within which the Indians can safely experiment with various elements of the "mainstream" culture.

The Civil Rights Act of 1968[66] might be employed as the framework within which the problems posed by the Indian, non-Indian urban contact might be solved.[67] Under the Act tribal consent must be obtained before a state can acquire jurisdiction over Indian lands.[68] While the Act does not *force* the Indians to submit to state control, jurisdiction once vested in the state effectively removes the Indian as an equal in the decision making process. For this reason the Civil Rights Act does not represent the optimum choice. What is needed is congressional authorization for the establishment of autonomous community development organizations, with representation from all interested parties. By giving these groups planning authority and the jurisdiction to settle disputes, the Indian tribes will be assured of a meaningful partnership in the business of making the decisions that affect their lives.[69]

Assuming the creation of an adequate legal framework, financing

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[66] 25 U.S.C.A. § 1301 (Supp. 1969).

[67] *But cf.* Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 638, 425 P.2d 22, *cert. denied,* 389 U.S. 1016 (1967); discussion of eminent domain and taxation, p. 718-21 *supra.*

[68] 25 U.S.C.A. §§ 1321-22 (Supp. 1969). Arizona did not take advantage of Public Law 280 prior to the enactment of the Civil Rights Act of 1968.

[69] These groups would need the authority of eminent domain, zoning power, and perhaps even the power to tax for certain purposes.

the undertaking becomes the next problem.[70] One possibility would be to allow the tribes to encumber their land as security for loans. Just such a proposal failed in the 90th Congress, and possibly will be considered by the 91st. This proposal is the Indian Resources Development Act,[71] introduced at the request of the then Secretary of the Interior, Stewart Udall.

The purpose of this Act was to give the Indians "free access to the private financial and credit markets of the Nation."[72] Unfortunately the bill also provided for disposal of real property, "including trust or restricted property"[73] held by a tribal corporation organized under the Act and, in addition, allowed for the mortgaging of the same property.[74] Although the disposal and mortgage provisions were not without safeguards, it would be naive to argue, in view of the earlier tragic experience of the loss of Indian lands, that the Indians were unreasonable in their belief that such provisions were another attempt at termination by destroying their land base.[75]

Assuming the Government would not be willing to remove the need for encumbering Indian lands by guaranteeing private loans, the best way to raise capital would seem to be through leasing of tribal land by granting to all tribes long-term leasing authority. Admittedly, by refusing to encumber their land, the tribes' opportunities are not as attractive for obtaining the large amounts of capital private lenders can make available. Through wise leasing, however, a capital fund could be established and then used to develop other portions of tribal land. Increased services and training also would be made available by an expanded leasing program. Most importantly, tribal title to the land would remain unencumbered and the chance for reduction of the Indian stronghold diminished.

When leasing, careful consideration should be given to the proposed use of the land. A lease should include a well-defined description of the acceptable uses. Variation from the prescribed use should be allowed only through appropriate legal means, after it is shown to be in the best interest of the Indian people and with the approval of the appropriate Indian government.

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[70] Application for assistance under the Model Cities Program would be one possible way. In fact, the Gila River Indian Community with headquarters at Sacaton, Arizona, submitted a comprehensive plan under this Act on April 12, 1968. Other sources might include the Economic Development Act, F.H.A., Small Business Administration and the Federal National Mortgage Association. *See generally* Bennett, *Problems and Prospects in Developing Indian Communities*, p. 649 *supra*.

[71] H.R. 10560, 90th Cong., 1st Sess. (1967).

[72] *Id.* § 2.

[73] *Id.* § 202.

[74] *Id.* § 202(6).

[75] For a different view, see Udall, *The State of the Indian Nation — An Introduction*, p. 555-56 *supra*.

The length of the lease also should be carefully considered. Lasting developments which are commercially feasible are preferable to temporary ones. Commercial financing for permanent development would seem easier to obtain, and private financial institutions could provide the Indians with valuable guidelines for the determination of commercial feasibility.

In Arizona, for example, leasing is already a valuable tool. The White Mountain Country Club located on the Fort Apache Indian Reservation provides 99 year leases for the development of residential dwellings. Although leasing land for residential purposes is relatively new to Arizona, substantial investments in homes have been made under the White Mountain lease.

The length of the lease in the White Mountain experience is important for more than one reason. In addition to assuring the lessee use of the land for a sufficient period to warrant a large investment, commercial lenders look more favorably upon a development with a life of 99 years than they do on a 10 year agricultural lease or the 35 year Hawley Lake lease on the same reservation.

A compromise between the 99 year lease and a 35 year lease for residential purposes might be one for the life of the owner, or surviving spouse, or for the term of 50 years, whichever is longer. This would allow enjoyment of the residence for life by the lessee and in some instances would result in an inheritable interest. In addition, the leasehold interest and improvements would revert back to the Indian owners in a shorter period of time for their use and further development.[76]

In each situation, preference should be given to those developers who agree to hire and train Indians in the operation and management of the enterprise. An incentive to such training is available to the developer in the form of Public Law 959[77] which allows the Bureau of Indian Affairs to pay 50 percent of the Indians' wages in certain training programs.

The Indian, Non-Indian Reciprocal City

The approaching and encroaching non-Indian urban areas, while admittedly the source of paramount problems for the Indians, may provide some compensating solutions.

Where the non-Indian community grows near or touches Indian land, there exists an opportunity for both to solve mutual problems. Indians together with non-Indians could develop planned communities which would satisfy both groups' need for economic growth. In such

[76] For a summary of the Agua Caliente Tribe's leasing experience, see R. SCHLESINGER, THE CALIFORNIA INDIAN LEASE (1967).
[77] 25 U.S.C. § 309 (1964).

areas, with the proper protections and provisions, Indians could be exposed to the non-Indian ways and experience life as it is in the "mainstream" while still preserving his stronghold. The "reciprocal city" could give Indians the opportunity to experience the operation of municipal government and the other functions of democracy and to learn first hand of hygenic, zoning and housing standards and other aspects of urban America. In the "reciprocal city" non-Indian America could find room for growth and investment; and both communities, through cultural reciprocity and exposure, could learn to understand each other.

The Indian cannot enter the mainstream until he learns to make it work. That he can do only by using it. The contact of non-Indian America with the reservation may be the key which unlocks this seemingly endless circle.

Joe P. Sparks