Homeland Security

FEDERAL LAW ENFORCEMENT TRAINING CENTERS
OFFICE OF CHIEF COUNSEL
ARTESIA LEGAL DIVISION
ARTESIA, NM

INDIAN LAW

HANDBOOK

2016

Foreword

October 2015

The Federal Law Enforcement Training Centers (FLETC) has a vital mission: to train those who protect our homeland.

As a division of the Office of Chief Counsel, the Artesia Legal Division (ALG) is committed to delivering the highest quality legal training to law enforcement agencies and partner organizations in Indian Country and across the nation.

In fulfilling this commitment, ALG Attorney-Advisors provide training on all areas of criminal law and procedure, including Constitutional law, authority and jurisdiction, search and seizure, use of force, self-incrimination, courtroom evidence, courtroom testimony, electronic law and evidence, criminal statutes, and civil liability.

In addition, ALG provides instruction unique to Indian Country: Indian Country Criminal Jurisdiction, Conservation Law, and the *Indian Civil Rights Act*.

My colleagues and I are pleased to present the first textbook from the FLETC that addresses the unique jurisdictional challenges of Indian Country: the *Indian Law Handbook*.

It is our hope in the ALG that the *Indian Law Handbook* can serve all law enforcement students and law enforcement officers in Indian Country and can foster greater cooperation between the federal government, state, local, and tribal officers.

An additional resource for federal, state, local and tribal law enforcement officers and agents is the LGD website:

https://www.fletc.gov/legal-resources

The LGD website has a number of resources including articles, podcasts, links, federal circuit court and Supreme Court case digests, and The Federal Law Enforcement *Informer*.

We hope to continue to provide excellent legal training programs, tools, and resources that meet our mission of training those who protect our homeland.

Robert J. Duncan
Editor
robert.duncan@fletc.dhs.gov

Current Instructors

Artesia, New Mexico

Robert J. Duncan is a graduate of Bacone College (B.S.), Oklahoma City University School of Law (J.D.), and the University of Tulsa College of Law (LL.M. *with honor* – American Indian and Indigenous Law). He is currently assigned to the Artesia Legal Division as an Instructor (Attorney-Advisor) and Editor of the *Indian Law Handbook*. Prior to joining the FLETC, he was the Attorney-Advisor and Associate Professor of Transnational Law at Bacone College. Mr. Duncan also taught state, local and tribal law enforcement officers in the Oklahoma Council on Law Enforcement Training and Education Reserve Academy. In private practice, he served as an Arbitrator for the Cherokee Nation Supreme Court and advised colleges and universities on Title IX, *VAWA* and *Clery Act* issues. He is a member of the bars of the State of Oklahoma, the Cherokee Nation, and the Muscogee (Creek) Nation. He may be contacted at (575) 748-0416 or robert.duncan@fletc.dhs.gov.

Joseph P. Haefner graduated from Cornell University in 1985. Mr. Haefner served as an Unrestricted Line Officer in the U.S Navy, operating in the Western Pacific while forward deployed to Sasebo, Japan and participated in Operation Desert Storm as part of the USS Nimitz Battle Group. He left active duty in 1993 and attended Case Western Reserve University School of Law, graduating in 1996. He then entered the private practice of law as an attorney in Medina, Ohio before being appointed as the Deputy Law Director and Prosecutor in Stow, Ohio. In November 1999, he was elected as the Stow City Law Director and served two four-year terms. He joined the FLETC Office of Chief Counsel in June 2008 and is physically located at the Artesia, New Mexico facility, providing dedicated legal support in the areas of labor, employment, and administrative law. In 2012, he added contract and fiscal law to his areas of responsibilities supporting the Procurement Branch in Artesia. In November 2014, to better support the mission at the Artesia Training Facility, Mr. Haefner was promoted to Associate Chief Counsel assuming the supervision and guidance of the instructional legal division staff.

Mr. Haefner is licensed to practice law in Ohio. Mr. Haefner can be contacted at (575) 746-5799 or Joseph.Haefner@fletc.dhs.gov.

David Hall is a graduate of the University of Central Oklahoma (B.A.) and the University of Oklahoma (J.D.). He has prosecuted and defended cases in the state and federal courts of Oklahoma. In addition, he has served as the prosecuting attorney for the Citizen Potawatomi Nation of Oklahoma and for the Seminole Nation of Oklahoma. Mr. Hall can be contacted at (575) 748-8105 or david.hall@fletc.dhs.gov.

Michelle M. Heldmyer is a graduate of the Florida State University, earning a Bachelor's Degree in Economics (magna cum laude) and a Juris Doctor (with honors) from the Florida State University College of Law. She began her legal career as an Assistant State Attorney in Jacksonville, Florida, during which she was quickly promoted to the Special Prosecutions Unit to conduct wiretap operations and investigate and prosecute large-scale criminal organizations. After three years in state prosecution, Ms. Heldmyer began her 26-year service as an Assistant United States Attorney, practicing in Florida and Colorado. Ms. Heldmyer has prosecuted all types of criminal offenses and tried over 100 cases, including homicides, narcotics, fraud, tax, firearms, Indian Country cases and alien crimes, and land management violations. In addition, Ms. Heldmyer was an instructor for a private consulting firm, during which she taught police liability, FOIA and narcotics enterprise tactics, and has guest lectured on many occasions at universities, police academies and law enforcement training centers. For the past six years, Ms. Heldmyer has provided legal update training for the Bureau of Land Management, the U.S. Forest Service and the U.S. Park Service throughout Western Colorado. Ms. Heldmyer has been the recipient of two Director's Awards for Superior Performance from the Department of Justice, the Top Prosecutor Award from the Internal Revenue Service, an Exceptional Service Award from the Department of Homeland Security, and three commendation letters from the Director of the Federal Bureau of Investigation. She can be contacted at (575) 746-5986 or michelle.heldmyer@fletc.dhs.gov.

Table of Contents

Chapter One

Survey of Indian Law History

1.1 Introduction

For all practical purposes, there are three types of sovereign entities in the United States[1] – federal, state, and tribal.

Tribal governments are unique among the three: they possess a separate sovereignty that has never been formally incorporated into the American constitutional framework, they have histories as separate nations that precede that of the United States, and they enjoy special recognition under Federal law because the nations themselves share treaty relationships with the United States. As a result, "the entire field of American Indian law is constitutionally, historically, and jurisprudentially characterized by exceptionalism."[2] Over the past three hundred fifty years, "laws dealing specifically with Indian tribes and Indian people"[3] have been revised and reimagined to bring Indians into the Constitutional structure of government as individuals in a "separate minority population."[4]

"Indian" is a term of art in Federal law – it is a word with a specific legal meaning separate and distinct from its meaning in ordinary use or language. Individually, Indians are defined by statute in

the U.S. Code. Generally speaking, an "Indian" is a person who is a member of a federally-recognized Indian tribe. An "Indian tribe" is any Indian tribe, band, nation, pueblo or other organized group or community, including any Alaska Native village or regional or village corporation as defined or established pursuant to the Alaska Native Claims Settlement Act, which is subject to the jurisdiction of the United States and recognized as possessing powers of self-government, or recognized as "eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[5] Likewise, Indian Country is legislatively defined and includes areas of tribal jurisdiction where criminal jurisdiction has been assumed by the United States.

This chapter follows the history of Indian law from early settlement in 1607 and the [ROYAL] PROCLAMATION OF 1763 to the *Indian Self-Determination Act of 1975* and beyond; it is designed as a broad survey of Indian law and gives historical context for the remainder of this text. The chapters that follow include more modern topics such as Indian Country Criminal Jurisdiction, *Major Crimes Act*, *Indian Child Welfare Act*, the *Tribal Law and Order Act.*

1.2 Discovery through PROCLAMATION OF 1763

Using then-existing doctrines of international law grounded in discovery, most European nations laid claim to parts of North America without regard for the original inhabitants of the area they claimed to discover. While this practice would be condemned today, it formed the basis of English claims to areas that would later become the United States. Thus, the doctrine of discovery is the genesis of our modern-day Indian law.

As early as 1607, England began establishing settlements in present-day Virginia, through royal charters granted to groups of

colonists and merchants. The settlers established economic relationships with the Indian tribes they encountered through treaties and accords. These relationships served two purposes for England. First, England benefitted financially from the economic agreements; second, other European countries would be excluded from furthering their own economic interests with the Indians.

Over the next approximately 150 years, England, Spain and France all extended their territories throughout the North American continent with relatively little fighting amongst themselves, and with little resistance from tribes they encountered. Some tribes allied with European powers, fought other European powers, traded freely, or moved territories.

> "Contrary to the overriding principle of acquisition of territory by discovery of a *terra nullius* employed by the [Spanish] conquistadores, the subjugation of the indigenous peoples on the territory of the present United States of America occurred, to some significant degree, on paper. This pattern of acquiring lands and securing peace and friendship as well as regulating trade by way of formal treaty was followed in North America by, among others, the Dutch, the French, the British and the early American colonists, even the Spanish."[6]

By 1760, larger Indian tribes had become increasingly skeptical of European peace treaties and the motives behind them. The tribes had been displaced further and further west because of permanent European settlements and encroachment, some of which violated the terms of their agreements. Indian tribes became increasingly aware that despite a grudging peace in North America, wars between the French and British in Europe dramatically reduced both the funds and manpower available to keep up an extended campaign against Indian tribes. "Wars with

the Dutch, royal indebtedness, the stirrings of revolution in Britain, [and] an entrenched colonial government…"[7] led to Britain concerns Indian tribes like the Six Nations of the Iroquois Confederacy would rise up and take advantage of this turmoil.

By 1760, "widespread encroachment on Indian land, mismanagement of Indian trade, and hostilities with the French created the need for a centralized Indian policy, particularly for acquiring Indian land,"[8] to prevent war with the tribes:

> "When war with France ended, Britain began to assess the reasons for initial hostility or neutrality among the Indian tribes. Conflict over land was one obvious source of discord. Accordingly, London embarked on a program for centralizing the management of control over land policies, contemplating ultimate extension of this centralization to trade and other areas of Indian affairs."[9]

King George's advisors were acutely aware that many tribes resented the British and incursions by land speculators into Indian territory formerly protected by the French could lead to an unwinnable multi-front war. Rather than continue to violate treaties and risk war with Indians, the Crown issued PROCLAMATION OF 1763. By royal decree, all private purchases of Indian land except by the Crown were be null and void under English law.[10]

By 1774, Britain had also lost its firm control over the colonies; the American Revolution was close at hand and the colonists had already elected delegates to represent their interests in a Continental Congress. Formed to declare independence from Great Britain, this new Continental Congress understood that independence from British rule would mean a lack of military support in the event of conflict with the tribes. Thus, almost immediately after its formation, the Continental Congress

pledged itself to "secure and preserve the friendship of the Indian nations"[11] by restraining land speculators from encroaching on Indian country[i].

The Continental Congress also established departments of Indian Affairs (northern, central, and southern) with Patrick Henry and Benjamin Franklin serving among the early commissioners. The goal of these departments was to negotiate treaties or at least ensure neutrality among Indian nations (particularly the Cherokee, Choctaw, Chickasaw, Muscogee [Creek], and the Six Nations Iroquois Confederacy [Cayuga, Mohawk, Oneida, Onondaga, Seneca, and Tuscarora].)

At the end of the Revolutionary War, General Cornwallis, in his capacity as commander of British forces against the colonies, surrendered all British claims in 1781 and "the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to [the United States]."[12]

The right to government did not mean that an effective government had been created, however. There was no central power to restrain settlers or land speculators from entering onto Indian lands in the United States; the Continental Congress could not enforce its treaty obligations with Indian tribes on the states. War with Indian tribes was a very real threat at the time, primarily because of land incursions by both individuals and by the several states.

In a series of letters, George Washington encouraged Congress to establish a boundary line between the new States and existing Indian nations to prevent war from breaking out.[13] In 1784, however, George Washington found land speculation still continued north of the Ohio River. "In defiance of the

[i] The use of Indian country here predates the term of art as used in the United States Code; in this text, a capitalized "Indian Country" refers to the territory described in Title 18.

proclamation of Congress," he lamented, "[speculators] roam over the Country on the Indian side [...] and even settle them. This gives great discontent to the Indians, and will unless measures are taken in time to prevent it, inevitably produce a war with the western Tribes."[14]

As a result, President Washington made several strong treaties promoting friendship and commerce with Indian tribes and urged Congress to pass laws restraining encroachment on Indian land. Early treaties with Indian tribes were treated by the Supreme Court[15] in the same way as treaties with European powers. Washington's letters and treaties expressing the importance of building trade rather than warfare were influential in the development of the Constitution.

When the Constitution was adopted to replace the Articles of Confederation in 1787, Congress was given broad powers "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"[16] under what is known today as the Indian Commerce Clause. This constitutional clause prohibited the acquisition of Indian land by the several states, which largely prevented war with Indian tribes on the frontier; it would later serve as the source of federal plenary power over Indian affairs.

In 1789, Congress established the War Department and appointed a Secretary of War; one of the responsibilities of the Secretary of War was "granting of lands to persons entitled thereto, for military services rendered to the United States" or duties "relative to Indian affairs."[17] Through an exclusive right to acquire property under the Indian Commerce Clause, the War Department managed Indian affairs with allied tribes (by virtue of their alliance with the United States) and hostile tribes (by assumption of rights passed on by Great Britain) alike.

With debts from the Revolutionary War, the War Department government often purchased land from Indian tribes and paid military veterans in land instead of currency. Unscrupulous land spectators, however, began acquiring more Indian land by illegal purchases or outright fraud. As a result, Congress passed additional acts in 1790 to preserve the government's exclusive right to acquire property from Indian tribes.[18]

In 1806, the War Department established an office and superintendent of Indian trade. Federally appointed Indian agents and superintendents, working closely with territorial governors and reporting to the Secretary of War, handled the government's relations with tribes. These individuals were responsible for restricting the liquor trade in Indian Country, issuing trade licenses, detailing Indian activities to the War Department, and keeping land speculators at bay.

Land speculators, however, were undeterred by the War Department's efforts, and incursions into Indian land took place with increasing regularlity from 1790 until after the War of 1812. Without the knowledge of Indian agents, the British and Spanish also covertly supplied arms to a small number of Indian tribes that actively fought against the United States in protest of these land incursions.

By 1813, widespread fear in the Muscogee (Creek) Nation that land speculators and Indian agents would overrun Indian lands fueled a civil war between factions of the Muscogee (Creek) Nation: a progressive faction wished to have peace with the United States and allow limited settlement, while a traditionalist faction wished to expel the settlers from their lands as other tribes had done. The traditionalist faction of the Creek was the most militant and fought against the United States in several border raids and minor skirmishes; they adopted the name "Red Sticks" because of the scarlet war clubs they carried.[19]

Despite the fact that the majority of the Muscogee (Creek) people did not wish to fight with the United States and that the Red Sticks were only a small faction, the United States did not attempt to aid the legitimate Creek government. Instead, General Andrew Jackson led a disproportionately large force of "3,500 militia men along with 1,000 Georgia volunteers"[20] through Creek territory in late 1813 in retaliation for Red Sticks border skirmishes. This force engaged in a punitive campaign not just against the Red Sticks, but any possible Creek resistance to the incursions of settlers and land speculators; the campaign ended with the killing of over nine hundred Red Sticks in the Battle of Horseshoe Bend.

Jackson's campaign demonstrated that military victory over Indian tribes—unthinkable in President Washington's day—was now possible thanks to modern arms and tactics. As war or diplomacy were the only two recourses for broken treaties, tribes like the Creek were left to rely on international allies for aid. However, Indians had no international allies to argue their cause and the British and French in no position to intervene because of the Napoleonic Wars.[21] Moreover, Jackson had stirred public sentiment against the Indians with news of his victories, and land speculators saw an opportunity to push forward towards Indian Country on a unprecedented scale.

1.3 Johnson v. M'Intosh

By 1813, Jackson demonstrated that Indian tribes no longer posed a credible military threat to the United States. With demand for Indian land now greatly increased and with public opinion set firmly against the tribes, the several states were greatly pressured by their citizens to open lands for settlement. The Indian Commerce Clause restrained the states from acquiring Indian land, but demand grew for twenty years.

In 1823, a collusive suit between land speculators embroiled the Supreme Court in an Indian land dispute case. The tribe that once owned the land at issue was not included in the lawsuit; the case was brought by two land speculators to test the legality of Indian land purchases.

In *Johnson v. M'Intosh,*[22] the plaintiff in the case had purchased land from the Piankeshaw Indians and the defendant claimed title to the land through a land patent issued by the United States. This case was a simple "action of ejectment," one intended by the plaintiffs to recognize an Indian tribes' ability to sell land, for individuals to hold title, and for individuals holding title to exercise rights of possession.

The Supreme Court held the land belonged to the defendant, who had acquired it by United States land patent. In deciding the case, the Supreme Court ignored any possessory rights of Indian tribes before contact with Europeans. The result of the decision, written by Justice Marshall, was to use a "doctrine of discovery" to put forward two important principles of Indian law. First, the United States holds superior title over Indian land against any other party, including Indian tribes. Second, only the United States can exercise dominion over Indian affairs or the grant of land patents in areas of Indian land.

In the opinion, Justice Marshall reasoned that Great Britain alone had sovereign powers over the territories it discovered, and the PROCLAMATION OF 1763 restricted alienation of Indian land except by grants from the Crown. In Justice Marshall's view, discovering European powers assumed sovereignty of the lands they claimed and indigenous people could thus be defeated, assimilated, or granted a right of occupation – in any case, both the land and the right to govern it flowed from discovery to European powers regardless of what title the Indians held.[23]

Since the British discovered the Cherokee Nation but neither defeated or assimilated them, the British granted the Cherokee Nation a right of occupation only. Thus, any purchaser who acquired land from the Indian tribes outside of a land patent had a defective chain of title; the plaintiffs in this case were considered to have only the right of occupancy as the tribes themselves had and could only assert title in the domestic property law of the tribe.[24]

Therefore, tribes could not enter into treaties or exchanges for land with anyone other than the discovering nation. States may have had former charters from the Crown, but "a charter intended to convey political power only, [and] would never contain words expressly granting the land, the soil, and the waters."[25] The land, the soil, and the waters belonged to the Crown; charters of political power could be revoked at the King's pleasure.

The "soil as well as jurisdiction" of formerly English holdings belonged to the "government of the Union"[26] after the Revolution and the language in the Commerce Clause[27] prevented the States from exercising any foreign relations with the Indian tribes. Title must first be recognized by a government before title is enforceable in that sovereign's court; the laws of the United States recognize the exclusive power[28] of that sovereign, not an Indian tribe, to grant title. The defendant's title could be followed from the line of discovery to the English crown's exercise of its authority to extinguish title, then onward from dominion over those lands from Great Britain, then finally to the United States by treaty. Tribes were only "domestic dependent nations" with rights of possession, so a land patent by the United States was superior to any prior land grant from the Piankeshaw. Thus, to enforce ownership rights in the domestic legal system of the United States rather than the domestic legal system of Indian tribes, one had to rely on a land patent.

