



JURISDICTION: BRINGING CLARITY OUT OF CHAOS

Under the United States' Federal system, States and localities, such as counties and cities, have primary responsibility for criminal justice. They define crimes, conduct law enforcement activity, and impose sanctions on wrongdoers. Police officers, criminal investigators, prosecutors, public defenders and criminal defense counsel, juries, and magistrates and judges are accountable to the communities from which victims and defendants hail. Jails and detention centers often are located within those same communities. It's the American Way: local communities address local criminal justice problems with locally controlled and accountable institutions. In contrast, the Federal government's role is limited to enforcing laws of general application,¹ and even then, Federal agencies often work in partnership with State and local authorities.

This familiar framework stands in stark contrast to the arrangements in federally recognized Indian country, where U.S. law requires Federal and State superintendence of the vast majority of criminal justice services and programs over local Tribal governments. In recent decades, as the Tribal sovereignty and self-determination movement endorsed by every U.S. president since Richard Nixon has taken hold, Tribal governments have sought greater management of their own assets and affairs, including recovering primary responsibility over criminal justice within their local Tribal communities.

Table 1.1 Major Statutes and Cases Affecting Indian Country Criminal Jurisdiction

ACT OR CASE	REFERENCE	YEAR	DESCRIPTION
Trade and Intercourse Act	1 Stat. 137 § 137	1790	Asserts that a State can punish crimes committed by non-Indians against Indians under the laws of the State.
General Crimes Act	18 U.S.C. § 1817	1817	General Federal laws for the punishment of non-Indian crimes are upheld on Tribal lands; Indian offenses remain under Tribal jurisdiction.
Assimilative Crimes Act	18 U.S.C. § 15	1825	Extends coverage through Federal enforcement of certain state criminal laws in certain Federal enclaves.
<i>Worcester v. Georgia</i>	31 U.S. (6 Pet.) 515	1832	State laws have no rule of force in Indian country
<i>United States v. McBratney</i>	104 U.S. 621	1881	Provides for exclusive State criminal jurisdiction over crimes between non-Indians for offenses committed in Indian country; rule later extended for “victimless” crimes.
<i>Ex parte Crow Dog</i>	109 U.S. 556	1885	Reaffirms Tribal self-governance and the absence of State jurisdictional authority in Indian country, as well as Federal jurisdiction in cases of intra-tribal crimes.
Major Crimes Act	18 U.S.C. § 1155	1885	Extends Federal jurisdiction to include authority over Indians who commit 7 (later amended to 16) felonies.
<i>United States v. Kagama</i>	118 U.S. 375	1886	Upholds the Major Crimes Act based on Congress’ plenary power over Indian affairs.
General Allotment Act (Dawes Act)	25 U.S.C. § 531	1887	Created individual Indian land parcels, held in trust by the Federal government for individual Indians and Indian households, out of reservation lands, eventually leading to so-called “checker-boarded” jurisdiction as some parcels moved from trust to fee status.
Indian Country Act	18 U.S.C. § 1151	1948	Defines the scope of Federal criminal jurisdiction over Indian lands.
Public Law 83-280	18 U.S.C. § 1162; 25 U.S.C. § 1360	1953	Transfers Federal jurisdiction over Indian lands to 5 mandatory States (Alaska added upon statehood), excepting 3 Tribes, without Tribes’ consent; optional for other States, also without Tribes’ consent.
Public Law 83-280, amended	18 U.S.C. § 1162; 25 U.S.C. § 1360	1968	Allows States to request retrocession of Indian country jurisdiction (a return of jurisdiction to the Federal government).
Indian Civil Rights Act (ICRA)	25 U.S.C. § 1301	1968	Details rights Tribes must provide defendants in their courts while restricting Tribal courts to misdemeanor sentencing only.
Indian Self-Determination and Education Assistance Act	25 U.S.C. § 450	1975	Allows for the reassertion of control over Tribal services through self-governance contracts and other mechanisms.
<i>Oliphant v. Susquamish Indian Tribe</i>	435 U.S. 191	1978	Holds that Tribal courts lack any criminal jurisdiction over non-Indians for offenses committed on Indian lands.
<i>United States v. Wheeler</i>	495 U.S. 315	1978	Double jeopardy does not apply in cases subject to concurrent Federal and Tribal criminal jurisdiction.
<i>Duro v. Reina</i>	495 U.S. 676	1990	Prevents Tribal courts from exercising criminal jurisdiction over Indians who are not members of that tribe.
ICRA, amended	25 U.S.C. § 1301	1991	So-called “Duro fix” reaffirms Tribal criminal jurisdiction over all Indians, not just member Indians.
Tribal governments’ consent for federal capital punishment	18 U.S.C. § 3598	1994	Requires that no Indian may be subject to a capital sentence unless the governing body of the Tribe has first consented to the imposition of the death penalty for crimes committed on the tribe’s lands.
<i>United States v. Lara</i>	541 U.S. 195	2004	Affirms that separate Federal and Tribal prosecutions do not violate double jeopardy when a tribe prosecutes a non-member Indian.
Tribal Law and Order Act	25 U.S.C. § 2801	2010	Enhances Federal collaboration with Tribal law enforcement agencies, expands Tribal courts’ sentencing authority to felony jurisdiction by amending ICRA to permit incarceration for up to three years per offense, while allowing multiple offenses to be “stacked”
Violence Against Women Reauthorization Act	127 Stat. 54	2015	Restores Tribal criminal jurisdiction over non-Indians in Indian country for certain crimes involving domestic and dating violence and related protection orders.

Disproportionately high rates of domestic violence, substance abuse, and related violent crime within many Native nations have called into question whether the current Federal and State predominance in criminal justice jurisdiction offers Tribal nations a realistic solution to continued social distress marked by high rates of violence and crime. Federal and State agencies can be invaluable in creating effective partnerships with Tribal governments, but there is no substitute for the effectiveness of locally controlled Tribal governmental institutions that are transparent and accountable. U.S. citizens rightly cherish the value of local control: that government closest to the people is best equipped to serve them. The comparative lack of localism in Indian country with respect to criminal justice directly contravenes this most basic premise of our American democracy.²

The Tribal Law and Order Act of 2010 (TLOA) instructs the Indian Law and Order Commission (Commission) to study jurisdiction over crimes committed in Indian country, including the impact of jurisdictional arrangements on the investigation and prosecution of Indian country crimes and on residents of Indian land. Additionally, TLOA calls for studying the Indian Civil Rights Act of 1968 and its impact on the authority of Indian Tribes, the rights of defendants subject to Tribal government authority, and the fairness and effectiveness of Tribal criminal systems. Finally, TLOA directs the Commission to issue recommendations that would simplify jurisdiction in Indian country.

The Commission's primary response is to request that the President and Congress act immediately to undo the prescriptive commands of Federal criminal law and procedure in Indian country and, with the assurance that the Federal civil rights of all U.S. citizens will be protected, recognize Tribal governments' inherent authority to provide justice in Indian country.

FINDINGS AND CONCLUSIONS: INDIAN COUNTRY JURISDICTION OVER CRIMES COMMITTED IN INDIAN COUNTRY

For more than 200 years, the Federal government has undertaken to impose Federal laws, procedures, and values concerning criminal justice on American Indian nations (Table 1.1). An oft-used justification for these jurisdictional modifications is that the overlay of Federal and State law will make Indian country safer. But, in practice, the opposite has occurred. Indian people today continue to experience disproportionate rates of violent crime in their own communities. An exceedingly complicated web of jurisdictional rules, asserted by Federal and State governmental departments and agencies whose policy priorities usually pre-date the modern era of Tribal sovereignty and self-determination, contributes to what has become an institutionalized public safety crisis. The symptoms of this systemic dysfunction are painfully apparent across Indian country.

Institutional illegitimacy. Because the systems that dispense justice originate in Federal and State law rather than in Native nation choice and consent, Tribal citizens tend to view them as illegitimate; these systems do not align with Tribal citizens' perceptions of the appropriate way to organize and exercise authority. The Commission heard this observation at virtually every one of its field hearings from the Eastern United States to Alaska. Generally, members do not willingly comply with decisions that have not won their consent.

Because Tribal nations and local groups are not participants in the decision making, the resulting Federal and State decisions, laws, rules, and regulations about criminal justice often are considered as lacking legitimacy. As widely reported in testimony to the Commission, nontribally administered criminal justice programs are less likely to garner Tribal citizen confidence and trust, resulting in diminished crime-fighting capacities. The consequences are many: victims are dissuaded from reporting and witnesses are reluctant to come forward to testify. In short, victims and witnesses frequently do not trust or agree with State or Federal justice procedures. Potential violators are undeterred.⁵

When Federal and State criminal justice systems treat Tribal citizens unfairly or are widely perceived as doing so, trust and confidence in the law erode further. Crime victims, witnesses, and defendants often must travel to far-off courthouses for their cases and testimony to be heard. Colorado is a case in point.⁴ The two Indian nations headquartered within the State's boundaries, the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe, are located between 7 and 10 hours' drive across the Rocky Mountains from Denver, where the entire U.S. District Court is housed in a single Federal courthouse.⁵

Tribal citizens are transported, often at their own expense, to nonlocal court venues, where trials are conducted according to the procedures and methods of adversarial justice, and where the process of assigning punishments can be foreign to Tribal cultures. By contrast, justice in many Tribal communities is oriented toward restoring balance and good relations among Tribal members. Victims, if possible, are restored to economic and social well-being. Offenders and their relatives strive to provide restitution to offended persons and kin. When an agreed-upon payment is found, the offender's family makes this restitution to the offended family, and the issue is at an end. Of course, this is not the case with every kind of offense or every Tribe, but the principle holds: local control for Native communities means the ability to build and operate justice systems that reflect community values and norms.

In Federal and State courts, Native defendants often are not tried by a true jury of their peers. Federal and State jury pools are drawn with little consideration of where Native people live and work. This concern also was raised repeatedly at Commission field hearings across Indian

country. Misperceptions impact every step of the process. Prosecutors may be more skeptical of Indian victims. Judges might award harsher sentences to Indian defendants because of assumptions they make about Indian country crime and those individuals involved. In the case of Federal courts, criminal sentences for the same or similar offenses are systemically longer than comparable State systems because there is no Federal parole or good-time credit even for inmates who follow the rules.

Ultimately, the inequities of Federal and State authority in Indian country actually encourage crime. The Commission received extensive testimony from Indian and non-Indians alike that Tribal citizens and local groups tend to avoid the criminal justice system by nonparticipation. Because Tribal members or relatives could be sent to prison or jail, which would have negative social and economic impacts on the family or local group, they will not bear witness against perpetrators. The punishment outcomes of the adversarial Federal and State court systems do little to heal Tribal communities and may create greater and longer disruptions within the communities.

You're going to take the Western model and put it—impose it—on Indian Country? It's never going to work.

*Anthony Brandenburg, Chief Justice, Intertribal Court for Southern California
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation
February 16, 2012*

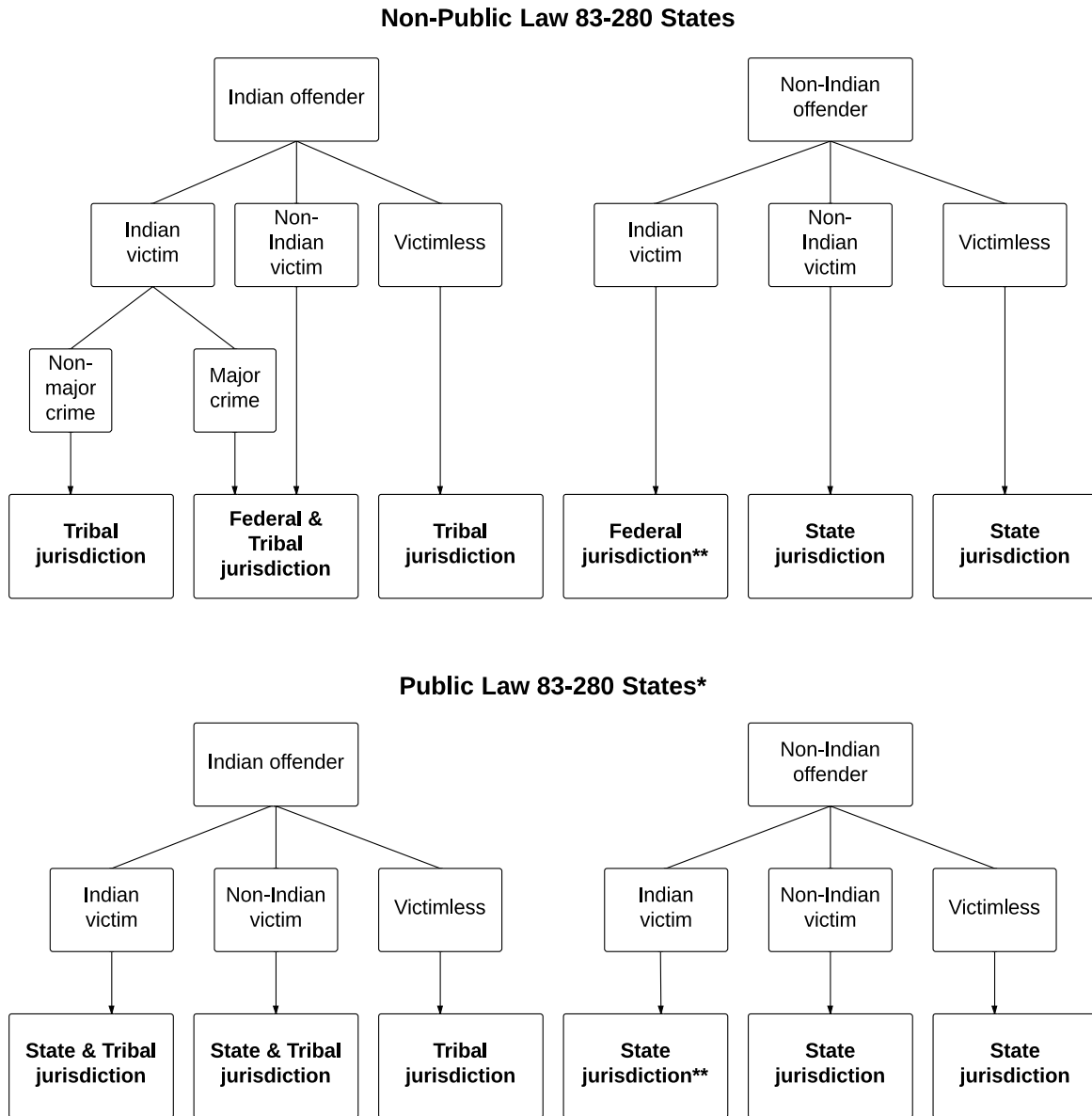
To be frank, State law enforcement in Indian country, as we learned, was viewed as an occupying force, invaders, the presence wasn't welcome. ...The common belief was that a deputy sheriff could come onto the reservation for whatever reason, [and] in handling a situation, if a condition [arose], the deputy could use any level of force necessary and then just drive away with no documentation, no justification, no accountability, and the Tribal community just had to take it.

*Ray Wood, Lieutenant, Riverside County Sheriff's Department
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation
February 16, 2012*

And I have argued, and I think it is a fair legal argument, that if you have an Indian country case, the jury must come from Indian country. That is what a jury means. A jury means representatives of the community. ...We ought to be drawing our jurors from Indian country, and we don't do that. We don't. We draw them the same way we draw every Federal jury in the Federal district courts, and that is problematic in many respects...because one of the ways that the Federal juries usually are drawn is from voter registration roles.

*Kevin Washburn, Dean, University of New Mexico School of Law
Testimony before the Indian Law and Order Commission, Hearing at Pojoaque Pueblo, April 19, 2012*

Figure 1.1 General Summary of Criminal Jurisdiction on Indian Lands
(Details vary by Tribe and State)



* Under the *Tribal Law and Order Act of 2010*, Tribes can opt for added concurrent Federal jurisdiction, with Federal consent. Neither this Tribe-by-Tribe issue nor the various configurations of "Optional 280" status is shown in this chart.

** Under the *Violence Against Women Act Reauthorization of 2013* (VAWA Amendments), after 2015, Tribes may exercise Special Domestic Violence Jurisdiction with the Federal government and with States for certain domestic violence crimes.

Institutional complexity. Figure 1.1 summarizes the complexity that results from the overlay and predominance of Federal and State authority over Tribal authority. Yet, the seeming order of the figure fails to capture how difficult actual implementation of this imposed legal matrix can be. Jurisdictional questions and concerns arise at every step in the process of delivering criminal justice from arrest to criminal investigation, prosecution, adjudication, and sanctions. For instance:

- Is the location in which the crime was committed subject to concurrent State criminal jurisdiction under P.L. 83-280 or other congressional provisions?
- If the State shares criminal law jurisdiction, does the Tribe also have statutes or ordinances that criminalize or penalize the action?
- Under which government's law does a law enforcement officer have the authority to make an arrest?
- If this portion of Indian country is not subject to P.L. 83-280, is the crime subject to concurrent Federal jurisdiction under the Major Crimes Act?
- If the incident does not constitute a major crime, does the Tribal nation have arrest and prosecution authority under its own statutes?
- Is the suspect a non-Indian, does a Tribal officer have the authority not only to detain, but also to arrest and charge the offender under a cooperative agreement, special Federal commission, or conferral of State peace officer status?
- Which jurisdiction has the authority to prosecute the suspect, and to whose officers should the perpetrator be turned over?
- Are there double jeopardy issues as a matter of State or Tribal law if one jurisdiction prosecutes first and the other wants to follow?
- Does the crime involve violence against women?
- If so, does that change the authority of the Tribal officer, under Tribal law, to arrest a non-Indian, no matter where the offense occurred?
- Where jurisdiction is concurrent, do available sanctions or rehabilitation options affect the choice of venue?

Essentially, the delivery of criminal justice to Indian country depends on each identified government being able and willing to fulfill its Indian country responsibilities. Any delays, miscommunications, service gaps, or policy gaps—unintentional or otherwise—threaten public safety. For example, if Tribal law enforcement officers require assistance from nontribal authorities (to turn over a suspect for arrest, for example), but those authorities are substantially delayed, Tribal police may be unable to pursue a crime any further. If police, prosecutors, and judges do not have access to another government’s criminal history information, they may not be able to act appropriately. If Federal investigators begin work on a case that is later returned to the Tribe for prosecution but Federal officials cannot share evidence, Tribal investigators will have to expend unnecessary effort to recreate it. Or, if a case is returned only after the Tribe’s statute of limitations has expired, an offender may go free.⁶ Again, the impact of federally imposed jurisdiction may likely be increased crime.⁷

The extraordinary waste of governmental resources resulting from the Indian country “jurisdictional maze” can be shocking, as is the cost in human lives. The jurisdictional problems often make it difficult or even impossible to determine at the crime scene whether the victim and suspect are “Indian” or “non-Indian” for purposes of deciding which jurisdiction—Federal, State, and/or Tribal—has responsibility and which criminal laws apply. In those crucial first hours of an investigation, this raises a fundamental question: which agency is really in charge? This is the antithesis of effective government.

An actual case involving a tragic highway accident in Colorado illustrates how overly complicated jurisdictional rules can undermine criminal investigations and hinder effective prosecutions. In *United States v. Wood*, the U.S. Attorney’s Office for the District of Colorado prosecuted a case on the Southern Ute Indian Reservation where a non-Indian drunk driver smashed into a car driven by a Tribal member.⁸ Both victims (an elderly woman—the Tribal member—and her 8-year-old granddaughter) burned to death. The child was not an enrolled member of the Tribe, but had a sufficient degree of Indian blood to be considered “Indian” for purposes of Federal criminal jurisdiction according to the legal requirements articulated over the years by the U.S. Court of Appeals for the Tenth Circuit, which hears appeals of Federal cases arising on the Southern Ute Indian Reservation. What was unclear based on the evidence available at the crime scene, however, was whether the little girl was also considered to be an “Indian” on the Southern Ute Indian Reservation—another Tenth Circuit legal requirement.

As the Federal case against the non-Indian defendant proceeded under the Major Crimes Act, defense counsel objected that the little girl, despite having Native blood, was still not considered to be an Indian by the Southern Ute Indian Tribe given her alleged lack of ties to that community. The factual record, which was unavailable to investigators in the field at the time of accident, was mixed on this issue. The girl had received

We have county law enforcement that assists the Bureau of Indian Affairs. The county is quite big. (W)e only have three county deputies who go back and forth between five different communities. So if one's on one end of the county and BIA needs assistance, they're without assistance.

*Billy Bell, Chairman, Fort McDermott Tribe, and Chairman, Intertribal Council of Nevada
Testimony before the Indian Law and Order Commission, Hearing at Salt River Reservation, AZ
January 13, 2012*

The Tribes still cannot get access to the CLETS information, which is the California Law Enforcement [Telecommunications System]. That's critical. If you are a law enforcement officer and you pull a vehicle over and...you run the plate, you are not going to get any California State information on that owner or driver that may be critical to you to better prepare yourself—to not only protect you, but the public. So not being able to get that information is critical.

*Joe LaPorte, Senior Tribal Advisor, Office of the Program Manager, Information Sharing Environment, Office
of the Director of National Intelligence
Testimony before the Indian Law and Order Commission, Hearing in Oklahoma City, OK
June 14, 2012*

Indian Health Service benefits on the Southern Ute Reservation and was visiting her grandparents on the reservation at the time of the accident. However, the girl and her mother lived off-reservation. After literally dozens of people had weighed in, eventually the question of whether the Tribe considered the child victim to be a Tribal member was resolved by the Southern Ute Tribal Council. After several months of jurisdictional wrangling, the Tribal Council concluded that the child victim was not a Tribal member—unlike her grandmother, who also had perished in the accident. This meant two separate prosecutions for the same crime: One by the U.S. Attorney’s Office for the death of the grandmother, the other by the LaPlata County, Colorado District Attorney’s Office for the child. And because of *Oliphant v. Suquamish Tribe*,⁹ the Tribe was deprived of any concurrent criminal jurisdiction because the defendant was a non-Indian.

Public Law 83-280. While problems associated with institutional illegitimacy and jurisdictional complexity occur across the board in Indian country, the Commission found them to be especially prevalent among Tribes subject to P. L. 83-280 or similar types of State jurisdiction, the latter of which tend to be Tribes in the East and South. In part, this is because State government authority often appears even less legitimate to Tribes than Federal government authority. The Federal government has a trust responsibility for Tribes, many Tribes have a treaty relationship with it,¹⁰ and there is an established government-to-government relationship between Tribes and the Federal government that has been affirmed in court decisions and through the self-determination policy declared by President Nixon in 1970.

More typically, Tribes’ widespread disenchantment with State criminal jurisdiction stems from the fact that States often have proven to be less cooperative and predictable than the Federal government in their exercise of authority. While there are exceptions, particularly within the past two decades, the general relationship can be strained to the point of dangerous dysfunction. Many States entered the Union with chartered boundaries that contained sizable Tribal lands and significant Indian populations. Tribal peoples signed treaties with the Federal government and were removed to reservations. Considerable amounts of Indian land were turned over to State governments and citizens. Memories that States and local governments actively sought reductions of Indian territories still engender distrust from Tribal governments and their citizens.

The Commission frequently was presented with official testimony (and unofficial statements during site visits and other meetings) that described how State and local governments failed to provide public safety services and actively prevented Tribal governments from exercising or developing their own capacities. This less-than-cooperative intergovernmental stance can be devastating in an environment where early misunderstandings about the stipulations of P.L. 83-280 stymied development of Tribal justice agencies through withdrawal of Federal funds (Chapter 3). The Bureau of Indian Affairs (BIA) will not fund Tribal

Public Law 83-280: Concurrent Tribal and State Jurisdiction. Public Law 83-280 (18 U.S.C. § 1162) removed Federal criminal jurisdiction over Indian country and replaced it with State criminal jurisdiction in select states. The mandatory P.L. 83-280 states are California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), Wisconsin, and Alaska. P.L. 83-280 permitted other States to assume criminal jurisdiction, either in whole or in part, over Indian country within their boundaries. The optional P.L. 83-280 states are Florida, Idaho, Iowa, Montana, and Washington.

I think the better scenario is to simply not have the State have jurisdiction and that doesn't mean that we wouldn't work with them because I think we live in a day and age where that's not possible. ... (W)e would prefer to deal with the Federal government on a government-to-government basis and then deal with the State as our neighbors, as we would do as opposed to them having jurisdiction.

*Carrie Garrow, Executive Director, Syracuse University Center for Indigenous Law, Governance, and
Citizenship
Testimony before the Indian Law and Order Commission, Hearing in Nashville, TN
July 13, 2012*

They have an Indian law subcommittee of the [California] State-Federal Judicial Council level, and...I got on it. They were asking me about Tribal courts and what I thought about whether Tribal courts have an impact, etc. I said, "Well, it has a lot to do with 280." And I'm looking around at the panel of judges, and one person opened their eyes [and asked]... "What's 280?"

*Anthony Brandenburg, Chief Justice, Intertribal Court for Southern California
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation, CA
February 16, 2012*

courts, jails, and police departments within mandatory P.L. 83-280 jurisdictions. Consequently, Tribal criminal justice administration is severely underdeveloped in P.L. 83-280 jurisdictions. State and county agencies manage criminal justice administration, while Tribal courts, police, and incarceration capabilities are largely subordinate to State agencies, non-existent, or not recognized.

Testimony before the Commission reported distrust between Tribal communities and local, non-Indian criminal justice authorities, leading to communication failures, conflict, and diminished respect. Most frequently, the Commission heard that nonresponsive State and local entities often left Tribes on their own to face the current reservation public safety crises. These findings, while anecdotal, comport with more comprehensive research in the field.¹¹

The testimony also indicated that Tribes subject to State criminal law jurisdiction through settlement agreements and other congressional enactments are obstructed from exercising any degree of local control. Witnesses from these communities, located mostly in the East and South, testified that State and local officials displayed a pronounced lack of cultural sensitivity, impatience with Tribal government authorities, and an attitude that Tribal members should assimilate with the surrounding non-Indian communities. Many Tribes reported that they have nearly given up hope they can establish their own criminal justice systems appropriate to the needs of their Tribal members or residents.

Making do with current jurisdictional arrangements. Many Tribal governments, State governments, and the Federal government have been active in making current jurisdictional structures work in this complex environment. They have developed a variety of approaches (discussed more fully in Chapter 4):

- **Cooperative agreements** (including deputization, cross-deputization, and mutual aid agreements) provide for shared law enforcement authority in and around Indian country. The most encompassing agreements cross-deputize officers, so that Federal, State, Tribal, municipal, or county officers are able to enforce a partner government's laws. For example, a Tribal police officer so cross-deputized can make an arrest based on Tribal law, certain Federal laws, or city ordinances. Such arrangements simplify law enforcement by supporting an officer's ability to intervene regardless of the crime's location or the perpetrator's or victim's identity.
- **Statutory peace officer status** is an across-the-board recognition of police officers who work for the public safety department of a federally recognized Tribe as State peace officers. Under Oregon's statute, for example, Tribal police are empowered to arrest non-Indians on the reservation for violations of State law and to continue

Here is a Federal mandate that we provide service to these communities, and yet we have no clue what we're doing, what our limits are. And we found that on a day-to-day basis, routinely, our officers were going into Indian country and making huge mistakes. Not just cultural mistakes, not just historical mistakes, but legal mistakes utilizing California regulatory law and enforcing it in Indian country because we didn't know.