The sovereignty of the United States had always been considered superior to the sovereignty of the individual States, but now "judicial alchemy in the domestic courts…transformed the United States from a discovering nation into a superior sovereign."[29]

1.4 Cherokee Nation v. Georgia

Indian affairs reached another legal turning point in 1831, when the Cherokee Nation sued to preserve the United States' promise of a homeland with self-governance.

Nearly twenty years before *M'Intosh* was decided, the United States entered into an agreement with the State of Georgia as a result of Andrew Jackson's 1813 campaign against the Red Sticks. With the threat of warfare with Indian tribes greatly diminished, "the federal government promised that it would, at its own expense, extinguish Indian title to land 'within' the boundaries of the state 'as soon as it could be done peaceably and on reasonable terms."[30]

The United States was a superior sovereign to Georgia; therefore, those reasonable terms would have been negotiated by the President through treaty. During the early nineteenth century, "[n]early all treaties [with southern U.S. tribes] provided that the tribe would retain reservation lands as permanent homelands; the treaties also recognized the tribe's sovereignty and contained promises by the United States [that the government] would ensure the well-being of tribal members."[31] Until 1829, every President had followed the example of George Washington and refrained from considering the issue of extinguishing Indian title on a large scale.

With previous land sales and Indian agents handling Indian affairs, it was widely believed by ordinary Americans that Indian tribes would readily agree to permanent homelands in newly acquired territory; this would allow settlement to continue in former Indian lands and tribes moved westward.[32] As acquiring Indian land became increasingly important to the Executive Branch, Secretary of War John C. Calhoun administratively created the Bureau of Indian Affairs; in 1824, he appointed Thomas McKenney as the bureau's first head.

McKenney was to oversee treaty negotiations (which included cession of land), manage Indian schools, and administer Indian trade, as well as handle all expenditures and correspondence concerning Indian affairs. Like Calhoun, "most whites were guided by the belief that it was only a matter of years before all the discussion would be but a moot issue and the Indians would be gone from lands east of the Mississippi which then constituted the border of the United States,"[33] but tribes resisted leaving sacred homelands. With their resistance, states grew increasingly frustrated at the lack of progress in extinguishing Indian title by treaty alone and urged the President to take action.

When Andrew Jackson campaigned for President, he was billed as a man who would do all he could to extinguish Indian title and support expansion. Jackson's fearsome reputation as an Indian fighter in skirmishes against the Creek, Choctaw, Cherokee, Chickasaw, and Seminole led to his election by people who expected him to use the full power of the federal government to remove Indians occupying land in the eastern United States.[34] He did not disappoint them; President Jackson announced his support for a new Indian removal bill early in his first term, despite the government's expenditure on Indian schools and public works.[35]

After Jackson's experiences with the Red Sticks, he believed (somewhat unrealistically) that Indian tribes would soon engage in covert war against the United States,[36] so removal was now widely "considered a possible 'solution' to the Indian problem."[37] In reality, Indian tribes had very little chance of successfully resisting removal. Border skirmishes with volunteers and militia had already led to hundreds of deaths among the Creek and Cherokee, and these skirmishes could escalate into war with regular U.S. troops. In the 1770s, the Continental Congress had entered into treaties on Indian terms to avoid an unwinnable war with tribes that were backed by European powers.[38] By this time, however, the United States had become a powerful force and tribes were left without European allies to supply arms. Using his removal bill and the "discovery doctrine" of *M'Intosh*, President Jackson planned to force Indian tribes westward into former Spanish territories. Facing armed conflict with state skirmishers and the uncertainty of federal aid, tribes accepted removal treaties as a means of self-protection.

Despite treaties with the federal governments, the Cherokee experienced the first significant and organized push for widespread Indian removal on December 29, 1828, when "the legislature of the State of Georgia enacted legislation which purported to annex Cherokee Nation lands to Georgia counties, open those lands for settlement, and annul all laws, ordinances or orders of the Cherokee Nation."[39]

The Cherokee resisted this legislation, but gold was discovered on Cherokee land in 1829 and President Jackson granted a request by Georgia's governor for "soldiers to enforce Georgia laws in the Indian territory. This enforcement included the arrest of Cherokees and citizens of 'foreign' states, such as North Carolina, found mining on the Indian lands."[40]

The United States had promised a homeland with self-governance by treaty, and the Cherokee Nation sued to preserve

that promise in 1831.[41] During the suit, the Cherokee Nation argued the Supreme Court had jurisdiction over the matter, "by the constitution and laws of the United States, original jurisdiction of controversies between a state and a foreign state, without any restriction as to the nature of the controversy." The Cherokee also argued the Supreme Court had the power to restrain Georgia's incursion into Cherokee territory, since President Jackson failed to restrain the state.

"The Chief Justice, who had overestimated the savagery of the Indians in his *M'Intosh* analysis, now underestimated the savagery of the federal authorities under President Jackson,"[42] and faced a difficult decision: acknowledge the Constitution's grant of jurisdiction and anger the President, or avoid assuming jurisdiction and preserve the Court's relationship with the Executive Branch. Marshall chose the latter, and held the complaint of the Cherokee Nation would require the Court to intrude into the political arena.[43]

Marshall's holding prevented the Supreme Court from intervening directly, but also required the United States to take action when the tribes were threatened. As dependent domestic nations, Indian tribes relied on protection from the United States from any over sovereign – including states. For tribes, "[t]heir relation to the United States resembles that of a ward to his guardian"[44] and thus the United States was duty-bound to protect the Cherokee homelands from state intrusion.

This holding marks the recognition of the trust responsibility that forms the basis for the obligation of the United States to provide funding for healthcare, policing, and other self-governance functions. In 1832, at the behest of McKenney, Congress formally mandated the Bureau of Indian Affairs and approved the appointment of a Commissioner of Indian Affairs, under whose authority rested the management and direction of all Indian

affairs and the responsibility to meet the responsibilities arising from federal trust responsibility.

1.5 Worcester v. Georgia

At the time of *Cherokee Nation v. Georgia*, treaties often included funds for educational institutions on Indian land and licenses for Christian missionaries to preach or to build churches and schools in Indian territory. In the nineteenth century, denominations such as the American Baptist Home Mission Society sought licenses from the President of the United States to enter Indian Country and assist the tribes they encountered.

Emboldened by the Supreme Court's refusal to intercede, the State of Georgia passed a law barring entry into the Cherokee Nation almost immediately after the ruling. The law was purposely written to ensure the Cherokee could not count on outside help to resist or disrupt state-run gold mining operations.[45] In defiance of Georgia's law, the Rev. Samuel Worchester and a fellow Christian missionary entered the Cherokee Nation in 1831. Both were arrested and tried in Georgia state court, where they were convicted and sentenced to hard labor. Worcester appealed his conviction to the Supreme Court by asserting that he was not only a United States citizen, but was also granted a license by the Executive Office to enter the Cherokee Nation.[46]

Three years prior to Worcester's conviction, Justice Marshall wrote in *Foster v. Neilson,*[47] that the "constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." The Cherokee Nation could thus demand the United States assert its superior sovereignty whenever state action conflicted with federal treaty obligations.

In *Worchester v. Georgia,* the Supreme Court held that treaty guarantees to the Cherokee Nation by the United States that "constituted a geographic preemption of state power caused by the federal guarantees of territorial autonomy to the tribe." Justice Marshall found a "blatant inconsistency between the Georgia law and the federal Trade and Intercourse Acts" which left the United States with a duty to assert jurisdiction over Indian affairs:[48]

> "Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States."[49]

Marshall may have meant to protect tribal self-government with assurances that the several states would be required to respect treaty obligations of the United States as a whole, but "the President and Congress used the strong federal power the Court had now endorsed to remove the Cherokee and the other eastern tribes to territories west of the Mississippi."[50] There was intense, but fleeting interest in the plight of the Cherokee:

> "Both sides were supported by powerful political, legal, and cultural forces. Georgia had a powerful ally in President Andrew Jackson, who made his political fortunes leading expansion, and spent most of his life fighting on behalf of his country against Native Americans and foreign powers[…] Worcester and the Cherokee Nation also had allies and enjoyed a degree of public support. Notably, Daniel Webster, who moved 'from debating political issues

> in the Senate to arguing in the Supreme Court,' and Henry Clay, the former Secretary of State known as the 'Great Compromiser,' both supported the Cherokee Nation, as did Davy Crockett, a cultural icon and Congressman."[51]

Expansion eventually won out over tribal sovereignty. Public pressure to remove the Cherokee to "outside" territory intensified to such an extent that Congress ratified the Treaty of New Echota in 1835, despite clear evidence that a minority party of the Cherokees was coerced to sign. In exchange for a promised payment of $1 million—which was not paid until 1906—the Cherokee ceded their lands to the federal government and were forcibly removed in 1838.[52]

Nearly 14,000 Cherokee were removed along the "Trail of Tears," where over 4,000 died from exhaustion and exposure to cold on the way to present-day Oklahoma in Indian Territory. The Supreme Court recognized in later cases that the Cherokee were not afforded even a basic level of medical care, an omission which formed the basis of many healthcare related trust responsibilities today.[53]

1.6 Mexican Cession, Pueblo people and the Navajo

In addition to eastern tribes that faced forcible removal, the United States also owes trust responsibilities to tribes in former Spanish colonies by way of the Mexican-American War. With the Treaty of Guadeloupe Hidalgo came large cessions of land from Mexico to the United States – including lands held by western tribes, held in fee simple under Mexican law.

The King of Spain granted formal title to the Pueblo people in 1689, and that title was recognized even after independence from Spain; Mexico treated Indian tribes as Mexican citizens and incorporated their property rights into Mexican law. As tribes

with property rights were recognized by the Mexican legal system, title to Indian property held in fee simple was also recognized by the United States under the Treaty of Guadeloupe Hidalgo. "[I]n contrast to Anglo-American law, Mexican law recognized Native Americans as Mexican citizens,"[54] and Indians enjoyed considerable (and more importantly, enforceable) property rights.

With these land grants from the King of Spain to Pueblo people, "Americans encountered a fully developed Spanish-Mexican legal system, as well as an entrenched system of canon law in the Catholic Church. This was, of course, a new scenario for the Americans, since they had previously encountered Indian communities living under circumstances which, from their European-biased views, did not evoke established societies with institutions."[55]

Following the war's end in 1848, the United States administered a great deal of territory through an unusual distribution of federal offices: the General Land Office was part of the Treasury, and the Bureau of Indian Affairs office was part of the Department of War. When the Department of the Interior was created, responsibility for the Bureau of Indian Affairs moved to the new department in 1829 but the Army remained heavily involved in Indian affairs.

With the Pueblo people and other tribes owning their land in fee simple, rather than having a mere right of possession as Marshall held with the Cherokee, the United States could not simply take the land and issue patents without violating its treaty with Mexico; the treaty required the United States to respect the property rights of Mexican citizens in the ceded territory.

The new Department of Interior did not wish to purchase Pueblo lands or otherwise find a way to secure title to land that was ceded by Mexico but occupied by the Navajo, so the United States

created a legal fiction that the Pueblo people and the Navajo did not elect to be Mexican citizens under the treaty and thus were dependent domestic nations without property rights:

> "The most controversial sections of the Treaty, and the ones that would have the most lasting impact, were those dealing with the citizenship and property rights of the former Mexican citizens residing in the ceded territories. Articles VIII and IX of the Treaty of Guadalupe Hidalgo set forth the terms by which the former Mexican citizens and their property would be incorporated politically into the United States. These articles in the treaty affected some 100,000 Mexicans in the newly acquired territories, including a large number of Hispanicized and nomadic Indians in New Mexico and California. As provided by Article VIII, a person had one year to 'elect' his or her preference for Mexican citizenship. If this were not done, it was stipulated that they had elected to become United States citizens and that they would be granted citizenship by Congress at some future time."[56]

The United States was prepared to forcibly establish reservations in Navajo lands in an effort to diminish the tribal structures of the Navajo (just as they had done with eastern tribes), but the outbreak of the Civil War insulated the Navajo from significant interference by the government. Federal troops returned to Navajo lands until 1861, but the Navajo were once again left alone as federal troops engaged in a punitive military campaign against the Apache during the Chiricahua Wars. When Fort Wingate was built on the edge of Navajo borders in 1868, eighteen headmen or "peace chiefs" later went to ask Army officers for a treaty of peace and co-existence between the Navajo and the United States.

Rather than a treaty with Indian agents, "peace chiefs" were given an ultimatum from the Army officers in charge. The Navajo could remove their people 50 miles away from any settlement in the Bosque Redondo reservation, where they were promised to expect ample game and water, Army supplies and Army doctors. The other alternative was war: [57]

> "We have no desire to make war upon [the peace chiefs] or other good Navajoes; but the troops cannot tell the good from the bad, and we cannot tolerate their staying as a peace party among those upon whom we intent to make war…[A]fter a deadline of July 20, 1863], every Navajo that is seen [outside of Bosque Redondo] will be considered as hostile and treated accordingly…after that day the door now open will be closed."[58]

The Navajo refused the ultimatum, because it meant moving away from their sacred homeland—*Dinetah.* When they refused to remove to Bosque Redondo, the Navajo were brought there by force:

> "In 1864, the federal government forcefully relocated thousands of Navajos from their homeland to a prison camp at Bosque Redondo, a period known as the "Long Walk," during which hundreds perished along the way, longing to return to the traditional homeland cradled by the four sacred mountains. Indeed, the Navajos' attachment to their sacred homeland was one of the main factors inspiring their resistance to relocation until the federal government initiated a campaign to destroy their villages, livestock, and all sources of food, thereby forcing them to relocate or perish. Four years later, the Navajos prevailed and negotiated a federal treaty restoring their rights to return home to occupy, govern, and live on a

reservation that was within—although smaller than—their traditional territory."[59]

The conditions at Bosque Redondo soon became hopeless. After four years of starvation and disease, the Navajo "had sunk into a condition of absolute poverty and despair" and the Army realized that they could do nothing to improve their condition. With "the nation's holdings now stretching all the way to the Pacific Ocean, it must have become plain to policymakers that the tribes could not be removed forever west," especially when Indians already owned land in the new territories.[60]

In 1867, Congress appointed a Peace Commission to study and address the problems found across the country in reservations administered by the Army. The Peace Commission recommended many changes to Congress, including the appointment of honest, effective agents and independence for the BIA to manage Indian affairs without Army interference. As a result, the Navajo were returned to a smaller section of their homeland by treaty in 1868. Leaving the Navajo on an isolated reservation with a handful of Indian agents to manage them was less expensive than a second removal by cavalry units.

As the western territories became states, the federal government required the creation of Indian reservation areas as a condition of admittance to the Union. The Department of Interior then "established the first western-style courts on Indian land. Specifically, the Secretary of the Interior created the Courts of Indian Offenses to replace tribal forms of justice and "to promote acculturation on the reservations and to help 'civilize' the Indians."[61] These courts were also referred to as "CFR" courts because they operated under the federal regulations set forth in volume 25 of the Code of Federal Regulations, not tribal law or custom. In 1869, Thomas Lightfoot—United States Indian Agent to the Iowa and the Sac and Fox tribes in Nebraska—became the

first agent to report the establishment of a federally-sponsored Indian police department.

Just as the United States had begun to replace traditional tribal government with CFR courts and Indian agents, a significant backlash brought a long-brewing feud amongst members of the Brulé Lakota to a head:

> "Early in the afternoon on August 5, 1881, a Sioux medicine man named Crow Dog (Kan-gi-shun-ca) shot and killed a popular Sioux chief named Spotted Tail (Sin-ta-ga-le-Scka) on a dusty road in the Great Sioux Reservation of the Dakota Territory. Spotted Tail had been a peaceful leader of the Sioux whom the federal government supported because he acted as a buffer between it and radical traditionalist chiefs like Sitting Bull and Crazy Horse. His conciliatory stance towards the U.S. government angered many of his fellow Sioux and probably served as the impetus for his murder by Crow Dog. After the murder, Crow Dog's family met with Spotted Tail's family. As Indian tradition prescribed, they reached a compensation agreement to settle the murder. Following tribal law, Crow Dog's family agreed to pay Spotted Tail's family $600 in cash, eight horses, and one blanket. As far as the tribe was concerned, the matter was settled."[62]

Outraged by the murder of a potential ally among the Brulé Lakota, the United States charged Crow Dog of murder in the federal territorial court. The statute used to prosecute Crow Dog was passed after the *Trade and Intercourse Act of 1790,* and was intended to be a means to protect Indians from non-Indian offenders, not to prosecute Indians themselves.[63]

Crow Dog appealed his conviction to the Supreme Court,[64] and argued that the laws passed by the United States were meant to

punish non-Indians and not supersede tribal law. These laws were meant to enforce the treaty obligations of the United States:

> "If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws."[65]

The Supreme Court agreed with Crow Dog's position. Crow Dog had already reconciled with the tribe and Spotted Tail's family under tribal law; for the Brulé Lakota, that was the end of the matter. Allowing a prosecution under the laws of the United States after the Brulé Lakota already resolved the matter would impose the rules of strangers who were ignorant of Indian norms and customs on tribal law, and would create offenses without knowledge or prior warning of western crimes; this outcome was contrary to the laws passed by the United States to protect Indian tribes and traditional societies.[66]

Western-style justice is largely about punishing wrongdoers, not restoring community. In many traditional societies, "people talk things out to achieve consensus and to resolve disputes in an orderly way. There are family and clan gatherings where people talk about a perpetrator and a victim's problem, and both the perpetrator and victim can participate. They also have people (usually clan relations) who speak for them."[67] These disputes do not make distinctions between what in western courts would be civil or criminal cases; preservation of societal norms and reconciliation are the goal in all cases. The rules and laws laid down by CFR courts did not incorporate reconciliation and were

not part of the traditional peacemaking ways of the Brulé Lakota, Cherokee, Navajo or other tribes:

> "Law, in Anglo definitions and practice, is written rules which are enforced by authority figures. It is man-made. Its essence is power and force. The legislatures, courts, or administrative agencies who make the rules are made up of strangers to the actual problems or conflicts which prompted their development. When the rules are applied to people in conflict, other strangers stand in judgment and police and prisons serve to enforce those judgments."[68]

Following the Long Walk and *Crow Dog*, the United States realized that traditional methods of governance and peacemaking lessened individual Indians' allegiance to the United States:

> "Native Americans maintaining tribal relations owed no political allegiance to the federal union. They were neither citizens nor subjects of the federal government or any states in which they might reside. They were, rather, members and citizens of a different nation — their tribe — and were subject to its governance in all matters of tribal affairs. This relationship bound them into a complex web of family, clan, religious, and society relationships that defined Indian tribal allegiance."[69]

After the events of *Crow Dog*, Congress authorized additional Indian police forces in 1878 to further undermine the traditional role of clans and leaders in resolving disputes; federal regulations often forbade the practice of Indian ceremonies and required Indians to perform manual labor for their rations. In 1885, Congress passed the *Major Crimes Act* (discussed in further chapters), placing crimes like murder under federal jurisdiction even if they occurred on Indian country. The stated goal was to

reduce the role of traditional peacemaking in serious crimes; the practical effect was to further control Indian tribes.

1.7 Treaty-making Gives Way to Plenary Power

By 1886, the federal government ended its practice of negotiating treaties with traditional consensus-based tribal governments in favor of direct legislation. This practice was upheld in *United States v. Kagama*[70]:

> "[A]fter an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure, to govern them by acts of congress. This is seen in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes: '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; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.'"

Following *Kagama*, Congress decided to exercise its plenary power and adopt a policy of assimilation. Assimilation was a misguided federal policy of trying to force Indian people to give up their cultures, languages, and traditions, and adopt mainstream American values and ways of life. At the time, tribal economies were languishing and many Indians were living in poverty. Moreover, settlers, ranchers and prospectors were pushing to break up tribal landmasses in the western territories by opening up Indian reservations to settlement.

The government asserted that Indians could prosper if they could acquire individual plots of land to cultivate and establish trade with nearby non-Indian settlements. The goal was to convert

Indians into middle-class farmers who would assimilate into the mainstream of American culture.

Bolstered by the *Kagama* decision, the United States adopted a policy called "allotment" in 1887 to accelerate the process of assimilation. Acting under the authority of the *General Allotment Act of 1887*, also known as the *Dawes Act*, BIA agents surveyed reservations, consolidated tribal land into a single parcel, then subdivided this parcel into smaller individual parcels and assigned lands to individual Indians. The agents also oversaw the sale of what were labeled "surplus" lands to non-Indian settlers.

Title to the parcels allotted to individual Indians remained with the United States for 25 years, which exempted the land from state taxation and any encumbrances. In theory, this trust status period would allow the Indian allottees to learn how to farm and raise livestock. It would also permit the allottees to learn how to adopt "the habits of civilized life" without state intervention. After a period of 25 years from the date of allotment, the land would be conveyed in fee simple to the Indian allottee, who then became a U.S. citizen. As a result, the individual Indian would be subject to the criminal and civil laws of the state rather than tribal law.

In practice, many Indians lost their land after receiving fee title because they were unable to pay the taxes or were taken advantage of through fraud or other unscrupulous dealings by non-Indians.

After individual members of the tribe received their allotments, the U.S. negotiated with the tribe for disposing of the "surplus" lands for non-Indian settlement. These non-Indian settlers received patents from the United States for the land, giving them title in fee simple absolute. In 1887, at the time the *General Allotment Act* was passed, 138 million acres of land were held

exclusively by Indians. When allotment ended 47 years later, in 1934, Indian land holdings amounted to 52 million acres.[71]

The 1903 opinion *Lone Wolf v. Hitchcock* made clear that the plenary power of Congress would be exercised over an Indian tribe regardless of any treaty rights it might assert.[72] As Congress asserted greater plenary power, the Supreme Court increased the amount of responsibility and accountability expected of the Department of the Interior.

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government[…] The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."[73]

Little popular objection to the wholesale divestment of Indian lands was voiced in the nineteenth century. For most Americans, "[i]njustice to [Indians] became of interest in politics only as it could be used to prejudice a political opponent in the eyes of the voters, and Indians had no votes."[74] The Supreme Court, however, admonished the President and Congress to use the exercise of government over Indians to their benefit, not detriment:

> "The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in

that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes."

1.8 Indian Reorganization Act and Self-Governance

From 1903 to 1933, the federal government exhibited very little interest in Indian affairs outside of the Department of Interior. That changed in 1934, when "a new generation of bureaucrats who had been brought to Washington by Franklin D. Roosevelt"[75] worked to reverse some of the damage by creating new policies and programs for Indian self-sufficiency. "Recognizing the inherent injustice of the legal predicament of Native Americans, the policies they crafted, collectively dubbed the 'Indian New Deal,' militated for the strengthening of tribal structures."[76]

Roosevelt's administration successfully urged Congress to pass legislation ending allotment; this legislation also extended the trust status of allotments still held in trust to an indefinite period, and included provisions to purchase any "surplus" tribal lands not granted in fee simple to third parties. Consequently, allotments are still held in trust for Indians—lands that are beneficially owned by an Indian, but over which the federal government has a fiduciary responsibility.

Congress also passed the *Indian Reorganization Act of 1934* (*IRA*), which gave tribes the choice of opting in to federal programs. The *IRA* would "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[77] The Roosevelt administration was aware that, from the start of allotment in 1887 to its end in 1934, "the policy had cost Indians almost 90 million acres, two-thirds of the land they owned fifty years earlier."[78]

Many Indian tribes were removed to areas with few natural resources or opportunity for economic growth; agriculture and other industry was greatly curtailed, but the Roosevelt administrated wanted to allow Indians to reverse their fortunes:

> *"This bill[…]seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians."*[79]

The Navajo and Cherokee had great difficulty in deciding whether to accept or reject the *IRA* because their long-established governments already had a consistent body of peacemaking and traditional law. Although the IRA contained provisions to encourage Indian tribes to adopt constitutions, those constitutions would be drafted by the BIA with standardized provisions for all tribes. As "[t]he effect of the Act, when all is said and done, was to recognize the tribal governments as federal corporations and to require them to adopt new constitutions and by-laws approved by the Department of the Interior,"[80] those tribes decided against adopting the *IRA*. As an example, the Navajo "rejected the opportunity to become an IRA tribe in an election held on June 17, 1935, by a vote of 7,992 to 7,608."[81]

Tribes like the Cherokee and Navajo chose to keep their current form of government and engage in nation-building projects[82] rather than settle for government subsidies. For the Navajo especially, self-determination projects and the "development of oil, coal, and uranium on the reservation[s] provided the tribal government[s] with discretionary resources for the first time in its history…[T]he Navajo government and its constituents insisted that Navajo ways and Navajo institutions should govern Navajo lives"[83] rather than laws drafted by the United States.

As the Navajo became more self-reliant, Arizona legislators looked towards the Navajo Nation as a source of tax revenue, which in turn pushed the Navajo to adopt many western legal customs:

> "The Navajo Nation faced a crisis in 1958 during the modern period of Indian assimilation. The Navajo Tribal Council saw moves in the Arizona legislature to assert criminal and civil jurisdiction over the Navajo Nation; the council responded by forming the Navajo Tribal Court. It was patterned after state court systems and based on the 1930s Bureau of Indian Affairs 'Law and Order' regulations. It followed the state model too closely; one observer concluded that the new Navajo Tribal Court was as alien to the Navajo people as state courts."[84]

By 1970, the United States recognized the danger inherent in states' attempts to absorb Indian tribes into state jurisdiction. To prevent states from interfering with tribal self-government and subsequently increasing federal expenditures, President Nixon created a roadmap for future legislation promoting Indian self-determination:[85]

> "The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard

> of living comparable to that of other Americans. This goal, of course, has never been achieved."

By 1974, Nixon implemented Indian hiring preferences in the Department of Interior to "give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." To the Supreme Court, such a hiring preference was important because healthcare, law enforcement, firefighting, and educational services "on the Indian reservations are actually local rather than federal services and are comparable to local municipal and county services, since they are dealing with purely local Indian problems."[86]

From Roosevelt to Nixon, Indian tribes enjoyed increasing support from the Executive Branch to be recognized as "self-governing sovereign political communities" which retained "elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government." Although no longer "possessed of the full attributes of sovereignty," Indian tribes still remained a "separate people, with the power of regulating their internal and social relations" and enjoyed substantial protection as "distinct, independent political communities, retaining their original natural rights" in matters of local self-government, but could not criminally prosecute non-Indians.[87]

With this support, tribes increasingly exercised the remaining powers of their original natural rights of sovereignty by way of tribal self-government and control, such as retaining the power to make their own substantive law in internal matters and enforcing that law in their own forums. In addition, the Supreme Court upheld legislation that singled out Indians for particular and special treatment based on treaty relationships and

emphasized "the distinctive obligation of trust incumbent upon the Government."[88]

1.9 Indian Self-Determination Act and Beyond

With the Supreme Court making clear that services for Indian tribes were based on political and not racial status, the Executive Branch attempted to further advance self-determination and self-sufficiency after the Nixon Administration's 1970 letter and 1974 employment mandate. One of the most significant pieces of Indian legislation followed this mandate: the *Indian Self–Determination and Education Assistance Act* (*ISDA*).

Before *ISDA* was passed in 1975, the Department of the Interior would only provide law enforcement and other tribal services directly through the Bureau of Indian Affairs. The *ISDA* requires the government to enter into contracts for tribes to administer designated federal services programs to tribal members directly, rather than have those services provided by the federal government. Under *ISDA*, tribes can elect to provide essential services like law enforcement directly and be reimbursed by the federal government.

After *ISDA*, Indian tribes were actively encouraged to take on program responsibilities,[89] and government agencies were encouraged to "recognize Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace…[and] view Tribal Governments as the appropriate non-federal parties for making decisions and carrying out program responsibilities affecting Indian reservations."[90]

As an example of tribal governments acting as sovereign entities with primary authority, the Navajo Nation adopted a six-volume, twenty-four title code that transitioned its previous 'council' style

government to a new three-branch system.[91] The Navajo government subsequently enacted legislation requiring all essential services to be provided by the Navajo Nation (rather than the United States) to the extent permissible under *ISDA*.

Today, the Navajo Nation provides government services like healthcare and policing in an area "bigger than New England and almost as big as South Carolina, the 40th state in size."[92] With *ISDA*, the Navajo Nation government provides services directly to more enrolled tribal members (more than 300,000 in the 2010 U.S. Census) in more square miles of tribally-owned land area (27,425 square miles in the 2000 American Indian Tribal Census Tract) than any other tribe in the United States. The Navajo Nation is thus often used as a measure for Indian law and policy, and frequently cited for its laws and practices.

Navajo courts have a "highly active and developed tribal court system and substantial body of decisional law, including Navajo customary law"[93] that has become a model for other tribes with traditional lawmaking and reconciliation. Navajo Court decisions in the later 2000s include language that recites the importance of reconciliation and harmony in decision-making; the use of reconciliation in law is one reason the Navajo elect to provide police services directly to tribal members under *ISDA*:

> "[Reconciliation] is very much living law, deeply connected to the *Diné* making use of it. We note that many written laws assume the baser instinct of human beings and attempt to control it through rigid rules. *Diné bi Beenahaz'áanii* assumes our higher instincts, providing broad principles of conduct and relationships that each person is expected to apply towards goals of reconciliation and *hozho*."[94]

As a result of tribes' renewed efforts to establish courts that meet

the same standards as courts established under the Constitution, as well as tribes' efforts to provide services directly to enrolled members, Federal law "appears to be accelerating in a direction that simultaneously supports the development of robust, contemporary tribal law—a goal closely aligned with the current stated federal policy of Indian self-determination and self-governance—and also cautiously seeks to align tribal judicial exercise more closely with American state and federal practices."[95]

[1] See Samantha A. Moppett, *Acknowledging America's First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum*, 35 OKLA. CITY U. L. REV. 267, 272 (2010).
[2] Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 201-02 (2014).
[3] G. William Rice, *There and Back Again-an Indian Hobbit's Holiday "Indians Teaching Indian Law"*, 26 N.M. L. REV. 169, 171 (1996).
[4] ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 1 (3d ed. 1991).
[5] *24 C.F.R. § 1000.48;* see also *26 U.S.C.§ 45A*; *25 U.S.C. § 1301.*
[6] Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 569-70 (1995).
[7] Adam F. Kinney, *The Tribe, the Empire, and the Nation: Enforceability of Pre-Revolutionary Treaties with Native American Tribes*, 39 CASE W. RES. J. INT'L L. 897, 899 (2008).
[8] *Oneida Indian Nation of New York v. State of N.Y.*, 649 F. Supp. 420, 425 (N.D.N.Y. 1986) aff'd, 860 F.2d 1145 (2d Cir. 1988).
[9] Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329, 354 (1989).
[10] See ROYAL PROCLAMATION OF OCT. 7, 1763 OF KING GEORGE III; see also 1 DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA 1759-1791 163-68, A. Shortt & A. Dougherty, eds., 2d ed. 1918; see also 3 W. WASHBURN, THE AMERICAN INDIAN AND THE UNITED STATES 2135-39 (1973).
[11] 2 JOUR. CONTINENTAL CONG. 174–77 (Jul. 12, 1775).
[12] *Johnson v. McIntosh*, 21 U.S. 543, 584, 5 L. Ed. 681 (1823).
[13] See FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY, 1 (2000).
[14] Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1018 (2014).
[15] See e.g. *Edye v. Robertson*, 112 U.S. 580, 598, 5 S. Ct. 247, 254, 28 L. Ed. 798 (1884).("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments

which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.")

[16] U.S. CONST., ART. I, SEC. 8, CL. 3.

[17] *Chap. VII. 1 Stat. 49*, A CENTURY OF LAWMAKING FOR A NEW NATION: U. S. CONGRESSIONAL DOCUMENTS AND DEBATES, Law Library of Congress.

[18] See e.g. NONINTERCOURSE ACT OF 1790; *25 U.S.C. §177*.

[19] See Joyce A. McCray Pearson, *Red and Black - A Divided Seminole Nation: Davis v. U.S.*, KAN. J.L. & PUB. POL'Y 607, 615 (2005).

[20] *Id.*

[21] See Paul W. Schreoder, *Napoleon's Foreign Policy: A Criminal Enterprise*, 54 J. MIL. HIST. 147, 150 (1990). (A history of Napoleonic Wars "[b]eginning with Britain in 1803 and continuing through Austria and Russia in 1805, Prussia in 1806, Spain in 1808, Austria in 1809, and Russia in 1812.")

[22] 21 U.S. 543, 5 L. Ed. 681 (1823)

[23] See *M'Intosh,* at 681.("[O]ur whole country [had] been granted by the crown [to either the colonies or individuals holding grants] while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees…[and] the king claimed and exercised the right of granting lands, and of dismembering the government at his will.")

[24] Cf. Joseph William Singer, *Property As the Law of Democracy*, 63 DUKE L.J. 1287, 1327 (2014) ("Democracies believe in self-government, and that means that the people, in some way, adopt our own laws, including rules governing the distribution and exercise of property rights.")

[25] *M'Intosh,* at 580.

[26] *M'Intosh,* at 586.

[27] See U.S. CONST. ART. I, SEC. 8, CL. 3.

[28] *M'Intosh,* at 603.

[29] Judith V. Royster, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 586 (1989).

[30] Robertson, at 95.

[31] Michelle Smith & Janet C. Neuman, *Keeping Indian Claims Commission Decisions in Their Place: Assessing the Preclusive*

Effect of ICC Decisions in Litigation over Off-Reservation Treaty Fishing Rights, 31 U. HAW. L. REV. 475, 486-87 (2009).

[32] JILL NORGREN, THE CHEROKEE CASES, 67 (1996).

[33] See Jill Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 N.D. L. Rev. 73, 94 (1988).

[34] See generally ROBERT REMINI, ANDREW JACKSON AND HIS INDIAN WARS (2001).

[35] See Christopher A. Love, *Andrew Jackson and His Indian Wars*, 53 A.F. L. Rev. 221, 228 (2002), citing ANTHONY F. C. WALLACE, THE LONG AND BITTER TRAIL: ANDREW JACKSON AND THE INDIANS 48 (1993)("The government for decades had maintained a dual policy, on the one hand appropriating money for educational purposes and trying to improve living conditions on their present reserves, while at the same time urging them to sell their lands and move westward, out of the way of white settlements. Jackson and his cohorts were determined to shift federal policy toward final and irrevocable removal.")

[36] *Id.*

[37] Ezra Rosser, *The Nature of Representation: The Cherokee Right to A Congressional Delegate*, 15 B.U. PUB. INT. L.J. 91, 93 (2005).

[38] See generally TREATY OF NEW ECHOTA.

[39] Robert Yazzie, *The Cherokee Nation of Indians, et al., v. Georgia Appeal from the Supreme Court of the United States to the Supreme Court of the American Indian Nations*, 8 WTR KAN. J.L. & PUB. POL'Y 159, 161 (1999).)

[40] Robert S. Davis, *State v. George Tassel: States' Rights and the Cherokee Court Cases, 1827-1830*, 12 J.S. LEGAL HIST. 41, 43-45 (2004).

[41] See *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1, 11 (1831).

[42] Anthony Bothwell, *We Live in Their Land: Implications of Long-Ago Takings of Native American Indian Property*, 6 ANN. SURV. INT'L & COMP. L. 175, 192 (2000).

[43] See *Id.,* at 20.

[44] *Cherokee,* at 17.

[45] See *Worcester v. State of Ga.*, 31 U.S. 515 (1832)("An act to prevent the exercise of assumed and arbitrary power, by all persons, under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia, occupied by the

Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the state within the aforesaid territory.")

[46] See *Id.* at 521.("The defendant is a state, a member of the union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States. The plaintiff is a citizen of the state of Vermont, condemned to hard labour for four years in the penitentiary of Georgia; under colour of an act which he alleges to be repugnant to the constitution, laws, and treaties of the United States.")

[47] 27 U.S. 253 (1829),

[48] See Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1171-72 (1995).

[49] *Worcester*, at 560.

[50] John Robert Renner, *The Indian Child Welfare Act and Equal Protection Limitations on the Federal Power over Indian Affairs*, 17 AM. INDIAN L. REV. 129, 133 (1992).

[51] Matthew L. Sundquist, *Worcester v. Georgia: A Breakdown in the Separation of Powers*, 35 AM. INDIAN L. REV. 239, 243 (2011).

[52] See Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 293 (1997).

[53] See *In re Kansas Indians*, 72 U.S. 737, 759 (1866). ("Did not the government accord to them the protection invoked, by executing the treaty? It surely did not need that the United States should say in words, we agree to protect you and vindicate your rights.")

[54] Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of A "Naked Knife"*, 4 MICH. J. RACE & L. 39, 74 (1998).

[55] Laura E. Gomez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9, 14 (2005).

[56] Castillo at 36.

[57] See ALAN AXELROD, CHRONICLE OF THE INDIAN WARS, 183-186. (1993).

[58] *Id.*

[59] Kristen A. Carpenter, Sonia K. Katyal, Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1062-63 (2009).

[60] See Matal, at 294-95.

[61] Moppett, at 293.