*Lt. Ray Wood, Tribal Liaison Unit Commander, Riverside County Sheriff's Department
Testimony before the Indian Law and Order Commission, Hearing at Agua Caliente Reservation, CA
February 16, 2012*

At the [Washington] State Supreme Court there was an initial decision finding the officer had authority to arrest in fresh pursuit of a crime that began on reservation. It was later reconsidered and amended, but sustained. Last week it was reconsidered again and reversed. This alone, just the result to have this happen, shows the level and depth of confusion caused by the jurisdictional maze.

*Brent Leonhard, Interim Lead Attorney, Office of Legal Counsel,
Confederated Tribes of the Umatilla Indian Reservation
Written Testimony for Indian Law and Order Commission, Hearing at Tulalip Indian Reservation, WA
September 7, 2011¹²*

[There are] people that move into those areas for that reason: they want to engage in unlawful activity. They do so because they know that there is an absence of law enforcement.

*Paul Gallegos, Humboldt County District Attorney
Testimony before the Indian Law and Order Commission, Hearing on the Agua Caliente Reservation, CA
February 16, 2012*

California does not allow Tribes into the fusion centers and does not recognize Tribal law enforcement. We hope to get this taken care of in California. A model and test case is being developed by the Sycuan Tribe. This same issue is found in New York, where the State only lets one Tribe in, but not the rest.

*Joe LaPorte, Senior Tribal Advisor, Office of the Program Manager, Information Sharing Environment, Office
of the Director of National Intelligence
Testimony before the Indian Law and Order Commission, Hearing in Oklahoma City, OK
June 14, 2012*

I think...that any time there's Federal law that [is] passed regarding Indian country, that it [should] apply to Settlement Act Tribes, plain and simple...Each Tribe doesn't have to be mentioned. That basically says, when there's Federal legislation passed, that it applies to all Indian nations, P.L. 83-280, Settlement Acts, however they want to word it. I think that is probably the first and foremost place to start. Because without that, you have different levels of sovereignty, and that's no more clear than when the State trumps the Federal government and trumps the Federal laws that are passed regarding the Indian country.

*Robert Bryant, Chief of Police, Penobscot Nation
Testimony before the Indian Law and Order Commission, Hearing in Nashville, TN
July 13, 2012*

pursuing a suspect onto an off-reservation jurisdiction and take action on crimes committed in their presence.¹⁵

- A **Special Law Enforcement Commission (SLEC)** is a type of cooperative agreement, authorized by Federal regulation, which provides authority for a State, Tribal, or local law enforcement officer to enforce certain Federal crimes committed within Indian country. Tribal or State officers who meet the SLEC requirements can be authorized to make Federal arrests. These officers are issued a SLEC card, which must be renewed (through retesting) every 3 years. To be eligible to receive SLECs, officers must be certified peace officers and pass a Federal background check. Their sponsoring agencies also must enter into an intergovernmental agreement with the Office of Justice Services (OJS), a part of BIA. The SLEC program can be enormously valuable for those Tribes that have entered into the required agreements with OJS. However, a major obstacle to the widespread use of the program—for both new SLEC cards and card renewals—has been the lack of access to SLEC testing and training, which historically was provided almost exclusively at the BIA Indian Police Academy in Artesia, NM. An off-site SLEC training program piloted in Colorado, which formed the basis for the expanded on-reservation SLEC training provisions contained in the Tribal Law and Order Act, resulted almost immediately in increased Federal prosecutions by Tribal officers who otherwise would lack the power to arrest non-Indians suspected of committing Federal crimes.¹⁴ TLOA encourages all U.S. Attorney’s Offices to partner with OJS to provide expanded SLEC training and testing for Indian country.
- **Cooperative prosecutorial arrangements** allow Tribal, Federal, and State officials to share information and work together more closely on case investigations and prosecutions. One example is designating Tribal prosecutors to serve as “Special Assistant U.S. Attorneys” (Chapter 3).

These are promising practices. They can be vitally important for responding to the flow of crime across Indian country’s borders. For addressing public safety in Indian country, however, the Commission concludes that such practices will, at best, always be “work-arounds.” They tend to deliver suboptimal justice because of holes in the patchwork system, because bias or a lack of knowledge prevents collaboration, and/or because local politics shift.

Conclusions concerning jurisdiction. The Indian Law and Order Commission has concluded that criminal jurisdiction in Indian country is an indefensible maze of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations. Ultimately, the imposition of non-Indian criminal justice institution in Indian country extracts a terrible

I believe that the State of Arizona is a model of how States should work with Indian country. The State under Arizona Revised Statutes 13-3874 authorizes Tribal police who meet the qualifications and training standards under Arizona Peace Officers Standards and Training (AZ POST) to exercise all law enforcement powers of peace officers in the State. ...This peace officer authority not only assists the Tribal governments it also adds more peace officers to the State.

*Edward Reina, (Ret.) Director of Public Safety, Tohono O'odham Nation
Written testimony for the Indian Law and Order Commission, Hearing at Salt River Indian Reservation
Jan. 13, 2012¹⁵*

price: delayed prosecutions, too few prosecutions, and other prosecution inefficiencies; trials in distant courthouses; justice systems and players unfamiliar with or hostile to Indians and tribes; and the exploitation of system failures by criminals, more criminal activity, and further endangerment of everyone living in and near Tribal communities. When Congress and the Administration ask why is the crime rate so high in Indian country, they need look no further than the archaic system in place, in which Federal and State authority displaces Tribal authority at the expense of local Tribal control and accountability.

When Tribal law enforcement and courts are supported—rather than discouraged—from taking primary responsibility over the dispensation of local justice, they are often better, stronger, faster, and more effective in providing justice in Indian country than their non-Native counterparts located elsewhere. After listening to and hearing from Tribal communities, the Commission strongly believes that for public safety to be achieved in Indian country, Tribal justice systems must be allowed to flourish, Tribal authority should be restored to Tribal governments when they request it, and the Federal government in particular needs to take a back seat in Indian country, enforcing only those crimes that it would enforce in any case, on or off reservation. The Federal trust responsibility to Tribes turns on the consent of Tribes, not the imposition of Federal will. The Commission also believes that what is not warranted is a top-down, prescriptive Federal solution to the problem.

FINDINGS AND CONCLUSIONS: INDIAN COUNTRY JURISDICTION AND THE INDIAN CIVIL RIGHTS ACT

In addition to its desire to protect public safety, Congress considered the overlay of Federal and State law (through P.L. 85-280) in Indian country to extend protections—similar but not identical to the Bill of Rights—to defendants, juveniles, victims, and witnesses. Its presumption was that Tribal criminal justice systems could not protect the rights of either Tribal or U.S. citizens, at least in a manner similar to the U.S. Constitution and Federal civil rights laws. The Commission has studied this and other issues in response to TLOA's directive to examine the effect of the Indian Civil Rights Act of 1968 (ICRA).

Without question, ICRA infringes on Tribal authority: it limits the powers of Tribal governments by requiring them to adhere to certain Bill of Rights protections, including the equal protection and due process clauses. At the same time, because ICRA does not incorporate certain other constitutional limitations—including the guarantee of a republican form of government, the prohibition against an established state religion, the requirement for free counsel for indigent defendants, and the right to a jury trial in civil cases—the Act may be viewed as a validation of Tribal self-government. Undoubtedly, the omissions reflect Congress' effort to respect some measure of Tribal sovereignty. Thus, while ICRA represents an

“The Indian Law and Order Commission has concluded that criminal jurisdiction in Indian country is an indefensible maze of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations.”

ntrusion on Tribal authority, it seeks to accommodate essential differences as well.

In terms of rights protections, ICRA has had both positive and negative effects. It has reinforced basic assumptions concerning the rights of defendants charged with crimes, thereby increasing community members' and outsiders' confidence in Tribal judicial systems. Tribal courts are mindful of ICRA's value in this respect and have been faithful in enforcing it. There is little or no scholarly research or other evidence showing significant violations of ICRA by Tribal courts that go uncorrected by Tribal appellate courts; in fact, what research exists, although limited, suggests that there is no systematic problem of under-protection.¹⁶ More generally, ICRA respects the obvious reality that all Tribal citizens are likewise citizens of the United States and thereby entitled to constitutional protections against arbitrary governmental action of any kind, as (in the case of the 2013 Violence Against Women Act Amendments) are nontribal defendants whose prosecutions may now be adjudicated in Tribal criminal court proceedings.

In this regard, ICRA's failure to provide the assistance of counsel without charge to indigent defendants except for cases brought under TLOA's expanded sentencing authority is especially problematic. ICRA only bars a Tribe from denying "to any person" the right "at his own expense to have the assistance of a counsel for his defense."¹⁷ When ICRA was enacted, Congress likely did not contemplate felony prosecutions by Tribal courts, so this right to counsel, normally afforded to indigent defendants charged with a felony,¹⁸ was not included in ICRA. Similarly, the applicable Federal law at the time did not extend representation rights to misdemeanor offenders, so there was no reason for the Congress to require it of Tribes.

Since 1968, however, both Tribal and Federal practice have changed dramatically. Tribal concurrent jurisdiction over many felonies has been affirmed, and Tribes have been increasingly active in prosecuting felonies under Tribal law. On the Federal side, the right to be provided counsel is guaranteed to indigent defendants charged with misdemeanors in cases where imprisonment is a possibility.¹⁹

Moreover, the Commission heard extensive testimony from public defenders, prosecutors, and judges alike, concluding that without the right to counsel, the right to due process itself is compromised. In sum, ICRA is out of step with Tribal court practice, diverges from the now broadly accepted norm for assistance of counsel in adversarial, punitive proceedings, and fails to create a coherent body of law. In at least these ways, and excepting those cases brought under the enhanced sentencing provisions in TLOA, the Commission finds that today ICRA is insufficient for the protection of Tribal citizen rights. Significantly, the Commission also finds that amending ICRA would dovetail with accepted procedure in a growing number of Tribal courts, especially those that are operating with an increasing degree of judicial independence.

“ICRA is out of step with Tribal court practice, diverges from the now broadly accepted norm for assistance of counsel in adversarial, punitive proceedings, and fails to create a coherent body of law.”

Congress' assumption that Tribal courts would handle only misdemeanors gives rise to another contemporary problem with ICRA: its limitation on Tribal court sentencing. The original limits of 6 months' imprisonment, a \$500 fine, or both have been modified to 1 year imprisonment, a \$5,000 fine, or both. Further, if a Tribe meets standards specified in TLOA, penalties can increase to 3 years' imprisonment for up to three offenses and a \$15,000 fine, plus the opportunity to "stack" or add multiple charges for longer potential periods of incarceration. These modifications are welcome; nonetheless they are insufficient.

While the Commission notes that some Tribes do not use incarceration as a punishment (Chapter 5), these limits prevent all Tribes from meting out sentences appropriate for a major crime. These limits affect Tribal sovereignty by giving a Native nation little choice. If a Tribe wants to access a more appropriate sentence and there is concurrent jurisdiction, it must cede prosecution to the Federal government or a State government. If a too-short Tribal sentence is the only option (for example, if a concurrent authority fails to prosecute or if there is only a Tribal case), public safety and victims' rights are affected. Ultimately, the sentencing restrictions erode Tribal community members' and outsiders' confidence in Tribal governments' ability to maintain law and order in Indian country.

A specific example underscores the issue. Under Federal law, the crime "assault with a dangerous weapon"²¹ comes with the penalty of up to 10 years imprisonment. Even if a Tribe (in a non-P.L. 85-280 setting) were to adopt a statute that exactly matched the Federal crime, its prosecutor could only seek a sentence of up to 1 year in jail, or under TLOA enhanced sentencing, 3 years for a single offense. To access a longer sentence, the Tribal prosecutor must refer the case for Federal prosecution. If, however, the United States Attorney does not prosecute the crime, the only option left is for the Tribe to take the case back and prosecute with the lesser, ICRA-restricted sentence. After that short time, the perpetrator would again be at large in the community, free to commit more violence.

This is intolerable and fuels the public safety crisis in Indian country. Such disparities lead to widespread public disenchantment with the delivery of justice in Indian country, comparatively fewer Federal prosecutions, too many restrictions and constraints on the Tribal criminal justice system, and lack of confidence by victims and the Tribal community that crime will be vigorously pursued and deterred.

Several witnesses in Commission field hearings called on Congress to amend IRCA to respond to both the lack of access to indigent defense for persons charged with serious crimes in Tribal court and the limits on sentencing authority. The Commission's own recommendation, as detailed below, is to follow the path already laid down by TLOA, providing broader access to appropriate sentences to Tribes that are able to guarantee defendants' Federal constitutional rights.

Public defenders are as committed to principles of public safety as prosecutors are. We want to ensure that an individual's rights are protected all along the path of the justice system, the path for all of us, and we don't want to see people wrongfully convicted, certainly not wrongfully accused.... (W)e want to ensure that justice is done. And at Tulalip that's what we are trying to do.

*Janice Ellis, Prosecutor Tulalip Tribes
Testimony before the Indian Law and Order Commission, Hearing at Tulalip Indian Reservation
September 7, 2012*

We don't want to mistreat anybody. We want to give due process, a fair trial.

William Johnson, Chief Judge, Confederated Tribes of the Umatilla Indian Reservation²⁰

RECOMMENDATIONS

In examining the complexities and deficiencies of criminal jurisdiction in Indian country (and other affected Native communities²²), the Commission seeks to meet three objectives:

- To consider potential solutions that have the promise of practical, real-world success in reducing crime and improving the safety of all persons in Indian communities, especially for women and children;
- To proceed in a manner that respects the sovereignty and autonomy of Indian Tribes; and
- To respect and enforce the Federal constitutional rights of crime victims and criminal defendants.

Consistent with these objectives and keeping in mind the importance of Tribal consent, the Commission rejects more “work-arounds” and instead embraces a far-reaching vision of reform to Indian country criminal jurisdiction. All Indian Tribes and nations—at their own sole discretion, and on their own timetable, but consistent with the guarantees to all U.S. citizens afforded by the U.S. Constitution—should be able to “opt out” of existing schemes of imposed authority over criminal matters in Indian country and be restored to their inherent authority to prosecute and punish offenders.

1.1: Congress should clarify that any Tribe that so chooses can opt out immediately, fully or partially, of Federal Indian country criminal jurisdiction and/or congressionally authorized State jurisdiction, except for Federal laws of general application. Upon a Tribe’s exercise of opting out, Congress would immediately recognize the Tribe’s inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe’s lands as defined in the Federal Indian Country Act.²³ This recognition, however, would be based on the understanding that the Tribal government must also immediately afford all individuals charged with a crime with civil rights protections equivalent to those guaranteed by the U.S. Constitution, subject to full Federal judicial appellate review as described below, following exhaustion of Tribal remedies, in addition to the continued availability of Federal habeas corpus remedies.

1.2: To implement Tribes’ opt-out authority, Congress should establish a new Federal circuit court, the United States Court of Indian Appeals. This would be a full Federal appellate court as authorized by Article III of the U.S. Constitution, on par with any of the existing circuits, to hear all appeals relating to alleged violations of the 4th, 5th, 6th, and 8th Amendments of the U.S. Constitution by Tribal courts; to interpret Federal law related to criminal cases arising in Indian

country throughout the United States; to hear and resolve Federal questions involving the jurisdiction of Tribal courts; and to address Federal habeas corpus petitions. Specialized circuit courts, such as the U.S. Court of Appeals for the Federal Circuit, which hears matters involving intellectual property rights protection, have proven to be cost effective and provide a successful precedent for the approach that the Commission recommends. A U.S. Court of Indian Appeals is needed because it would establish a more consistent, uniform, and predictable body of case law dealing with civil rights issues and matters of Federal law interpretation arising in Indian country. Before appealing to this new circuit court, all defendants would first be required to exhaust remedies in Tribal courts pursuant to the current Federal Speedy Trial Act, 18 U.S.C. § 3161, which would be amended to apply to Tribal court proceedings to ensure that defendants' Federal constitutional rights are fully protected. Appeals from the U.S. Court of Indian Appeals would lie with the United States Supreme Court according to the current discretionary review process.²⁴

The mirror of this special circuit court jurisdiction at the Tribal court level is this: Tribal courts do not become Federal courts for general purposes. Tribes retain full and final authority over the definition of the crime, sentencing options, and the appropriate substance and process for appeals outside of the narrow jurisdiction reserved for the new Federal circuit court.

It has been argued that the government-to-government relationships between Tribes and the U.S. government mean that the U.S. Supreme Court is the appropriate initial forum for any appeal of a Tribal court decision. While this may be true in concept, the Commission also seeks to ensure that Tribal court operations continue in the smoothest manner possible and that appeals are minimally disruptive to the ongoing delivery of justice services in Tribal communities.

With 566 federally recognized tribes in the United States, the U.S. Supreme Court might be asked to hear many appeals from Indian country, but choose only a few to remain responsive to the wide array other issues and subject matters brought to its attention. Tribal courts could become paralyzed by the wait and by the loss of confidence generated by the cloud of uncertainty resulting from dozens of denied appeals. Having a panel of Article III judges²⁵—all with the highest expertise in Indian law, ruling in a forum designed in consultation between the U.S. government and Tribal governments—hear such cases first meets not only the demands of practicality, but also reinforces Tribal sovereignty.²⁶

1.3: *The Commission stresses that an Indian nation's sovereign choice to opt out of current jurisdictional arrangements should and must not preclude a later choice to return to partial or full Federal or State criminal jurisdiction. The legislation implementing the opt-out*

provisions must, therefore, contain a reciprocal right to opt back in if a Tribe so chooses.

1.4: Finally, as an element of Federal Indian country jurisdiction, the opt-out would necessarily include opting out from the sentencing restrictions of Indian Civil Rights Act (ICRA). Critically, the rights protections in the recommendation more appropriately circumscribe Tribal sentencing authority. Like Federal and State governments, Tribal governments can devise sentences appropriate to the crimes they define. In this process of Tribal code development, Tribes may find guidance in the well-developed sentencing schemes at the State and Federal levels.

The Commission recognizes that this vision of restored inherent authority for all Tribes that so choose expanded sovereignty and local control in a manner that fully protects all defendants' Federal civil rights is a long-term one. That the current system is entrenched and complex likely poses a challenge for even the most prepared Native nations. Some Tribes may decide never to go down that path. Others may prefer not to subject their justice systems to Federal judicial review. In light of this, the opt-out recommendation is designed to provide Tribes with enhanced autonomy and choice, as well as greater leverage in entering into intergovernmental agreements with Federal and State authorities. This recommendation aims to create space in Federal law for an individual Tribe to opt out of the current jurisdictional architecture at the scale and pace it chooses, based on its capacity, resources, and governance preferences.

The Commission also respects that restoration of Tribes' sovereign authority, taken away from them through a long process of subjugation and neglect, can occur only with the trust and respect of the non-Indian community, including Federal, State, and local governments, the general non-Indian population, and the urban and rural communities adjacent to or inside Indian country. That trust depends, in part, upon the sovereign Tribes protecting the rights of citizens of the Tribes, States, and the United States. Requiring Tribes that opt out in full or in part to meet the standards of the 4th, 5th, 6th, and 8th Amendments to the U.S. Constitution, as interpreted by Tribal and then Indian Circuit Court Federal judges, will go far in building that trust.

The Commission does not envision that every Tribe with the opportunity to choose which criminal jurisdiction arrangements will govern its territory will choose to operate a system entirely on its own. Choice includes the option not only to exit various federally imposed configurations, but also to collaborate with other governments. For example, if a Tribal government finds that it is serving a Tribe's needs appropriately, it may opt to continue its present cross-deputization, statutory State peace officer status, special commission, and other shared authority arrangements. Similarly, a Tribal government developing new capacity may opt for these current possibilities. The arrangements might

also include wholly new intergovernmental collaborations that Tribal governments and their partner governments devise. This is the essence of choice.

Choice also means that any expansion of jurisdiction and associated changes to Tribal justice systems need not result in the diminishment of effective, traditional components of those systems, nor diminish the opportunity to create them. Tribes would need to develop procedures by which defendants could, in a considered manner, waive their Tribal constitutional and ICRA rights—consenting to Tribal court jurisdiction—as a first step in participation on the alternative track. These alternative methods for delivering justice should be encouraged: research on the healing to wellness courts and other traditional processes suggests that they often provide the best chance to reduce recidivism and help defendants change their lives.²⁷ As a final note, nothing would prevent a Tribe from continuing to use traditional justice processes for those disputes and criminal violations that always have been under Tribal jurisdiction.

Several final comments on the Commission’s recommendations relate to applicability and funding.

First, the proposed mechanism under which Tribes can opt out of congressionally authorized State jurisdiction might appear to present an issue of federalism. The Commission believes that that is not the case; in P.L. 85-280, Congress gave more authority to the States than the U.S. Constitution requires or contemplates. Thus, the retrocession mechanism, wherein a State returns the jurisdiction back to the Federal government, was a congressionally created artifice that respected the States’ prerogatives, but was not required by any means. Indeed, in the Tribal Law and Order Act of 2010, Congress specifically allowed P.L. 85-280 Tribes to petition the Federal government to apply concurrent Federal criminal jurisdiction even while leaving the congressionally authorized State jurisdiction intact. Clearly, however, Congress has the power to take the grant of State jurisdiction over criminal prohibitory offenses back at any time. The Commission believes a Tribe should have the option of making this choice, and the Federal government should be obliged to respond.

Second, while the recommendation is for a process to be created that allows Tribes currently under Federal criminal jurisdiction, P.L. 85-280 criminal jurisdiction, or settlement State criminal jurisdiction to opt out of that jurisdiction, the Commission also recognizes the unique configuration of criminal jurisdiction in the State of Alaska. The extension of the recommendation to Alaska is that Tribes with Federal land should be afforded the same opportunities as Tribes in the lower 48 states. (More detail on Alaska and the Commission’s recommendations for that unique geographic and jurisdictional setting is provided in Chapter 2.)

Third, the Commission acknowledges that enhanced Tribal criminal justice capacities, such as law-trained judges, written codes, appropriate

jail space, etc. will increase costs for Tribes. Yet, the Commission also does not intend that only “well off” Tribes—those that could afford to develop expanded capacity on their own—be able to opt out of imposed jurisdictional arrangements. Indeed, throughout the course of its field hearings, the Commission was repeatedly struck by the number of Tribes that, despite extraordinary budget challenges, are nonetheless asserting enhanced criminal and civil jurisdiction in order to strengthen self-governance and to put even more Tribal sovereignty into action.

The Commission acknowledges the budget challenges our country faces. Nonetheless, the process Congress develops for opting out should include enhanced funding for Tribes. Over time, as less effective Federal and State systems are scaled down or even eliminated in areas where Tribes choose this path, locally controlled and accountable Tribal justice systems will save money. (More detail on the possible sources of funds is provided in Chapter 3.) However, the Commission points to the success of the Indian Self-Determination and Education Assistance Act of 1975 at transferring to Tribes money formerly spent by Federal personnel in Indian country. As Tribes reassert jurisdiction, there is broad scope across many Federal agencies to replicate these transfers.²⁸ Money should flow to the agencies and governments providing criminal justice services in Indian country, and as those agencies and government change, funding flows should change as well.

CONCLUSION

Through TLOA and the VAWA Amendments, Congress set forth a path toward greater Tribal government authority over law and justice in Tribal communities. The Commission’s recommendations strive to continue this vital work. By balancing expansion of jurisdiction as Indian nations deem themselves ready, and by protecting defendants’ individual Federal constitutional rights, through the creation of the new U.S. Court of Indian Appeals, the Commission embraces the best aspects of all three systems—Federal, State, and Tribal. By removing mandates rather than prescribing responsibility, the Commission’s approach departs from the historical pattern of dictating to Tribes. Tribes must be free to choose. By recognizing the power in local control, these recommendations provide a tribally based, comprehensive solution to the problems with law and order in Indian nations that fully comports with the American Way: Local control for local communities instead of Federal command-and-control policies.

ENDNOTES

¹The term “laws of general application” refers to laws that apply to all persons in the United States, such as anti-terrorism and racketeering laws among other offenses.

²It also runs counter to long-standing Native traditions and views. For thousands of years, Indian nations provided local management of justice; this arrangement upheld and respected each nation’s specific rights and institutional ways of providing community order and justice.

³See Carole Goldberg, *In Theory, In Practice: Judging State Jurisdiction in Indian Country*, 81 COLO. L. REV. 1027 (2010); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); AND STEWART WAKING, MIRIAM JORGENSEN, SUSAN MICHAELSON, & MANLEY BEGAY, *POLICING ON AMERICAN INDIAN RESERVATIONS* (2001), especially chapters 5 and 6, available at <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

⁴The Commission received similar information about Wyoming, where the Eastern Shoshone and Northern Arapaho Tribes’ reservation is located approximately 300 miles from where the U.S. District Court is based.

⁵OVERSIGHT HEARING ON FEDERAL DECLINATIONS TO PROSECUTION CRIMES IN INDIAN COUNTRY BEFORE S. COMM. ON INDIAN AFFAIRS, 110th Cong. 47 (2008) (statement of Janelle F. Doughty, Director, Department of Justice and Regulatory, Southern Ute Indian Tribe) available at <http://www.indian.senate.gov/public/files/September182008.pdf> (“Trying cases that meet the elements of the Major Crimes Act 350 miles from the jurisdiction in which they occur stands as a road block to justice and must be resolved”).

⁶U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 11-252, *INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS* (2011) at 17-18, available at <http://www.gao.gov/new.items/d11252.pdf>.

⁷See Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, THE ATLANTIC, Feb. 22, 2013, available at <http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273591/>, for an extended example of the Three Affiliated Tribes’ situation (on Fort Berthold Indian Reservation in North Dakota).

⁸This description is excerpted from S. 797, THE TRIBAL LAW & ORDER ACT 2009: Hearing Before the S. Comm. on Indian Affairs (2009) (statement of Troy A. Eid) at 40-41, available at <http://www.indian.senate.gov/hearings/hearing.cfm?hearingid=e655f9e2809e5476862f735da14c3a5f&witnessId=e655f9e2809e5476862f735da14c3a5f-1-5>. Chairman Eid had served as the United States Attorney for the District of Colorado when *United States v. Wood* was prosecuted.

⁹435 U.S. 191 (1978).

¹⁰The U.S. government negotiated more than 800 treaties with Indian nations from 1775 to 1871. Approximately 270 of these treaties were ratified by the U.S. Senate in compliance with the U.S. Constitution.

¹¹DUANE CHAMPAGNE & CAROLE GOLDBERG, *CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280* (2012). Among those findings echoed in Commission hearings were (1) county-State police overstepping their authority through excessive force, disrespect of Tribal law, discrimination, and arrests without proper warrants; (2) a lack of county-State police presence or minimal patrolling; (3) inadequate county-State police response; (4) a perceived lack of thoroughness and timeliness in investigations; (5) perceived poor communications by county-State police with tribal communities; (6) a lack of respect by county-State police for Tribal culture and Tribal governmental authorities; and (7) overall perceptions of unfairness.