[62] James Winston King, *The Legend of Crow Dog: An Examination of Jurisdiction over Intra-Tribal Crimes Not Covered by the Major Crimes Act*, 52 Vand. L. Rev. 1479, 1486 (1999).
[63] See Megan H. Dearth, *Defending the "Indefensible": Replacing Ethnocentrism with A Native American Cultural Defense*, 35 Am. Indian L. Rev. 621, 637 (2011).
[64] See *Ex parte Kan-gi-shun-ca [Crow Dog]*, 109 U.S. 556 (1883).
[65] *Id.*, at 567.
[66] See *Id.*, at 571.
[67] Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo*, 76 JUDICATURE 15, 17 (1992).
[68] Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).
[69] Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 847 (1990).
[70] 118 U.S. 375, 382, 6 S. Ct. 1109, 1113, 30 L. Ed. 228 (1886).
[71] See *Hagen v. Utah*, 510 U.S. 399, 425 (1994)(Blackmun dissent, fn. 5).
[72] See *Lone Wolf v. Hitchcock* 187 U.S. 553, 555 (1903).
[73] *Kagama,* at 384-85.
[74] Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 630-31 (2006).
[75] Karim M. Tiro, *Claims Arising: The Oneida Nation of Wisconsin and the Indian Claims Commission, 1951-1982*, 32 AM. INDIAN L. REV. 509, 510 (2008).
[76] *Id.*
[77] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S. Ct. 1267, 1272, 36 L. Ed. 2D 114 (1973).
[78] See Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1561 (2001).)
[79] S.Rep.No.1080, 73d Cong., 2d Sess., 1 (1934).
[80] See Michael M. Pacheco, *Toward A Truer Sense of Sovereignty: Fiduciary Duty in Indian Corporations*, 39 S.D. L. REV. 49, 69 (1994).
[81] See Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. REV. 275, at 285.
[82] See Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation,*

and Northern Cheyenne Tribe, 26 AM. INDIAN L. REV. 147, 159 (2002).

[83] Bethany R. Berger, *Williams v. Lee and the Debate over Indian Equality*, 109 MICH. L. REV. 1463, 1494 (2011).

[84] Tso, at 16.

[85] See The American Presidency Project, Text of Special Message to the Congress on Indian Affairs, http://www.presidency.ucsb.edu/ws/?pid=2573 (last visited May 27, 2015).

[86] Morton v. Mancari, 417 U.S. 535, 541-42, 94 S. Ct. 2474, 2478, 41 L. Ed. 2D 290 (1974).

[87] See e.g. *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978); *Kagama* at 381-382; *Wheeler* at 313; *Worcester* at 559; *United States v. Mazurie*, 419 U.S. 544, 557 (1975).; F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 122-123 (1945).)

[88] *Montana v. United States*, 450 U.S. 544, 564, (1981); see also *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425 (1989); *Roff v. Burney*, 168 U.S. 218 (1897). (membership); *Meehan* at 29 (inheritance rules); *United States v. Quiver*, 241 U.S. 602 (1916). (domestic relations); *Williams v. Lee*, 358 U.S. 217 (1959); *Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943) (federally granted tax immunity); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973)(same); *Morton v. Ruiz*, 415 U.S. 199 (1974). (federal welfare benefits for Indians 'on or near' reservations); *United States v. Mitchell*, 463 U.S. 206 (1983) quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).)

[89] See Joel H. Mack & Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295, 1358 (1993).

[90] Peter W. Sly, *EPA and Indian Reservations: Justice Stevens' Factual Approach*, 20 ENVTL. L. REP. 10429, 10430 (1990).

[91] See e.g., NNC tit.1-24 (1995).

[92] Robert Yazzie, *"Hozho Nahasdlii"-We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 118 (1996).

[93] Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1115 (2004).

[94] Todacheene v. Shirley, SC-CV-37-10, 2010 WL 3022690 (July 9, 2010).

[95] Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 Am. Indian L. Rev. 421, 421 (2014).

Chapter Two

The Indian Civil Rights Act

2.1 Purpose

The purpose of the *Indian Civil Rights Act* (*ICRA*) is to prohibit Indian tribal governments from violating the civil rights of individual members of an Indian tribe.[1] The Act also enhances civil liberties of individual Indians without unduly undermining Indian self-government and cultural autonomy.[2]

Few Indian tribes had European-style formal court systems, thus early treaties with Indian nations often included "bad men" provisions that would allow Indian tribes to punish their own members, require Indian tribes to deliver up non-Indians for punishment by the government, and require the government to return Indians to their tribe for punishment. Absent a treaty provision or Congressional statute (when treaties were no longer made with Indian tribes), Indian tribes were assumed not to have criminal jurisdiction over non-Indians.[3]

Likewise, Indian tribes enjoy immunity from suit in federal, state, or tribal courts unless the tribe gives consent or the immunity is abrogated by Congress.[4] In *Citizen Band of Potawatomi Indian*

Tribe v. Oklahoma Tax Com.,[5] the Court found that Indian tribes have sovereign immunity from suits to which they do not consent, subject to the plenary control of Congress. The Supreme Court observed that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."

The Court held specifically that *ICRA* did not abrogate tribal sovereign immunity. Therefore, suits brought in federal court against a tribe under *ICRA* are barred. Internal matters of tribal government are not within bounds of federal jurisdiction unless jurisdiction is expressly conferred by Congressional enactment.[6]

2.2 Text of the Indian Civil Rights Act

2.2.1 Subsection (a)

No Indian tribe in exercising powers of self-government shall-

1. make or enforce any law prohibiting the free exercise of religion or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

> This *ICRA* provision concerning First Amendment-like protections has no provision comparable to the establishment clause of the First Amendment, which states: "*Congress shall make no law respecting an establishment of religion…*" This omission was in conscious recognition of the fact that in some tribes, especially the Pueblos, government, religion and all the rest of life are inextricably interwoven.
>
> Thus, this provision of the *ICRA* does not require the separation of religion and the operations of the tribal

government because separating religion from government would have changed tribes beyond recognition. Congress only wanted to ensure that tribal governments protected free exercise of religion.

2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

This language of the *ICRA* comes directly from the Fourth Amendment to the U.S. Constitution.

3. subject any person for the same offense to be twice put in jeopardy;

This language of the *ICRA* comes from the Fifth Amendment of the U.S. Constitution. Under this section of *ICRA*, the tribal courts are prohibited from prosecuting a person twice for the same offense. If a tribe were to put a person twice in jeopardy for the same offense, it would be possible for that person to petition the federal court for a writ of habeas corpus.

Example: Amanda Deer is acquitted in the Fall River Tribal Court on a charge of simple assault arising out of an incident in which she was alleged to have threatened John Whitebear with a knife. Amanda is then brought to trial on a charge of aggravated assault arising out of the same incident. The second prosecution (aggravated assault) is barred by *Section 1302(3)* of *ICRA* since Amanda would be twice put in jeopardy for the same offense.

The double jeopardy clause of the Fifth Amendment is not

infringed when an Indian is convicted in federal court after having been convicted of the same crime or a lesser-included offense in tribal court, because the tribal court and the federal court are not arms of the same sovereign.[7]

4. compel any person in any criminal case to be a witness against himself;

5. take any private property for a public use without just compensation;

These two provisions mirror the provisions of the Fifth Amendment to the U.S. Constitution.

6. deny to any person in a criminal proceeding the right to speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

This section of *ICRA* is based on the Sixth Amendment of the U.S. Constitution, with an important difference as it relates to right to counsel: the right to counsel under *ICRA* is at the defendant's own expense. Under the Sixth Amendment of the federal Constitution, state and federal governments are required to provide counsel to indigent people at government expense when the prosecution may result in imprisonment.

In a tribal court proceeding, if a defendant is unable to afford counsel, the tribal court will order the defendant to stand trial regardless of whether he or she has an attorney. If a tribe adopts the *Tribal Law and Order Act of 2010* (*TLOA*) or *Violence Against Women Reauthorization Act of*

2013 (*VAWA*), tribes are required to provide counsel at the tribe's expense.

7. (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

This section of *ICRA* is based on the Eighth Amendment of the U.S. Constitution, but it also imposes sentencing limitations on tribal courts. From the passage of *ICRA* until the enactment of the *TLOA*, tribal courts could sentence a defendant to a maximum of *"imprisonment for a term of one year and a fine of $5,000.00, or both."* This limitation on the penalties or punishments that tribal courts could impose effectively forced tribal courts and governments to punish tribal criminal offenses, even serious violent crimes, as misdemeanors. Subsection (C) and (D) were added to *ICRA* after the *TLOA*, to allow tribal courts "felony" jurisdiction over some offenses committed in Indian Country.

8. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

By this section, *ICRA* combines both the "Due Process" language from the Fifth and Fourteenth Amendments, and the "Equal Protection" language from the Fourteenth Amendment.

Tribes are required to ensure due process-fundamental fairness in all proceedings. Tribal governments must also ensure equal protection of the law. Tribes cannot treat people differently because of race, gender, or religion.

9. pass any bill of attainder or ex post facto law;

The language in this section of *ICRA* comes from U.S. CONST, ART. I, SEC. 9, CL. 3, prohibiting Congress from passing either ex post facto laws or bills of attainder.

An *ex post facto* law is one that makes criminal an act that was not criminal at the time the act was done.

Example: Stanley Yepa has a grazing permit from his tribe. Under the tribal grazing permit, Stanley can only graze a specific number of animals per acre so that the land is not overgrazed. He decides to add bison to his herd of cattle, careful to ensure that he does not exceed the maximum amount of animals under his permit. Neither his grazing permit nor the tribal ordinance on use of the range restricted grazing to any particular type of animal. Some of the other tribal members who have grazing permits for their cattle become upset when they learn that Stanley is grazing bison. They appeal to the Tribal Council, which promptly passes an ordinance making it a crime to graze bison on the reservation. Stanley cannot be charged, prosecuted, and convicted under the new tribal ordinance for grazing before the law passed. If he continues to graze bison after the law is passed, however, he could be charged

with a crime.

Bills of attainder are laws passed by a legislative body, which pronounce a person guilty of a crime and punish him without a trial.

Example: Esther Red Willow works as an aide for the President of her tribe. The President relies on Ms. Red Willow for advice on all matters affecting economic development. The President has a second aide whom he relies on for other specific issues. The President and the Tribal Council have been at odds on several matters concerning the types of economic development in which the tribe should engage. The Council attributes these disagreements to the advice Red Willow is giving to the President.

The Tribal Council passes the following ordinance: "It shall be a crime for any person, serving as an aide to the President of the Tribe, who is a member of the Moon Clan, to receive a full-time salary from the tribal government budget." Ms. Red Willow, unlike the President's other aide, is a member of the Moon Clan. Because the Tribal Council approved the budget, they know that the tribal budget has a line item for the President's expenses, including salaries for two full-time aides. The effect of this statute is to find Esther Red Willow guilty of a crime without benefit of a trial, since she is the only person whose situation satisfies the elements of the crime.

10. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Here *ICRA* requires a jury trial for any offense which could

result in imprisonment. This provision places a heavier burden on tribal governments than the U.S. Constitution places on either the federal or state governments. Under federal courts' interpretation of the right to trial by jury, a defendant may not be entitled to a jury trial for petty offenses–offenses that are punishable by less than six months in jail.

However, tribal courts are required to provide a jury trial for any offense, even those that are punishable by less than six months in jail. The defendant must request a jury trial. In tribal courts, only a six-person jury is required for a criminal trial as opposed to twelve in a federal trial. Neither a criminal prosecution by grand jury indictment or the right to trial by jury in civil cases are required under ICRA.

2.2.2 Sentencing Enhancements Under Subsection (b)

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

1. *Has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or*

2. *Is being prosecuted for any offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.*

   The *Tribal Law and Order of Act of 2010* (*TLOA*) expanded the punitive capabilities of tribal courts by increasing the punishment that an offender could receive in Tribal courts from 1 year and a five thousand dollar fine to three years

and fifteen thousand dollars fines for offenses that warrant enhancement or for offenses that are like felonies in other jurisdictions. According to subsection (a) paragraph 7 of the *Indian Civil Rights Act*, tribal courts are also allowed to stack felony charges. Therefore, the maximum punishment a defendant can receive in tribal court is nine years and a $15,000 fine. However, the maximum punishment for one offense is three years and a $15,000 fine.

2.2.3 Defendant's Rights Under Subsection (c)

In a proceeding where the Court has adopted *TLOA* or is prosecuting under *VAWA*, the following additional rights apply to a criminal defendant:

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

1. *provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and*

2. *at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;*

3. *require that the judge presiding over the criminal proceeding—*

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

4. *prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and*

5. *maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.*

2.2.4 Sentences Under Subsection (d)

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—to serve the sentence—

in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)[1] of the Tribal Law and Order Act of 2010;

in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

in an alternative rehabilitation center of an Indian tribe; or to serve

another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

2.2.5 Definition of Offense Under Subsection (e)

In this section, the term "offense" means a violation of a criminal law.

2.2.6 Reservation of Rights Under Subsection (f)

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

2.2.7 Relationship Between ICRA and VAWA

With the passage of the *Violence Against Women Reauthorization Act of 2013*, Congress authorized Indian tribes to assert criminal jurisdiction over non-Indian offenders by amending the language of the *Indian Civil Rights Act* at *25 U.S.C. § 1301 et. seq.* Today, Indian tribes who adopt the provisions of *VAWA* can assert jurisdiction over certain crime: dating violence, domestic violence and violations of protection orders.

The term “dating violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

The term “domestic violence” means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the

victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the area of Indian Country where the violence occurs.

The term "protection order" means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a *Pendente lite* order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of the person seeking protection.[8]

Congress recognized in *VAWA,* at *25 U.S.C. § 1304(b),* that powers of self-governance include the inherent power to prosecute all persons for the crime of domestic violence occurring on tribal land. This jurisdiction is concurrent with the jurisdiction of the United States, individual states, or both, to exercise jurisdiction over the same conduct.

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one of two categories. The first category is domestic violence and dating violence. The second category is violations of protection orders. To qualify, the violation of the protection order must occur in Indian Country and in the jurisdiction of the participating tribe. Further, the violation must be of an order that prohibits violence, threatening acts, harassment, sexual violence, contact, or communication with another person. Prior to the enforcement of the order, the tribe must show the respondent had notice of the protective order and an opportunity to be heard as required by *18 U.S.C. § 2265(b).*

If the victim and perpetrator are non-Indian, however, the tribe lacks jurisdiction over the offense under *VAWA.* The tribe is also excluded from exercising jurisdiction unless it can show the person has a significant relationship with the tribe. "Significant relationship" includes defendants: (i) residing in the jurisdiction of the participating tribe; (ii) being employed in the jurisdiction of the participating tribe; or (iii) is a spouse, intimate partner, or dating partner of (I) a member of the participating tribe; or (II) an Indian who resides in the jurisdiction of the participating tribe. Crimes of sexual violence are precluded from the enforcement unless the tribe can establish a domestic or dating relationship.

In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction and a defendant may face any term of imprisonment, the tribe must ensure that the defendant may exercise the rights described in *25 U.S.C. §1302(c).* These rights include the right to a court-appointed licensed attorney, a judge that is qualified to hear criminal proceedings and is a licensed attorney, notice of tribal law and rules of evidence, and a record of the proceedings. An audio recording is sufficient to meet the record requirement.

Further, the defendant has a right to a trial by an impartial jury drawn from sources that reflect a fair cross-section of the community; the selection of jurors must not systematically exclude any distinctive group in the community, including non-Indians.

VAWA also modified *18 USC §2265* to ensure that a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, which includes the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms in matters arising anywhere in

the jurisdiction of the Indian tribe or otherwise within the authority of the Indian tribe.[9]

2.3 Writ of Habeas Corpus

A writ of habeas corpus is a judicial mandate to a prison official ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody. Under *25 U.S.C. § 1303*, "the privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

Because the *Indian Civil Rights Act* is a federal statute, one would think that it could be enforced in the federal courts. However, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court held that *ICRA* is primarily enforceable in tribal courts.

This case involved a rule of the Santa Clara Pueblo concerning how the Pueblo determined membership in that tribe. The rule made children born of female members married to a person outside the tribe ineligible for membership in the tribe. However, children born of marriages between male Santa Clara Pueblo members to spouses outside the tribe were eligible for membership in the tribe. Santa Clara Pueblo justified its 1939 ordinance on the basis of patriarchal traditions, as well as the economic need to restrict the tribal rolls.

Julia Martinez, a female member of the Pueblo, had married a Navajo. Their children were raised in the Pueblo, spoke Tewa (the traditional language of that Pueblo), and continued to live there. Nonetheless, Ms. Martinez's children were excluded from membership in the tribe by the ordinance. Because her children were not regarded as members of the tribe, they did not have the benefits of Santa Clara membership, such as voting in tribal

elections, and retaining land use rights. Julia Martinez filed a lawsuit against the tribe and its governor, alleging a violation of the equal protection clause of the *Indian Civil Rights Act*, saying that the ordinance denied her and her children equal protection of the laws as guaranteed under *ICRA*. The issue presented to the United States Supreme Court was whether an Indian tribe could create membership criteria which discriminated against women. The Supreme Court did not address this issue, but instead dismissed the lawsuit on the basis of some important jurisdictional grounds.

As a result of the Santa Clara decision, federal court enforcement of the *Indian Civil Rights Act* is limited almost exclusively to review of criminal matters. The decision has been highly controversial, because it simultaneously reduces the degree of federal interference in tribal self-government while raising the potential for violations of federal law without a federal remedy.

Enforcement of much of *ICRA* is left to the tribal courts, primarily the non-criminal portions of the Act. In *United States v. Washington*,[10] the court found that finding that like states, Indian tribes are sovereign entities, albeit, "domestic dependent" sovereign. According to the court, "[t]he same considerations of federal non-interference in the affairs of other sovereigns" that influenced the court in *Edmunds v. Won Bay Chang*, 509 F.2d 39 (9th Cir. 1975) to limit habeas review of state convictions applied to review of the actions of Indian tribes.

In *Poodry v. Tonawanda Band of Seneca Indians*,[11] tribal officials informed select tribal members that they were guilty of treason by attempting to overthrow the tribal government. As a result, they were forever banished from the reservation and stripped of all rights of membership. The Circuit Court held that banishment was a severe punishment, involving a sufficient restraint on

liberty to qualify as a "detention" and permitted federal review by habeas corpus under *§1303* of *ICRA*.

In *Jeffredo v. Macarro,*[12] the court held that disenrollment does require the same review as banishment. In *Jeffredo*, tribal members were disenrolled but not banished from the reservation. Even if they had been, the tribe had a uniform process for excluding both members and nonmembers of the tribe from the Reservation that included procedures for appealing one's exclusion or eviction. The court found that federal review was not warranted when the former members had not actually been banished, and when there was an internal mechanism for appeal.

Recall that in *Oliphant v. Suquamish Indian Tribe*, the United States Supreme Court held that Indian tribes do not have criminal jurisdiction over non-Indian offenders, absent congressional authorization. Specifically, the Court found that an early version of the *Indian Civil Rights Act* extended its guarantees only to "American Indians," rather than to "any person." Although *ICRA* provides protection to any person, the Court found the purpose of that language was to extend guarantees to "all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians."[13]

However, the Court noted that the wording was not intended to give Indian tribes criminal jurisdiction over non-Indians. Instead, the wording merely demonstrated Congress' desire to extend guarantees under *ICRA* to non-Indians if and where they come under a tribe's criminal or civil jurisdiction by either treaty provision or Act of Congress.[14]

Thus, the application for writ of habeas corpus is also made applicable to non-Indians charged in tribal court. A person who has filed a petition for a writ of habeas corpus in a court of the United States under *25 U.S.C. § 1303* may petition that court to

stay further detention of that person by the participating tribe. A court shall grant a stay if the court finds a substantial likelihood that the habeas corpus petition will be granted and, after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released. An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges.

[1] See *Thompson v. New York*, 487 F. Supp. 212 (N.D.N.Y. 1979).
[2] See *Means v.Wilson*, 383 F. Supp. 378, 383 (D.S.D. 1974).
[3] See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d. 209 (1978).
[4] See *Confederated Tribes of Colville Indian Reservation v. Washington*, 446 F. Supp. 1339 (E.D.Wash.1978).
[5] 888 F.2d 1303 (10th Cir. 1989).
[6] See *Pinnow v. Shoshone Tribal Council*, 314 F. Supp. 1157 (D.C. Wyo.1970).
[7] See *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978).
[8] See *25 U.S.C. 1304(a).*
[9] *18 USC §2265(e).*
[10] 573 F.3d 701 (9th Cir.2009).
[11] 85 F.3d 874 (2nd Cir. 1996).
[12] 599 F. 3d 913 (9th Cir. 2010).
[13] See Summary Report on the Constitutional Rights of American Indians, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 10 (1966).
[14] See *Oliphant* at 196.

Chapter Three

Indian Country Criminal Jurisdiction

3.1 Introduction

When Europeans first arrived on the continent that is now North America, over five hundred Indian nations prospered in what is now the United States.[1] Each nation possessed its own government, culture and language.[2] Today, there are more than

560 federally recognized Indian Tribes in the United States. Alaska is home to 226 tribes, with other tribes scattered through thirty-four of the continental United States. Each tribe is a unique entity, distinct from each other in many ways—including the exercise of criminal jurisdiction. The Supreme Court has noted that criminal jurisdiction in Indian Country is "a complex patchwork of federal, state and tribal law,"[3] that has been largely defined by three factors.

3.1.1 Trust Relationship and Tribal Sovereignty

Prior to the arrival of Europeans on the North American continent, tribes had political, cultural, and social autonomy. As sovereigns, tribes governed territory through enforcement of social norms (as European nations did with civil and criminal laws), and excluded outsiders from tribal territories. They made war and peace, provided for their people, and lived according to their cultural and religious worldviews, without approval or disapproval of any outside entity.

When European nations first encountered Indian tribes, they respected this sovereignty and entered into treaties largely centered on trade and commerce. Following the Revolutionary War, the United States took steps to ensure that other European nations did not enter into treaties with Indian tribes.

When the United States made treaties, however, the goal was the acquisition of land rather than trade and commerce. Indian tribes ceded vast areas of traditional land holdings in exchange for the United States' promise to protect them and provide for their welfare, which in turn reduced the tribes' exercise of sovereignty.

In many of these treaties, Indian nations reserved for themselves land bases, hunting and fishing rights, water rights, and all attributes of sovereignty not expressly relinquished through

treaty. Among their most significant losses of sovereign power, however, was criminal jurisdiction.

As discussed in Chapter One, the Supreme Court eventually held Indian tribes were "domestic dependent nations" and thus were dependent on the federal government for protection. As such, Indian tribes' authority to enforce criminal laws against non-Indians was reduced, and it was assumed the federal government would punish non-Indians for criminal conduct.

The relationship between tribes and the federal government has since been characterized as a "trust relationship" by the Supreme Court. This trust relationship means the federal government holds legal title to tribal property and has a legal duty to manage and protect the property for the beneficial use of tribal nations. The federal government must act in the best interests of the Indian nations, protect tribal governments from incursions by the states, safeguard the natural resources and land bases of tribes, and provide health care, education, and public safety for these domestic dependent nations. In the history of the United States and its treatment of Indian nations, federal policies for dealing with Indian nations have not always been faithful to this trust responsibility. Federal policy has varied radically from a policy of annihilation, to assimilation, to termination, and then to self-determination.

Each change in policy has been influenced by the political and social climate of the era. Westward expansion and gold fever influenced removal of tribes from the eastern seaboard to the west. Federal legislation caused the removal of tribal homelands from Indian Country, and treaty promises were broken. Still today, the trust relationship and federal superintendence over Indian nations rests upon Congress' plenary power over Indian affairs, and federal criminal jurisidiction in Indian Country also flows from Congress' plenary power.

3.1.2 Plenary Power of Congress

Congress' plenary power over Indian affairs is the second factor contributing to the tangled pattern of criminal jurisdiction in Indian Country. The Supreme Court has consistently held the source of Congress' extensive power over Indian nations derives from several Constitutional powers: war powers; treaty powers; U.S. Const. ART. II, SEC. 2 CL. 2; the treaty clause, which gives the President and Congress the power to make treaties with Indian tribes; and the Interstate Commerce Clause, which has been relied on as the principal source of Congress' plenary power over Indian nations.

Found at U.S. CONST., ART. 1, SEC. 8 CL. 3 of the United States Constitution, the Interstate Commerce Clause states that:

> *"The Congress shall have power…to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes…"*

The Supreme Court held in 1832 that the treaty clause and the Interstate Commerce Clause provides Congress with "all that is required" for plenary power over Indians and tribes.[4] Historically, the Supreme Court has also cited the law of discovery and conquest as a basis for such plenary power.[5] Congress abolished treaty-making with tribes in 1871; therefore, the Treaty Clause is no longer cited in modern Indian law as a source of federal control over Indians. As the law of discovery and conquest are no longer cited, the Supreme Court relies solely on the Commerce Clause in its modern jurisprudence.[6]

The Interstate Commerce Clause, which regulates commerce with Indian tribes, is Congress' only express authority to deal with the tribes. Despite what appears to be a limited power to

regulate commerce, successful arguments by the government before the Supreme Court have created limitless plenary power over Indian affairs. This power has been used both as a shield *for* tribes and their sovereignty against the states, and as a sword *against* tribes and their sovereignty against federal control.

The federal government has a trust responsibility to protect tribes, yet Congress' power has been interpreted to be great enough to unilaterally abolish treaties or certain treaty rights, or even to end the government-to-government relationship with any particular tribe. At its most extreme limits, Congress can legislate who is and is not an Indian tribe and may increase, decrease, or remove entirely from tribal governments their criminal and civil jurisdiction. "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights," and Congress can assist or destroy an Indian tribe as it sees fit.[7] Through its plenary power, Congress also has the authority to export federal criminal laws into Indian Country.

3.1.3 Supreme Court Decisions

Although Congress has plenary power, it is not absolute. The two most important constitutional limitations on congressional power are the Due Process Clause and the Just Compensation clause of the Fifth Amendment.[8] The interpretation of whether certain actions taken under plenary power and the effect on Indian nations is complex, and often rises to a high level of conflict between the federal government's trust responsibility and the extent and meaning of tribal sovereignty. The judicial branch, specifically the United States Supreme Court, is called upon to resolve such issues. The involvement of the judicial branch has contributed immensely to the complexity of criminal jurisdiction in Indian Country.

Through its decisions, the United States Supreme Court has interpreted numerous sources—treaties, federal statutes, executive (Presidential) orders, and the United States Constitution—and defined the outer contours of tribal sovereignty and jurisdiction. The Supreme Court's role in Indian law is limited to determining constitutionality of congressional legislation and executive enforcement of laws affecting Indian tribes; the Supreme Court does not act to protect tribal autonomy against congressional action.

As a result, the Court can only determine if laws passed by Congress are constitutional, even if they severely undermine the sovereignty of tribal nations and the jurisdiction of tribal courts. The Supreme Court has upheld congressional actions stripping tribes of:

- jurisdiction over crimes committed by non-Indians against non-Indians within the reservation boundaries [*United States v. McBratney* (1881), *Draper v. United States* (1896)]; and

- jurisdiction over non-Indian offenders who commit crimes against Indians within the reservation boundaries [*Oliphant v. Suquamish Indian Tribe* (1978)].

It is important to note that Indian Country criminal jurisdiction is not based on race—"Indian" and "non-Indian" are *political* classifications, not racial ones. An "Indian" is a person recognized to have certain political or treaty rights. It is possible to be racially Indian and yet not be a member of a federally-recognized tribe, and thus not "Indian" in terms of federal law.

For example, the Upper Mattaponi tribe is one of only two state-recognized tribes in Virginia that own reservation land outright. The Upper Mattponi has been, and still is, recognized by both the

State of Virginia and the United Kingdom as an Indian tribe in the TREATY BETWEEN VIRGINIA AND THE INDIANS OF 1677. The tribe is not federally-recognized as of 2015, therefore its members are not "Indians" under federal law despite recognition by Virginia and the United Kingdom. Only if the Upper Mattaponi are recognized by the federal government as a "tribe" will its members be "Indians" under federal law.

3.2 Criminal Jurisdiction in Indian Country

"Jurisdiction" means an exercise of authority in all judicial matters. Criminal defendants can only be prosecuted in a court with jurisdiction over both the crime and the criminal. Further, jurisdiction can be exercised exclusively or concurrently by different sovereigns – federal, state, or tribal. "Exclusive jurisdiction" means only one sovereign can exercise authority over particular judicial matters, and "concurrent jurisdiction" means more than one sovereign has such authority.

Three separate sovereigns potentially could exercise criminal jurisdiction, exclusively or concurrently, in Indian Country. These three sovereigns have a number of different relationships which prevent them from fully and independently exercising jurisdiction in Indian Country. The federal government and the states have a Constitutional relationship, and the federal government and tribes have a treaty relationship. The Constitution grants plenary power over Indian affairs to the federal government and thus restrains the states. Treaties require the United States to protect Indians from non-Indian offenders, and allow tribes to punish tribal members for criminal conduct.

With this background in mind, it is apparent that criminal jurisdiction in Indian Country presents both an intellectual and logistical challenge to law enforcement. It requires an

understanding of key concepts, including:

• Who is an Indian?
• What is Indian Country?
• What are the limits on federal, tribal, and criminal jurisdiction?
• What are the primary federal criminal statutes applicable in Indian Country?

3.2.1 Statutory Definition of "Indian"

As discussed previously, the federal criminal jurisdiction statutes do not define the term "Indian." For purposes of both federal and tribal criminal jurisdiction, an individual Indian must be considered a member of a federally recognized tribe.[9] Therefore, the Supreme Court has articulated a test to determine whether an person is an Indian:

1) Whether there is some degree of Indian blood (a slight degree is sufficient), and;

2) Whether the person is recognized as "Indian" by either a federally-recognized tribe or the federal government.[10]

Enrollment in a federally recognized tribe indicates a person's status as an "Indian" for purposes of federal criminal (and tribal) jurisdiction. Formal enrollment in a recognized tribe is not always necessary for an individual to be regarded as an Indian for federal criminal jurisdictional purposes.[11]

Congressional acts that govern the status of individual tribes[12] may also define the status of Indians, as may informal government recognition through receipt of assistance provided only to Indians, the enjoyment of the benefits of tribal affiliation, social recognition as an Indian through residence on the reservation, and participation in Indian culture or social life.[13]

Tribal membership can be established through Bureau of Indian Affairs or tribal census records. A person eligible for enrollment, but not yet enrolled, is also considered an Indian for purposes of federal criminal jurisdiction.[14]

Individual status follows tribal status, however, so there can be no Indian without a tribe. A member of a non-federally recognized tribe is not an Indian for purposes of federal criminal jurisdiction or tribal jurisdiction[15] even if that tribe is recognized by other countries or other states. Likewise, if a tribe was federally-recognized and Congress subsequently terminates its trust relationship with a tribe (as was the case with the Menominee in the 1950s), the individual members are not considered Indians for purposes of federal criminal jurisdiction unless the trust relationship is re-established (as was the case with the Menominee in 1973). Canadian tribes (First Nations people) are not federally recognized for purposes of treating their tribal members as Indian offenders or victims in the United States.

3.2.2 Statutory Definition of "Indian Country"

Special federal criminal jurisdiction exists in "Indian Country," as defined by *18 U.S.C. § 1151*:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, including patented lands and rights-of-way running through the reservation,
>
> (b) all dependent Indian communities,
>
> (c) all Indian allotments to which Indian title has not been extinguished, including rights-of-way running through the allotments.

As an element of a charged criminal offense, the government must prove that the crime took place on a reservation or in Indian Country.[16]

3.2.3 Reservation Land

The first category of Indian Country includes all lands within an Indian reservation under federal jurisdiction, including patented lands within the reservation and rights-of-way running through the reservation.[17] Patented lands are those lands located within the exterior (outer) boundaries of the reservation that have been sold by the United States to individual non-Indians and owned in fee simple.

Today, we think of patents in terms of inventions – a grant of exclusive use or right. Similarly, land patents are grants of land for exclusive use or right, like a deed. Patents are granted directly from the United States government. In the 1800s, patents were often granted to religious groups for lands within reservations, for the purpose of establishing missions or schools. In addition, some reservations were extended or established where patents already existed, and were thus included within the new boundaries of the reservation.

For example, the Muscogee (Creek) Nation requested a land patent for the American Baptist Home Mission Society to establish Indian University (now Bacone College). The land patent was issued by the United States, not by the Muscogee (Creek) Nation, and the college was in Indian Country (even though the land was owned in fee simple by a non-Indian corporation.) After 1887, when the Muscogee (Creek) Nation reservation was disestablished, the land owned by Indian University was no longer in Indian Country because there was no longer an exterior boundary of a reservation as described under *§1151(a)*. Disestablishment of a reservation does not invalidate a

land patent, however. As the University had a land patent issued by the United States, it owned the land in fee simple and the land became subject to the jurisdiction of Indian Territory; it could not be allotted when the Muscogee (Creek) Nation reservation was broken up into individual allotments.

Non-Indian ownership within reservations occurred in other ways as well. Primarily, individual allotees alienated land (sold and extinguished Indian title so the land can be held in fee simple absolute), "surplus" land was sold during allotment,[18] or reservations were opened to settlement by non-Indians.

During allotment, tribal lands were divided up among individual members. Some of those allotments to Indians were made alienable, or eligible for sale to non-Indians, and subject to state taxation after a certain number of years. After the period of restriction, Indian owners could remove the trust restrictions, retain ownership of the lands in fee simple, then sell the land. In practice, many Indian owners lost the land due to nonpayment of taxes or fraud.

Other allotment schemes opened up "surplus" lands to non-Indian purchasers or homesteaders, after each Indian family received an allotment. As a result, there are large tracts of land settled by non-Indians, and sometimes entire towns were incorporated under state law by non-Indians within many reservations. Even though they were incorporated under state law, those tracts and towns are still within Indian Country for jurisdictional purposes.[19] For example, the city of Mission, South Dakota, lies within the boundaries of the Rosebud Sioux Reservation, and is considered Indian County for purposes of federal criminal jurisdiction.

Other reservations were "disestablished," meaning Indian tribes ceded land or the land was alienated through allotment. This

former Indian land, which was usually opened for settlement by non-Indians, is no longer part of the reservation, and therefore not Indian Country. Almost all of Oklahoma was former reservation land, but the reservations were disestablished, so large areas of cities like Tulsa are not in Indian Country.[20]

3.2.4 Dependent Indian Communities

The second category of "Indian Country" includes dependent Indian communities which are not reservations *per se*, but are still recognized by the federal government and dependent upon the federal government for protection. The term "dependent Indian community" is a term of art which developed from *United States v. Sandoval.*[21]

In *Sandoval*, the Supreme Court decided New Mexico Pueblo communal lands held by the Pueblos in fee simple, under conveyances from the Spanish government as land grants and recognized under Mexican law until the Treaty of Guadalupe Hidalgo ceded jurisdiction to those lands to the United States, were in "Indian Country" even though they were not formally designated as federal reservations.[22] The Court reasoned that since the Pueblos were distinctly Indian communities, recognized by the federal government and dependent upon the federal government for protection, their land grants were Indian Country. Thus, ownership of lands by a federally recognized, dependent Indian tribe is sufficient to bring those lands within the definition of Indian Country. The *Sandoval* holding was later incorporated into the definition of "Indian Country" in *18 U.S.C. §1151(b)*, which included dependent Indian communities as Indian Country for purposes of federal criminal jurisdiction.

In *Alaska v. Native Village of Venetie,*[23] the Supreme Court further explained that the term "dependent Indian community," as used in *18 U.S.C. §1151(b)*, refers to a limited category of

Indian lands that are neither reservation nor allotments (such as Pueblos or Alaskan Native villages). The two essential characteristics of a "dependent Indian community" are: first, the land must have been set aside by the federal government specifically for use by Indians, and; second, the land must be under federal superintendence (supervision). "Superintendence" means the community must be "sufficiently 'dependent' upon the Federal Government so that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question."

Federal superintendence is not evidenced merely by federal provision of health, social welfare, and economic programs; the federal government must actively control the land and effectively act as a guardian for the Indians.

3.2.5 Indian Allotments

As described in Chapter One, years of allotments and patents resulted in the designation of some portions of Indian Country as "checkerboard" areas, so-called because they contained alternate areas of Indian and non-Indian owned land, within and outside the boundaries of reservations.

Allotments are lands held in trust for individual Indians—lands that are beneficially owned by an Indian, but over which the federal government has a fiduciary responsibility. Whether located within a reservation or not, allotments held in trust by the United States are considered Indian Country.[24]

Title 18 U.S.C § 1151 does not explicitly address the status of tribal trust lands located outside of Indian reservations unless those lands are used for the residence of a dependent Indian community.

Thus, at least two types of tribal trust property have Indian Country status if used for the federal purpose of residence and support of Indians, which are lands purchased for a tribe pursuant to section 5 of the *Indian Reorganization Act,* and individual allotments converted to tribal trust property. Other types of tribal trust property have been held by courts to be Indian Country, but no general rule as to whether trust land located outside of reservation boundaries is Indian Country has yet emerged as of 2015.