¹²Testimony of Brent M. Leonhard, September 7, 2011, Hearing of the Indian Law and Order Commission, Tulalip Indian Reservation, at 2, WA, available at https://www.indian-lawandordercommission.com/resources/documents/ILOC%20Field%20Hearing_Tulalip-WA_090711_Testimony_BLeonhard.pdf.

¹⁵ Oregon Senate Bill 412-C (2011), amending Or. Rev. Stat. § 135.005, et. seq.

¹⁴ Doughty testimony, *supra* footnote 54 at 48 (detailing how the Southern Ute Indian Tribe and the U.S. Attorney’s Office for the District of Colorado created an on-site SLEC training program, approved by the BIA’s Indian Police Academy, that trained Tribal officers to make Federal arrests). Conducted in 2007-08, this pilot program trained Southern Ute law enforcement officers to act as Federal agents in investigating crimes committed on the Southern Ute Indian Reservation. The pilot program training sessions were held in the Tribe’s headquarters in Ignacio, Colorado, and taught by prosecutors from the U.S. Attorney’s Office in Denver. In her testimony, Doughty, then the Tribe’s chief law enforcement officer, describes how just months after the initial SLEC trainings were completed, Southern Ute Tribal criminal investigator Chris Naranjo used his SLEC card on May 24, 2008, to arrest a non-Indian who had serially abused his girlfriend, a Southern Ute Tribal member. Naranjo responded to a suspected domestic violence assault and was able to effectuate a Federal arrest, which the U.S. Attorney’s Office was then able to prosecute. The defendant was later convicted in U.S. District Court in Denver and imprisoned.

¹⁵ Testimony of Edward Reina, Jr., Hearing of the Indian Law and Order Commission, Salt River Indian Reservation, AZ, January 13, 2012, at 2, available at https://www.indianlawandordercommission.com/resources/documents/ILOCFH_PhxAZ_Testimony_EReina.pdf

¹⁶ THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley, eds., 2012). See especially the chapter by Mark Rosen.

¹⁷ 25 U.S.C. § 1302(a)(6).

¹⁸ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁹ Following the decisions in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), *Scott v. Illinois*, 440 U.S. 367 (1979), and *Alabama v. Shelton*, 535 US 654 (2002), the right to be provided counsel is guaranteed to indigent defendants charged with misdemeanors in cases where imprisonment is a possibility.

²⁰ Quoted in Sarah Cline, *Sovereignty under Arrest: Public Law 280 and Its Discontents*, (May, 20, 2013) (unpublished master’s thesis, Oregon State University) at 54, available at <http://ir.library.oregonstate.edu/xmlui/handle/1957/39175>.

²¹ 18 U.S.C. § 115(3)

²² Most Alaska Native villages and towns may not currently meet the definition of Indian country, but ultimately suffer from similar problems and should be afforded similar opportunities.

²⁵ 18 U.S.C § 1151.

²⁴ To respect Tribal self-governance, the enabling legislation creating this new court could clarify that Federal jurisdiction shall not extend to matters relating to Tribal elections, membership enrollment, and other matters internal to Tribal self-governance. Determinations of what constitutes an “internal matter” of a Tribe can be accomplished through in-camera (confidential with the court) proceedings that protect the integrity of Tribal customs and tradition.

²⁵ As a practical matter, this means that the President nominates the judges, the Senate confirms them, and they serve for life. Nominations would be made in consultation with Tribes and each panel would consist of at least three judges. Ideally this new Federal circuit court should be located somewhere within Indian country itself.

²⁶ It might also be reasonably expected that in making nominations to the U.S. Court of Indian Appeals, Presidents should take into consideration expertise in Indian law and legal practice. In nominating such candidates, and in the U.S. Senate’s confirmation proceedings, it seems likely that many applicants will be Native American or Alaska Natives. This would be a welcome development in a Federal court system that, since its inception in the Judiciary Act of 1789 (1 Stat 75), has been virtually devoid of any Native American or Alaska Native judges. This, too, creates institutional integrity issues that the new court would help address.

²⁷ A full discussion of this result is available in Chapter 5.

²⁸ For a complete discussion, see Kevin K. Washburn, *Federal criminal law and tribal self-determination*, 84 N.C. L. Rev. 779 (2006).



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Negotiating Jurisdiction: Retroceding State Authority
Over Indian Country Granted by Public Law 280

Prof. Robert T. Anderson

NEGOTIATING JURISDICTION: RETROCEDING STATE AUTHORITY OVER INDIAN COUNTRY GRANTED BY PUBLIC LAW 280

Robert T. Anderson*

Abstract: This Article canvasses the jurisdictional rules applicable in American Indian tribal territories—"Indian country." The focus is on a federal law passed in the 1950s, which granted some states a measure of jurisdiction over Indian country without tribal consent. The law is an aberration. Since the adoption of the Constitution, federal law preempted state authority over Indians in their territory. The federal law permitting some state jurisdiction, Public Law 280, is a relic of a policy repudiated by every President and Congress since 1970. States have authority to surrender, or retrocede, the authority granted by Public Law 280, but Indian tribal governments should be allowed to determine whether and when state jurisdiction should be limited or removed.

The Public Law 280 legislation was approved by Congress in the face of strenuous Indian opposition and denied consent of the Indian tribes affected by the Act . . . The Indian community viewed the passage of Public Law 280 as an added dimension to the dreaded termination policy. Since the inception of its passage the statute has been criticized and opposed by tribal leaders throughout the Nation. The Indians allege that the Act is deficient in that it failed to fund the States who assumed jurisdiction and as a result vacuums of law enforcement have occurred in certain Indian reservations and communities. They contend further that the Act has resulted in complex jurisdictional problems for Federal, State and tribal governments.

S. COMM. ON THE INTERIOR & INSULAR AFFAIRS, 94TH CONG., BACKGROUND REP. ON PUBLIC LAW 280 (Comm. Print 1975) (statement of Sen. Henry M. Jackson, Chairman).

Senator Jackson’s statement accurately described the issues then and now. This Article reviews the legal history of federal-tribal-state relations in the context of Public Law 280 jurisdiction. Washington State has recently taken progressive steps that could serve as the foundation for a national model to remove state jurisdiction as a tribal option. The modern Indian self-determination policy is not advanced by adherence to termination era experiments like Public Law 280. The Article concludes that federal legislation should provide for a tribally-driven retrocession model and makes proposals to that end.

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INTRODUCTION

The United States was founded upon the principle of the “consent of

the governed,”¹ although this proposition has dubious validity with respect to Indian tribes and their citizens. Despite early respect for tribal sovereignty and complete independence from state jurisdiction, the Supreme Court recognized nearly unlimited power in Congress to unilaterally alter the jurisdictional arrangements in tribal territories.² This power over Indian tribes and their territory was exercised without the meaningful consent of the affected tribes, and thus is morally suspect.³ Nevertheless, Congress utilized its authority to assert federal control of criminal matters in Indian country, and later to authorize some state criminal and civil jurisdiction over tribes and their territories.

In 1953, Congress passed Public Law 280 (P.L. 280),⁴ which required six states to assert jurisdiction over Indian country, and opened the door for other states to do the same if they wished.⁵ It provided no role for the affected tribes in state decisions to assert jurisdiction. The unilateral imposition of state jurisdiction has long been regarded as offensive to tribal governments and Indian people because the states, as opposed to the federal government, in many ways remain the “deadliest enemies” of the tribes.⁶ In 1963, Washington State asserted jurisdiction over Indian

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”); WASH. CONST. art. I, § 1 (“All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”); *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) (“The Constitution is based on a theory of original, and continuing, consent of the governed.”).

2. Compare *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (Georgia has no jurisdiction over non-Indians within Cherokee Reservation), with *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980) (“[T]ribal lands are subject to Congress’ power to control and manage the tribe’s affairs. But the court must also be cognizant that ‘this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions.’”). See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) (“Long ago the Court departed from Mr. Chief Justice Marshall’s view that ‘the laws of [a state] can have no force’ within reservation boundaries”) (quoting *Worcester*, 31 U.S. at 520). See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.01, at 499–514 (Neil J. Newton, Robert Anderson et al. eds., 2005) [hereinafter COHEN]. The 2012 edition of COHEN’S HANDBOOK OF FEDERAL INDIAN LAW was released as this Article was in the final editing stages. While the page numbering has changed, most of the section numbers remain the same and are included here for ease of reference.

3. For a detailed examination of these consent principles, see Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989), and Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45 (2012).

4. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.

5. *Id.*

6. *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“Because of the local ill feeling, the

country and Indian people in a complex fashion that bewilders all who enter the jurisdictional maze.⁷ This assumption of state jurisdiction ignores the democratic consent principle and is inconsistent with modern policies promoting tribal self-determination.⁸ The separate sovereign status of tribes, manifested in the commerce clause of the Constitution⁹ and the foundational decisions of the Supreme Court,¹⁰ supports continued recognition of tribal territories as areas where tribal law is paramount to the exclusion of state law. However, recognizing that Congress and the Supreme Court have in fact frequently authorized the assertion of state authority, Indian tribes are positioned as supplicants to Congress, or the states themselves, when requesting that state jurisdiction over Indian country be withdrawn—or retroceded. Indeed, some states view their jurisdiction over Indian country as the historic norm when in fact it is a relatively recent development.

This Article outlines the legal history of federal-tribal relations, primarily in the criminal jurisdiction context, and examines in some detail the congressional authorization of state jurisdiction over Indian country nationwide and in the Washington-specific context. It reveals the extreme complexity of civil and criminal jurisdiction over Washington's Indian country, and describes recent progressive state legislation that provides tribes with a path to remove state authority, albeit dependent on the good will of the Governor of the state. The Article next reviews several options for adjusting state and tribal jurisdiction in the areas governed by the Indian Child Welfare Act and the Indian Gaming Regulatory Act. It concludes with the recommendation that Congress provide a tribally-driven option for removing state jurisdiction over Indian country. There should be a process of negotiation and information sharing with the states that obtained this non-consensual jurisdiction, but in the end a tribal request for the retrocession of state jurisdiction should be between the affected Indian tribe and the United States. The process should provide an opportunity for interest-based discussions to ensure that the exercise of criminal and civil jurisdiction in Indian country is carried out in a way

people of the states where they [Indians] are found are often their deadliest enemies.”).

7. The Supreme Court upheld this complex arrangement in *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979).

8. See generally COHEN, *supra* note 2, § 1.07, at 97–113.

9. U.S. CONST. art. I, § 8, cl. 3.

10. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1577–81 (1996) (describing the foundational principles of federal Indian law).

that best serves all citizens.

Part I of this Article provides historical context for the modern jurisdictional rules applicable to Indian tribes and their territory. Part II explains the baseline criminal and civil jurisdictional rules that operate in Indian country. Part III outlines the manner and scope of P.L. 280's jurisdictional grant to the states. Part IV reviews how Washington asserted jurisdiction under P.L. 280, and reveals the complex jurisdictional scheme. Part V details the state legislation that became effective in June 2012, and established a process for the elimination of some or all state jurisdiction upon the request of an affected Indian tribe. Part VI explores the legal and policy issues implicated in what is essentially a negotiation of federal, tribal, and state sovereignty under P.L. 280's framework. It also suggests approaches to federal legislation to guide the process in a manner consistent with modern tribal self-determination policy.

I. INDIAN TRIBES ARE SOVEREIGNS RECOGNIZED UNDER FEDERAL LAW AND FREE OF STATE JURISDICTION ABSENT TRIBAL AGREEMENT OR FEDERAL LAW TO THE CONTRARY

The Indian Commerce Clause was included in the Constitution to center authority over Indian affairs in Congress and to deny state jurisdiction within Indian country absent some delegation from Congress or common law rule. In *Worcester v. Georgia*,¹¹ the Court rejected Georgia's assertion of criminal jurisdiction over a non-Indian present within the Cherokee Nation without a license required by state law.¹² Chief Justice Marshall explained that Indian tribes were quasi-independent sovereigns not subject to state jurisdiction.¹³ Now, Indian tribes, the federal government, and the states share authority within Indian country as a result of treaties, federal statutes, and federal common law. The modern definition of "Indian country," found in the federal criminal code, encompasses Indian reservations, allotments, and

11. 31 U.S. (6 Pet.) 515 (1832).

12. *Id.* at 559–61; *see generally* COHEN, *supra* note 2, § 6.01[2], at 501–03.

13. "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." *Worcester*, 31 U.S. at 559–61. Earlier, in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court ruled that the Cherokee Nation was not a foreign nation within the meaning of Article III of the Constitution and thus could not invoke the Supreme Court's original jurisdiction to challenge Georgia's laws purporting to regulate the Nation.

dependent Indian communities.¹⁴ The Supreme Court later ruled that this definition is also generally applicable in the civil context,¹⁵ though there are many other definitions applicable in particular situations.¹⁶

Treaty negotiations with western tribes took place as the United States gained new territory from foreign nations. Property used and occupied by Indian nations could not be transferred except by treaties or other agreements ratified by Congress.¹⁷ These tribal property rights were based on aboriginal Indian occupancy¹⁸ and were said to be as “sacred as the fee simple of the whites.”¹⁹ Three hundred and sixty-seven treaties with Indian tribes were negotiated and ratified between 1778 and 1871.²⁰ The treaties furthered peaceful relations with the tribes and provided access to vast areas for non-Indian settlement.²¹ The United States recognized permanent reservations, and, primarily in the upper-Midwest and Pacific Northwest, the tribes reserved off-reservation hunting and fishing rights.²² However, when non-Indians wanted to settle the land previously “guaranteed” to the tribes by treaty, most of the “permanent” tribal homelands were drastically reduced in size.²³

14. 18 U.S.C. § 1151 (2006).

15. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

16. *See Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1293 (D.C. Cir. 2000) (surveying various definitions of “reservation”).

17. 25 U.S.C. § 177 (2006).

18. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *see also* COHEN, *supra* note 2, § 15.04[2], at 971 (“The Court described the tribal interest in land variously, as a ‘title of occupancy,’ ‘right of occupancy,’ and right of possession . . .”). The common shorthand term for these property rights is “aboriginal title.” *See* *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233–34 (1985); *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 669 n.5, 676 (1974).

19. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835). Of course, the Supreme Court in 1955 created a gaping hole in the fabric of aboriginal title when it held that “unrecognized Indian title” in southeast Alaska was not protected by the Just Compensation Clause of the Fifth Amendment. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); *see* Joseph Singer, *Erasing Indian Country: The Story of Tee-Hit-Ton Indians v. United States*, in *INDIAN LAW STORIES* 229 (Carole Goldberg et al. eds., 2011).

20. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES* 1 (1994).

21. *See, e.g.*, Act of June 5, 1850, ch. XVI, 9 Stat. 437 (authorizing the President “to appoint one or more commissioners to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if found expedient and practicable, for their removal east of said mountains; also, for obtaining their assent and submission to the existing laws regulating trade and intercourse with the Indian tribes in the other Territories and of the United States”).

22. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

23. For example, Congress confiscated the Black Hills of South Dakota through an “agreement” that amounted to a taking of the tribe’s recognized title to the land in violation of the Fifth Amendment. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 377–83 (1980).

The promise of permanent homelands also faded during the 1850s when the Senate ratified treaties with tribes that authorized the breakup of tribal lands into individual “allotments.”²⁴ The federal retreat from the consent model increased when Congress ended treaty-making in 1871.²⁵ The policy of ending the reservation system culminated with the adoption of the General Allotment Act,²⁶ which reduced the Indian land base from 156 million acres in 1881 to approximately forty-eight million acres in 1934.²⁷ Congress returned to the public domain lands that were considered “surplus” to Indian needs.²⁸ While previous reservations were generally under exclusive tribal ownership, the new policies allowed an influx of non-Indians within reservation boundaries. This resulted in a checkerboard pattern of land ownership within reservations and introduced many of today’s vexing jurisdictional problems.²⁹

Congress returned to earlier policies that supported protection of Indian land with the adoption of the Indian Reorganization Act (IRA) in 1934.³⁰ The IRA “halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands.”³¹ This return to support of tribal self-government and a secure Indian land base was short-lived, however, as less than twenty years later, Congress adopted a resolution calling for the

24. See Treaty with the Duwamish et al., art. 7, 12 Stat. 927 (1855); Treaty with the Omahas, art. 1, 10 Stat. 1043 (1854).

25. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as 25 U.S.C. § 71 (2006)) (“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 . . .”). Existing treaty rights were not impaired. *Id.* The United States continued to negotiate agreements with Indian tribes, which were then ratified by Congress. See, e.g., *Winters v. United States*, 207 U.S. 564 (1908) (construing agreement with the tribes of the Fort Belknap Reservation).

26. General Allotment (Dawes) Act of 1887, 24 Stat. 388. The Dawes Act gave the President authority to divide communal tribal lands into individual parcels to be held by tribal members. These “allotments” were protected from taxation and could not be sold without the consent of the Secretary of the Interior for a period of twenty-five years. After that they were to be held in fee simple status. 25 U.S.C. § 348 (2006). See generally COHEN, *supra* note 2, § 1.04, at 75–84.

27. COHEN, *supra* note 2, § 1.04, at 78–79.

28. See, e.g., *Solem v. Bartlett*, 465 U.S. 463 (1984).

29. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

30. Wheeler-Howard Act, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–79); see COHEN, *supra* note 2, § 1.05, at 86–88.

31. *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992). Today, Indian land holdings are estimated at 55.4 million acres, with approximately 44.4 million owned by tribes and eleven million held in the form of individual allotments. COHEN, *supra* note 2, § 15.01, at 965, § 16.03[4][a], at 1048.

“termination” of the federal-tribal relationship with certain Indian tribes.³² Although the termination period quickly fell into disfavor, its short tenure resulted in the end of the government-to-government relationship between the United States and over seventy federally recognized Indian tribes, and transferred jurisdiction over those tribes to the states.³³ This state control turned the historic federal-tribal relationship on its head and states began aggressively to assert jurisdiction over Indian country through laws such as P.L. 280.³⁴ As such, states began to view their claims of jurisdiction as the norm and viewed the presence of tribal reservations as unwanted jurisdictional enclaves that states opposed on principle, without examining the bona fide interests of the tribes or the state itself.³⁵

The presence of substantial numbers of non-Indians within Indian country and their presence on non-tribal land increased the states’ desires to assert jurisdiction over their non-Indian citizens in Indian territories. Recall, however, that it was Georgia’s assertion of jurisdiction over a non-Indian’s presence on the Cherokee Reservation that resulted in the categorical rule that states lacked jurisdiction within Indian country.³⁶ Changes in federal law were necessary for states to accomplish their end. With Indian peoples no longer physically separated from the non-Indian population, and their reservations now included within the exterior boundaries of many states, local racism and jurisdictional jealousy combined to increase efforts to reduce federal protection of tribal autonomy. Nowhere is this more true than in the context of criminal jurisdiction—the focus of P.L. 280. Before launching into the P.L. 280 issues that are the focus of this Article, a review of general criminal jurisdiction rules is necessary.

32. H.R. Con. Res. 108, 83d Cong. (1953) (directing the Secretary of the Interior to recommend tribes for termination); see COHEN, *supra* note 2, § 1.06, at 95. In general, “[termination] would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and social well-being would be repudiated; and the tribes themselves would be effectively dismantled.” Richard M. Nixon, Special Message to Congress on Indian Affairs (July 8, 1970), H.R. Doc. 91-363, at 1. *But see* Menominee Tribe v. United States, 391 U.S. 404 (1968) (termination of Menominee Indian Tribe did not abrogate tribal rights to hunt and fish free of state regulation).

33. See COHEN, *supra* note 2, § 1.06, at 95.

34. See *infra* Part III.

35. CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 249 (2005).

36. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

II. THE EVOLUTION OF CRIMINAL JURISDICTION IN INDIAN COUNTRY FROM EXCLUSIVE TRIBAL CONTROL TO AN INCREASED STATE ROLE IS INCONSISTENT WITH SELF-DETERMINATION AND CONSENT PRINCIPLES

Criminal jurisdiction in Indian country evolved from early acknowledgement of exclusive tribal jurisdiction over persons within aboriginal territories, to a gradual assertion of paramount federal authority over crimes involving tribal members and non-Indians. The federal government initially took a hands-off approach to intra-tribal disputes, but as the United States shifted toward assimilation, it asserted jurisdiction over major crimes between tribal members. Federal domination of criminal jurisdiction increased over time and was accompanied in 1968 by the reduction of tribal authority to impose punishments on criminal offenders in tribal court proceedings.³⁷ While there are many problems with the assertion and implementation of federal jurisdiction and policies, most evidence points to the conclusion that the exercise of state jurisdiction in the criminal law arena has made a bad situation worse.³⁸ Before exploring these issues more deeply, it is useful to set out the basic scheme governing criminal jurisdiction in Indian country.

The term “Indian country” is the geographic touchstone for application of the Indian law jurisdictional rules.³⁹ The modern definition was adopted in 1948 to take policy changes and various Supreme Court decisions into account.⁴⁰ Prior to 1948, the definitions of Indian country were supplied by Congress,⁴¹ or the Supreme Court as a matter of common law.⁴² In *United States v. John*,⁴³ the Court explained that while “earlier cases had suggested a more technical and limited

37. See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006) (giving an insightful and descriptive critique of the adverse effects of federal policies in the criminal justice area). Tribal sentencing authority was limited to six months in jail and a \$500 fine per offense, Pub. L. No. 90-284, § 202(7), 82 Stat. 77 (1968), and now stands at one year in jail and a \$10,000 fine, with the option to increase the penalties to three years per offense with a \$15,000 fine, provided certain conditions are met. 25 U.S.C. § 1302 (2006).

38. DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 200 (2012) [hereinafter CAPTURED JUSTICE].

39. See generally COHEN, *supra* note 2, § 3.04, at 182–99.

40. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (2006)).

41. Act of June 30, 1834, ch. 161 § 1, 4 Stat. 729.

42. *United States v. John*, 437 U.S. 634, 649 n.18 (1978) (citing *Bates v. Clark*, 95 U.S. 204 (1877)); see COHEN, *supra* note 2, § 3.04[2][b], at 184–88.

43. 437 U.S. 634.

definition of ‘Indian country,’” it was a “more expansive scope of the term that was incorporated in the 1948 revision of Title 18.”⁴⁴ The current statute defines Indian Country as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation*, (b) all dependent Indian communities . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, *including rights-of-way running through the same*.⁴⁵

This statute’s most often applied section is that dealing with “reservation” Indian country. Of particular importance here, the reservation component expressly includes lands patented in fee simple to non-Indians and state rights-of-way within reservations as Indian country.⁴⁶ The Supreme Court noted that the reason for the unified treatment of all land within reservations was to facilitate effective law enforcement by avoiding the need to determine land status on a tract-by-tract basis to determine the bounds of federal criminal jurisdiction.⁴⁷

A. *Federal Jurisdiction over Indians in Indian Country Increased as Indian Nations Succumbed to Federal Domination*

Congress first treaded lightly when passing criminal laws affecting Indians and their territory, but gradually increased federal power as the non-Indian population grew. The Trade and Intercourse Act of 1790 made crimes by non-Indians against Indian victims federal offenses.⁴⁸ Offenses by Indians against non-Indians were generally dealt with through diplomatic channels in the early days of federal-tribal relations. In 1817, Congress adopted the first version of the Indian Country Crimes Act (ICCA), which made offenses by non-Indians and Indians in Indian territory federal offenses.⁴⁹ The ICCA extends federal criminal laws that apply to areas of exclusive federal jurisdiction, such as military bases and national parks, to Indian country.⁵⁰ The ICCA has two

44. *Id.* at 649 n.18.

45. 18 U.S.C. § 1151 (2006) (emphasis added).

46. *See Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (rejecting the State of Washington’s argument that the words “notwithstanding the issuance of any patent” extends only to land patented to an Indian).

47. *Id.* at 358–59.

48. Trade and Intercourse Act of 1790, ch. 34, § 5, 1 Stat. 137, 138.

49. Act of Mar. 3, 1817, § 1, 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152 (2006)).

50. The geographic jurisdictional reach of the statute is set out in 18 U.S.C. § 7. The federal

important exceptions. First, it does not cover Indian-on-Indian crimes.⁵¹ Second, if an Indian has first been punished for a crime under tribal law, he or she may not be prosecuted under the ICCA for the same offense.⁵² The ICCA also incorporates state law crimes under the Assimilative Crimes Act (ACA)⁵³ to fill gaps in the federal criminal code.⁵⁴ Thus, if a crime committed in Indian country is not covered directly by the federal criminal code for federal enclaves, a federal prosecutor may apply state criminal law through the ICCA. The second source of modern criminal jurisdiction in Indian country is the Major Crimes Act (MCA),⁵⁵ which defines sixteen crimes as federal offenses when committed by Indians (whether the victims are Indian or not).⁵⁶ The MCA was passed in response to the Supreme Court's decision in *Ex Parte Crow Dog*.⁵⁷ There, the Court ruled that the federal government was barred from prosecuting an Indian for the murder of another tribal member because of the ICCA's Indian-on-Indian exception.⁵⁸ The incident had been dealt

crimes made applicable include most felonies and a wide variety of offenses related to the subject matter of federal enclaves. *See, e.g.*, 18 U.S.C. § 32 (destruction of aircraft); 18 U.S.C. § 2251 (sexual exploitation of children in federal territories).

51. 18 U.S.C. § 1152. Victimless crimes such as adultery also are not covered by the ICCA. *United States v. Quiver*, 241 U.S. 602, 605–06 (1916); *see* COHEN, *supra* note 2, § 9.02[1][c][iii], at 735–36 (citing and criticizing several lower court cases that have not followed *Quiver*).

52. 18 U.S.C. § 1152. An exception for Indians who had been punished by the local law of their tribe was added in 1854. Act of Mar. 27, 1854, § 3, 10 Stat. 270.

53. 18 U.S.C. § 13.

54. *See Williams v. United States*, 327 U.S. 711, 719 (1946) (assuming that the ACA was subsumed within the ICCA); COHEN, *supra* note 2, § 9.02[1][c][ii], at 734.

55. 18 U.S.C. § 1153.

56. The Major Crimes Act reads:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Id.

57. 109 U.S. 566 (1883); *see* SIDNEY L. HARRING, *CROW DOG'S CASE, AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 134–40 (1994); COHEN, *supra* note 2, § 9.02[1][e] at 742.

58. *Ex Parte Crow Dog*, 109 U.S. at 572. While the ICCA and the MCA provide the substantive law for federal prosecutions in Indian country, at the sentencing stage the United States Sentencing Guidelines serve as a guide to the court. 18 U.S.C. § 3551 (2006); *see* COHEN, *supra* note 2, § 9.02[2][h], at 747–49. “The Federal Death Penalty Act of 1994 conditionally eliminated the death

with under traditional Brule Sioux law, which called for a tribal council meeting, family meetings with a peacemaker, and restitution in order to restore order to the tribal community.⁵⁹ The ethnocentric non-Indian view was that such tribal justice systems were inadequate and western notions of criminal punishment should be imposed on tribes, and thus the MCA became law.