In 1991, the Supreme Court held that the test for determining whether land is Indian Country "does not turn upon whether that land is denominated 'trust land' or 'reservation'… [but] whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'"[25]

This language suggests that tribal trust land may qualify as Indian Country for purposes of the federal criminal jurisdiction statute as well. In *United States v. Roberts,*[26] the Court held that the Choctaw Nation Tribal Complex property, located in Durant, Oklahoma, is Indian Country for purposes of federal criminal jurisdiction. At issue was whether the federal courts had subject matter jurisdiction over the prosecution of a tribal member for sexual abuse offenses against another tribal member occurring at the tribal complex. The Court considered the following factors in determining whether the tribal complex was Indian Country, and thus subject to federal jurisdiction:

- the United States retains title to the property;
- the State of Oklahoma considers the property beyond its taxation jurisdiction;
- the BIA Area Director approved the land acquisition;
- both the BIA and the Choctaw Nation treat the complex as trust property;
- the complex serves as the Nation's governmental

headquarters;
• the United States continues to have a supervisory role in the management of the property.

In sum, determinations of Indian Country status depend on title to land or a showing that the area is a dependent Indian community.

3.3 Nature of Crime and Applicable Statutes

In most cases, criminal jurisdiction may be exercised by a tribe and the federal government together, by the tribe alone, or by the federal government alone. Federal crimes of general applicability are not affected by the special rules of Indian Country jurisidiction. In other words, all federal criminal statutes can be enforced regardless of location or tribal enrollment, so long as all of the elements of the charged offenses can be met. The general conspiracy statute, *18 U.S.C. §371,* is also applicable in Indian Country if the object of the conspiracy is the commission of a crime of general federal application. Likewise, tribes may prosecute tribal members for any crimes committed in violation of tribal law.

Crimes not of general federal applicability are those typically handled by states, such as murder, robbery, assault, and so on. Determining which sovereign has jurisdiction over these crimes depends in part on whether the offender is Indian and whether the victim is Indian, whether the crime occurred in Indian Country, and whether the *Indian Country Crimes Act*, *Major Crimes Act*, or *Assimilative Crimes Act* apply, along with a number of other factors.

3.3.1 Indian Country Crimes Act

In 1803, the United States purchased the territory of Louisana from the French. Later treaties with Indian tribes would create reservations inside the territory and under federal control, outside the reach of states. But fifteen states would eventually be granted land from the territory.

Given the experience of the Cherokee in Georgia, Congress recognized a possibility that settlers and expansionists would commit crimes against the Indians to force them from the reservations; it was also possible that the states would fail to prosecute, leaving the Indians without protection as required by treaty. To prevent such an occurance, Congress enacted the *Indian Country Crimes Act* in 1817.

The *Indian Country Crimes Act* ensured that the federal government could exercise jurisdiction over non-Indians who committed crimes in Indian Country after the territory was divided into these states by designated them as exclusive federal jurisidiction. If the offender is an Indian, the *Indian Country Crimes Act* does not apply.

The Act reads as follows:

> *§1152.* Law governing
>
> *Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.*
>
> *This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor*

> *to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.*

Today, the primary purpose of the statute is to allow prosecution for:

- Crimes committed by non-Indians against Indians; or

- Crimes by Indians against non-Indians that (1) do not fall under the *Major Crimes Act* and (2) have not already been punished by that tribe for the same conduct.

The statute's primary effect has been to apply prosecutions to Indian Country in the same way as federal criminal statutes governing other federal enclaves like military installations, postal offices, and national parks. Unlike the *Major Crimes Act,* the *Indian Country Crimes Act* does not create new federal offenses, it simply creates federal jurisdiction.

Federal misdemeanors also can be prosecuted under the *Indian Country Crimes Act*, allowing prosecution of both non-Indian defendants as well as Indian defendants whose victims are non-Indians and who have committed crimes that (1) do not fall under the *Major Crimes Act* and (2) have not already been punished by that tribe for the same conduct.

The statute's reference to punishment of an Indian offender by "the local law of the tribe" acknowledges the tribal courts' primary jurisdiction over Indian defendants. If the Indian offender has not been prosecuted and punished under tribal law, then *§1152* authorizes federal prosecution. If the tribe has prosecuted and punished an Indian offender who committed a crime against a

non-Indian, there is no federal jurisdiction under *§1152*. (The offender still may be prosecuted if the crime is specifically enumerated under the *Major Crimes Act*, discussed in the next section.)

Historically, the *Indian Country Crimes Act* does not apply where exclusive jurisdiction over specified offenses has been reserved to the tribe pursuant to a treaty; this provision has little relevance today, as very few treaties conferred exclusive jurisdiction to tribes.

Under a broad reading of *§1152*, it would seem that federal law should apply in Indian Country whenever a non-Indian is involved in an offense, including an offense against another non-Indian. While there does not appear to be any exception for crimes committed by a non-Indian against a non-Indian in the text of the *Indian Country Crimes Act*, the Supreme Court has exempted these offenses from federal and tribal jurisdiction.

In *United States v. McBratney,* 104 U.S. 621 (1882), the Supreme Court held that the states have exclusive criminal jurisdiction over crimes committed in Indian Country by non-Indians against non-Indians, absent treaty provisions to the contrary. This decision created what is known as the *McBratney-Draper* rule. Subsequent decisions have acknowledged this rule[27] and today states have exclusive jurisdiction to prosecute crimes in Indian Country when:

- The offender and the victim are both non-Indian, or;
- If the crime is a victimless crime committed by a non-Indian.

3.3.2 Major Crimes Act

The *Indian Country Crimes Act* specifically exempts crimes committed by one Indian against the person or property of

another Indian from its coverage. Recall the Supreme Court held that the federal government had no jurisdiction to try an Indian for the murder of another Indian in *Crow Dog,* thus tribes had exclusive jurisdiction over all crimes committed by Indians. After *Crow Dog* was decided in 1885, Congress passed the *Major Crimes Act* to allow federal prosecution of Indians for certain specified "victim" crimes, traditionally prosecuted by states.

The *Major Crimes Act* reads as follows:

> §1153. Offenses committed within Indian country
>
> *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.*

The effect of the *Major Crimes Act* is to grant jurisdiction to federal courts—exclusive of the states—over Indians who commit any of the specifically listed Indian Country offenses, regardless of whether the victim is an Indian or non-Indian. All of the listed offenses are types of crimes normally prosecuted by the states, but the *Major Crimes Act* took jurisdiction from the states and gave it exclusively to the federal government. In addition, the federal Sentencing Guidelines apply to all convictions under the *Major Crimes Act*.

When an Indian commits any of the enumerated offenses, the case must be brought in federal court under the *Major Crimes Act.* The *Major Crimes Act* is the only source of federal jurisdiction for crimes in which both the offender and the victim are Indians. The only jurisdictional requirement is that the crime must have occurred in Indian Country.

Therefore, if the offense committed is one of the 15 major crimes, the offender is Indian, and the victim is non-Indian, the *Major Crimes Act* will apply and grant federal jurisdiction over the Indian offender. If a crime is other than one of the 15 major crimes, the offender is Indian and the victim is non-Indian, the *Indian Country Crimes Act* will apply and grant federal jurisdiction over Indians for other felonies and misdemeanors. Consequently, more crimes can be federally prosecuted involving an Indian who commits a crime against a non-Indian than involving an Indian who commits a crime against another Indian.

For example, assault with intent to commit a felony other than murder or sexual abuse is a crime under *18 U.S.C. § 113(a)(2)*, but is not listed in the *Major Crimes Act* and, therefore, it cannot be used in prosecutions of Indians who assault other Indians. Assault resulting in serious bodily injury is an enumerated offense in the *Major Crimes Act*, and must be brought under the *Major Crimes Act* if committed by an Indian against a non-Indian.

The crimes specified in the *Major Crimes Act* are defined by other federal statutes, except for burglary, child abuse or neglect, and incest. These crimes are to be defined and punished in accordance with the law of the state where the crime was committed.

While the listed crimes themselves can be prosecuted federally, attempts or conspiracies to commit *Major Crimes Act* felonies are generally found to be lacking federal jurisdiction.

By contrast, federal jurisdiction is supported under the *Major Crimes Act* in cases involving attempted sexual abuse because Chapter 109A felonies are contained within the *§1153* list, and the Chapter 109A statutes explicitly include attempts. Attempted murder or attempted manslaughter may also be prosecuted (depending on the circumstances of the case) if charged as:

- assault with intent to murder;
- assault with a dangerous weapon; or
- assault resulting in serious bodily injury.

Even though non-specified crimes may not be charged in the first instance, they may appear at trial in the form of a lesser-included offense to the crime actually charged. If warranted by the evidence, a defendant is entitled to have an instruction submitted to the jury on a lesser-included offense even though the government could not have originally charged the defendant with the lesser crime. For example, a defendant could be charged with arson in federal court but convicted of the less-serious crime of destruction of property. If the jury returns a guilty verdict upon the lesser offense, the court has the jurisdiction to impose sentence for the lesser-included offense, even though it would not have had jurisdiction over the offense initially.

Misdemeanors committed in Indian Country by Indians against other Indians do not qualify for federal jurisdiction under *§1153* except for assaults on juveniles under age 16. Tribal courts have jurisdiction over misdemeanors committed by one Indian against another in that court's jurisdiction. Tribal courts' sentencing power has been limited to misdemeanors by Congress because of the *Indian Civil Rights Act of 1968*[28] and other applications of federal criminal laws to Indian Country.

Tribal courts may prosecute felonies; however, penalties are much greater in federal court. Therefore, most tribes have

continued to rely primarily on the federal government to prosecute major felonies; a few tribes continue to prosecute serious crimes on their reservations, in spite of these severe constraints on their abilities to punish offenders, as a matter of sovereignty.

Major Crimes Act **definitions (*also appears in *ICCA*)**

Any 109A felony (sexual crimes).....*18 U.S.C. §§ 2241-2245*
Arson*.....*18 U.S.C. § 81*
Assault - dangerous weapon*.....*18 U.S.C. § 113(a)(3)*
Assault - intent to commit murder*.....*18 U.S.C. § 113(a)(1)*
Assault - serious bodily injury*.....*18 U.S.C. § 113(a)(6)*
Assault - under sixteen*.....*18 U.S.C. §§ 113(a)(5), (a)(7)*
Burglary.....*Defined by state statute*
Felony Child Abuse or Neglect.....*Defined by state statute*
Felony Theft (Grand Larceny)*.....*18 U.S.C. § 661*
Incest.....*Defined by state statute*
Kidnapping*.....*18 U.S.C. § 1201(a)(2)*
Maiming*.....*18 U.S.C. § 114*
Manslaughter*.....*18 U.S.C. § 1112*
Murder*.....*18 U.S.C. § 1111*
Robbery*.....*18 U.S.C. § 2111*

Definitions and elements for crimes under *Major Crimes Act*

Any 109(A) felony may be charged under the *Major Crimes Act*. (These offenses are addressed in a separate chapter.)

Arson involves willfully and maliciously setting fire to, burning, or attempting to set fire to or burn any building, structure, vessel, machinery, or building materials or supplies. If the building is a dwelling, or if a person's life was placed in jeopardy, the maximum penalty is higher than if the building is not inhabited.

Assault usually means either a common law battery (non-consenting, offensive touching), or common law assault, namely an attempted battery or a threat, coupled with a present ability to commit a battery. The most common uses of the assault statutes are in physical altercations where the defendant has inflicted some type of bodily injury on the victim, from a tiny scratch or bruise to a potentially mortal wound. However, depending on proof of intent, discharging a gun or brandishing a knife or other weapon can also constitute an assault, even if no physical contact occurs.

Assault with a dangerous weapon requires that the assault be carried out with a dangerous weapon and that the assailant intended to do bodily harm to the victim. It can apply to assaults when there is no physical contact—such as when the defendant fires a gun but no one is hit, or when the defendant brandishes a knife but does not actually slash the victim—as long as the intent element can be proven. The most common dangerous weapons are guns and knives.

Many other objects, however, can qualify as "dangerous weapons" under this statute. In *United States v. Sturgis*, the Fourth Circuit held an HIV-positive defendant who knew that he was HIV-positive used his teeth as dangerous weapons when he attempted to bite officers. In *United States v. Riggins*, a belt and shoe were dangerous weapons when a parent beat a two-year-old child as hard as she could; the belt and shoe were used in a manner likely to endanger life or inflict great bodily harm based on the size difference and the young age of the victim. In *United States v. Murphy*, the Fourth Circuit held that "…virtually any object that can be used or attempted to be used to inflict grave physical injury constitutes a dangerous weapon" when a federal prisoner grabbed the jailer by the head and forcibly slammed it into the steel bars of jail cell-block, then beat the jailer with his fists.

In *United States v. Gholston*, the Eleventh Circuit held that a desk was a dangerous weapon: "Whether an object is a dangerous weapon turns not on the object's latent capability alone, but also on the manner in which it was used…" Assault with a dangerous weapon is a specific intent crime. Consequently, voluntary intoxication can be a defense, but is not automatically a justification.

Assault with intent to commit murder may be established if there is evidence of the assailants' intent to kill beyond a reasonable doubt, even without physical harm to the victim.

Assault resulting in serious bodily injury is defined in *§113(b)(2)* by reference to *18 U.S.C. 1365(g)(3).* Serious bodily injury is thus an injury involving a substantial risk of death; or extreme physical pain or protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. This definition has arguably made it more difficult to prosecute this type of crime by narrowing the scope of injury; once the injury is proven, however, the government needs only prove that there was an assault and that it resulted in serious bodily injury. Unlike assault with a dangerous weapon, this is a general intent crime.

Assault under sixteen may be charged under *18 U.S.C. §113(a)(5)* if there is no substantial bodily injury that results. Assaults that result in substantial bodily injury to child under sixteen may also be charged under the more serious *18 U.S.C. § 113(a)(7)*. As with assault resulting in serious bodily injury, this offense is a general intent crime. All that is necessary to prove is that the defendant assaulted a child under sixteen and that the child suffered "substantial" bodily injury. "Substantial bodily injury" includes many of the same elements as *§113(b)*: a temporary but substantial disfigurement; or a temporary but substantial loss or impairment of the function of any bodily

member, organ, or mental faculty. The difference is that there is no requirement of an injury involving a substantial risk of death.

Burglary is assimilated from state law, therefore the elements of burglary will also be assimilated from the law of the state where the crime occurs. A common definition is "an unauthorized breaking and entering of a building or dwelling of another with the intent to commit a felony once inside." The penalty for burglary is likewise assimilated from state law. For example, an Indian commits a burglary on a reservation in Arizona. Burglary is a crime under the *Major Crimes Act*. In a prosecution for burglary, the United States would generally rely on federal law. As there is no section in Title 18 to define burglary, the Arizona statute prohibiting burglary would be used. The federal government could not assimilate the tribe's Criminal Code.

Felony child abuse or neglect is assimilated from state law, therefore the elements of incest will also be assimilated from the law of the state where the crime occurs. As an example, an Indian resides on and is a member of a reservation located in Montana. In a prosecution for felony child abuse, the United States would generally rely on federal law. As there is no section in Title 18 to define incest, the Montana statute prohibiting incest would be used. The federal government could not assimilate the tribe's Criminal Code.

Felony theft is the taking and carrying away of personal property of another worth more than $1,000.00 with intent to steal or purloin. If the property taken has a value of more than $1,000.00, or if it was taken from the person of another, the offense constitutes grand larceny. Felony thefts may be prosecuted federally when both the offender and the victim are Indians. Both felony and misdemeanor thefts occurring in Indian Country can be prosecuted if the defendant is non-Indian and the victim is Indian, under the *Indian Country Crimes Act*.

If the property taken has a value of less than $1,000.00, the theft is a misdemeanor (petty larceny). Therefore, only non-Indians can be federally prosecuted for committing petty larceny if the victim is Indian and the crime occurred in Indian Country.

For example, if a non-Indian steals a horse worth $900.00 from an Indian on a reservation in North Dakota, the U.S. District Court for the District of North Dakota would have jurisdiction to hear a misdemeanor (petty larceny) case under the *Indian Country Crimes Act* but could not hear the case under the *Major Crimes Act*.

By contrast, if an Indian steals a horse worth $2,000.00 from another Indian on a reservation in North Dakota to replace the horse stolen in the previous example, the U.S. District Court for the District of North Dakota would have jurisdiction to hear a felony (felony theft) case under the *Major Crimes Act*.

Incest is assimilated from state law, therefore the elements of incest will also be assimilated from the law of the state where the crime occurs. for example, an Indian resides on and is a member of a tribal community located in New Mexico. For the past year, he and his adult niece who also lives on the reservation, have had an incestuous relationship. Incest is a crime under the *Major Crimes Act*. In a prosecution for incest, the United States would generally rely on federal law. As there is no section in Title 18 to define incest, the New Mexico statute prohibiting incest would be used. The federal government could not assimilate the tribe's Criminal Code.

Kidnapping requires that the defendant unlawfully seizes another person, or confines, kidnaps, abducts, or carries away and holds him for ransom or reward or otherwise. The most common federal jurisdictional hook in kidnapping cases arises in

§1202(a)(1), when the kidnapped person is transported in interstate commerce. When any of the specified acts of kidnapping occur in Indian Country, the kidnapping is federally prosecutable under *§1153* and *§1201(a)(2)* even if it does not occur across state lines. Under this statute, it is not a crime if the kidnapper is the parent of the kidnapped child until the parent removes a child from the United States or keeps the child outside the United States with intent to obstruct another's lawful exercise of parental rights. Once kidnapping becomes an international matter, kidnapping statutes apply to parents.

Maiming includes cutting, biting, or slitting another's nose, ear, or lip; cutting out or disabling the victim's tongue; putting out or destroying the victim's eye; cutting off or disabling the victim's limb or other bodily member; and throwing or pouring scalding water, corrosive acid, or a caustic substance on the victim. In so doing, the defendant must have the intent to maim or disfigure. Maiming is a *Major Crimes Act* felony and can be used in all Indian Country prosecutions. As a practical matter, it is not used very often. The facts usually fit one of the felony assaults, often serious bodily harm.

Manslaughter is "the unlawful killing of a human being without malice," committed either voluntarily or involuntarily:

> *§1112. Manslaughter*
>
> *Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:*
>
> *Voluntary—Upon a sudden quarrel or heat of passion.*
>
> *Involuntary—In the commission of an unlawful act not amounting to felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a*

lawful act which might produce death.

Voluntary manslaughter comes about "upon a sudden quarrel or heat of passion." Heat of passion includes strong emotions like rage, resentment, anger, terror, and fear. Something less than fear of deadly force may constitute sufficient provocation to reduce the offense to involuntary manslaughter. However, mere words standing alone are not sufficient provocation, no matter how offensive, insulting, or abusive. Voluntary intoxication is not a defense to voluntary manslaughter.

Involuntary manslaughter may be the result of a misdemeanor act, or a lawful act without due caution which might produce death. The first type is most commonly prosecuted as impaired driving resulting in death in states where the impaired driving itself is not a felony.

It is necessary to cite to—and prove the elements of—the underlying state law to establish that the defendant's conduct constituted a misdemeanor. It is also possible to use tribal law to define the underlying misdemeanor offense in involuntary manslaughter cases. If the involuntary manslaughter charge arises in Indian Country under the *Major Crimes Act* because the offender is Indian, the definition of misdemeanor conduct can be established by tribal laws.[29] For example, a federal manslaughter conviction was sustained by the Eighth Circuit Court of Appeals, where the underlying misdemeanor was the Standing Rock Sioux Tribe's reckless driving statute.[30]

The second type of involuntary manslaughter results from a defendant committing a lawful act that might result in death (1) in an unlawful manner, or (2) in a lawful manner but without due caution and circumspection. Accidental shootings are the leading example of this type.

Murder is "the unlawful killing of a human being with malice aforethought." Common law provides the definition for "malice aforethought" and means to kill someone deliberately and intentionally, or to act with extreme recklessness or callous and wanton disregard for human life, which in turn results in the victim's death:

> *§ 1111. Murder—*
> *(a). Murder is the unlawful killing of a human being with malice forethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.*

First Degree Murder: Murder perpetrated by "willful, deliberate, malicious, and premeditated means" is first degree murder. The time necessary for premeditation depends on the facts of each case. The doctrine of transferred intent specifically applies: A person who, with premeditation, sets out to kill one victim and ends up killing another is guilty of first degree murder of the decedent, even though he may not have had any intent to kill the decedent. Voluntary intoxication can be a defense to first degree murder, if the defendant's intoxication rendered him incapable of premeditation.

Felony-Murder: Certain felony-murders also qualify as first degree murder. These include killings committed during the course of, or in an attempt to commit, eleven specified crimes that include: Arson; Kidnapping; Sexual abuse; Burglary; and

Robbery. The predicate crimes (the crime that forms the basis of the felony-murder charge) normally are defined by reference to the appropriate federal statute. In a felony-murder prosecution, it is not necessary to prove that the defendant specifically intended that the victim die. Federal common law is not completely consistent because it derives from federal courts' analyses of English common law as it has evolved in the various states. Many federal courts have held that the only necessary *mens rea* is the intent to commit the underlying felony. There is a requirement that the death have been caused by an act that was committed in furtherance of the underlying felony and that the possibility of death have been reasonably foreseeable.

Second Degree Murder: All murders not included in the statutory definition of first degree murder are second degree murders. Most of these are intentional killings that simply lack the aggravating factors that qualify a homicide as first degree murder. However, the common law "abandoned and malignant heart" second degree murder may also be applicable. Distinction between the degree of recklessness necessary for second degree murder and for manslaughter is not always easy to articulate.

Robbery is the taking or attempting to take anything of value from the person or presence of another by means of force, violence, or intimidation. Even though the statute on its face criminalizes attempts, courts have precluded federal prosecution under the *Major Crimes Act* of Indians who attempt to rob other Indians in Indian Country but do not, in fact, succeed in the attempt.[31]

3.3.3 Assimilative Crimes Act

The federal government has exclusive jurisdiction to prosecute Indians under the *Major Crimes Act* and non-Indians in Indian Country under the *Indian Country Crimes Act*; only the *Major*

Crimes Act actually includes definitions and punishments for most enumerated crimes. There are some notable exceptions; the crimes of incest, burglary and felony child abuse or neglect are not defined in the federal criminal code.

Without definitions for crimes under the *Indian Country Crimes Act*, a gap exists between offenses which can be committed in Indian Country and offenses found in the United States Code: "Congress has always assumed that the basic, comprehensive body of criminal law would be legislated by the states,"[32] and so not all potential offenses are found within federal statutes.

To fill the gap, Congress passed the *Assimilative Crimes Act*, *18 U.S.C. §13.* The *Assimilative Crimes Act* effectively borrows definitions for state criminal offenses where there is no applicable federal definition for enumerated offenses. These definitions are applied to crimes in areas under exclusive federal jurisdiction, including Indian Country:

> *Whoever within [the special maritime and territorial jurisdiction of the United States] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment…*

Thus, an individual who commits a crime covered by the *Assimilative Crimes Act* is charged with a federal offense which is defined by the relevant state statute, but is tried in federal court and punished according to the State statute's prescribed sentence.

If a federal statute is available and on point, that statute must be used instead of the state statute even if it results in a lesser sentence.

The *Assimilative Crimes Act* is one of the "general laws of the United States" extended to Indian Country by the *Indian Country Crimes Act (§1152).*[33] Where there is no applicable substantive federal crime specific to Indian Country, the law of the state in which the crime occurred may be incorporated into the federal criminal code, and then used in *§1152* prosecutions pursuant to the *Assimilative Crimes Act*. This means that the *Indian Country Crimes Act* and the *Assimilative Crimes Act* work hand-in-hand.

If a non-Indian committed an offense in Indian Country that was not defined in federal law but would be a crime if it occurred in an area of state jurisdiction, *18 U.S.C. §1152* would allow assimilation of the state elements and punishment for the crime. State misdemeanors against persons and personal property also can be assimilated: property damage crimes; trespass; assaults (other than *§1153* assaults); drunken driving resulting in injury or property damage; and non-governmental frauds and embezzlements are all commonly assimilated crimes.

Crimes committed against no particular person or their property, but rather against public order and morals, are characterized as "victimless crimes." These typically include such offenses as traffic violations, disorderly conduct, prostitution, gambling, narcotics offenses, and drunken driving when there is no injury to persons or property other than the offender's person or property. When these victimless crimes are committed in Indian Country, federal prosecutions, based on *§1152* (the *Indian Country Crimes Act*) and *§13* (the *Assimilative Crimes Act*) can occur only in certain limited circumstances:

• When the offender in a victimless crime is Indian, both the tribe and the United States may assert jurisdiction; the tribe under tribal law and the United States under *§ 1152;*[34]

• When the offender in a victimless crime is non-Indian, however, the state has exclusive jurisdiction.[35] Neither the tribe nor the United States may prosecute.

The *Assimilative Crimes* Act also provides the means to define incest, burglary and felony child abuse or neglect in the *Major Crimes Act*; these crimes are not otherwise defined in federal law.

3.4 Public Law 280

One complication to using these federal statutes is that some areas of Indian Country have been removed from exclusive federal jurisdiction by *Public Law 280*.

In 1953, Congress exercised its plenary power and compelled six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) to assume jurisdiction over crimes occurring in all or specified parts of Indian Country in those states, pursuant to *Public Law 280* and *18 U.S.C. § 1162*.

The six "mandatory" states have exclusive criminal jurisdiction, which means that the federal government does not exercise criminal jurisdiction for Indian Country offenses. The tribes continue to have criminal jurisdiction and authority to enforce their own laws over Indians within the reservation boundaries, just as in non-*Public Law 280* states.

However, as of 2015, several Indian land areas within these mandatory states are exempt from state jurisdiction, and are instead within federal jurisdiction:

- Boise Forte Chippewa Indian Reservation (Minnesota);[36]
- Confederated Tribes of the Umatilla Reservation (Oregon);
- Menominee Reservation (Wisconsin);
- Metlakatla Native Community (Alaska);[37]
- Omaha Reservation (Nebraska);
- Red Lake Reservation (Minnesota);
- Warm Springs Reservation (Oregon); and
- Winnebago Reservation, except for public roads and highways (Nebraska).

Where no exemption applies to lands within the six mandatory states, there is no exclusive federal jurisdiction.

Public Law 280 also allows other than the mandatory states to assume jurisdiction only over certain crimes or certain reservations within the state. States that are not mandatory states are called "optional" states. Under the *Indian Civil Rights Act*,[38] optional states are required to obtain consent from a tribe before the state voluntarily assumes jurisdiction over the affected tribe.

Under the *Tribal Law and Order Act of 2010*, tribal governments may also request that the Department of Justice re-assume federal criminal jurisdiction over that tribe's Indian Country. If DOJ grants the request, the federal government may once again prosecute Indian Country General Crimes Act and Major Crimes Act cases from that reservation, located in a *Public Law 280* jurisdiction.

As of 2015, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, South Dakota, and Washington have all assumed some degree of jurisdiction over crimes committed by

tribal members on tribal lands.

Arizona originally was given criminal and civil jurisdiction over the Pascua Yaqui Indians comparable to that in *Public Law 280*. In 1985, the state retroceded criminal and civil jurisdiction over the Pascua Yaqui Indian Reservation. The State of Arizona also has assumed criminal and civil jurisdiction over air pollution in Indian Country.

Florida assumed full criminal and civil jurisdiction under *Public Law 280.*

Idaho assumed criminal and civil jurisdiction concerning the following seven matters: compulsory school attendance; juvenile delinquency and youth rehabilitation; dependent, neglected, and abused children; insanities and mental illness; public assistance; domestic relations; and operation and management of motor vehicles upon highways and roads maintained by the county or state, or their political subdivisions.

Iowa assumed civil jurisdiction over the Sac and Fox Reservation in Tama County.

Montana assumed criminal jurisdiction over the Flathead Reservation. The state has retroceded partial criminal jurisdiction over the Confederated Salish and Kootenai Tribes, which are no longer subject to the state's criminal misdemeanor jurisdiction.

Nevada assumed full criminal and civil jurisdiction under *Public Law* 280 and subsequently retroceded jurisdiction for most reservations.

North Dakota passed legislation which would permit it to assume civil jurisdiction only with tribal consent. No tribe

has consented to the state's civil jurisdiction as of 2015.

Utah passed legislation which permitted it to assume civil and criminal jurisdiction only with tribal consent. No tribe has consented to the state's jurisdiction as of 2015.

Washington assumed an "incredibly complicated partial assumption of [criminal and civil] jurisdiction" [39] under *Public Law 280* without tribal consent. The areas of jurisdiction asserted by Washington include:[40] jurisdiction over all non-Indians wherever located on a reservation, including tribal trust or allotted lands; jurisdiction over crimes committed by Indians or non-Indians on fee patented lands within reservations; compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings (modified by the *Indian Child Welfare Act*); dependent children (modified by the *Indian Child Welfare Act*); and operation of motor vehicles on public streets, alleys and roads and highways. For all other matters, the state has retroceded jurisdiction over several tribes: Tulalip Tribe;[41] all criminal jurisdiction over the Confederated Tribes of the Chehalis Reservation, Quileute Indian Reservation, Swinomish Tribal Community;[42] all criminal jurisdiction over the Colville Reservation;[43] criminal and civil jurisdiction over the Suquamish Port Madison Reservation;[44] and criminal and civil jurisdiction over the Quinault Tribe.[45]

Unlike in the mandatory *Public Law 280* states, the *Major Crimes Act* and the *Indian Country Crimes Act* still apply.[46] This means that both the federal and state governments may punish conduct that violates either of these federal statutes and state law.[47] In both the mandatory and optional *Public Law 280* states, the tribes retain their inherent sovereign powers to enforce criminal

and civil laws against Indians within their reservations. Therefore, tribes in the mandatory and optional *Public Law 280* states have concurrent jurisdiction over offenses committed by Indians on their reservations.[48] *Public Law 280* also specifically denies states authority to alienate, encumber, or tax Indian trust property, or to regulate hunting, fishing, and trapping rights protected by treaty, statute, or agreement.[49]

Several states were given partial criminal jurisdiction over reservations through special jurisdictional legislation passed by Congress, prior to passage of *Public Law 280.*[50]

California was given criminal and civil jurisdiction over the Agua Caliente Reservation in 1949.[51]

New York was given criminal jurisdiction over all reservations in 1948, however the *Major Crimes Act* and the *Indian Country Crimes Act* still apply[52] and state does not have jurisdiction over hunting and fishing by Indians pursuant to agreement, treaty, or customs.[53]

Iowa was given criminal jurisdiction over the Sac & Fox Reservation in 1943,[54] but the *Major Crimes Act* and the *Indian Country Crimes Act* still apply.[55]

Kansas was given partial criminal jurisdiction over all reservations (Iowa Reservation, Kickapoo Reservation, Prairie Band Potawatomi Reservation, Sac and Fox Reservation[56]) in 1940, however the *Major Crimes Act* and the *Indian Country Crimes Act* still apply.[57]

North Dakota was given partial criminal jurisdiction over the Devil's Lake Reservation (now called the Spirit Lake Reservation), but tribal, federal, and state authorities now regard this transfer of jurisdiction to be invalid.[58]

Texas was given criminal and civil jurisdiction over the Ysleta del Sur and the Alabama and Coushatta Tribes[59] once Congress restored federal recognition.

Connecticut has full criminal jurisdiction over the Mashantucket Tribe[60] and criminal jurisdiction over the Mohegan Tribe pursuant to a settlement act that established a reservation and allowed the exercise of state law criminal jurisdiction over offenses committed by or against Indians on the Mohegan Reservation,[61] but the Mohegan Tribe has concurrent jurisdiction over these offenses[62] and Major Crimes Act still applies on the Mohegan Reservation.[63]

States generally have no criminal jurisdiction over Indians in Indian Country, unless there has been an assumption of jurisdiction pursuant to federal law; however, several courts have validated state police arrests of Indians on the reservation for crimes committed off the reservation.

Regardless of the application of *Public Law 280* in certain states, some general federal criminal statutes are effective throughout the United States, and apply in Indian Country—regardless of whether the offender is Indian or non-Indian. Federal crimes of nationwide applicability likely to be a concern on the reservation include:

(1) Controlled Substances Act (Distribution and Possession with Intent to Distribute), *21 U.S.C. §841(a)(1)*;

(2) Felon in Possession of a Firearm, *18 U.S.C. §922(g)*;

(3) *Youth Handgun Safety Act, 18 U.S.C. §922(x)(2);* and

(4) *Violence Against Women Act* (*VAWA*).

Part of the *Violent Crime Control and Law Enforcement Act of 1994,* VAWA has become especially important in Indian Country. It provides federal tools for prosecuting domestic violence situations involving firearms, interstate travel or activity.

The statutory basis for federal jurisdiction over crimes occurring in Indian Country is found in *18 U.S.C §§ 1151-1170*. Federal court decisions at all levels, and particularly the Supreme Court, have been instrumental in establishing the jurisdictional boundaries of federal, tribal, and state governments. When considering federal jurisdiction in Indian Country, attention must be directed to the location of the crime, whether the offender is Indian or non-Indian, whether the victim is Indian or non-Indian, and the type of crime. Together, these factors determine which sovereign has jurisdiction over the crime.

3.5 Concurrent Jurisdiction, Double Jeopardy

Federal and tribal courts have concurrent jurisdiction for crimes that constitute a major felony under *§1153*. Tribal courts retain jurisdiction to prosecute Indians for conduct that also constitutes a major felony, despite the limits on tribal courts' sentencing authority imposed by the *Indian Civil Rights Act*. At least one federal appellate court has concluded that tribal courts have concurrent jurisdiction to punish conduct that also constitutes an offense under the *Major Crimes Act.*[64] Other federal courts have suggested in dicta that tribal court jurisdiction over serious crimes committed by tribal members has been preempted by the federal government through the *Major Crimes Act*. To date, the Supreme Court has not decided this issue.

The Constitutional prohibition against double jeopardy does not apply to successive tribal and federal prosecutions for the same conduct. The Supreme Court ruled in *United States v. Wheeler*[65] that there is no double jeopardy when tribes and the federal government prosecute for the same criminal act, because tribes and the federal government are separate sovereigns. Therefore, the federal government may prosecute an Indian for a *Major Crimes Act* felony arising out of the same conduct for which he has already been prosecuted in tribal court.

3.6 Limits on State Jurisdiction

Outside of Indian Country, states have general criminal jurisdiction over all persons whether or not they are Indian or non-Indian.

Within Indian Country, the relationships between Indian tribes and states vary significantly from state to state. As a general principle, the federal government has such broad power over tribes that state authority in Indian Country is excluded in favor of federal or tribal authority.

Unless granted jurisdiction by *Public Law 280*, states have no jurisdiction to prosecute Indians who commit crimes in Indian Country and thus do not exercise criminal jurisdiction in Indian country over crimes by Indians against anyone. In other words, Non-*Public Law 280* states have no jurisdiction to prosecute Indian offenders who commit crimes in Indian Country, whether committed against other Indians or non-Indians. Thus, state jurisdiction is generally limited to crimes that do not affect Indians or Indian interests for Non-*Public Law 280* states.

Courts have allowed some exercise of authority by states under limited circumstances. In *Fournier v. Roed,* 161 N.W.2d 458 (N.D. 1968), the North Dakota Supreme Court affirmed the power of a

deputy sheriff to make a warrantless arrest of an Indian on the Fort Totten reservation. Even though the Ramsey County deputy sheriff had to cross over into another jurisdiction to effect the warrantless arrest for a felony larceny of an automobile, and the court recognized that North Dakota had no criminal jurisdiction on the reservation, it was concerned that the state would "become helpless when an offense is committed off the reservation by an Indian who escapes to the reservation before he is apprehended."

In *Old Elk v. District Court*,[66] the Supreme Court of Montana held that an arrest of a Crow Indian on the Crow Reservation by a state officer pursuant to a state warrant was valid. The defendant was charged with "deliberate homicide" which occurred off the reservation. The defendant, Old Elk, challenged this action as an illegal arrest and de facto extradition. In upholding the arrest, the Montana court emphasized the Crow Tribe's lack of an extradition statute and the tribal judge's refusal to issue an arrest warrant. The court also expressed concern that the crime would go unpunished if the state did not validate the arrest, since federal jurisdiction was lacking because the crime had not been committed in Indian Country.

In *Arizona v. Herber*,[67] the Arizona Court of Appeals upheld the warrantless arrest of a non-Indian by state law enforcement officers, who followed him onto the Papago Indian reservation (now known as the Tohono O'odham Reservation). A non-Indian who had been convicted of possession of marijuana for sale appealed his conviction on the basis that the state had no jurisdiction on the reservation. In upholding the conviction, the Arizona appellate court stated that because the state has "undisputed authority" to prosecute and punish non-Indians for crimes against non-Indians committed on the reservation, the state had jurisdiction to arrest him on the reservation.

3.7 Limits on Tribal Jurisdiction

From 1978 to 1990, the Supreme Court placed increasingly severe limits on tribal criminal jurisdiction over non-Indian and non-member Indian offenders. In *Oliphant v. Suquamish Indian Tribe,*[68] the Supreme Court held that tribal courts do not have criminal jurisdiction to prosecute and punish non-Indian offenders. In *Oliphant*, a non-Indian assaulted a tribal police officer on the reservation during an annual tribal festival. The non-Indian resisted arrest before he was taken into custody and prosecuted. He then filed a writ of *habeas corpus* after his arrest. The tribe argued that it had inherent sovereignty to enforce its laws within its boundaries and that Congress had never taken away this power through treaty or legislation. The Ninth Circuit agreed with the tribe, but the Supreme Court held that tribes have no criminal jurisdiction over non-Indians because this was inconsistent with their domestic dependent nation status:

- If both the offender and the victim are non-Indian, the state has exclusive jurisdiction under *McBratney*.