In addition, some courts have held that the United States has jurisdiction over some general federal criminal laws within Indian country.⁶⁰ These appellate court rulings have been criticized because Congress has not expressly made such offenses applicable to Indians in Indian country. Just as the MCA was necessary to reach specifically enumerated Indian-on-Indian offenses, it seems that general federal statutes should not apply in Indian country unless Congress has expressly stated its intention to do so. However, these federal appeals courts appear in agreement that such general crimes have a nationwide scope and therefore should reach into Indian country.

B. Tribes Retain Inherent Jurisdiction over Indians

Indian tribes have criminal jurisdiction over their own members and other Indians who are members of federally recognized tribes.⁶¹ Tribal sentencing authority, however, was severely limited by the Indian Civil Rights Act (ICRA), which provides that tribes may impose only a sentence of up to one year in jail and/or \$5000 per offense.⁶² The Tribal Law and Order Act of 2010 amended this to provide that subject to certain federal standards, tribes may sentence an Indian defendant to up

penalty for Native American defendants prosecuted under the Major Crimes Act or the General Crimes Act, subject to the penalty being reinstated by a tribe's governing body." *United States v. Gallaher*, 608 F.3d 1109, 1110 (9th Cir. 2010) (citing 18 U.S.C. § 3598).

59. See *HARRING*, *supra* note 57, at 110, 119, 141.

60. See, e.g., *United States v. Smith*, 387 F.3d 826, 829 (9th Cir. 2004) (holding that 18 U.S.C. § 1513(b), which bars retaliation against a federal witness, applies to crimes committed by and against Indians in Indian country); *United States v. Begay*, 42 F.3d 486, 499 (9th Cir. 1994) (holding that the federal conspiracy statute, 18 U.S.C. § 371, "is a federal criminal statute of nationwide applicability, and therefore applies equally to everyone everywhere within the United States, including Indians in Indian country").

61. *United States v. Lara*, 541 U.S. 193, 210 (2004) (upholding congressional restoration of tribal criminal jurisdiction over non-member Indians); *United States v. Wheeler*, 435 U.S. 313, 331-32 (1978) (recognizing inherent tribal jurisdiction over tribal members).

62. Indian Civil Rights Act, Pub. L. No. 90-284, § 202, 82 Stat. 77 (1968) (tribes were originally limited to imposing penalties of six months in jail and a \$500 fine per offense) (codified as amended at 25 U.S.C. § 1302 (2006)). The 1986 amendments increased the penalties. Pub. L. No. 99-570, § 4217, 100 Stat. 3207 (1986).

to three years in jail and impose a \$5000 fine per offense.⁶³

Although the Supreme Court has never decided the issue,⁶⁴ tribes retain concurrent criminal jurisdiction over Indians with the federal government for crimes governed by the MCA and ICCA.⁶⁵ In *United States v. Wheeler*,⁶⁶ the Court held that the Double Jeopardy Clause of the Constitution did not bar federal prosecution for an offense after a tribal prosecution based on the identical conduct.⁶⁷ The Court noted that “tribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe’s jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests.”⁶⁸ Because tribal powers may not be limited by implication, it seems apparent that concurrent tribal jurisdiction over matters covered by federal criminal statutes is not preempted.⁶⁹

In *Oliphant v. Suquamish Tribe*,⁷⁰ the Supreme Court ruled that Indian tribes have no criminal jurisdiction over non-Indian defendants on the ground that such jurisdiction had been divested through the tribes’ incorporation into the United States, various other acts of Congress, and the “shared assumptions” of the three branches of the federal government.⁷¹ Despite the lack of jurisdiction, tribal police do have “authority to stop and detain a non-Indian who allegedly violates state and tribal law while traveling on a public road within a reservation until

63. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234(a), 124 Stat. 2279 (relevant portions codified at 25 U.S.C. §§ 1302 (a)(7), (b) (Supp. IV 2010)). Tribes are permitted to stack sentences for separate offenses up to a total of nine years and \$15,000 in fines. *Id.*

64. *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990).

65. *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995).

66. 435 U.S. 313.

67. *Id.*; see also *Talton v. Mayes*, 163 U.S. 376 (1896) (tribal prosecution for murder not subject to the dictates of the Bill of Rights on the ground that tribes are separate sovereigns and not arms of the federal government).

68. *Wheeler*, 435 U.S. at 332.

69. See COHEN, *supra* note 2, § 2.02, at 119–20.

70. 435 U.S. 191 (1978).

71. *Id.* at 210–11. For a critical analysis of the historical record relied upon by the Court, see Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979). The *Oliphant* ruling was extended by the Supreme Court to bar tribal jurisdiction not only over non-Indians, but also over Indians who are members of other tribes. *Duro v. Reina*, 495 U.S. 676 (1989). Congress reversed the Court’s ruling when it amended the Indian Civil Rights Act to restore the inherent criminal jurisdiction of all federally recognized tribes over “all Indians” in the governing tribe’s territory. 25 U.S.C. § 1301(2) (2006).

that person can be turned over to state authorities for charging and prosecution.”⁷² Washington State law provides for cross-deputization agreements, permitting tribal law enforcement officials to enforce applicable state law.⁷³ Tribes may also cross-deputize state and federal officers under tribal laws if they wish.

C. *States Have No Jurisdiction over Criminal Matters Involving Indians*

State jurisdiction over Indian country is precluded by the inherent sovereignty of Indian nations,⁷⁴ and is also preempted by the MCA and the ICCA.⁷⁵ Similarly, states lack jurisdiction over crimes by non-Indians when the victim is an Indian because of the same principles. On the other hand, by common law rule, states have jurisdiction over crimes committed by non-Indians against other non-Indians within Indian country.⁷⁶ States also appear to have jurisdiction over victimless crimes committed by non-Indians when no federal or tribal interests are

72. *State v. Schmuck*, 121 Wash. 2d 373, 376, 850 P.2d 1332, 1333 (1993); *cf. Strate v. A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997) (“We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law.”); *see also State v. Eriksen (Eriksen III)*, 172 Wash. 2d 506, 259 P.3d 1079 (2011) (holding that the stop-and-detain rule does not extend to tribal police officers who stop and detain non-Indians on state land outside of an Indian reservation, even when the stop is based on probable cause occurring within reservation boundaries); Kevin Naud, Jr., Comment, *Fleeing East from Indian Country: State v. Erickson and Tribal Inherent Sovereign Authority to Continue Cross-Jurisdictional Fresh Pursuit*, 87 WASH. L. REV. 1251, 1272–74 (2012) (discussing *Eriksen III*).

73. *See* WASH. REV. CODE § 10.92.020 (2010). The Washington State statute provides that:

Tribal police officers under subsection (2) of this section shall be recognized and authorized to act as general authority Washington peace officers. A tribal police officer recognized and authorized to act as a general authority Washington peace officer under this section has the same powers as any other general authority Washington peace officer to enforce state laws in Washington, including the power to make arrests for violations of state laws.

WASH. REV. CODE § 10.92.020(1). The second section of the statute contains provisions related to training and insurance requirements and concludes with a provision mandating arbitration if an affected county and tribe cannot reach a cross-deputization agreement after a tribal request that conforms to the statutory requirements. *Id.* § 10.92.020(2). Both tribal and state police may be certified to enforce federal law within Indian country. 25 U.S.C. § 2804 (2006). State officers may be so authorized only if the affected Indian tribe does not object. *Id.* § 2804(c).

74. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *cf. Ex Parte Crow Dog*, 109 U.S. 556 (1883) (federal government had no jurisdiction to prosecute Indian for murder of another Indian absent affirmative grant from Congress).

75. COHEN, *supra* note 2, § 9.03[1], at 754.

76. *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881).

implicated.⁷⁷

Congress has used its power under the Indian Commerce Clause to authorize the exercise of state jurisdiction in haphazard fashion. Thus, New York,⁷⁸ Iowa,⁷⁹ and Kansas⁸⁰ all were authorized to exercise some jurisdiction over Indian country in those states.⁸¹ These statutes were the precursors to the most sweeping authorization of state jurisdiction ever: Public Law 280, which was adopted in the midst of the federal termination era. In addition, a number of modern land claims settlement acts contain provisions that place criminal law enforcement authority largely in the hands of state authorities, while sometimes preserving concurrent federal and tribal jurisdiction.⁸²

77. COHEN, *supra* note 2, § 9.03[1], at 754–55. These are crimes that do not involve an Indian victim, individual Indian defendant, or tribal property.

78. Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (2006)) (grant of criminal jurisdiction over all reservations in state, but subject to savings clause excepting state authority over “hunting and fishing rights as guaranteed them by agreement, treaty, or custom,” and preempting any state fish and game licensing requirements).

79. Act of June 30, 1948, ch. 759, 62 Stat. 1161 (grant of criminal jurisdiction over Sac and Fox Reservation; concurrent federal jurisdiction reserved).

80. Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified as amended at 18 U.S.C. § 3243 (2006)) (grant of criminal jurisdiction over all reservations, including trust and restricted allotments in Kansas; concurrent federal jurisdiction reserved); *see* *Negonsott v. Samuels*, 507 U.S. 99, 110 (1993) (construing the Kansas grant as including concurrent state jurisdiction over crimes covered by the federal Major Crimes Act).

81. For a discussion of these statutes and authorities construing them, *see* COHEN, *supra* note 2, § 6.04, at 581–84.

82. *See, e.g.*, Crow Boundary Settlement Act of 1994, Pub. L. No. 103-444, 108 Stat. 4632 (codified at 25 U.S.C. § 1776); Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, 101 Stat. 704 (codified at 25 U.S.C. § 1771) (state granted jurisdiction with no mention of tribal or federal jurisdiction); Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (codified at 25 U.S.C. §§ 1751–60) (state granted jurisdiction with no mention of tribal or federal jurisdiction); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (codified at 25 U.S.C. §§ 1721–35) (state granted jurisdiction subject to exception for internal matters), *construed in* *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999); Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (codified at 25 U.S.C. §§ 1701–16) (state granted jurisdiction).

III. P.L. 280 AUTHORIZED STATE CRIMINAL AND SOME CIVIL JURISDICTION IN INDIAN COUNTRY IN A MANNER INCONSISTENT WITH MODERN SELF-DETERMINATION POLICIES

A. *The Passage of P.L. 280 Marked a Retreat from the Policy of Support for Tribal Institutions Under the IRA*

After the encouragement and tangible support provided to Indian tribes in the 1934 Indian Reorganization Act, Congress quickly lapsed into a policy of assimilation and eventually into a policy of selectively terminating the government-to-government relationship with Indian tribes.⁸³ In 1953 Congress passed House Concurrent Resolution 108, which set a goal of removing federal jurisdiction over Indian country and making Indians subject to general state law as quickly as possible.⁸⁴ Congress implemented this policy by enacting statutes applicable to individual tribes and set out plans for effecting the termination of the federal-tribal relationship.⁸⁵ Another prong of the termination policy came through P.L. 280,⁸⁶ which required six states to assert criminal jurisdiction and some civil jurisdiction over the Indian country located within those states.⁸⁷ In addition, Congress provided a disclaimer of any

83. COHEN, *supra* note 2, §§ 1.05–.06, at 85–97; *see also* WILKINSON, *supra* note 35, at 1–89.

84. H.R. Con. Res. 108, 83d Cong. (1953). Although this policy was eroded in the 1960s and was repudiated by President Nixon in 1970, Congress did not formally revoke it until 1988. 25 U.S.C. § 2501(f) (“Congress repudiates and rejects House Concurrent Resolution 108 of the 83d Congress and any policy of unilateral termination of Federal relations with any Indian nation.”). *See generally* COHEN, *supra* note 2, § 1.07, at 97–113.

85. The court in *Ute Distribution Corp. v. United States*, 938 F.2d 1157, 1159 n.1 (10th Cir. 1991), observed that:

These tribes included: the Southern Paiutes of Utah (Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099 (repealed 1980) (formerly codified at 25 U.S.C. §§ 741–760); the Alabama and Coushatta Indians of Texas (Act of Aug. 23, 1954, ch. 831, 68 Stat. 768 (codified at 25 U.S.C. §§ 721–728); sixty-one tribes and bands in western Oregon (Act of Aug. 13, 1954, ch. 773, 68 Stat. 724 (repealed 1977 with respect to Siletz Tribe) (codified as amended at 25 U.S.C. §§ 691–708); the Klamaths of Oregon (Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (repealed 1978 with respect to Modoc Tribe) (codified as amended at 25 U.S.C. §§ 564–564x); the Menominee Tribe of Wisconsin (Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973) (formerly codified at 25 U.S.C. §§ 891–902); and the mixed-blood Utes of the Uintah and Ouray Reservations in Utah).

Id.

86. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006) and 28 U.S.C. § 1360 (2006)).

87. Congress also provided that the Major Crimes Act and Indian Country Crimes Act would no longer be applicable in the six mandatory states. 18 U.S.C. § 1162. In 2010, however, Congress gave Indian tribes authority to request the application of those statutes by making a request to the Attorney General. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 221(b), 124 Stat. 2272 (codified at 18 U.S.C. § 1162(d) (Supp. I 2010)). Regulations implementing the statute can be found

effect on any trust property, water rights, or hunting, trapping or fishing rights, including tribal regulatory power over such activities.⁸⁸

Finally, Congress also included a provision authorizing other states to unilaterally assert criminal and/or civil jurisdiction over Indian country.⁸⁹ The fact that this provision did not include a role for affected tribes in the process has long been viewed as morally and politically unacceptable by Indian tribes.⁹⁰ President Eisenhower expressed great

at 28 C.F.R. § 50.25 (2012). In the preamble to the Rule, the Justice Department stated that: “As indicated above, the Department concludes that the United States has concurrent jurisdiction over General Crimes Act and Major Crimes Act violations in areas where States have assumed criminal jurisdiction under ‘optional’ Public Law 280.” 76 Fed. Reg. 76,037, 76,039 (Dec. 6, 2011). The Eighth Circuit reached the same conclusion in *United States v. High Elk*, 902 F.2d 660 (8th Cir. 1990). *But see* *United States v. Burch*, 169 F.3d 666 (10th Cir. 1999) (holding that statute incorporating voluntary assumption component of P.L. 280 preempted federal jurisdiction under MCA). *United States v. Johnson*, No. CR80-57MV (W.D. Wash. May 13, 1980) (holding that the Major Crimes Act did not apply to prosecution over which Washington State assumed jurisdiction). The United States appealed, but withdrew its appeal before a decision on the merits. *United States v. Johnson*, No. 80-1391 (July 23, 1980). For a critical examination of the issue, see COHEN, *supra* note 2, § 6.04[3][d], at 567–68.

88. The criminal jurisdiction disclaimer provides in full:

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 any 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; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

18 U.S.C. § 1162(b) (2006).

The civil jurisdiction counterpart provides:

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 any 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; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

28 U.S.C. § 1360(b) (2006).

89. Act of Aug. 15, 1953, Pub. L. No. 83-280, § 7, 67 Stat. 588, 590 (“The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.”).

90. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 544–46 (1975); see DAVID M. ACKERMAN, CONG. RESEARCH SERV., *Background Report on Public Law 280*, at 22 (94th Cong. 1st Sess. (1975) [hereinafter *Public Law 280*] (describing opposition of the Colville and Yakima Tribes of Washington because of “a ‘fear of inequitable treatment in the State courts and fear that extension of State law to their reservations would result in the loss of various rights’”); see also *Washington v. Confederated*

concern over the law's failure to obtain tribal consent to the intrusion on tribal jurisdiction in his signing statement.⁹¹ Although Congress ultimately approved a provision in the 1968 Indian Civil Rights Act that required a state to obtain tribal consent before adopting P.L. 280,⁹² seven states had already unilaterally asserted some measure of jurisdiction.⁹³

B. P.L. 280's Grant of Criminal and Civil Jurisdiction Did Not Include Civil Regulatory Authority

The primary focus of P.L. 280 was to grant states criminal jurisdiction over Indian country. The legislative history makes it clear that "the foremost concern of Congress at the time of enacting PL-280 was lawlessness on the reservations and the accompanying threat to Anglos living nearby."⁹⁴ States did not gain any authority to regulate civil activities in Indian country through P.L. 280⁹⁵ because Congress did not extend the full panoply of civil regulatory powers to the states, but only intended to afford Indians a judicial forum to resolve disputes among themselves and with non-Indians.⁹⁶ This principle is clear from *Bryan v. Itasca County*,⁹⁷ in which the county attempted to tax non-trust property within a reservation under the guise that P.L. 280 granted it authority to do so. The Court rejected Itasca County's argument that the grant of civil jurisdiction included the authority to impose taxes and regulations on non-trust property within Indian country.⁹⁸

This interpretation of P.L. 280 was reinforced in the landmark case of *California v. Cabazon Band of Mission Indians*.⁹⁹ In *Cabazon*, California sought to regulate bingo and various poker games on reservations under P.L. 280's *criminal* provisions. State law permitted

Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 489 n.33 (1979) (noting Yakima opposition to state jurisdiction since 1952).

91. CAPTURED JUSTICE, *supra* note 38, at 11 (citing CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (1996)).

92. See Carole Goldberg & Duane Champagne, *Searching for an Exit: The Indian Civil Rights Act and Public Law 280*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY 247, 247 (Carpenter, Fletcher, Riley eds., 2012) [hereinafter *Searching for an Exit*].

93. COHEN, *supra* note 2, § 6.03[a], at 544–45 n.308.

94. *Public Law 280*, *supra* note 90, at 541.

95. *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976).

96. *Bryan*, 426 U.S. at 388–91.

97. 426 U.S. 373. For a history of the litigation, see Kevin K. Washburn, *How a \$147 County Tax Notice Helped Bring Tribes More Than \$200 Billion in Indian Gaming Revenue: The Story of Bryan v. Itasca County*, in INDIAN LAW STORIES 421 (Carole Goldberg et al. eds., 2011).

98. *Id.* at 390.

99. 480 U.S. 202 (1987).

bingo and other games, but only for charitable purposes and subject to regulations with which the tribal gaming operators refused to comply.¹⁰⁰ California sought to enforce these regulations by punishing these violators with criminal penalties.¹⁰¹ When determining whether California had jurisdiction to regulate gaming under the criminal provisions of P.L. 280, the Court strongly reinforced its holding in *Bryan*.¹⁰² The Court ruled that “it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.”¹⁰³ California argued that because it imposed criminal penalties for violations of its regulations, the case should not be analyzed under *Bryan*’s (or P.L. 280’s) civil jurisdiction rules. The Court rejected California’s plea by drawing a distinction between state “criminal/prohibitory” laws and state “civil/regulatory” laws.¹⁰⁴ Conduct that is actually prohibited as a matter of state law and policy falls on the criminal side of P.L. 280’s grant, while activity that is generally permitted but regulated through state laws and rules is not within P.L. 280’s grant of civil jurisdiction.¹⁰⁵ The Court rejected California’s argument that because criminal penalties attached to the violation of the state regulations, it should be regarded as prohibited criminal conduct and thus subject to state jurisdiction under P.L. 280. After examining the state’s gaming laws, the majority concluded that “in light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.”¹⁰⁶ The Court thus eliminated the argument that a state could simply attach criminal penalties to a regulatory program to enforce the regulations pursuant to P.L. 280.

The Court’s test is easy to apply in most cases.¹⁰⁷ For example, there is no doubt that serious crimes such as murder, assault, robbery and the like all fall on the criminal/prohibitory side of the line. In some cases, states have explicitly classified certain offenses as civil infractions rather

100. *Id.* at 205–06.

101. *Id.*

102. *See generally id.*

103. *Id.* at 208.

104. *Id.* at 209.

105. *Id.* at 209–10 (footnote omitted).

106. *Id.* at 211.

107. *See generally* COHEN, *supra* note 2, § 6.04[3][b], at 546–53.

than criminal offenses. This distinction was critical in an action brought by the Confederated Tribes of the Colville Reservation where the Ninth Circuit considered Washington's assertion of civil and criminal jurisdiction over activities on highways within Indian country.¹⁰⁸ The court ruled that because the state legislature decriminalized the traffic code, those civil regulations could not be enforced through P.L. 280.¹⁰⁹

Because state regulatory authority is not sanctioned by P.L. 280, what is left is the application of state rules of decision in civil litigation.¹¹⁰ While state taxation, zoning, and workers' compensation laws are regulatory in nature and thus easily identified as outside of P.L. 280's grant of civil jurisdiction,¹¹¹ other laws have proved difficult to classify. For example, a dependency proceeding leading to the involuntary termination of parental rights was characterized by the Ninth Circuit as a non-regulatory procedure akin to the adjudication of a private civil dispute over a contract or tort claim, thus falling within P.L. 280's ambit.¹¹² But the Wisconsin Attorney General reached the opposite conclusion in an opinion years earlier.¹¹³ The Ninth Circuit's ruling rested on the notion that a dependency proceeding is a dispute about the status of a private individual—a child—and that “child dependency proceedings are more analogous to the ‘private legal disputes’ that fall under a state’s Public Law 280 jurisdiction than to the regulatory regimes at issue in *Bryan* and *Cabazon*.”¹¹⁴ This reasoning ignores the extreme coercive consequence of a dependency adjudication, namely removal of a child from the custody of a parent, and the possible

108. *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991).

109. *Id.* at 148; *see also* COHEN, *supra* note 2, § 6.04[3][b], at 549 n.346.

110. State law is “applicable only as it may be relevant to private civil litigation in state court.” *Cabazon*, 480 U.S. at 208. Rules of decision can be the common law rules utilized in private tort or contract litigation, or the statutes that provide substantive law for the resolution of such disputes.

111. *See* COHEN, *supra* note 2, § 6.04[3][b], at 548; *cf.* *Gobin v. Snohomish Cnty.*, 304 F.3d 909 (9th Cir. 2002) (holding that county lacked zoning authority over Indian fee land within Indian country).

112. *Doe v. Mann*, 415 F.3d 1038, 1058–59 (9th Cir. 2005). In *Comenout v. Burdman*, 84 Wash. 2d 192, 525 P.2d 217 (1974), the court upheld state jurisdiction over child dependency matters under the 1963 statute, but it is important to note that the case was decided prior to the criminal-prohibitory/civil-regulatory dichotomy in *Bryan v. Itasca County*, 426 U.S. 373 (1976).

113. 70 Op. Att’y Gen. Wis. 237, 241, 246–48 (1981). *But see In re Commitment of Burgess*, 665 N.W.2d 124, 132 (Wis. 2003) (involuntary commitment of an individual, who is found to be a “sexually violent person” under chapter 980, is “civil” rather than “criminal” based on the purposes of the chapter to provide treatment and to protect the public). *See Burgess v. Watters*, 467 F.3d 676 (7th Cir. 2006) (declining to issue habeas corpus petition despite doubts that involuntary commitment scheme was within P.L. 280’s jurisdictional grant).

114. *Mann*, 415 F.3d at 1059.

termination of parental rights. Such an outcome is only possible because of the state's authority to regulate domestic relations matters as a party to an adjudication, which is far different from a state court being available to adjudicate private civil matters such as voluntary adoptions, contract disputes, or tort claims arising out of on-reservation conduct.

In addition, there are a number of jurisdictional matters unaffected by P.L. 280. First, P.L. 280 disclaims any grant of state authority to regulate or tax trust or restricted property, or to affect any treaty-protected rights including water, hunting, and fishing rights.¹¹⁵ The civil disclaimer also precludes state probate jurisdiction over trust property and any interest therein.¹¹⁶ Second, P.L. 280 does not affect the relative bounds of state regulatory jurisdiction under the preemption and infringement tests described by the Supreme Court in *White Mountain Apache Tribe v. Bracker*.¹¹⁷ Under these related doctrines, federal law often preempts state regulatory jurisdiction over non-members in Indian country. Moreover, state regulatory jurisdiction over tribal members is generally preempted.¹¹⁸ Third, issues of tribal authority over non-members on non-Indian fee land are analyzed under the *Montana* line of cases, which establish a presumption that there is no tribal jurisdiction absent federal delegation, or exceptional circumstances.¹¹⁹ Because P.L. 280's jurisdictional grant does not affect these issues, they are similarly not in play when a state retrocedes any or all jurisdiction it gained under P.L. 280.

Also unaffected by retrocession are crimes related to Indian gaming, which is governed by the Indian Gaming Regulatory Act of 1988 (IGRA).¹²⁰ Three provisions of the IGRA govern gaming-related criminal activity in Indian country.¹²¹ One provision makes state

115. 28 U.S.C. § 1360(b) (2006) (civil); 18 U.S.C. § 1162(b) (2006) (criminal). The full text of both disclaimers is quoted in note 88, *supra*.

116. 28 U.S.C. § 1360(b); 18 U.S.C. § 1162(b).

117. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980) (evaluating preemption of state jurisdiction over non-Indian conducting business with Indian tribe by balancing the relative federal, tribal, and state interests in light of traditional notions of tribal independence from states).

118. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) (state taxation of Indians in Indian country generally preempted); see COHEN, *supra* note 2, § 6.03, at 520–37. Of course, as noted above, P.L. 280 alters these doctrines to the extent it opens the courthouse door to adjudicate civil causes of action in state courts and to apply state law to resolve such disputes.

119. *Montana v. United States*, 450 U.S. 544 (1981); see also *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); COHEN, *supra* note 2, § 6.02[2], at 515–20.

120. 25 U.S.C. §§ 2701–21 (2006). See generally COHEN, *supra* note 2, § 12, at 857–88.

121. 18 U.S.C. §§ 1166–68.

gambling laws applicable within Indian country as a matter of federal law,¹²² but “gambling” does not include class I or II gaming as defined in IGRA, or class III gaming if conducted pursuant to a tribal-state compact.¹²³ However, IGRA explicitly confers authority to prosecute any violations of state law exclusively on the federal government, unless otherwise provided by a tribal-state compact.¹²⁴ This provision has been interpreted as preempting any state criminal jurisdiction over gaming-related matters. In *Sycuan Band of Mission Indians v. Roache*,¹²⁵ the court rejected California’s argument that it retained jurisdiction to enforce state gaming laws in Indian country.¹²⁶

To summarize, in non-mandatory P.L. 280 states: (1) Indians are potentially subject to prosecution by federal authorities under the Major Crimes Act or Indian Country Crimes Act, by state authorities under the terms of a P.L. 280 assumption, and by tribal authorities under inherent tribal power; (2) non-Indians are subject to federal prosecution under the Indian Country Crimes Act, and state prosecution under the terms of a P.L. 280 assumption, or the common law rules permitting state prosecutions of non-Indian versus non-Indian crime. When considering state criminal jurisdiction under P.L. 280, one must remember to evaluate whether the particular law is simply a civil regulation dressed up with criminal penalties—and thus not enforceable under the criminal/prohibitory civil/regulatory dichotomy developed by the Supreme Court. If this were not difficult enough, the Supreme Court has permitted non-mandatory states to selectively assert jurisdiction under P.L. 280, which adds another level of complexity in those jurisdictions—such as Washington.

122. 18 U.S.C. § 1166(a) (“Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.”).

123. 18 U.S.C. § 1166(c). Definitions of gaming classes can be found at 25 U.S.C. § 2703(6)–(8) (2006). Class III gaming is commonly known as casino-style gaming and is the most lucrative and prevalent form of gaming nationally and in Washington.

124. “The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, [unless a tribal-state compact provides otherwise].” 18 U.S.C. § 1166(d) (2006). The compacting process related to the allocation of state and tribal jurisdiction is governed by 25 U.S.C. § 2710(d)(3)(C) (2006).

125. 54 F.3d 535 (9th Cir. 1994).

126. *Id.* at 539–40.

IV. WASHINGTON'S JURISDICTIONAL SCHEME UNDER P.L. 280 IS CONFUSING AND INCONSISTENT WITH THE CONSENT PARADIGM

The rules governing federal, state, and tribal jurisdiction set out in Section II changed when the Washington State Legislature passed important legislation in 1957¹²⁷ and 1963.¹²⁸ The 1957 legislation followed the consent paradigm as it offered state jurisdiction over Indian country only upon request from the affected tribe. On the other hand, in 1963, the state selectively assumed jurisdiction without regard to tribal wishes.¹²⁹ Eleven tribes requested state jurisdiction pursuant to the 1957 statute, although seven tribes achieved partial retrocession of state jurisdiction.¹³⁰

Challenges to state jurisdiction came promptly. Individuals subject to state prosecutions contested the validity of the state's assertion of jurisdiction on constitutional grounds. In *State v. Paul*,¹³¹ the defendant

127. 1957 Wash. Sess. Laws 941, ch. 240. The operative section of that statute is carried forward at WASH. REV. CODE § 37.12.021 (2010):

Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he or she shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: PROVIDED, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.

Id.

128. 1963 Wash. Sess. Laws 346, ch. 36 (codified at WASH. REV. CODE § 37.12.010); *see also* M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 704–12 (2012) (discussing the 1957 and 1963 statutes).

129. *See infra* notes 137–168 and accompanying text for details about the 1963 statute.

130. The eleven are: Muckleshoot, Squaxin Island, Nisqually, Skokomish, Suquamish (Port Madison), Tulalip Tribes, Quinalt Indian Nation, Confederated Tribes of the Chehalis Reservation, Quileute Indian Reservation, Swinomish Tribal Community, and Confederated Tribes of the Colville Reservation. 1 NAT'L AM. INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN: THE IMPACT OF PUBLIC LAW 280 UPON THE ADMINISTRATION OF CRIMINAL JUSTICE ON INDIAN RESERVATIONS 78–81 (1974). The Swinomish and Colville requests for state jurisdiction were made after 1963, and thus under that statute, which carried forward most of the voluntary consent provisions of the 1957 statute. *See* Colville Business Council Res. 1965-4 (Jan. 13, 1965) (full jurisdiction, except fish and game regulation) (on file with Washington Law Review); Swinomish Indian S. Res. (Mar. 23, 1963) (criminal jurisdiction only) (on file with Washington Law Review). The 1963 version dropped the requirement for the Yakima, Colville, and Spokane tribes that any assumption be approved by a two-thirds vote at a tribal referendum. *Cf.* 1963 Wash. Sess. Laws 346, ch. 36; 1957 Wash. Sess. Laws 941, ch. 240. *See infra* note 178 for the seven tribes that achieved partial state jurisdiction.

131. 53 Wash. 2d 789, 337 P.2d 33 (1959).

challenged a prosecution under the 1957 statute on the ground that the state's enabling act and constitution disclaimed any jurisdiction over Indian lands.¹³² While Congress authorized states to amend their constitutions so that they could accept jurisdiction over Indian country under P.L. 280,¹³³ Washington failed to do so. Nevertheless, the Washington State Supreme Court upheld Washington's assertion of jurisdiction, reasoning that the state constitution need not be amended as a matter of P.L. 280 or state law.¹³⁴ In addition to the *Paul* litigation, the Quinault Indian Nation unsuccessfully challenged Washington's assertion of jurisdiction in federal court before the Ninth Circuit on the same state constitutional ground.¹³⁵ After a later Ninth Circuit ruling that Washington's partial assumption of jurisdiction scheme lacked a rational basis and thus violated the federal equal protection guarantee, the United States Supreme Court reversed, and also held that states with disclaimers in their constitutions were not required as a matter of federal law to amend them to assume P.L. 280 jurisdiction.¹³⁶

132. The state's enabling act provided:

That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States

Act of Feb. 22, 1889, 25 Stat. 676 (emphasis added). It was mirrored in the state constitution. WASH. CONST. art. 26.

133. Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 590 ("Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act.").

134. *Paul*, 53 Wash. 2d at 794, 337 P.2d at 37.

135. *Quinault Indian Nation v. Gallagher*, 368 F.2d 648, 657–58 (9th Cir. 1966). The *Quinault* case is interesting for the fact that a group purporting to be the tribal council requested full state jurisdiction in 1958, and the state promptly assumed jurisdiction. Almost immediately, a petition signed by sixty-eight members repudiated the original request. *Id.* at 652. The Washington State Supreme Court later upheld the assumption per the original request. *State v. Bertrand*, 61 Wash. 2d 333, 341, 378 P.2d 427, 432 (1963). Other cases challenging Washington's mode of assumption are *Makah Indian Tribe v. State*, 76 Wash. 2d 485, 457 P.2d 590 (1969), *Tonasket v. State*, 84 Wash. 2d 164, 525 P.2d 744 (1974), and *Comenout v. Burdman*, 84 Wash. 2d 192, 199, 525 P.2d 217, 221 (1974). As early as 1972 there was a statewide tribal effort in Washington to obtain the retrocession of state jurisdiction under P.L. 280. See *State Indian-Rights Leaders Ask Control Over Reservations*, SEATTLE TIMES, Sept. 14, 1972, at A5 [hereinafter *Indian-Rights Leaders Ask Control*]; *Leaders of 30 State Tribes Agree on Goals for Indians*, SEATTLE TIMES, Sept. 16, 1972, at A11. For a detailed discussion of tribal objections to P.L. 280, see *Searching for an Exit*, *supra* note 92, at 247–49, 263–64.

136. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 493, 500–02 (1979), *rev'g* 552 F.2d 1332 (9th Cir. 1977). The panel decision was prompted by an earlier

The 1963 legislation unilaterally asserted civil and criminal jurisdiction over (1) all off-reservation Indian country; (2) all reservations, not including Indians on tribal or allotted lands within “an established reservation”; and (3) Indians on tribal or allotted lands within “an established reservation” in the following eight subject matter areas:¹³⁷

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways.¹³⁸

A threshold issue in each case involving state jurisdiction over an Indian is whether the alleged activity occurred on “tribal or allotted lands” within a “reservation” and thus is beyond the scope of state jurisdiction if not within one of the eight enumerated areas. For example, in *State v. Boyd*,¹³⁹ the court determined that land owned by the United States Bureau of Reclamation within the Colville Reservation was not “tribal or allotted land” so that state criminal jurisdiction was permitted.¹⁴⁰ In *State v. Pink*,¹⁴¹ the state lacked jurisdiction over a firearms offense on a state highway right-of-way because the court found that the underlying land was held in trust by the United States for the benefit of the tribe, therefore the state’s jurisdiction was limited to

en banc remand to determine the equal protection issue. 550 F.2d 443 (9th Cir. 1977) (en banc).

137. This is a paraphrase of WASH. REV. CODE § 37.12.010 (2010). The verbatim text provides:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following [eight areas]

Id. For the enumerated eight areas, see *infra* text accompanying note 138.

138. WASH. REV. CODE § 37.12.010. As set out in *supra* note 136, the Supreme Court upheld this scheme in the face of an equal protection challenge.

139. 109 Wash. App. 244, 34 P.3d 912 (2001).

140. *Id.* at 252, 34 P.3d at 916.

141. 144 Wash. App. 945, 185 P.3d 634 (2008).

traffic offenses.¹⁴² The court ruled in *State v. Jim*¹⁴³ that a treaty fishing access site was a “reservation” precluding state criminal or civil jurisdiction over Indians, except for the eight areas.¹⁴⁴ In *State v. Comenout*,¹⁴⁵ the court upheld criminal jurisdiction over tribal members violating state law on an off-reservation allotment.¹⁴⁶

Tribes formally recognized after P.L. 280 was amended in 1968 to require tribal consent to state jurisdiction under P.L. 280 are not subject to state jurisdiction under P.L. 280.¹⁴⁷ In *State v. Squally*,¹⁴⁸ the court faced the question of whether land added to the Nisqually reservation after 1968 was subject to state jurisdiction under P.L. 280. The court emphasized the Nisqually tribe’s original, broad request for full state jurisdiction of its reservation under the 1957 statute and ruled that trust land added to the reservation after 1968 was subject to state jurisdiction.¹⁴⁹ It is significant that in one instance where Congress chose

142. *Id.* at 955, 185 P.3d at 639. The court rejected state jurisdiction because “the State has not shown that the Quinault Tribe relinquished its interest in the land.” *Id.* The state was not attempting a prosecution for a traffic offense, but for unlawful possession of a firearm—a crime that did not involve “operation of motor vehicles upon . . . [public] highways.” *Id.* at 956, 185 P.3d at 639. The court distinguished *Somday v. Rhay*, 67 Wash. 2d 180, 184, 406 P.2d 931, 934 (1965), which upheld full state jurisdiction over a highway right-of-way running across fee simple non-Indian land. The court reasoned that because the tribe had surrendered its entire interest in the surface and subsurface, the state could rely on its blanket assertion of jurisdiction over Indians on non-Indian fee lands.

143. 173 Wash. 2d 672, 273 P.3d 434 (2012).

144. *Id.* at 685, 273 P.3d at 440; *see also* *State v. Sohappy*, 110 Wash. 2d 907, 757 P.2d 509 (1988) (holding that state did not have jurisdiction over an “in-lieu” fishing site that was created under federal law to replace Indian fishing grounds developed by construction of the Bonneville Dam). These cases could both have been decided on the alternative ground that P.L. 280’s disclaimer of jurisdiction over treaty fishing rights precluded state jurisdiction. That is, assuming P.L. 280 applied in full, it does not authorize jurisdiction over Indian treaty fishing rights. 18 U.S.C. § 1162(b) (2006). Another ground for denying state jurisdiction is based on the fact that the reservation Indian country was established after 1968 when tribal consent was made a prerequisite to state assumptions of jurisdiction. *See infra* note 147 and accompanying text. Moreover, state fish and game laws are part of a civil/regulatory regime and thus beyond P.L. 280’s grant. COHEN, *supra* note 2, § 18.03[2][b], at 1126–27. Any state jurisdiction over treaty hunting, fishing, or gathering activity by Indians, whether on or off-reservation, must conform to the “conservation necessity standards” set out by the U.S. Supreme Court. *Id.*, § 18.04[3][b], at 1143–46; *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 682 (1979).

145. 173 Wash. 2d 235, 267 P.3d 355 (2011).

146. *Id.* at 239, 267 P.3d at 357.

147. Pub. L. No. 90-284, §§ 402, 406, 82 Stat. 79 (1968) (codified at 25 U.S.C. §§ 1322(a), 1326 (2006)); *see* COHEN, *supra* note 2, § 6.04[3][f][ii], at 577–78.

148. 132 Wash. 2d 333, 343, 937 P.2d 1069, 1074 (1997).

149. Similarly, in *State v. Cooper*, 130 Wash. 2d 770, 928 P.2d 406 (1996), the court ruled that state jurisdiction extended to off-reservation allotments that were in existence when the non-consensual 1963 law passed. The court stated: “We assume, without deciding, that the subsequent establishment of a new Indian reservation vitiates the pre-existing RCW 37.12.010 assumption of

to make P.L. 280 applicable to lands taken in trust in a P.L. 280 state after 1968 for a restored tribe it explicitly so provided.¹⁵⁰ If the preexisting assertion of state jurisdiction under P.L. 280 extended to newly recognized tribes and Indian country, Congress's action would have been unnecessary. Moreover, the Indian law canons of construction counsel against broadly interpreting P.L. 280 to the detriment of tribal sovereignty as "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians."¹⁵¹

If a prosecution under P.L. 280 arises anywhere within Indian country, the court must undertake an analysis of the criminal/prohibitory civil/regulatory dichotomy.¹⁵² As a threshold matter, recall that state civil jurisdiction under P.L. 280 is limited to "opening the courthouse door" and does not authorize the exercise of state *regulatory* jurisdiction.¹⁵³ Thus, whenever the state asserts criminal jurisdiction over an Indian, the prosecution must demonstrate that the conduct is prohibited as a matter of state law and is not actually part of a civil regulatory regime.

A significant amount of litigation has involved activity on public highways under the eighth category—operation of vehicles on public highways.¹⁵⁴ In *State v. Abrahamson*,¹⁵⁵ Division I of the Washington State Court of Appeals correctly upheld a drunk driving conviction on

state jurisdiction with respect to Indian lands *within* the boundaries of the new reservation." *Id.* at 781 n.6, 928 P.2d at 411 n.6 (emphasis in original). The court elaborated: "Four reservations were formed after 1968, and their membership never elected to come under state jurisdiction. The Jamestown-Klallam, Nooksack, Sauk Suiattle and Upper Skagit reservations are not subject to RCW 37.12.010." *Id.* (citing Pamela B. Loginsky, *Criminal Jurisdiction Issues*, in WASH. STATE BAR ASS'N, CONTINUING LEGAL EDUC. COMM. & INDIAN LAW SECTION, PERSPECTIVES ON INDIAN LAW, at 4–8 (1992)). The list should also include the Stillaguamish, Cowlitz, and Snoqualmie Tribes, who were formally acknowledged after 1968, and whose reservations were similarly established after 1968. The Cowlitz Tribe does not yet have a reservation.

150. 25 U.S.C. § 715d (authorizing state jurisdiction over Coquille Tribe in Oregon—a mandatory P.L. 280 state).

151. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976); see COHEN, *supra* note 2, § 6.04[3][f][ii], at 577–78; Leonhard, *supra* note 128, at 712–14.

152. See *supra* Part III.B. This would include the state's assertion of jurisdiction over off-reservation trust lands and allotments as well as fee lands within reservations. See COHEN, *supra* note 2, § 6.04[3][b], at 546–53 for a detailed discussion of the scope of jurisdiction granted by P.L. 280.

153. *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991); see CAPTURED JUSTICE, *supra* note 38, at 17–18 (discussing Washington jurisdictional scheme).

154. See cases cited *supra* note 141 and *infra* notes 155, 157, 160, 162.

155. 157 Wash. App. 672, 238 P.3d 533 (2010).

public roads on the Tulalip Indian Reservation.¹⁵⁶ Drunk driving seems clearly to fall on the criminal/prohibitory side of the P.L. 280 dichotomy. On the other hand, in the case of an individual who did not consent to a breathalyzer or blood draw test and was accordingly subject to a civil suspension of his license, another court held that “[s]tatutes that authorize evidence collection in support of prosecuting criminal cases are properly classified as criminal in nature.”¹⁵⁷ While the court may be correct as to the authority to gather evidence from a defendant in support of a prosecution over which P.L. 280 grants jurisdiction, the court’s reasoning as to the criminality of the implied consent statute is doubtful. This is because the only sanction for refusing a blood or breathalyzer test is a civil license suspension, and the legislature explicitly provided that refusal to comply with the implied consent statute “is designated as a traffic infraction and may not be classified as a criminal offense.”¹⁵⁸ The court also inferred that the criminal/prohibitory civil/regulatory distinction mandated by the United States Supreme Court might not apply because Washington assumed jurisdiction in a more limited way than the mandatory states involved in *Cabazon* and *Bryan*.¹⁵⁹ This seems incorrect and inconsistent with *Confederated Tribes of the Colville Reservation v. Washington*,¹⁶⁰ where the tribes successfully challenged the state’s authority over traffic offenses under P.L. 280. In *Colville*, the Ninth Circuit ruled that Washington may not regulate speeding by tribal members because speeding is not a criminal offense, but rather a civil infraction sanctioned by a fine; the court drew no distinction based on whether a state is one of the six mandatory jurisdictions under P.L. 280.¹⁶¹ However, in *Yallup* it was likely proper to use the result of the

156. *Id.* at 685, 238 P.3d at 539.

157. *State v. Yallup*, 160 Wash. App. 500, 508, 248 P.3d 1095, 1099 (2011).

158. WASH. REV. CODE § 46.63.020 (2010). The legislature made a long list of exceptions to the rule, but did not include § 46.20.308(2)(a), which is the implied consent suspension statute. *See id.* At the same time, the court cited *Abrahamson*, 157 Wash. App. 672, 238 P.3d 533, which held that the state did have jurisdiction over the underlying drunk driving offense. *Id.*

159. *Yallup*, 160 Wash. App. at 506, 248 P.3d at 1098.

160. 938 F.2d 146 (9th Cir. 1991).

161. *Id.* at 147–48. It is important to remember that P.L. 280’s grant of civil jurisdiction only opened the courthouse door to private civil disputes. Thus, state courts may entertain personal injury lawsuits involving Indians arising within reservations on public highways. *McCrea v. Denison*, 76 Wash. App. 95, 885 P.2d 856 (1994). Moreover, under Washington Superior Court Rule 82.5(b), state courts may defer to tribal court jurisdiction. WASH. SUP. CT. R. 82.5(b). That rule, adopted in 1995, provides:

Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, concurrent jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court of a federally recognized Indian tribe, the superior court may, if the interests of justice require, cause such action to be transferred to the

blood test in aid of the conviction for driving under the influence because the state has jurisdiction over Indians on public highways and the blood draw took place on fee land where the state has full P.L. 280 jurisdiction.¹⁶² The defendant was properly subject to criminal prosecution for driving under the influence, but a civil sanction for refusing a test under the implied consent statute would be of doubtful validity.

There has been much less litigation involving the other seven categories encompassed by the statute. The state asserted jurisdiction over public assistance under category (2), although no reported decisions have been located. Three of the categories—domestic relations (category 3),¹⁶³ adoption proceedings (category 6), and dependent children (category 7)—relate to family law matters and allow state courts to adjudicate matters involving family relationships.¹⁶⁴ It is more difficult to determine the jurisdiction permissible in terms of commitments for mental illness (category 4). Under the reasoning of *Doe v. Mann*, such status determinations presumably would be within state civil

appropriate Indian tribal court. In making such determination, the superior court shall consider, among other things, the nature of the action, the interests and identities of the parties, the convenience of the parties and witnesses, whether state or tribal law will apply to the matter in controversy, and the remedy available in such Indian tribal court.

Id.

162. *Yallup*, 160 Wash. App. at 503, 248 P.3d at 1097. When a state officer wishes to conduct a search in territory where the state lacks jurisdiction under P.L. 280, the proper recourse is to obtain a warrant from the tribal court. *Cf. South Dakota v. Cummings*, 679 N.W.2d 484 (S.D. 2004).

163. In *Estate of Cross*, 126 Wash. 2d 43, 50, 891 P.2d 26, 29 (1995), the Washington State Supreme Court responded to a certified question from the United States Tax Court ruling that “[c]ommunity property law is included under domestic relations [for purposes of P.L. 280 jurisdiction].” Interestingly, the court noted that “the United States Tax Court must make a factual inquiry as to whether any tribal custom existed and if so whether the customs contradict or supplement Washington community property law.” *Id.* at 49–50, 891 P.2d at 29. The court did not consider other objections based on federal law. *Id.* at 49, 891 P.2d at 28–29. Of course, P.L. 280 expressly denies the application of state law or state jurisdiction to distribution of trust or restricted property in probate proceedings or otherwise. 25 U.S.C. § 1322(b) (2006).

164. Prior to assumption of jurisdiction, it was clear that juvenile courts lacked jurisdiction to enter dependency and delinquency determinations involving Indian children within Indian country. *See State ex rel. Adams v. Superior Court*, 57 Wash. 2d 181, 356 P.2d 985 (1960). *Adams* was a companion case to *In re Colwash*, 57 Wash. 2d 196, 356 P.2d 994 (1960). After the 1963 assumption of jurisdiction, the court in *Comenout v. Burdman*, 84 Wash. 2d 192, 201, 525 P.2d 217, 222 (1974), upheld state jurisdiction over child dependency matters. The case was decided before the U.S. Supreme Court developed the civil/regulatory limitation on state jurisdiction in *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976). If viewed as a civil regulatory proceeding due to the coercive effect on parental rights, jurisdiction over such matters may no longer be with the state. *See supra* notes 112 and 114 and the accompanying discussion of *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005). In any event, the exercise of any state jurisdiction in child custody proceedings must take place in conformity with the Indian Child Welfare Act, 25 U.S.C. §§ 1901–63 (2006).

adjudicatory jurisdiction,¹⁶⁵ although the coercive effect of a civil commitment may make it fall on the civil/regulatory divide of P.L. 280 and thus beyond state jurisdiction. Adjudication of matters involving juvenile delinquency (category 5) includes criminal matters on tribal and allotted lands.¹⁶⁶ On the other hand, with regard to compulsory school attendance (category 1), one might expect state authority on trust and allotted lands within reservations to be limited, or non-existent, because regulation of school attendance seems to be a civil regulatory matter. This is especially true because there is a federal statute that expressly authorizes state jurisdiction over such on-reservation matters, but only when the tribe has consented to state jurisdiction, and the Secretary of the Interior has approved the state jurisdiction.¹⁶⁷ That the state's assumption of jurisdiction over the eight areas took place years before the civil regulatory/adjudicatory dichotomy was revealed by the Supreme Court in *Bryan v. Itasca County* and amplified in *Cabazon Band*¹⁶⁸ would explain how the legislature misconceived its authority on the civil/regulatory side.

Now, anyone has to admit that this is a very complex and confusing jurisdictional scheme. Nevertheless, state and tribal officials, courts, and the public must deal with the piecemeal fashion in which state jurisdiction has been imposed. One way to deal with it would be to simply get rid of all P.L. 280 jurisdiction—something made possible by Congress.

165. See *supra* notes 112 and 114 and accompanying text for a discussion of *Doe v. Mann*, 415 F.3d 1038.

166. Juvenile courts have exclusive jurisdiction under Washington law over matters “[r]elating to juveniles alleged or found to have committed offenses, traffic or civil infractions, or violations as provided in RCW 13.40.020 through 13.40.230[.]” WASH. REV. CODE § 13.04.030(1)(e) (2010). To the extent that a juvenile has committed a traffic or civil infraction, state court jurisdiction would not exist because the state’s authority is limited to criminal jurisdiction and does not include civil regulatory authority. *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991).

167. 25 U.S.C. § 231 (2006). The implementing regulations at 25 C.F.R. § 273.52 (2012) refer to P.L. 280 as if it conferred similar authority, but the regulation was adopted in 1975 and thus predates the decision in *Bryan v. Itasca Cnty.*, 426 U.S. 373, which made it clear that civil regulatory jurisdiction was not granted by P.L. 280. See COHEN, *supra* note 2, § 6.04[5][a], at 586; *cf. Colwash*, 57 Wash. 2d at 198–99, 356 P.2d at 996 (holding that state jurisdiction over truancy matters under 25 U.S.C. § 231 would not extend to dependency proceeding).

168. See CAPTURED JUSTICE, *supra* note 38, at 17–18 (discussing Washington’s jurisdictional scheme).

V. CONGRESS AMENDED P.L. 280 SO STATES MAY
RETROCEDE JURISDICTION, BUT TRIBES HAVE NO
FORMAL ROLE IN THE PROCESS

When P.L. 280 was passed, tribal dissatisfaction with the unilateral assertion of state jurisdiction was widespread and well documented.¹⁶⁹ Adopted in the midst of the now-repudiated termination era, the statute and the state jurisdiction that accompanied it—most often without tribal consent—are illustrative of discredited policies inconsistent with the modern Indian self-determination policies. Washington tribes reacted to this by initiating concerted efforts in 1972 to remove state jurisdiction from their Indian country.¹⁷⁰ When a local congressman claimed before a congressional committee that jurisdictional confusion had been solved in Washington under P.L. 280, the Vice-President of the National Congress of American Indians, Mel Tonasket, retorted, “[Congressman] Meeds made some statements that are totally false . . . He should know better.”¹⁷¹

Like Washington tribes, national Indian organizations were consistent in their opposition to the unilateral imposition of P.L. 280 jurisdiction on tribes.¹⁷² In one of many cases challenging the state’s assertion of P.L. 280 jurisdiction, the Ninth Circuit observed that, “Indian tribes were critical of Pub. L. 280 because section 7 authorized the application of state law to tribes without their consent and regardless of their needs or circumstances.”¹⁷³ In 1968, Congress repealed the section of P.L. 280 that allowed states to acquire jurisdiction without tribal consent. It also amended the statute by providing that “[t]he United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to [P.L. 280].”¹⁷⁴ The President of the United States authorized the Secretary of the Interior to accept a state’s retrocession after consulting with the Attorney General.¹⁷⁵ However, the Secretary is not required to

169. See Leonhard, *supra* note 128, at 698–701.

170. See *Indian-Rights Leaders Ask Control*, *supra* note 135.

171. David Suffia, *Indian Leader Says Meeds Lied About Effects of Policing*, SEATTLE TIMES, May 31, 1978, at G7. Mr. Tonasket was also the Chairman of the Confederated Tribes of the Colville Reservation. *Id.*

172. 1 AM. INDIAN POLICY REVIEW COMM’N, FINAL REPORT TO CONGRESS, 205–06 (1977) (discussing events leading to a draft retrocession bill introduced in 1975 by Senator Henry Jackson).

173. *United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979).

174. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 403, 82 Stat. 79 (codified at 25 U.S.C. § 1323 (2006)).

175. Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (Nov. 23, 1968).

accept the retrocession. As a practical matter, the Secretary considers the law enforcement capacity of the tribe and the United States with respect to any retrocession in order to avoid a decrease in on-the-ground law enforcement. Also, the views of the Justice Department carry great weight because the local U.S. Attorney and FBI would have increased obligations to enforce federal criminal laws in Indian country after any retrocession. Since 1968, there have been thirty-one tribes that have fully or partially achieved state retrocession over some or all of the Indian country under their jurisdiction.¹⁷⁶ Prior to 2012, Washington's retrocession laws provided that certain tribes that agreed to full state criminal and civil jurisdiction under the 1957 state law could request retrocession of some (but not all) state criminal jurisdiction.¹⁷⁷ There was no provision for retrocession of civil jurisdiction. Of the eleven tribes that requested full state jurisdiction under the 1957 state law, seven requested and were granted retrocession.¹⁷⁸

176. *Searching for an Exit*, *supra* note 92, at 265–66; CAPTURED JUSTICE, *supra* note 38, at 166. There are 170 tribes in the lower forty-eight states that are subject to state authority under P.L. 280. CAROLE GOLDBERG & DUANE CHAMPAGNE, NATIVE NATION LAW & POLICY CTR., FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 9–11 (2007) [hereinafter FINAL REPORT], available at <http://cdn.law.ucla.edu/SiteCollectionDocuments/centers%20and%20programs/native%20nations/pl280%20study.pdf>. The Federal Register announcements accepting retrocession are as follows:

(1) full civil and criminal jurisdiction: fifteen Nevada tribes, 40 Fed. Reg. 27,501 (June 30, 1975); Ely Indian Colony, 53 Fed. Reg. 5837 (Feb. 26, 1988); Menominee, 41 Fed. Reg. 8516 (Feb. 27, 1976); Burns Paiute, 44 Fed. Reg. 26,169 (May 4, 1979); Omaha, 35 Fed. Reg. 16,598 (Oct. 16, 1970); Santee Sioux, 71 Fed. Reg. 7994 (Feb. 15, 2006);

(2) criminal retrocession only: Umatilla, 46 Fed. Reg. 2195 (Jan. 8, 1981), Winnebago, 51 Fed. Reg. 24,234 (July 2, 1986); Bois Forte Band of Chippewa, 40 Fed. Reg. 4026 (Jan. 27, 1975); and

(3) partial criminal retrocession: Confederated Salish and Kootenai Tribes, 60 Fed. Reg. 33,318 (June 27, 1995); seven Washington tribes listed in *infra* note 178.

177. The current statute, WASH. REV. CODE § 37.12.120 (2010), provides:

Whenever the governor receives from the confederated tribes of the Colville reservation or the Quileute, Chehalis, Swinomish, Skokomish, Muckleshoot, or Tulalip tribe a resolution expressing their desire for the retrocession by the state of all or any measure of the criminal jurisdiction acquired by the state pursuant to RCW 37.12.021 over lands of that tribe's reservation, the governor may, within ninety days, issue a proclamation retroceding to the United States the criminal jurisdiction previously acquired by the state over such reservation. However, the state of Washington shall retain jurisdiction as provided in RCW 37.12.010. The proclamation of retrocession shall not become effective until it is accepted by an officer of the United States government in accordance with 25 U.S.C. Sec. 1323 (82 Stat. 78, 79) and in accordance with procedures established by the United States for acceptance of such retrocession of jurisdiction. The Colville tribes and the Quileute, Chehalis, Swinomish, Skokomish, Muckleshoot, and Tulalip tribes shall not exercise criminal or civil jurisdiction over non-Indians.

Id.

178. The Muckleshoot, Squaxin Island, Skokomish, and Nisqually Indian tribes remain subject to full state jurisdiction. The seven tribes who achieved limited retrocession are: Tulalip Tribes, 65 Fed. Reg. 75,948 (Dec. 5, 2000) and 65 Fed. Reg. 77,905 (Dec. 13, 2000); Confederated Tribes of

In the 2011 Washington State legislative session, Representative John McCoy introduced a bill that permitted the full or partial retrocession of state criminal jurisdiction to the United States upon an Indian tribe's request.¹⁷⁹ The bill required the Governor to issue a proclamation retroceding state criminal jurisdiction if requested by the Indian tribe¹⁸⁰ and acknowledged that retrocession would only become effective if accepted by a duly designated officer of the United States government."¹⁸¹ The Secretary of the Interior is the officer designated to accept a retrocession.¹⁸² A subsequent amendment—offered by Representative McCoy—would have eliminated the Governor's obligation to issue a retrocession proclamation upon receipt of a request from a tribe and instead provide her with discretion to approve a retrocession petition and forward a proclamation to the Secretary of the Interior.¹⁸³ While the bill did not become law, there was tremendous interest in the proposal from tribes, the U.S. Attorney's office, and state law enforcement entities. The premise of the proposed legislation was that Indian tribes should have the choice whether to be subject to state jurisdiction, and that it was unfair for Congress to allow state jurisdiction without tribal consent.

The Governor, Speaker of the House, and President of the Senate appointed a Joint Executive-Legislative Workgroup to consider retrocession issues before the 2012 legislative session.¹⁸⁴ A letter signed by Governor Gregoire, House Speaker Frank Chopp, and Senate President Lisa Brown explained:

It became apparent that retrocession is an issue of broad importance to the tribes; federal, state and local governments; and the citizenry of Washington. It also became apparent that retrocession is not generally understood and that a coordinated and focused effort would be necessary to give the issue the

the Chehalis Reservation, Quileute Indian Reservation, and Swinomish Tribal Community, 54 Fed. Reg. 19,959 (May 9, 1989); Confederated Tribes of the Colville Reservation, 52 Fed. Reg. 8372 (Mar. 17, 1987); Suquamish (Port Madison), 37 Fed. Reg. 7353 (Apr. 13, 1972); Quinault Indian Nation, 34 Fed. Reg. 14,288 (Aug. 30, 1969).

179. H.B. 1773, 62d Leg., Reg. Sess. (Wash. 2011).

180. *Id.* § 3.

181. *Id.* § 4.

182. See Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (Nov. 23, 1968).

183. H.B. 1773, H. Amd. 343, 62d Leg., Reg. Sess. (Wash. 2011).

184. See FINAL B. REP., E.S.H.B. 2233, 62d Leg., Reg. Sess., at 3 (Wash. 2012). For information about the task force see <http://www.leg.wa.gov/jointcommittees/JELWGTR/Pages/default.aspx>. The Task Force included the author of this Article and Professor Douglas Nash of Seattle University School of Law as academic advisors.

attention it deserves and allow all affected parties an opportunity to discuss and understand potential implications.

Accordingly, we have agreed to establish a Joint Executive-Legislative Workgroup on Tribal Retrocession.¹⁸⁵

The twenty-member task force met four times between July and November for in-depth discussions of the issues and development of a draft bill. A wide variety of constituencies provided information and advice to the task force, which discussed a draft bill at its final meeting in November 2011.¹⁸⁶ As a result, members of the State House and Senate introduced identical bills at the start of the 2012 Session—House Bill 2233¹⁸⁷ and Senate Bill 6147.¹⁸⁸ The 2012 version of the bill included two major changes. First, it afforded the Governor discretion to reject a tribal petition for retrocession, and second, allowed for retrocession of civil as well as criminal jurisdiction. The new legislation was approved in the Senate on March 5, 2012 by a vote of 42-6, and in the House by a vote of 59-38 on March 6, 2012.¹⁸⁹ It became effective on June 7, 2012, ninety days after the Governor signed the bill, as provided by state law.¹⁹⁰

Washington's 2012 retrocession legislation authorizes the Governor to forward a proclamation for retrocession to the Secretary of the Interior when certain conditions are met. While previous law permitted only the partial retrocession of criminal jurisdiction and no retrocession of civil jurisdiction (and now applies to only two of the four tribes that remain subject to full state jurisdiction), the new legislation allows for retrocession of "all or part of the civil and/or criminal jurisdiction previously acquired by the state over a federally recognized Indian tribe, and the Indian country of such tribe."¹⁹¹ The process is commenced by a tribal resolution and would be carried out in the following fashion:

(1) The governing body of a tribe submits a resolution to the

185. Letter from Christine O. Gregoire, Frank Chopp & Lisa Brown to Eric Johnson, Exec. Dir., Wash. State Ass'n of Cntys., (May 26, 2011) (on file with Washington Law Review).

186. *Joint Executive-Legislative Workgroup on Tribal Retrocession*, WASH. STATE LEGISLATURE, <http://www.leg.wa.gov/JointCommittees/JELWGTR/Documents/2011-11-16/Agenda.pdf> (Nov. 16, 2011). The agendas for all four meetings reveal the wide array of witnesses who assisted the Task Force. WASH. STATE LEGISLATURE, *supra*, at <http://www.leg.wa.gov/jointcommittees/JELWGTR/Pages/default.aspx> (last visited Nov. 4, 2012).

187. H.B. 2233, 62d Leg., Reg. Sess. (Wash. 2012).

188. S.B. 6417, 62d Leg., Reg. Sess. (Wash. 2012).

189. FINAL B. REP., E.S.H.B. 2233, 62d Leg., Reg. Sess., at 5 (Wash. 2012).

190. E.S.H.B. 2233, 62d Leg., Reg. Sess., at 5 (Wash. 2012) (codified at WASH. REV. CODE §§ 37.12.160–180 (2012)).

191. WASH. REV. CODE § 37.12.160(1).

Governor requesting retrocession with information regarding the tribe's plan to exercise jurisdiction after retrocession.¹⁹²

(2) Within ninety days of receiving the resolution, the Governor must convene a government-to-government meeting with the tribal governing body or its designated representatives. The Governor's office must also consult with elected officials of state political subdivisions located near the Indian tribe's territory.¹⁹³

(3) The Governor has one year after receiving the tribal resolution to approve or deny the request in whole or in part, although extensions may be made for any term by agreement, or unilaterally by either party for six months. Any denial of a tribal request must be supported by reasons set out in writing by the Governor. If accepted, a proclamation to that effect must be issued and forwarded on to the Secretary of the Interior within ten days.¹⁹⁴

(4) Within 120 days of receiving the tribal resolution, but before approving it, designated standing committees of each house in the legislature must be notified, and they may have hearings and make non-binding recommendations to the Governor.¹⁹⁵

(5) The proclamation for retrocession will not be effective until accepted by a "duly designated officer of the United States government."¹⁹⁶

192. *Id.* § 37.12.160(2) ("The resolution must express the desire of the tribe for the retrocession by the state of all or any measures or provisions of the civil and/or criminal jurisdiction acquired by the state under this chapter over the Indian country and the members of such Indian tribe. Before a tribe submits a retrocession resolution to the governor, the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal agreements, or other collaborative arrangements, with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process.").

193. *Id.* § 37.12.160(3).

194. *Id.* § 37.12.160(4).

195. *Id.* § 37.12.160(5).

196. *Id.* § 37.12.160(6). This section also refers to "procedures established by the United States for the approval of a proposed state retrocession." *Id.* There are no formal procedures aside from the delegation of authority from the President to the Secretary of the Interior, who must consult with the United States Attorney General before accepting a retrocession and publishing the determination in the Federal Register. Here is the Executive Order:

By virtue of the authority vested in me by section 465 of the Revised Statutes (25 U.S.C. 9) [§ 9 of this title] and as President of the United States, the Secretary of the Interior is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President or of any other officer of the United States, any and all authority conferred upon the United States by section 403(a) of the Act of April 11, 1968, 82 Stat. 79 (25 U.S.C. 1323(a)) [subsection (a) of this section]: *Provided*, That acceptance of retrocession of all or any measure of civil or criminal jurisdiction, or both, by the Secretary hereunder shall be effected by publication in the FEDERAL REGISTER of a notice which shall specify the jurisdiction

(6) If the proclamation addresses jurisdiction over public roads, the Governor must consider: (a) whether tribal interlocal agreements exist with other jurisdictions that address uniformity of motor vehicle operations in Indian country; (b) whether there is a tribal police department to ensure safety; (c) whether the tribe has traffic codes and courts; and (d) whether there are appropriate traffic control devices in place.¹⁹⁷

(7) The legislation contains savings clauses that reserve any state jurisdiction over civil commitment of sexually violent predators under state law,¹⁹⁸ and ensures that cases commenced in state courts or agencies prior to the effective date of a retrocession may continue.¹⁹⁹ It also provides that the tribes covered by the existing partial retrocession scheme would remain eligible to use that mechanism.²⁰⁰

The Joint Executive-Legislative Work Group on Tribal Retrocession worked hard to understand the complex legal and policy issues implicated in Indian country. The task force's leadership received input from state, federal, and tribal law experts to understand how tribal desires for retrocession of state civil and criminal jurisdiction could best be accomplished, and the effects of retrocession on both Indian and non-Indian parties. Those concerns were taken into account in a fashion that provides for non-tribal input to a process that tribes may initiate and present directly to the Governor.²⁰¹ In the end, however, the Governor

retroceded and the effective date of the retrocession: *Provided further*, That acceptance of such retrocession of criminal jurisdiction shall be effected only after consultation by the Secretary with the Attorney General.

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Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (Nov. 23, 1968); 25 U.S.C.A. § 1323 Note.

197. WASH. REV. CODE § 37.12.160(8). This section was the last amendment to the bill. An earlier Senate amendment would have required the Governor (and in some cases other state agencies) to certify that actions and agreements on the foregoing matters (including inter-local agreements) were actually in place. E.S.H.B. 2233, S. Amd. 153, 62d Leg., Reg. Sess. (Wash. 2012). The House refused to concur in the Senate version and a Senate substitute bill was passed to provide that the Governor should simply consider the issues in making her decision on a retrocession proclamation. E.S.H.B. 2233, S. Amd. 282, 62d Leg., Reg. Sess. (Wash. 2012). This version passed the Senate on March 5, 2012 and the House concurred on March 6, 2012. H.B. REP. E.S.H.B. 2233, 62d Leg., Reg. Sess., at 1 (Wash. 2012).

198. WASH. REV. CODE § 37.12.170(1).

199. *Id.* § 37.12.170(2).

200. *Id.* § 37.12.180. The preexisting partial retrocession is available for the two tribes that have not utilized the partial retrocession process—Skokomish and Muckleshoot. *Id.* § 37.12.100. Curiously, that statute does not extend to the other two tribes that requested full P.L. 280 jurisdiction under the 1957 statute: Squaxin Island and Nisqually. *Id.*

201. *Id.* § 37.12.160(2) (“Before a tribe submits a retrocession resolution to the governor, the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal

has discretion to accept to a tribal petition.

VI. THE MODERN SELF-DETERMINATION POLICY IS INCOMPLETE WITHOUT TRIBAL AUTHORITY TO INITIATE RETROCESSION AT THE FEDERAL LEVEL

A. *Washington's 2012 Retrocession Legislation Is an Excellent Model for Negotiating Jurisdiction in Indian Country*

It should be apparent by now that criminal jurisdiction in Indian country is unduly complex, and does not work very well. The regime is governed by federal law, and was imposed generally without tribal consent in a piecemeal fashion. Congress found in 2010 that:

The complicated jurisdictional scheme that exists in Indian country—

(A) has a significant negative impact on the ability to provide public safety to Indian communities;

(B) has been increasingly exploited by criminals; and

(C) requires a high degree of commitment and cooperation among tribal, Federal, and State law enforcement officials[.]²⁰²

In any given case, federal, tribal, and state police and prosecutors determine jurisdiction in Indian country based on whether an Indian is involved in a crime as defendant or victim,²⁰³ and the nature of the offense. Indians may be federally prosecuted if they have committed an offense included in the Major Crimes Act.²⁰⁴ Indians and non-Indians alike are subject to prosecution under the Indian Country Crimes Act, but subject to exceptions in the case of Indian-on-Indian crimes, in cases of prosecutions of Indians already punished by a tribe, or in the case of a specific treaty exception.²⁰⁵ Non-Indian versus non-Indian crime is left to the states,²⁰⁶ unless it is also a violation of a general federal criminal

agreements, or other collaborative arrangements, with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process.”); *id.* § 37.12.160(8) (recommending state and local input regarding “the operation of motor vehicles upon the public streets, alleys, roads, and highways” after retrocession).

202. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(4), 124 Stat. 2262.

203. *See supra* Part II.A. For a discussion of the factors bearing on whether an individual is an Indian for federal jurisdictional purposes, see *United States v. Bruce*, 394 F.3d 1215, 1223–27 (9th Cir. 2005) and Bethany R. Berger, “*Power Over this Unfortunate Race*”: *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV 1957 (2004).

204. 18 U.S.C. § 1153 (2006); *see supra* Part II.A.

205. 18 U.S.C. § 1152.

206. *United States v. McBratney*, 104 U.S. 621 (1881).

statute.²⁰⁷ P.L. 280 added to the complexity by transferring federal criminal *and civil* jurisdiction to six “mandatory” states, and authorizing other states to assume criminal and civil jurisdiction at their option.²⁰⁸ The only empirical study of the transfer of jurisdiction to the states under P.L. 280 demonstrates that it did not improve law enforcement in Indian country, and in most cases, law enforcement services and tribal-state relations declined.²⁰⁹ As explained above in Part IV, Washington State assumed jurisdiction in a manner that passed rational basis review, but is otherwise bewildering. Moreover, the jurisdictional arrangements described above were not developed consistently with basic democratic consent principles.²¹⁰ Rather, they were imposed upon Indian tribes by federal and state law in sporadic bursts. In recognition of this situation, the Washington State Legislature took a significant step to reduce the complexity of this arrangement by offering to surrender some of its jurisdiction in accord with tribal desires.

Washington now has an excellent system to achieve retrocession at the state and tribal level.²¹¹ The new law has deadlines and provides an opportunity for all interested parties to have their interests heard in what are essentially negotiations between petitioning tribes and the Governor’s office. Professors Goldberg and Champagne have thoroughly documented the difficulties tribes have encountered achieving retrocession in other states when the only avenue runs directly through the state legislature.²¹² When the group retrocession for fifteen tribes in Nevada is excluded, there have only been sixteen discreet campaigns for full or partial retrocessions of state jurisdiction.²¹³ In Nebraska, for example, the state legislature voted to retrocede most of its jurisdiction on the Omaha reservation in 1969. However, almost immediately after the Secretary of the Interior in 1970 accepted the retrocession, Nebraska sought to revoke its retrocession.²¹⁴ The

207. *See* *United States v. Begay*, 42 F.3d 486, 499 (9th Cir. 1994) (holding that the federal conspiracy statute, 18 U.S.C. § 371, “is a federal criminal statute of nationwide applicability, and therefore applies equally to everyone everywhere within the United States, including Indians in Indian country”).

208. *See supra* Part III.

209. *See* FINAL REPORT, *supra* note 176.

210. *See supra* note 1 and accompanying text.

211. The approach originally advanced would be better as it would put the Washington tribes in control of whether and how much jurisdiction should be retroceded by the state, albeit subject to the discretion of the Secretary of the Interior to accept or reject the proffered retrocession.

212. *Searching for an Exit*, *supra* note 92, at 264–68; CAPTURED JUSTICE, *supra* note 38, at 168.

213. *Searching for an Exit*, *supra* note 92, at 266.

214. CAPTURED JUSTICE, *supra* note 36, at 169–70.

Winnebago Tribe slowly built up its governmental infrastructure and petitioned the Nebraska legislature in 1974 for retrocession of both civil and criminal jurisdiction.²¹⁵ An expensive and bruising political battle ensued with state jurisdiction under P.L. 280 remaining intact. Ultimately, Nebraska's unicameral legislature voted to retrocede only criminal jurisdiction on the Winnebago Reservation in 1985.²¹⁶ A political compromise had to be made by dropping the retrocession request as to civil jurisdiction, with much of the opposition based on the mistaken assumption that by retroceding civil jurisdiction, the tribe would be receiving more authority.²¹⁷

By contrast, Washington's new approach provides a rational path for considering retrocession and its effect on all the affected parties. The legislature is not the place to work out the details of how retrocession will work for a particular tribe, the state, and the federal government. The legislature made the major policy decision to permit full or partial retrocession to occur at the request of the tribe. It requires the Governor to act on a tribal request under a one-year deadline so that inaction alone cannot frustrate tribal wishes.²¹⁸ Moreover, "[i]n the event the governor denies all or part of the [tribal] resolution, the reasons for such denial must be provided to the tribe in writing."²¹⁹ If the Governor issues the requested proclamation, the crucial final step is convincing the Secretary

215. *Id.* at 171.

216. *Id.* at 172–74; see Gabriela Stern, *Senators Give Winnebagos Jurisdiction*, OMAHA WORLD-HERALD, Jan. 17, 1986 (recounting rancor and racism is the legislative effort to retrocede jurisdiction). The headline from the Omaha World-Herald is premised on the common misconception that retrocession of state jurisdiction bestows additional governmental powers on affected tribes. It does not. Rather, it simply removes concurrent state jurisdiction.

217. *Control of Civil Matters Called Next Logical Step*, OMAHA WORLD-HERALD, July 21, 1985. The article quotes one opponent:

'With civil retrocession, they would have the rule of the land,' Freese said. 'For example, they could put a \$500,000 tax on a tavern business, and you either pay it or you go out of business. They could tax white-owned real estate. It could completely ruin the value of real estate.'

Id. The statement is absolutely incorrect as a matter of law. Tribal authority to tax non-members and their property is governed by a federal common law test unaffected by the application of P.L. 280. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (striking down Navajo Nation's tax on non-Indian fee simple property).

218. WASH. REV. CODE § 37.12.160(4) (2012). There is no guarantee that a Governor will grant a given retrocession petition, but one should expect good faith efforts to reach an accord.

219. *Id.* We will soon be able to see how this process plays out as the Confederated Tribes and Bands of the Yakama Reservation submitted retrocession resolutions to the Governor of Washington in July 2012. Letter from Confederated Tribes and Bands of the Yakama Nation to Governor Christine Gregoire (July 16, 2012) (attaching Yakama Tribal Council Resolutions T-117-12 and T-036-12) (on file with Washington Law Review).

of the Interior to accept the retrocession of state jurisdiction.²²⁰

One observer of the Washington process argues that while it represents a good effort, “by placing the ultimate decision in the hands of the Governor and mandating the inclusion of non-Indian governments in the decision-making process, it does not truly place the power of consent [to state jurisdiction] back in the hands of tribes.”²²¹ While it would be best for the legislature to place greater control in hands of the tribes, such an outcome is unlikely in the foreseeable future for several reasons. First, proposed legislation taking such an approach was introduced in 2011, but the sponsor soon amended it to give the Governor discretion whether to accept the proposed retrocession and the bill still failed to move out of committee.²²² Second, state and local governing bodies surrendering jurisdiction will always insist on inserting their views into the substance and manner in which their jurisdiction will be affected.²²³ The ensuing dialogue may further understanding of tribal justice systems, and lead to cooperative arrangements under state, federal, and tribal laws that allow for mutual aid agreements and cross-deputization of law enforcement officers.²²⁴ Yet, while the new legislation provides an opportunity for local government views to be considered, the legislature wisely rejected amendments that would have required the Governor to certify that certain intergovernmental agreements were actually in place.²²⁵ This is good because it allows

220. It would be useful if the Department of the Interior developed at least some guidelines for determining whether to accept a petition for retrocession. As it stands now, it is entirely an ad hoc process. See *infra* notes 254–258 and accompanying text for a reasonable approach under the Indian Child Welfare Act.

221. Leonhard, *supra* note 128, at 721. Nevada is the only state to offer unconditional retrocession to any tribe that had not consented to state jurisdiction. NEV. REV. STAT. § 41.430 (2011); see CAPTURED JUSTICE, *supra* note 38, at 184–87 (discussing Nevada’s retrocession scheme in general and problems encountered by the Ely Colony); Acceptance of Offer to Retrocede Jurisdiction, 40 Fed. Reg. 27,501 (June 24, 1975).

222. H.B. 1773, H. Amd. 343, 62d. Leg., Reg. Sess. (Wash. 2011).

223. There was little (if any) overt opposition to the retrocession as the Task Force worked through the various issues. More typical were concerns expressed by the Washington State Association of Counties and the Kitsap County Prosecuting Attorney’s Office. Both were interested in ensuring efficient and coordinated service and law enforcement delivery after any retrocession. Memorandum from Russell D. Hauge, Kitsap Prosecuting Attorney, to Sarah Lambert, Legislative Assistant, Tribal Retrocession Work Group (Nov. 2, 2011) (on file with Washington Law Review); Letter from Wash. State Ass’n of Cntys. to Representative McCoy and Retrocession Work Group (Oct. 10, 2011) (on file with Washington Law Review).

224. See Tassie Hanna, Sam Deloria & Charles E. Trimble, *The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship*, 47 TULSA L. REV. 553, 592 (2012) (discussing the virtues of intergovernmental cooperation).

225. Compare E.S.H.B. 2233, S. Amd. 2233-S.E AMS ENGR S4848.E § 1(8) (passed Senate on Feb. 28, 2012), with E.S.H.B. 2233, S. Amd. 282, 2233-S.E AMS PRID S5296.1 § 1(8) (passed

Indian tribes to submit their retrocession petition when they feel they have adequately consulted with state and local officials and can make their case directly to the Governor.²²⁶ The consultation mandate and the possibility for legislative hearings provide opportunities to explore all issues of concern, but ultimately leave the negotiation process to the Executive Branch of state government and the petitioning Indian tribe. It also avoids giving local governments a veto. Rather, the consultation provisions help the tribal, state, and local officials think through the manner in which the shift in jurisdiction will be implemented, and the practical consequences of the changes.

In fact, the negotiation process can facilitate better relations simply due to the increased mutual understanding that develops through the process. Indeed, several commentators have noted the benefits of tribal-state negotiations in a variety of contexts. The late David H. Getches noted that “negotiated arrangements among governments concerning jurisdiction and the provision of government services on Indian reservations can give certainty and avoid the necessity of litigation.”²²⁷ As stated by Professor Frank Pommersheim: “Without talk and conversation, there is no *hope for the future* of tribal-state relations. Yet hope must also encourage the energetic dialogue that animates and gives hope meaning in the first instance.”²²⁸ The goal is “to identify those common interests that are better served by cooperation and coordination

Senate on Mar. 5, 2012). The engrossed Senate Bill of Feb. 28, 2012 contained the mandatory certification language, which was rejected by the House and followed by the “striker” language of March 5, 2012. A complete history of the bill’s amendments can be found at <http://dlr.leg.wa.gov/billsummary/default.aspx?bill=2233&year=2011>.

226. If state agencies and local entities were left completely out of the process, they could be expected to weigh in with their opposition at the stage when the Secretary of the Interior deliberates whether to accept the retrocession petition. Cf. Letter from Russell D. Hauge, Kitsap Prosecuting Attorney, to Governor Christine Gregoire (Sept. 14, 2012) (on file with Washington Law Review) (suggesting that the U.S. Attorney would not have adequate resources to prosecute non-Indians if state authority over non-Indian versus Indian crimes were no longer subject to state authority).

227. David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120, 143 (1993). Dean Getches also canvassed other federal efforts to encourage tribal-state compacting over jurisdictional matters. *Id.* at 145–47; see also COHEN, *supra* note 2, § 6.05, at 589.

228. Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future*, 36 S.D. L. REV. 239, 276 (1991); see also Robert T. Anderson, *Indian Water Rights, Practical Reasoning and Negotiated Settlements*, 98 CAL. L. REV. 1133, 1134 (2010) (discussing how uncertainty in the water rights area “has created an environment in which creative, practical solutions to conflicts have emerged in the Indian water settlements approved by Congress”); P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 373 (1994) (“Tribal-state negotiations can be comprehensive, instead of piecemeal, as is inherent in case-by-case litigation.”).

than competition and confrontation.”²²⁹

At the same time, a state process is not enough. For example, it remains to be seen whether the Governor will accept a proffered tribal request for retrocession. Governors should be expected to operate in good faith, but tribes are in the position of supplicants seeking restoration of a jurisdictional scheme that was altered without tribal consent. Congressional action is therefore necessary and desirable to reverse the effects of the unilateral grant of state authority under P.L. 280.

B. Federal Law Should Be Changed to Provide a Tribally-Controlled Process for Negotiating the Balance of Jurisdiction in Indian Country

As noted at the outset of this Article, the consent of the governed has a hallowed place in the United States’ system of government as well as in emerging international law pertaining to indigenous peoples’ rights.²³⁰ The U.N. Declaration on the Rights of Indigenous Peoples provides that “States shall consult and cooperate in good faith with the indigenous peoples . . . in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”²³¹ As the brief historic survey of federal-state-tribal relations set out in this Article reveals, the United Nations’ consent paradigm has rarely been followed in federal Indian policy. One hundred and fifty years of vacillating policies has left a legacy of many moral and legal wrongs that must be undone. While it is not practically possible to undo all of the harmful policies manifested in federal Indian law in one fell swoop, the modern era has seen some encouraging steps that can serve as a platform for constructing further improvements.

President Nixon repudiated the termination policy and ushered in an era supportive of the federal-tribal relationship, announcing a new policy of “self-determination without termination.”²³² Congress followed suit with the Indian Self-Determination and Education Assistance Act of 1975,²³³ which allows for the transfer of the administration of federal

229. Hanna, Deloria & Trimble, *supra* note 223. This Article provides a comprehensive history of the efforts in the modern era to reach cooperative agreements in a wide variety of areas of concern to tribes and local non-Indian governments.

230. *See supra* note 1 and accompanying text.

231. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

232. H.R. DOC. No. 91–363, at 2 (1970).

233. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in 25 U.S.C. §§ 450–450n,

programs from the Bureau of Indian Affairs to the tribes.²³⁴ That program was augmented by the Self-Governance Acts of 1988,²³⁵ 1994,²³⁶ and 2000,²³⁷ which establish flexible block grant systems for tribal delivery of services the federal government would otherwise provide.²³⁸ In a host of other statutes and administrative actions, the United States today encourages and supports tribal governmental institutions.²³⁹ These modern policies harken back to the original tribal-federal relationship that provided ample room for the exercise of tribal sovereignty within tribal territories.

While the earliest treaties reflected a desire for mutual peace and intergovernmental respect, later treaties and agreements were geared to the United States' acquisition of land.²⁴⁰ In return, the United States provided compensation in various forms. Most important from the Indian perspective were the promises of permanent homelands and recognition of the right to continue to exist as distinct sovereign peoples.²⁴¹ Federal intervention in internal tribal matters has a suspect doctrinal pedigree, and the Supreme Court has acknowledged as much in cases decided more than a century apart.²⁴² In fact, Indian treaties and treaty substitutes should be accorded quasi-constitutional status as they stand as the only consent-based, and thus legitimate, source of federal authority over Indian nations.²⁴³ The fact that the Supreme Court has

§§ 455–458e (2006)).

234. COHEN, *supra* note 2, § 22.02, at 1346–49.

235. Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, 102 Stat. 2285 (1988).

236. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250.

237. Omnibus Indian Advancement Act, Pub. L. No. 106-568, 114 Stat. 2868 (2000).

238. 25 U.S.C. §§ 458aa–458aaa-18.

239. *See, e.g.*, Native American Business Development, Trade Promotion, and Tourism Act of 2000, P.L. 106-464, 114 Stat. 2012 (codified at 25 U.S.C. § 4301(6)) (“[T]he United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes.”); Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000) (affirming the federal trust responsibility to Indian tribes). An exhaustive discussion of federal programs supporting tribal self-government and economic development can be found in COHEN, *supra* note 2, § 22, at 1335–1413.

240. *See* COHEN, *supra* note 2, § 102[1], at 16–17.

241. *Id.* § 1.03[6][a], at 64–65.

242. *Compare* United States v. Kagama, 118 U.S. 375 (1886) (rejecting the Constitution’s Indian Commerce Clause as a basis for federal jurisdiction over criminal jurisdiction in Indian country), *with* United States v. Lara, 541 U.S. 193, 201 (2004) (“Congress’ legislative authority would rest in part, not upon ‘affirmative grants of the Constitution,’ but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as ‘necessary concomitants of nationality.’”).

243. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and*

upheld harsh treatment of tribal legal rights at times²⁴⁴ does not mean that more enlightened treatment should not be forthcoming as a matter of policy.

The self-determination policy, backstopped by the federal government's trust responsibility to Indian nations,²⁴⁵ is the way that the United States' promise of permanent tribal homelands under federal protection is manifested in the twenty-first century. The return to tribal control over criminal and civil jurisdiction in Indian country is an essential component of this move to self-determination. States' rights are greatly valued in our federal system in order to facilitate legislative experimentation and local control. Indian tribes are the third sovereign mentioned in the Constitution. The same values favoring local control by states apply with even greater force since the tribes did not have a hand in the formation of the Constitution, and thus did not voluntarily submit themselves to the jurisdiction of the national government. In the course of setting aside Georgia's claim of authority over the Cherokee Nation, Chief Justice Marshall noted that 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."²⁴⁶ Despite two centuries of inconsistent federal policies and actions, Chief Justice Marshall's recognition of Indian autonomy and self-government is once again at the foundation of federal policy. It has not, however, been manifested in the context of criminal jurisdiction in Indian country.

Professor Kevin Washburn of the University of New Mexico School of Law underlined these issues when he described the federal criminal jurisdictional patchwork in Indian country as a relic of repudiated policies—an anomaly in the self-determination era. "The federal Indian country criminal justice regime reflects the unilateral imposition, by an external authority, of substantive criminal norms on separate and independent communities without their consent and often against their

Interpretation in Federal Indian Law, 107 HARV. L. REV. 381 406–17 (1993). As set out in the text accompanying *supra* note 1, the consent principle is foundational to federal, state, and international law.

244. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding unilateral abrogation of Indian treaty despite promise that it would not be changed without the consent of three-fourths of adult male Indians).

245. In *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), the Supreme Court concluded that the United States "has charged itself with moral obligations of the highest responsibility and trust."

246. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

will.”²⁴⁷ Professor Washburn concluded his analysis by suggesting that Congress should consider an opt-out program for tribes for the removal of federal jurisdiction to be replaced by sole tribal authority.²⁴⁸ While Professor Washburn’s argument has merit, an even stronger case can be made for congressional approval of legislation to authorize tribes to remove *state* jurisdiction granted under P.L. 280. This is not a new idea. In 1975, a bill was introduced that would have authorized tribes to directly petition the Secretary of the Interior for the retrocession of state jurisdiction acquired under P.L. 280.²⁴⁹ The states would have had no role in the Secretary’s decision to accept a tribal retrocession request, and the Secretary could only reject the petition if “(1) the tribe has no applicable existing or proposed law and order code, or (2) the tribe has no plan for fulfilling its responsibilities under the jurisdiction sought to be reacquired or determined.”²⁵⁰ The bill never made it out of committee, but it could serve as a starting point for congressional action today. The Tribal Law and Order Act of 2010 increased tribal authority in sentencing, thus demonstrating Congress’s support for tribal courts.²⁵¹ It also allows tribes in mandatory P.L. 280 states to request the resumption of concurrent federal jurisdiction under the Major Crimes Act and Indian Country Crimes Act.²⁵² In addition, the Tribal Law and Order Act provides for appointment of tribal prosecutors to enforce federal law in federal courts against Indians and non-Indians alike.²⁵³ While none of these provisions address the problem of unwanted state jurisdiction, it demonstrates federal support for tribal wishes regarding enhanced federal law enforcement.

Another approach short of tribally-mandated retrocession, suggested by Professors Duane Champagne and Carole Goldberg,²⁵⁴ would be to

247. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 782 (2006). Professor Washburn was confirmed by the Senate as the Assistant Secretary of Indian Affairs on September 21, 2012. 158 CONG. REC. S6685 (daily ed. Sept. 21, 2012); Press Release, Dept. of Interior, Salazar Applauds Senate Confirmation of Kevin Washburn as Interior’s Assistant Secretary for Indian Affairs (Sept. 22, 2012), available at <http://www.doi.gov/news/pressreleases/Salazar-Applaud-Senate-Confirmation-of-Kevin-Washburn-as-Interiors-Assistant-Secretary-for-Indian-Affairs.cfm>.

248. Washburn, *supra* note 247, at 853.

249. Indian Law Enforcement Improvement Act of 1975, S. 2010, 94th Cong. (1975).

250. *Id.* § 103(c).

251. *See supra* note 63 and accompanying text.

252. 18 U.S.C. § 1162(d) (2006); *see supra* note 86.

253. 25 U.S.C. § 2810(d) (2006); 28 U.S.C. § 543 (2006).

254. Professors Goldberg and Champagne are two of the leading authorities on P.L. 280 and authors of the only empirical study on the effects of P.L. 280. FINAL REPORT, *supra* note 176.

utilize the Indian Child Welfare Act (ICWA) model, which permits partial retrocession of state P.L. 280 jurisdiction in child custody matters.²⁵⁵ In ICWA, a tribal petition to the Secretary of the Interior initiates the retrocession process and the Secretary has limited discretion to reject the petition.²⁵⁶ Moreover, if a tribal petition is denied, the Secretary must help the tribe cure any defects in the tribal plan to reassume exclusive jurisdiction.²⁵⁷ This is an effective approach as it explicitly targets jurisdiction conferred by P.L. 280 and similar statutes. While the Secretarial-approval role is somewhat paternalistic, the petitioning tribe is generally in control of the process, and Congress provided substantive standards to cabin the Secretary's discretion.²⁵⁸ The affected state has no formal role in the process.

The Indian Gaming Regulatory Act (IGRA)²⁵⁹ provides yet another model for intergovernmental cooperation in general, and respecting P.L. 280 jurisdiction in particular. Under IGRA, casino-style gaming on Indian lands is prohibited unless an Indian tribe has reached an agreement (compact) with the state where the land is located.²⁶⁰ It allows Indian tribes to initiate negotiations in order to reach a tribal-state compact that would govern the terms of the gaming.²⁶¹ If the process

255. *Searching for an Exit*, *supra* note 92, at 268–69. The ICWA of 1978 provides substantive and procedural protection for the benefit of Indian tribes and Indian families. Chief among these are provisions mandating the transfer of child custody proceedings from state to tribal courts at the request of a tribe or Indian custodian. 25 U.S.C. § 1911 (2006); *see* *Miss. Band of Choctaw v. Holyfield*, 490 U.S. 30 (1989).

256. 25 U.S.C. § 1918 (“Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.”). Implementing regulations are found at 25 C.F.R. pt. 13 (2012).

257. 25 U.S.C. § 1918(c) (“If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.”).

258. *Id.* § 1918(b)(1) (“[T]he Secretary may consider, among other things: (i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe; (ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe; (iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and (iv) the feasibility of the plan in cases of multiracial occupation of a single reservation or geographic area.”).

259. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–21).

260. 25 U.S.C. § 2710(d)(1). Casino style gaming is defined as “class III gaming” in IGRA. *See* 25 U.S.C. § 2703.

261. *Id.* § 2710(d).

does not yield a compact, a judicially or administratively supervised arbitration process is imposed.²⁶² While this model is not perfect,²⁶³ it has resulted in the greatest economic development in Indian country in the history of the United States.²⁶⁴ The premise of IGRA was that Indian tribes had a right to be free of state jurisdiction with respect to gaming activities. The statute codifies that right while also providing for some state involvement in the way gaming would occur. This has allowed tribes and states to develop relatively harmonious relationships pursuant to these intergovernmental compacts. The statute sets out items that may be included in a compact.²⁶⁵ It also enumerates certain matters that may not be the subject of negotiations, for example, states may not condition their agreement on a tribal concession to state taxation.²⁶⁶ IGRA expressly provides for the “allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of” state or tribal laws directly related to “licensing and regulation of [gaming].”²⁶⁷ The criminal law enforcement provisions of IGRA preempt state gaming laws but authorize compact provisions to make state law applicable.²⁶⁸ Tribal-state compacts in Washington generally provide that Indian tribes shall be the primary enforcement and regulatory authorities respecting Indian gaming, but also authorize state enforcement of some state gambling laws.²⁶⁹ This Article does not

262. *See id.* § 2710(d)(7); 25 C.F.R. §§ 291.7–.11; Final Rule, Class III Gaming Procedures, 65 Fed. Reg. 17,535, 17,536 (Apr. 12, 1999) (explaining process).

263. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (holding that judicial supervision aspect may be barred by state sovereign immunity because Congress lacks power to waive state immunity pursuant to the Commerce Clause). A regulatory avenue was developed in response to the Supreme Court’s ruling. 25 C.F.R. pt. 291.

264. *See Washburn, supra* note 95, at 422 (“Indian gaming is simply the most successful economic venture ever to occur consistently across a wide range of Indian reservations.”).

265. 25 U.S.C. § 2710(d)(3)(C).

266. *Id.* § 2710(d)(4).

267. *Id.* § 2710(d)(3)(C)(i)–(ii).

268. 18 U.S.C. § 1166(d) (2006) (“The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.”).

269. *See, e.g., Tribal-State Compact for Class III Gaming Between the Snoqualmie Indian Tribe and the State of Washington*, § 9, Wash.-Snoqualmie Tribe, Apr. 4, 2002, available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Snoqualmie%20Indian%20Tribe/snoqualmiecomp040402.pdf>. All Tribal-State compacts are available from the National Indian Gaming Commission at http://www.nigc.gov/Reading_Room/Compacts.aspx. Washington also has a progressive tribal cross-deputization statute. WASH. REV. CODE § 10.92.020 (2010); *see also supra* note 73.

advocate a P.L. 280 retrocession approach that would require state agreement to remove the state jurisdiction granted by P.L. 280. Rather, the compacting model simply provides an example of tribal-state cooperation in criminal law enforcement matters when such negotiations are authorized under federal law. It is interesting that many of the Washington gaming compacts provide for a limited role of state law enforcement—especially with respect to non-Indians. Presumably, this is because an exclusive tribal and federal regime might create a practical vacuum for minor criminal offenses committed by non-Indians. Tribal criminal jurisdiction over such offenses would be barred by the *Oliphant* rule,²⁷⁰ and prosecution of minor crimes by non-Indians is often a low priority for federal prosecutors, or may fail for other reasons.²⁷¹ A successful negotiation process allows the parties to step back from wooden, doctrinal positions and instead to focus on the substantive law enforcement issues at hand, and how best to implement an effective system in tribal territories.

The foregoing statutory schemes offer useful concepts for tribal removal of unwanted state jurisdiction that should be part of a new approach to P.L. 280 retrocession pursuant to federal law. While imposing state jurisdiction on sovereign tribes without informed consent was bad policy and morally wrong, Congress should not simply oust state jurisdiction unilaterally. Instead, a better approach is one that melds the ideas of encouraging negotiations and compacting as in IGRA, with ultimate power in the tribes to petition the Secretary for a full or partial removal of state jurisdiction as provided in ICWA. Consultation with the affected state should be mandated at a minimal level to encourage intergovernmental cooperation without imposing undue burdens or delay on the petitioning tribe. Authorization of inter-governmental compacts akin to IGRA may not be needed in all states, but if included as an option, it would remove all doubt regarding the possibilities and legality of voluntary intergovernmental arrangements. Time for negotiations allows consideration of reliance interests, which are established by the manner in which law enforcement and service delivery is now carried out by tribal, state and federal authorities. Moreover, the sheer complexity of the P.L. 280 jurisdictional scheme counsels in favor of a deliberate process in which the affected governments can assess the effect of retrocession on their resources and constituents. Any new retrocession process must be developed in consultation with Indian

270. See text at *infra* notes 70–71.

271. Washburn, *supra* note 37, at 713–15.

tribes and affected parties. The purpose of any substantive requirements should simply look to an explanation of how retroceded jurisdiction would be replaced. We live in the era of tribal self-determination. It is time that tribes be given the option to remove that relic of the termination era—P.L. 280.

CONCLUSION

This Article provides the reader with background information in the field of federal Indian law and explains the complexities of criminal jurisdiction in Indian country. It demonstrates that the independence of the Indian tribes at the time of the United States' formation was well accepted, and treaty making with the tribes was consistent with their quasi-independent status after their involuntary incorporation into the United States. The immunity of Indian tribes and their members from state jurisdiction has a pedigree stretching back to the adoption of the Constitution. P.L. 280 altered that situation in a dramatic way by granting states jurisdiction without following the democratic consent principle. As Senator Jackson noted in 1975, “[t]he Public Law 280 legislation was approved by Congress in the face of strenuous Indian opposition and denied consent of the Indian tribes affected by the Act The Indian community viewed the passage of Public Law 280 as an added dimension to the dreaded termination policy.”²⁷²

The complexity that resulted from the ill-conceived grant of authority to the states by P.L. 280 actually decreased the effectiveness of law enforcement in Indian country. The federal government repudiated termination in 1970 in favor of the policy of tribal self-determination, which continues, but P.L. 280's intrusion into Indian country remains. Washington State assumed P.L. 280 jurisdiction in an extremely complex fashion and generally without the consent of Indian tribes. The denial of tribal consent to the jurisdictional scheme on both the federal and state levels is inconsistent with the notion that the consent of the people is a bedrock principle of democracy in the United States.

The Article goes on to describe how Washington developed a state retrocession statute that provides tribes with an innovative avenue to remove unwanted state jurisdiction. Washington's P.L. 280 retrocession law marks a progressive step toward recognizing tribal sovereignty and self-determination, but it does not go far enough because it still denies

272. S. COMM. ON THE INTERIOR & INSULAR AFFAIRS, 94TH CONG., BACKGROUND REP. ON PUBLIC LAW 280 (Comm. Print 1975) (statement of Sen. Henry M. Jackson, Chairman).

tribes the power to remove jurisdiction asserted unilaterally. Congress should consider and pass legislation authorizing tribes to remove state jurisdiction obtained under P.L. 280. Models that vest that power in the tribes, but include opportunities for negotiated cooperative schemes, are set out in the final section of the Article. Such approaches allow Indian tribes the opportunity to develop arrangements that best promote effective justice services and law enforcement in their jurisdictions.

37.12.010. Assumption of criminal and civil jurisdiction by state, WA ST 37.12.010

[West's Revised Code of Washington Annotated](#)

[Title 37. Federal Areas--Indians \(Refs & Annos\)](#)

[Chapter 37.12. Indians and Indian Lands--Jurisdiction \(Refs & Annos\)](#)

West's RCWA 37.12.010

37.12.010. Assumption of criminal and civil jurisdiction by state

[Currentness](#)

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of [RCW 37.12.021](#) have been invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and

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37.12.010. Assumption of criminal and civil jurisdiction by state, WA ST 37.12.010

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted.

Credits

[1963 c 36 § 1; 1957 c 240 § 1.]

[Notes of Decisions \(87\)](#)

West's RCWA 37.12.010, WA ST 37.12.010

Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

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ENHANCED SENTENCING IN TRIBAL COURTS: LESSONS LEARNED FROM TRIBES

by Christine Folsom-Smith, Director, The National Tribal Judicial Center

January 2015

INTRODUCTION

The Tribal Law & Order Act of 2010 (TLOA)¹ was signed into law on July 29, 2010 by President Obama. The TLOA amends the Indian Civil Rights Act² by allowing felony sentencing for certain crimes through the provision of enhanced sentencing authority, establishes new minimum standards for protecting defendants' rights in the tribal court system, and encourages federally-recognized Indian tribes (tribes) to consider the use of alternatives to incarceration or correctional options as a justice system response to crime in their communities. Further, the Act authorizes the Attorney General to permit tribes access to National Crime Information Center (NCIC) data, and to grant concurrent jurisdiction/retrocession to the federal government by tribes in Public Law 83-280 as amended, often referred to as PL 280 states.

¹ Public Law (Pub.L.) 111-211, H.R. 725, 124 Stat. 2258, enacted July 29, 2010.

² 25 U.S.C. §§ 1301 et seq.

The decision to implement enhanced sentencing authority is left up to each individual tribe. A handful of tribes have begun or have completed establishing the mechanisms required under TLOA to pronounce enhanced

TRIBAL CIVIL AND CRIMINAL LEGAL ASSISTANCE PROGRAM

The Tribal Civil and Criminal Legal Assistance (TCCLA) Program provides resources to:

1. Enhance the operations of tribal justice systems and improve access to those justice systems, and
2. Provide training and technical assistance (TTA) for development and enhancement of tribal justice systems.

The TTA services in the area of tribal civil and criminal assistance help tribal communities with the provision of procedural justice in tribal civil and criminal legal procedures, legal infrastructure enhancements, public education, and the development and enhancement of tribal justice systems. Services focus on topics that include:

- Indigent defense services;
- Civil legal assistance;
- Public defender services; and
- Strategies for implementing the enhanced sentencing authority under the Tribal Law and Order Act (TLOA).

For more information on the TCCLA Program, visit www.bja.gov/ProgramDetails.aspx?Program_ID=102.

sentences. This publication is designed to provide a brief overview, not a comprehensive review, of the changes under TLOA regarding enhanced sentencing authority, offer considerations for correctional/detention and community corrections programming related to enhanced sentences, and provide tribes with a checklist to help guide discussions around implementation of enhanced sentencing authority. Additionally, this publication explores the adoption of TLOA's enhanced sentencing authority through interviews with several tribal court judges and personnel who have been intricately involved in establishing the provisions required to convey enhanced sentences, highlighting the beginning of change at the tribal level, the processes and challenges faced by these courts, the current status of the implementation as of the date of the interviews, and any other aspects of implementation that the interviewees shared³. Finally, this publication will provide information on financial resources to fund enhanced sentencing authority implementation.

ENHANCED SENTENCING AUTHORITY

In order to exert enhanced sentencing authority, tribal courts will be required to make and adopt criminal codes and rules of evidence, make rules of criminal procedure available to the public, provide qualified legal counsel to defendants, have law-trained judges, and record any criminal proceedings⁴. Figure 1 on the next page provides a quick reference of the changes related to enhanced sentencing authority under TLOA.

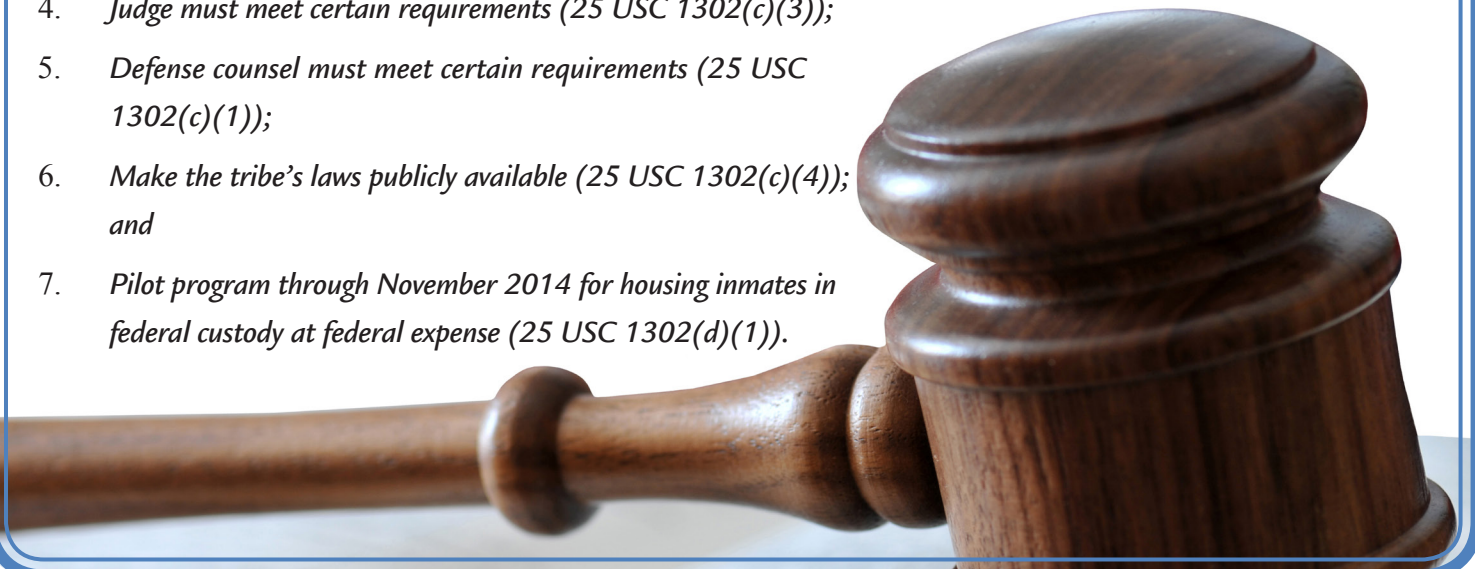
3 Chief Judge Theresa Pouley of the Tulalip Tribes, Gary LaRance who was at the time employed by the Salt River Pima Maricopa Community Public Defender's Office, and Chief Judge Richard Trujillo and Court Administrator Wilbur Maho of the Hopi Tribe were interviewed for this publication.

4 Pub.L. 111-211, H.R. 725, 124 Stat. 2258, enacted July 29, 2010.

FIGURE 1

CHANGES UNDER TLOA RELATED TO ENHANCED SENTENCING AUTHORITY

1. *Sentences are increased from 1 year to 3 years for the maximum penalty per offense (25 USC 1302(a)(7)(C) and 25 USC 1302 (b));*
2. *Punishment for multiple offenses can be “stacked” to a maximum of 9 years (25 USC 1302(a)(7)(D));*
3. *Court is required to be a “court of record” (25 USC 1302(c)(5));*
4. *Judge must meet certain requirements (25 USC 1302(c)(3));*
5. *Defense counsel must meet certain requirements (25 USC 1302(c)(1));*
6. *Make the tribe’s laws publicly available (25 USC 1302(c)(4)); and*
7. *Pilot program through November 2014 for housing inmates in federal custody at federal expense (25 USC 1302(d)(1)).*



WHAT CRIMES SHOULD QUALIFY FOR ENHANCED SENTENCING?

Tribes should carefully consider and choose which crimes will qualify for enhanced sentencing in their tribal courts. Crimes identified as appropriate for enhanced sentencing will vary among tribes; however, only certain crimes should be re-classified as eligible for enhanced sentencing. Some crimes have traditionally been treated as misdemeanors, for example thefts of property under \$500, fighting words or statutory crimes like speeding and should remain classified as such. Tribes may want to look at other jurisdictions to research crimes commonly accepted as misdemeanors and felonies and then decide what is most reasonable for their community. Figure 2, on the next page, provides an overview of examples of crimes that tribes may want to consider for enhanced sentencing.

FIGURE 2**CRIMES THAT TRIBES MAY WANT TO CONSIDER FOR ENHANCED SENTENCING AUTHORITY**

- **Murder**
- **Vehicular manslaughter (including Driving Under the Influence (DUI) causing death)**
- **Repeat offender DUI – perhaps on fourth or fifth DUI within 10 years**
- **DUI causing substantial bodily harm**
- **Rape (spousal or otherwise); forcible sodomy; forcible oral copulation; forcible sexual penetration**
- **Assault with intent to commit rape**
- **Robbery – armed or strong-arm**
- **Kidnapping**
- **Child molestation**
- **Human trafficking (particularly use of children as sex workers)**
- **Repeat offender of domestic violence (states and federal consider at third offense)**
- **Battery (domestic violence or any) with deadly or dangerous weapon, or causing “substantial bodily harm” or “great bodily harm” or “protracted pain”**
- **Assault, battery or threats to Tribal Officials such as Tribal Council members, Community Council members**
- **Assault, battery or threats to key employees such as Tribal Administrator, police officers, judge, prosecutor, defense attorney, domestic violence advocate, Court Appointed Special Advocates (CASA) or CASA worker, etc.**
- **Assault, battery or threats to tribal elders**
- **Financial abuse of tribal elders above a certain dollar level**
- **Failure to register as a sex offender (or repeated failure to register; or failure to register by only those who have been convicted of one of these offenses)**
- **Manufacturing or sales of controlled or hypnotic substances; particularly manufacturing that endangers children or elders; particularly sales to children**
- **Desecration of graves or sacred sites**
- **Other offenses that the Tribe finds particularly appropriate for felony prosecution**

CORRECTIONS/DETENTION

A significant consideration for tribes seeking to implement enhanced sentencing authority has to be not only where individuals will be housed, both pre-trial and post-sentence, but how the tribe will pay for it. The cost of housing for inmates, whether long-term or not, would fall under the same funding scheme the tribe currently uses for inmate housing costs. For example, if there is a contract with the Department of the Interior's Bureau of Indian Affairs (BIA) to house inmates for the tribe, the contract would not necessarily include those inmates housed for extended sentences as it has in the past. However, if the tribe has its own detention facility, the cost would be covered by the tribe in the same manner as the cost of housing inmates for shorter terms in the same facility, assuming the facility meets sufficient standards for long-term housing of inmates⁵. Tribes have funded their inmate housing costs in a variety of ways in the past, including imposing fines, filing fees, and general funds allocations. These same funds could be used for the enhanced inmate housing costs, but are likely not sufficient in volume to cover all costs.

Many tribes are seeking to build their own detention facilities—or multi-purpose facilities—to be responsive to the changing needs of their communities. The Bureau of Justice Assistance (BJA) provides a limited amount of funds to tribes seeking to renovate or construct new facilities. Purpose Area 4 of the Coordinated Tribal Assistance Solicitation should be explored if your tribe is interested in planning for, renovating, or constructing a new facility.

Another avenue for tribes may be to develop a Memorandum of Understanding (MOU) or Memorandum of Agreement (MOA) with other jurisdictions (local, state, tribal) to assist them in housing their members sentenced under their new authority. The MOU/MOA should clearly state the agreed upon daily rate and what is included in that daily rate (such as shelter, food, medical care, services such as treatment, educational, mental health, rehabilitative, etc. as well as reentry planning for community release).

COMMUNITY CORRECTIONS

Enhanced sentencing authority is not limited solely to incarcerating an individual for a longer period of time. The authority can include a combination of time served in a secure facility as well as time on supervised community release (probation/parole). The impact of enhanced sentencing authority on community corrections should not be overlooked when planning for anticipated costs of implementing this new authority. Community corrections personnel will not only be supervising a potentially higher number of individuals on their caseloads as a result of this new authority, but they will also be supervising a higher-risk level of individuals which is very time intensive. Tribal communities will need to ensure that a menu of services is available for individuals serving longer community based sentences as well as for individuals who plan to return to their communities following a period of secure confinement (such as transitional housing, family reunification services, and continuation of treatment, medical, and mental health services initiated during confinement).

⁵ For more information on these standards, please see the BIA Adult Detention Facility Guidelines here <http://tloa.ncai.org/documentlibrary/2011/02/BIA%20Adult%20Detention%20Facility%20Guidelines%20Dec%202010%20SOL.pdf>

The Bureau of Justice Assistance (BJA) has provided funds to agencies to provide training and technical assistance to tribes seeking to develop or enhance their community corrections and correctional alternative programs⁶. Services such as pretrial, probation, and reentry should be included as an integral planning consideration for tribes seeking to implement enhanced sentencing authority. Purpose area 3 under CTAS can be used to seek funding for community corrections personnel and programming; Purpose area 4 under CTAS can be used to seek funding for alternatives to incarceration personnel and programming; and Purpose area 9 under CTAS can be used to seek funding for community corrections personnel and programming *specific to juvenile populations*.

LESSONS LEARNED ALONG THE PATH TO IMPLEMENTATION:

In August and September 2013, the National Tribal Judicial Center conducted interviews with tribal judges and tribal leaders that had either completed or were in the midst of TLOA implementation related to enhanced sentencing authority. The tribes contacted and interviewed were the Salt River Pima-Maricopa Indian Community (SRPMIC), the Tulalip Tribes, and the Hopi Tribe.



POSITIVE COMMUNITY INVOLVEMENT

can be essential to achieving change in your community. Collaborative transformations are more effective than those forced on a group. If you can create consensus with your stakeholders, your chances of success increase as you seek to implement change in your system. A first step in this process is community education.

Another component of this process is sharing information about the legislative process of your tribe and why action is necessary to amend the law of the tribe. You may be able to accomplish this through tribal newspaper or newsletter announcements or articles, community forums or meetings. Regular updates on the process are also an effective way of keeping the community engaged and informed. As the process continues, your tribe may seek public comment on any code revisions or changes.

⁶ To request technical assistance for your community corrections programming, please visit the American Probation & Parole Association Tribal Justice Capacity Building Training and Technical Assistance Project Page at http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IV_ProjectDetail&wps_key=7414391d-e5db-4bf6-b9b1-5648c496bdc7

The next section includes a discussion of lessons learned from their experiences that hopefully will guide other tribes to success in their own implementation. Additionally, a checklist of considerations is provided to guide other tribes in their decision-making processes related to enhanced sentencing authority implementation.

BEGINNINGS

Implementation of TLOA has created some challenges for tribal communities ranging from interpreting the language used in the Act to garnering community support. For example, TLOA states, in part, that the judge handling cases that are eligible for enhanced sentencing must be “licensed to practice law by any jurisdiction in the United States.” (25 USC 1302 (c)(3)(b)). The lack of definitive guidance on phrases such as “any jurisdiction” has led to multiple interpretations in the field. One jurisdiction could choose to interpret the language as requiring a state licensed attorney in the position; whereas, another jurisdiction might interpret that to mean a tribally licensed attorney. The widely accepted interpretation of this language suggests that the judge could be licensed by the tribe only and there is no strict requirement that the judge be licensed by any jurisdiction.

Another critical factor involved in making changes to codes or procedures is commitment to the process by the tribal governing body. Sometimes the decision-making process is slow and there is a certain level of lobbying for change that should occur. Additionally, marshaling the involvement of the proper parties who should be involved in the process of changing codes to accommodate the modification and addition of procedures required by TLOA can make this a time-consuming project.

In addition, tribes must make the financial commitment to the judicial branch as well as the policing, corrections, and community corrections departments necessary to effectuate the requirements of TLOA. While tribes now work within ICRA pre-TLOA amendments and have set tribal “hard funds” and budget goals accordingly, the TLOA amendments require increased expenditures that are difficult to quantify because the law is new, and tribes may be hesitant to take on the burden without more certainty.

PROCESS

The process for each court is and will be unique to individual community needs. At the SRPMIC, for example, the County Manager and Tribal President met with certain department directors to ask what each thought was needed in order to implement the TLOA requirements. The first step for them was to amend The Rules of Court followed by drafting a new criminal code. This process was spread over 25 months.

In contrast, the Tulalip Tribes amended their code in September 2012 to add a layer of enhanced prosecutions to the base code provisions. Due to the new class being felonies, they chose to designate these offenses as “Class F” offenses. BIA first approved then rescinded approval of the amendments because the code did not explicitly state that the tribe published their codes. The requirements of TLOA do not specifically state that a tribe has to

include, within the code itself, notice of where a defendant can access the codes but rather the tribe has to make the code available, which Tulalip Tribes had, for some time before this change was proposed. The Tulalip Tribes continue to make all of their codes publicly available on the tribal website. The Tulalip Tribes have prosecuted cases under this code since January 2013.

At Hopi Tribe, they initially sought to amend their code but determined it was best to write an entirely new

criminal code to adopt the TLOA changes. The tribe held a series of meetings to gather community input before amending the code. The law was adopted in September 2012, and technical amendments were made in April 2013. The tribe also adopted all federal rules of evidence and procedure to provide familiarity for any federal judges who may be tasked with appeals from the tribal court in these cases.

AT THE DATE OF THESE INTERVIEWS,

it should be noted that other tribes have sentenced inmates under the federal pilot program. The Tribes exercising enhanced sentencing and incarcerating inmates under the TLOA include:

- Hopi Tribe
- Tulalip Tribes
- Cherokee Nation of Oklahoma
- Confederated Tribes of the Umatilla Reservation
- Eastern Band of Cherokee Nation
- Fort Peck Assiniboine & Sioux Tribes
- Muscogee (Creek) Nation of Oklahoma
- Salt River Pima Maricopa Indian Community
- Pascua Yaqui

Several other tribes are close to implementation.
<http://tloa.ncai.org/tribesexercisingTLOA.cfm>

Any tribe wishing to pursue enhanced sentencing will have to formulate a plan that addresses foremost, the community's self-identified needs. The community should be represented by the most inclusive amount of shareholders as possible, even though the inclusiveness may initially slow the process. Next, the tribe will have to audit its codes to comply with the requirements of TLOA. An essential element of the code audit is to make sure other codes, not only the criminal code, reflect any changes necessitated by TLOA criminal code changes, such as social services codes, personnel codes, and children's codes, to name a few, as well as the tribe's constitution. The tribe will then have to make a "best guess" of the fiscal impact of the code changes going forward and budget monies accordingly if the revisions are voted on and accepted by the community.

Each tribe, being sovereign, has the privilege and responsibility to design its own budget priorities and may choose to exercise its governance at a level less than permitted by TLOA. Tribes funded through "self-governance" funds in particular enjoy this privilege, and "638" funded tribes must negotiate for its funds for every department and program. Tribal "hard funds", or monies derived from its own businesses, may already be assigned or budgeted and the government will have to make the political choices it deems necessary for the community. Therefore, the uncertainties of the increased costs weigh heavily upon the communities.

CHALLENGES

The Hopi code requires state bar licensed attorneys for defense and prosecution, as well as for its judges in all TLOA enhanced sentencing cases. Non-attorney judges are permitted to hear other matters under Hopi law. The cost for hiring state-licensed attorneys was a concern of the community and council prior to passage. The additional cost was one of the reasons the Hopi community expressed some resistance to adoption of the enhanced sentencing. To address this resistance, a group of Hopi women appeared at a tribal council meeting to tell their stories and explain why the changes were needed. Stories told were of unprosecuted crimes against the women of the tribe and the resulting injustices. The changes passed easily after their very personal presentations.

The Tulalip Tribes reported one external challenge to implementation that was due to the process issues they experienced getting their code changes approved by BIA. Ultimately, the tribe was able to resolve the issue and moved forward. However, it was a challenge that required extra time to process changes they sought to implement in their justice system.

The challenges from within the Tulalip Tribes included: (1) getting the tribe to focus on the needed changes to implement enhanced sentencing authority; (2) determining additional cost to the tribe for processing enhanced sentencing cases and determining who would pay for the costs; and (3) getting the federal authorities to use appropriately licensed and capable trial prosecutors, such as Special Assistant United States Attorneys (SAUSAs). Once the tribe focused on how few crimes would fall under these amendments, the delays were overcome at the tribal level. Tulalip Tribes experienced minimal additional cost since they already used state-licensed attorneys for judges and defense counsel. The U.S. Attorney in the Western District in Washington State does not use tribal prosecutors as SAUSAs and this has not changed since TLOA was enacted.

For the SRPMIC, the challenges were more internal in that the public defender's office was not included in the decision-making process. The resulting code amendments do not include several critical provisions, including: (1) flexibility for the court to depart from mandatory minimum sentences; (2) mitigation factors for sentencing considerations; or (3) an option for alternative sentencing for offenses where the court may determine it is appropriate. The tribe addressed their internal challenges and is moving forward in this new era of enhanced sentencing.

Ultimately, the tribe was able to resolve the issue and moved forward but it was a challenge that added required extra time to the process changes they sought to implement in their justice system.

STATUS

As of June 2013:

- At SRPMIC, approximately 10-15 people have been prosecuted under the enhanced sentencing provisions. At the time of the interview, no tribal members have received enhanced sentences.
- Hopi Tribe has filed approximately 10-15 cases under its enhanced sentencing authority. As of the date of the interview, none of these cases had been set to trial. Hopi is actively pursuing housing a number of its defendants in the Bureau of Prisons pilot program⁷.

As of August 2014:

- Tulalip Tribes, under the Class F Offenses category or TLOA offenses, have filed 23 cases (with 26 total charges). Eleven cases remain open. Twelve cases (with 14 total charges) have been disposed of with nine guilty pleas, two not guilty pleas and three cases dismissed (two were dismissed in conjunction with a Class F charge). One defendant has been sent to federal prison and another defendant will be sent in the near future⁸.

OTHER POINTS OF INTEREST

Hopi Tribe is considering amending its code to include special criminal jurisdiction in domestic violence cases under the changes in the Violence Against Women Re-Authorization Act (VAWA) of 2013, but a serious concern for the tribe is whether it would want to include non-Hopis on their juries. The Tulalip Tribes is already in the process of amending its codes to implement the special criminal jurisdiction in domestic violence cases under VAWA 2013. They currently have a process for utilizing non-Indian employees of the tribe for jurors. SRPMIC is also in the process of amending its code to include prosecution of non-Indians under VAWA of 2013.

FUNDING RESOURCES

One of the key barriers for tribes choosing to exert enhanced sentencing authority continues to be the lack of funding. Much of the funding available begins at the federal level. The Bureau of Indian Affairs (BIA) provides funding for law enforcement services in Indian Country, and for support of certain court operations, including corrections operations. Tribes can access this funding through the Office of Justice Services at: www.bia.gov/WhoWeAre/BIA/OJS/index.htm.

One-time funding and individualized training and technical assistance for Tribal Justice Systems is also available through the Division of Tribal Justice Support, Office of Justice Services (TJS). TJS conducts voluntary tribal court assessments intended to evaluate tribal court needs and provide tribal courts with a 3-5 year strategic plan focused on improving court operations. In many instances, additional one-time funding and on-site training and technical assistance is provided as TJS works with BJA in an effort to provide training and technical assistance which is individualized to the Tribe. Purpose Area #3⁹, Justice Systems and Alcohol and Substance Abuse, of the Coordinated Tribal Assistance Solicitation (CTAS) provides funding to federally-recognized Indian tribes

⁷ Please see <http://tloa.ncai.org/documentlibrary/2010/11/BOP%20Pilot%20Program.pdf> for more detailed information on the federal pilot program.

⁸ Updated information provided by Tulalip Tribal Court, Court Projects Supervisor Nicole Sieminski.

⁹ Violence Against Women Reauthorization Act of 2013, S. 47, 113th Congress, 2013-2015.



FIGURE 3

COORDINATED TRIBAL ASSISTANCE SOLICITATION¹

CTAS is administered by the U.S. Department of Justice (DOJ), Office of Justice Programs (OJP), the Office of Community Oriented Policing Services (COPS) and the Office on Violence Against Women (OVW). The funding can be used to conduct comprehensive planning, enhance law enforcement, bolster justice systems, support and enhance efforts to prevent and control delinquency and strengthen the juvenile justice system, prevent youth substance abuse, serve sexual assault and elder victims, and support other efforts to combat crimes. For more information on the CTAS, visit the CTAS Factsheet or the CTAS FAQs. The 9 purpose areas covered under the CTAS grant opportunity are:

1. Public Safety and Community Policing (COPS)
2. Comprehensive Tribal Justice System Strategic Planning (BJA)
3. Justice Systems and Alcohol and Substance Abuse (BJA)
4. Corrections and Correctional Alternatives (BJA)
5. Violence Against Indian Women-Tribal Governments Program (OVW)
6. Children's Justice Act Partnerships for Indian Communities (OVC)
7. Comprehensive Tribal Victim Assistance Program (OVC)
8. Tribal Juvenile Healing to Wellness Courts (OJJDP)
9. Tribal Youth Program (OJJDP)

Tribes or tribal consortia may also be eligible for non-tribal national grant programs and are encouraged to explore other funding opportunities for which they may be eligible. Additional funding information may be found at www.grants.gov or the websites of individual agencies.

¹ Please see <http://www.justice.gov/tribal/open-sol.html>.

and authorized consortia to develop, enhance and continue tribal justice systems. This includes tribal courts, corrections and reentry. Language in this purpose area specifically mentions that funding can be used to support enhanced sentencing authority implementation. See Figure 3, on the preceding page, for a more information on CTAS funding and the process¹⁰. Tribes may also look to their own budgets for funding this kind of system change.

CHECKLIST

Many tribal communities are holding off on deciding whether to move toward enhanced sentencing authority for a variety of reasons. Some indicate they are waiting to see the impact the new authority has in other communities while others cite lack of financial resources to designate for implementation.

Because this law is so new and so few tribes have moved towards implementation, there are very few resources and/or tools available to guide tribes seeking direction in how to implement enhanced sentencing in their courts. To meet this need, the following checklist has been developed, based upon the experiences of tribes that have led the way with implementation, to assist other tribes in auditing their own laws, codes, competencies / capabilities to meet the provisions required under TLOA to enact enhanced sentencing authority. While this checklist is not exhaustive, it does provide interested tribes with a starting point in moving toward implementation.

	What are the existing competencies/capabilities of the tribe to implement enhanced sentencing under the TLOA?
	Determine if there will be an increased cost to the tribal justice system.
	For a judicial officer that meets the qualifications of TLOA:
	Will this judge be used for all cases or just enhanced sentencing cases?
	Do the enhanced sentence cases include any case where stacked sentences exceed a year or where the base crime itself is punishable by more than a year, or both?
	Will the tribe establish its own laws and regulations for determining if the judge meets the TLOA requirements?
	Is the tribe setting up judicial licensing and training? What are the requirements?
	Is a program that certifies tribal court judges competent to hear TLOA enhanced sentencing cases in existence and if so, has the tribal judge been certified by it? What are the requirements?
	For defense counsel that meets the qualifications of the TLOA:
	Will this counsel be used for all cases or just enhanced sentencing cases?
	Do the enhanced sentencing cases include any case where stacked sentences exceed a year or where the base crime itself is punishable by more than 1 year, or both?
	Will the tribe establish its own laws and regulations for determining if defense counsel meets the TLOA qualifications?

¹⁰ <http://www.justice.gov/tribal/grants.html>

	<p>Are grants available to hire indigent defense counsel? Are there regional non-profits or other agencies that are willing to provide this service at low or no cost to the tribe? Can the tribe pull from the pool of available attorneys who may already practice in the tribal court system?</p>
	<p>Is the tribe setting up attorney licensing and training? What are the requirements?</p>
	<p>Is the tribe setting up a Tribal Bar Association? What are the requirements?</p>
	<p>Does a program exist that certifies defense counsel as competent to defend these TLOA enhanced sentencing cases, and if so, has defense counsel been certified by it? What are the requirements?</p>
	<p>For inmate incarceration for enhanced sentences:</p>
	<p>How is housing currently paid for with non-TLOA sentenced inmates?</p>
	<p>For ensuring the court is a “court of record”:</p>
	<p>What mechanism is used to record hearings?</p>
	<p>Can this be accessed and searched?</p>
	<p>For ensuring the tribe’s laws are publically made available:</p>
	<p>Are the tribal laws online?</p>
	<p>Are they available in hard copy?</p>
	<p>Are they available on CD-ROM?</p>
	<p>Are they otherwise available? If so, how?</p>
	<p>Codes:</p>
	<p>Which crimes will be subject to TLOA enhanced sentences (see Figure 2 for suggested offenses)?</p>
	<p>What code sections would need to be amended/drafted to be in compliance:</p> <ol style="list-style-type: none"> a. Criminal code: the entire criminal code or just sections (punishments, certain offenses)? b. Criminal procedures: the entire code or just sections (related to certain punishments or certain offenses) <ol style="list-style-type: none"> 1. Notices 2. Procedures before, during, and after trial 3. Statutes of limitations 4. Probation/Parole administration 5. Alternative sentences 6. Appeals 7. Rules of court 8. Ethics Codes (for judges, prosecutors, defenders and other attorneys and advocates and court staff) 9. Fee schedules 10. Establishment of licensure standards for court (judges and attorneys in TLOA enhanced sentencing cases)

CONCLUSION

Tribes considering implementation of enhanced sentencing authorized by TLOA face a number of considerations and challenges; none of which are insurmountable. The tribes at the forefront of these changes serve as a valuable resource to other tribes planning to make the same changes in their own communities. The successes and difficulties faced by these tribes offer a lesson in perseverance to further develop the jurisdiction of their courts. Tribal government involvement at all levels and community support for this transformative process are fundamental in securing a positive move forward. Tribes may encounter additional barriers in financing this evolution of the tribal justice system, but support through competitive grant funding can be found through DOJ and BIA. Tribes may also choose to access other funding streams through their governmental budgets. TLOA offers tribes an opportunity to strengthen their justice systems and emphasize their commitment to providing their citizens with a higher level of justice.

This publication is part of a series of publications being developed through a Cooperative Agreement with the Bureau of Justice Assistance and the 2012 Tribal Civil & Criminal Legal Assistance (TCCLA) Training and Technical Assistance Project Partners, The American Probation and Parole Association (APPA), the Tribal Judicial Institute at the University of North Dakota School of Law (TJI/UND), and the National Tribal Judicial Center, National Judicial College (NTJC/NJC).

Project Overview: Tribal communities face a daunting task of providing safety for tribal communities where violent crime is, according to a 2004 Department of Justice, Bureau of Justice Statistics Report, 2.5 times higher than the national norm. The Tribal Law and Order Act of 2010 (TLOA) sought to enhance the provision of justice in Indian Country as a means to address the increasing crime rates by allowing for tribes to enhance their sentencing authority and encouraging tribes to seek out alternatives to incarceration/correctional options. However, while these provisions are necessary and welcomed by many tribal justice agencies, little guidance has been developed on how to implement the strategies encouraged by TLOA.

Throughout this 24-month project, the 2012 TCCLA Training & Technical Assistance partners will:

- *Develop and disseminate a training needs assessment to adequately assess the training and technical assistance needs of grantees funded under the Tribal Civil and Criminal Legal Assistance Grant;*
- *Deliver two national/regional trainings comprised of jurisdictional teams (prosecutors, judges, defense and community corrections personnel);*
- *Provide on-site technical assistance to up to three tribal jurisdictions ready to take the next step, beyond training, to implementation;*
- *Provide office-based technical assistance for up to 30 tribes;*
- *Develop and disseminate three project-related publications; and*
- *Deliver 6 webinars.*

*For more information on this project, including the above deliverables, please visit our project page by clicking the link:
Tribal Civil & Criminal Legal Assistance Program*

ADDITIONAL RESOURCES

American Probation and Parole Association

www.appa-net.org

Bureau of Justice Assistance Grants/Funding Page

<https://www.bja.gov/funding.aspx>

Bureau of Justice Assistance Tribal Law and Order Act

https://www.bja.gov/ProgramDetails.aspx?Program_ID=88

Bureau of Prisons, Tribal Law & Order Pilot Program

http://www.bop.gov/inmate_programs/docs/tloa.pdf

Grants.gov Page

www.grants.gov

National Congress of American Indians TLOA website

<http://tloa.ncai.org/>

National Tribal Judicial Center/National Judicial College

<http://www.judges.org/ntjc/>

Office of Justice Services, Bureau of Indian Affairs Page

www.bia.gov/WhoWeAre/BIA/OJS/index.htm

Tribal Civil & Criminal Legal Assistance Project

http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IV_ProjectDetail&wps_key=49d0989a-0f8a-4644-ba62-2cedacc704bc

Tribal Judicial Institute

<http://law.und.edu/tji/>

Tribal Law & Order Resource Center

<http://tloa.ncai.org//tribesexercisingTLOA.cfm>

United States Department of Justice, Coordinated Tribal Assistance Solicitation (CTAS) Page

<http://www.justice.gov/tribal/grants.html>

United States Department of Justice:

<http://www.justice.gov/tribal/tloa.html>

United States Department of Justice, Bureau of Justice Assistance TLOA Website:

https://www.bja.gov/ProgramDetails.aspx?Program_ID=88

Walking on Common Ground

<http://www.walkingoncommonground.org/>

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Tribal Judicial Institute



AT THE NATIONAL JUDICIAL COLLEGE



BJA
Bureau of Justice Assistance
U.S. Department of Justice



VAWA 2013 AND TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE

Congress recently passed the Violence Against Women Reauthorization Act of 2013, or “VAWA 2013.” This new law includes significant provisions addressing tribal jurisdiction over perpetrators of domestic violence. These tribal provisions were proposed by the Justice Department in 2011.

WHAT WILL TRIBES BE ABLE TO DO UNDER THE NEW LAW? Tribes will be able to exercise their sovereign power to investigate, prosecute, convict, and sentence both Indians and non-Indians who assault Indian spouses or dating partners or violate a protection order in Indian country. VAWA 2013 also clarifies tribes’ sovereign power to issue and enforce civil protection orders against Indians and non-Indians.

WHEN DOES THIS NEW LAW TAKE EFFECT? Although tribes can issue and enforce civil protection orders now, generally tribes cannot criminally prosecute non-Indian abusers until at least **March 7, 2015**.

WILL THIS BE VOLUNTARY? Yes, tribes will be free to participate, or not. The authority of U.S. Attorneys (and state/local prosecutors, where they have jurisdiction) to prosecute crimes in Indian country remains unchanged.

WHAT CRIMES WILL BE COVERED?

Covered offenses will be determined by tribal law. But tribes’ criminal jurisdiction over non-Indians will be limited to the following, as defined in VAWA 2013:

- Domestic violence;
- Dating violence; and
- Criminal violations of protection orders.

WHAT CRIMES WILL NOT BE COVERED?

The following crimes will generally not be covered:

- Crimes committed outside of Indian country;
- Crimes between two non-Indians;
- Crimes between two strangers, including sexual assaults;
- Crimes committed by a person who lacks sufficient ties to the tribe, such as living or working on its reservation; and
- Child abuse or elder abuse that does not involve the violation of a protection order.

WHAT IS THE PILOT PROJECT? A tribe can start prosecuting non-Indian abusers sooner than March 7, 2015, if—

- The tribe’s criminal justice system fully protects defendants’ rights under federal law;
- The tribe applies to participate in the new Pilot Project; and
- The Justice Department grants the tribe’s request and sets a starting date.

WHAT RIGHTS WILL DEFENDANTS HAVE UNDER THE NEW LAW? A tribe must—

- Protect the rights of defendants under the Indian Civil Rights Act of 1968, which largely tracks the U.S. Constitution’s Bill of Rights, including the right to due process.
- Protect the rights of defendants described in the Tribal Law and Order Act of 2010, by providing—
 - Effective assistance of counsel for defendants;
 - Free, appointed, licensed attorneys for indigent defendants;
 - Law-trained tribal judges who are also licensed to practice law;
 - Publicly available tribal criminal laws and rules; and
 - Recorded criminal proceedings.
- Include a fair cross-section of the community in jury pools and not systematically exclude non-Indians.
- Inform defendants ordered detained by a tribal court of their right to file federal habeas corpus petitions.

IS THERE NEW FUNDING FOR THE TRIBES? In VAWA 2013, Congress authorized up to \$25 million total for tribal grants in fiscal years 2014 to 2018, but Congress has not yet appropriated any of those funds. However, tribes may continue to apply for funding through DOJ’s Coordinated Tribal Assistance Solicitation (CTAS), which can support VAWA implementation. Additional federal funding sources may also be available.

HOW CAN WE LEARN MORE? Please contact the Justice Department’s Office of Tribal Justice (OTJ) at 202-514-8812 or Office on Violence against Women (OVW) at 202-307-6026, or visit www.justice.gov/tribal.