- If the offender is non-Indian victim is Indian, the federal government has exclusive jurisdiction under the *Indian Country Crimes Act*.

In *Duro v. Reina,*[69] the Supreme Court held that tribal courts have no criminal jurisdiction over Indians who are members of other tribes. In this case, a juvenile Indian was shot and killed by an Indian from a different tribe. The juvenile's tribe brought charges after the federal government declined to prosecute. The Supreme Court said the tribes were precluded by their domestic dependent nation status from exercising criminal jurisdiction over non-member Indians; with the state precluded from charging, the federal government declining to charge, and the tribe unable to charge, there was no prosecution for the killing.

This decision created the potential for a jurisdictional void over crimes committed in Indian Country, so Congress passed an amendment to the *Indian Civil Rights Act* that same year. This legislation is widely referred to as the "*Duro* fix." Through this legislation, Congress legislatively overrode the U.S. Supreme Court's *Duro* decision and recognized the tribes' inherent authority to exercise criminal jurisdiction over all Indians – not just members of the tribe – who commit crimes within their reservation borders.

The *Indian Civil Rights Act* provides that, for purposes of tribal criminal jurisdiction, an "Indian" is:

> "*any person who would be subjected to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that sections applies."*

Consequently, any person who qualifies as an "Indian" for purposes of federal criminal jurisdiction under the *Major Crimes Act,* is an "Indian" for purposes of tribal criminal jurisdiction. However, because Congress did not define the term "Indian" in Title 18, a determination of who is an Indian for purposes of tribal criminal jurisdiction depends on case law, as previously discussed.

For example: an Oglala Lakota Indian commits a battery against an Omaha Indian. Both live on the Navajo Reservation and this is where the battery occurs. The Navajo Nation prosecutes the Oglala Sioux under its criminal code. If the Oglala Sioux challenges the Navajo Nation Tribal Court's jurisdiction over him by filing a writ of habeas corpus to the federal court, the challenge would fail because the Tribe has the ability to prosecute Non-member Indians after the *Duro* fix.

Today, tribes have the power to create tribal courts and to assert criminal jurisdiction over Indian offenders. As discussed above, it is not a violation of double jeopardy for a tribal court to charge an Indian defendant who has also been charged in federal court for essentially the same conduct. Tribes have concurrent jurisdiction over crimes that also constitute major felonies.

For example, *Wetsit v. Stafne*, 44 F.3d 323 (9th Cir. 1995), a member of one of the Ft. Peck Tribes (Assiniboine and Sioux) stabbed her common law husband to death. Her husband was a tribal member, and the stabbing took place within the Ft. Peck Reservation boundaries. First, she was indicted in federal court on voluntary manslaughter charges under the Major Crimes Act and acquitted by federal jury. She was then charged with manslaughter for the same killing by the tribe. She was convicted by a jury, sentenced to one year incarceration, fined $2,500, and ordered to participate in mental health treatment and a domestic abuse program. Arguing that the federal court had exclusive jurisdiction under the *Major Crimes Act*, she petitioned for a writ of habeas corpus to the federal court. The Ninth Circuit held that a tribal court has jurisdiction to try a tribal member for a crime that is also prosecutable under the *Major Crimes Act* because tribes have not given up their power to prosecute their members for tribal offenses "by virtue of their dependent status."[70] The *Wetsit* court also noted the *Duro* Court's continuing approval of the principle that a tribe criminally punishing a tribal member for murder acts as an independent sovereign.

3.7.1 Optional Jurisdiction under VAWA

After *Oliphant*, tribal jurisdiction was also seriously limited in the area of domestic violence. Consider the following example: A non-Indian has been violent towards an Indian spouse for a period of several years. Tribal officers are the first responder to each domestic violence dispatch, but could only restrain the offender,

determine the offender's status (non-Indian), determine the victim's status (Indian), determine jurisdiction (federal), and the detain for a federal officer to make the arrest since tribal officers could not arrest.

With the 2013 reauthorization of the *Violence against Women Act* (*VAWA*), Congress restored limited tribal jurisdiction for tribes that adopted *VAWA* provisions. Tribes that adopt *VAWA* may exercise their sovereign power to issue and enforce civil protection orders as well as 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 under *VAWA*.

To adopt *VAWA* and exercise the authority to prosecute non-Indians, a tribe must:

- Protect the rights of defendants under the *Indian Civil Rights Act of 1968*, by providing due process rights similar to those in the Constitution;
- 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 of their right to file federal habeas corpus petitions if they are ordered detained by a tribal court.

Offenses covered by *VAWA* are defined by tribal law (much in the way that federal law borrows from state law under the *Assimilative Crimes Act*):

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

VAWA does not limit the authority of federal and state prosecutors to prosecute non-Indians in Indian Country where they may have jurisdiction; it allows tribal prosecutors to prosecute non-Indian offenders concurrently, not exclusively.

VAWA does not authorize prosecution of non-Indians by tribal prosecutors for any of the following crimes:

- 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, or;
- Child abuse or elder abuse that does not involve the violation of a protection order.

3.8 Limits on Law Enforcement Officer Authority

While there are some well-defined principles for criminal jurisdiction in Indian Country, the principles defining arrest, fresh pursuit, and extradition in Indian Country are not settled. Legal controversies arising in these areas primarily have been resolved at the highest appellate court level of the states, with few federal appellate court decisions. Consequently, there are no definitive decisions by the United States Supreme Court. The principles resulting from lower court decisions are not universal and should not be viewed as authoritative except where the decision was rendered.

Likewise, tribal officers must know their agencies' policies and practices, statutory authority, and case law concerning subjects like fresh pursuit and extradition—especially when cross-commissioned or when operating under the authority of a Special Law Enforcement Commission from the Bureau of Indian Affairs.

Officers should be familiar with the tribal or state statutes defining the authority for fresh pursuit: some jurisdictions limit fresh pursuit to felonies, while some jurisdictions allow fresh pursuit for all crimes. Courts have reached varying conclusions about the authority of state law enforcement officers to make arrests in Indian Country, especially when there is fresh pursuit of Indian suspects onto the reservation for off-reservation criminal activity or when state law enforcement officers seek to extradite Indian defendants from Indian Country for an off-reservation crime. The courts which have considered these cross-jurisdictional issues primarily have considered them in the context of the reach of state authority onto reservations.

Normally, a sovereign's policing and arrest powers follow its criminal jurisdiction.[71]

3.9 Tribal Police Officer Authority/Limits

The *1975 Indian Self-Determination and Education Assistance Act*, *Pub. L. 93-638*, gave Indian tribes the authority to contract with the Federal government to operate programs, such as law enforcement services, serving their tribal members and other eligible persons. Tribal operation of a law enforcement program under a contract with the Bureau of Indian Affairs under the Indian Self-Determination Act does not automatically confer Federal law enforcement authority on the officers in departments with BIA contracts. Tribal police officers in those police departments first must receive a SLEC, as described previously,

from the BIA before they can enforce federal law in Indian Country.

Tribal police officers commissioned as BIA officers have authority to arrest non-Indians for offenses committed against Indians or Indian property in Indian Country for violations of the *Indian Country Crimes Act* (*18 U.S.C. § 1152*), or the *Assimilative Crimes Act* (*18 U.S.C. § 13*). Tribal police officers commissioned as BIA officers also have authority to arrest Indians who commit offenses against Indians or non-Indians in Indian Country, under authority of the *Major Crimes Act* or the *Indian Country Crimes Act*.

Due to the U.S. Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe,* tribes do not have criminal jurisdiction to prosecute and punish non-Indians for criminal violations committed within the exterior boundaries of the reservation. Without a SLEC, tribal police officers still have authority to enforce tribal law within the exterior boundaries of the reservation but jurisdiction extends only to Indians—tribal members and non-members alike—for violations of the tribe's criminal laws.

Even so, a tribe's sovereignty includes the "undisputed power to exclude persons whom [it] deems undesirable" from its territory,[72] thus tribal officers without a SLEC may detain a non-Indian suspected of committing state or federal offenses within the exterior boundaries of the reservation and then eject that offender or turn the non-Indian offender over to the authority with jurisdiction to prosecute.[73]

After the *Oliphant* decision, tribes "likely retain the right to arrest non-Indians for state and federal offenses."[74] In a case of possession of a deadly weapon in violation of state law, an Arizona appellate court did not address the question of whether

the arrest of a non-Indian by tribal law enforcement officers for the violation of state law was an illegal arrest,[75] and the question has still not been directly addressed by other courts.

It is clear, however, that tribal police have authority—incident to the tribe's power to exclude—to investigate on-reservation violations of state and federal law.[76]

Thus, tribal police have "authority to conduct a proper and thorough investigation, to gather the evidence necessary for a successful prosecution" or prepare a case and evidence for transfer to the jurisdiction with authority to prosecute the non-Indian.[77]

Courts have also recognized the inherent authority of tribal police officers to detain a non-Indian driving a motor vehicle on a public road within the reservation until the offender could be turned over to state authorities for charging and prosecution when the driver was alleged to have violated both state and tribal law.[78]

3.10 BIA Officer Authority/Limits

The statutory authority for Bureau of Indian Affairs uniform police and criminal investigators is found in the *Indian Law Enforcement Reform Act*, *25 U.S.C. §§ 2801-2809*. BIA officers enforce federal criminal statutes applicable in Indian Country including liquor laws and certain laws regarding hunting, trapping, fishing, and trespass on Indian lands.

On many reservations, BIA officers provide public safety in place of a tribal police department; these officers enforce both federal and tribal law, if the tribe has requested enforcement of tribal laws. The tribe and the Bureau of Indian Affairs, through the Office of Law Enforcement Services, must enter into a formal agreement[79] before the BIA officers are deputized by the tribe;

BIA enforcement of tribal law is possible only through a cross-deputation agreement with the tribe.

3.11 State, County, Local Officer Authority/Limits

State police, county sheriffs, and other similar state and local personnel, have authority to arrest non-Indians who commit crimes against non-Indians, or who commit victimless crimes on the reservation. State law enforcement officers have the same criminal jurisdiction over offenses committed by Indians off the reservation as other non-Indian offenders committing offenses within the state.

State police officers who stop a speeder passing through Indian Country on a state highway have no authority to arrest the speeding driver if he or she is Indian. However, the Ninth Circuit has held that a deputy had authority to conduct an investigatory stop of an offending vehicle on a state highway in Indian Country to determine whether he had authority to arrest the driver.[80]

The general rule is that states have no jurisdiction over Indians in Indian Country unless there is a grant of jurisdiction pursuant to federal law. In *Nevada v. Hicks*, 121 S.Ct. 2304 (2001), the court ruled that state officers who execute a state search warrant in Indian Country for evidence of a state crime committed off the reservation and allegedly violate civil rights are not subject to suit in tribal court for those violations, but may be sued in federal court. In other words, if an Indian who is the subject of the state officer's investigation alleges that the officer violated civil rights or committed a tort while executing the state search warrant, the Indian plaintiff may sue the officer either in state or federal court, but may not bring suit in tribal court.

While the Supreme Court held that state officers have jurisdiction to execute state search warrants in Indian Country concerning

crimes committed off the reservation, the best practice is for a state officer to "domesticate" state search warrants by seeking approval for the warrant through the tribal courts, then to coordinate execution of the state warrant with the tribal police in the interest of maintaining cooperative, effective, and efficient working relationships between law enforcement departments, and in the interest of public safety across jurisdictional boundaries.

3.12 Limits on Fresh Pursuit into Indian Country

Fresh pursuit raises cross-jurisdictional concerns which, under most circumstances, are addressed by bright-line rules. However, when the pursuit crosses from state jurisdiction to Indian Country, matters become complex. There has been no definitive decision from the U.S. Supreme Court on fresh pursuit involving Indian Country. Fresh pursuit is a common law doctrine which allows an officer to pursue a suspected felon into another city or county and arrest him or her there, with or without a warrant.[81] Fresh pursuit of a misdemeanant cannot cross the jurisdictional line, unless a statute authorizes such pursuits. State law generally governs fresh pursuit across state lines. In order for the fresh pursuit doctrine to apply, the pursuit must be fresh, continuous, and uninterrupted. For fresh pursuit into Indian Country, most courts have strained the principles of fresh pursuit to validate state authority in Indian Country.

In these state courts' decisions, it is clear that neither the common law doctrine of fresh pursuit nor the state's statute on fresh pursuit constrained the court. Most state courts which considered the issue validated an arrest following fresh pursuit, despite courts' varying acknowledgement that the state officer lacked statutory authority, that the defendant was pursued for a misdemeanor offense, or even that the arrest following fresh pursuit violated the defendant's Fourth Amendment rights.

While some of the courts considered the impact on and invasion of tribal sovereignty by the state's fresh pursuit onto the reservation, they nevertheless concluded that there was no impact on tribal sovereignty.

Officers should keep in mind that the state court decisions discussed below are binding only within that state. However, one state court's decisions can be used to influence how a different state's court will rule when faced with a similar issue.

In *State v. Spotted Horse*,[82] the Supreme Court of South Dakota upheld the arrest and conviction of a member of the Standing Rock Sioux tribe for failure to display current registration, but reversed the conviction for driving under the influence. Upon observing that Spotted Horse, the defendant, was not displaying a valid license plate sticker, a Mobridge city police officer attempted to stop the vehicle within the municipal boundaries. Spotted Horse did not stop, but drove onto the Standing Rock Sioux reservation, with the officer giving chase at speeds between 90 to 109 miles per hour. The chase ended on Spotted Horse's private driveway, where the officer struck him with a nightstick several times, hitting him on the head and cheek. Spotted Horse was arrested and taken back to the city of Mobridge, where he was charged with, among others, driving under the influence and failure to display current registration.

The South Dakota Supreme Court found that the state did not have *Public Law 280* jurisdiction over the reservation and that the state could not exert partial jurisdiction over the state highways running through the reservations. Therefore, the court found that South Dakota's fresh pursuit statute did not extend to the reservation. Despite these findings, and its explicit finding that Spotted Horse's arrest violated his Fourth Amendment rights, the court upheld his conviction on the misdemeanor offense of failing to display current registration. The court

sustained this conviction because it had occurred off the reservation, the officer had independent evidence of the violation through his observation before the illegal arrest, and an illegal arrest does not preclude prosecution.

The court reversed the conviction for driving under the influence because the seizure (arrest) of Spotted Horse violated his Fourth Amendment rights. Because the arrest was unconstitutional, the trial court should have suppressed the evidence obtained as a result of that arrest (blood alcohol content), used to convict Spotted Horse on the DUI offense.

In *State v. Lupe*,[83] the Arizona Court of Appeals upheld an on-reservation arrest of an Indian by a state law enforcement officer for an off-reservation offense, following fresh pursuit onto the White Mountain Apache reservation. In this case, the officer had observed a vehicle speeding and driving recklessly, outside the reservation boundaries. The officer turned on his overhead lights, following the vehicle on to the reservation, where the car stopped. The driver, John Lupe, was arrested for driving while intoxicated when his driver's license was suspended, revoked or refused. Lupe was convicted and appealed on the theory that the state had no jurisdiction over him.

The court held that arrest of a tribal member made on the reservation, following close pursuit that began on state land, does not interfere with tribal sovereignty where no extradition agreement exists. In reaching this conclusion, the court supported its holding on public policy grounds that the state had a "particularly strong policy interest in not allowing suspects to narrowly escape arrest and avoid [the] State's jurisdiction over offenses committed within this State by fleeing across the border to another jurisdiction." In support of its conclusion that tribal sovereignty was not infringed, the appellate court noted that the tribe and the state had no extradition agreement, and the tribe

had not enacted laws regarding the state's authority to arrest following hot pursuit.

In *State v. Littlewind*,[84] the Supreme Court of North Dakota held that a BIA officer's fresh pursuit that resulted in an off-reservation arrest of an Indian defendant, for an offense committed on the reservation, was legal. The court characterized the BIA officer's arrest as a valid citizen's arrest.

The BIA officer was patrolling on the Fort Totten reservation when he received a dispatch about a possible drunken driver. The officer located the vehicle driven by Dallas Littlewind and observed it weaving several times over the centerline. He activated his lights on his marked patrol car and pursued Littlewind for two or three miles until he pulled over in Ramsey County, outside of the reservation boundaries. The BIA officer subdued, frisked, handcuffed, and placed Littlewind in his car until a state highway patrol officer arrived. The state patrol officer arrested Littlewind and took him into custody and he was later tested with an intoxilyzer and videotaped. Littlewind was charged with and convicted of his fifth DUI offense.

Littlewind challenged his conviction, alleging that his arrest by the BIA officer off the reservation was illegal because he had no statutory authority to act as a Ramsey County police officer, nor was he cross-deputized. Therefore, the evidence obtained as a result of the illegal arrest should have been suppressed. The court acknowledged the general rule that an officer acting outside his jurisdiction has no official power to arrest, but a police officer has the same power to arrest as a private citizen.

However, in a footnote, the court noted that a citizen's authority to make a warrantless arrest for a misdemeanor is more limited than a police officer's authority. A citizen may arrest only when the misdemeanor is actually committed or attempted in his

presence. Because the defendant had not raised the issue whether a private citizen could have stopped or arrested him under the circumstances, the court did not address that issue.

3.13 Limits on Extradition from Indian Country

Extradition is the formal surrender by one jurisdiction (the asylum jurisdiction) to another jurisdiction (the demanding jurisdiction) when an individual is accused or convicted of an offense in the jurisdiction which is demanding the surrender. Extradition normally is based upon a reciprocal agreement. Within the United States, states have Constitutional and statutory extradition duties to their sister states. There are also extradition duties between state and federal authorities,[85] but Constitutional extradition duties are not imposed on tribal governments because tribes are sovereigns which preceded the U.S. Constitution.

Therefore, the law concerning extradition will vary from tribe to tribe, and state to state. There may be several reasons that law enforcement officers may attempt to remove an Indian defendant from a reservation to face charges elsewhere—such as when an officer pursues an Indian subject onto a reservation and makes an arrest for an off-reservation offense—but removing a defendant from a reservation is extradition regardless of cause.

Several decisions by courts have invalidated arrests of Indians on the reservation by state law enforcement officers who bypassed the tribal extradition statutes; other courts have refused to adopt this view, instead holding that the state court was not deprived of jurisdiction by virtue of the illegal arrest.

In *Merrill v. Turtle*,[86] a Cheyenne tribal member lived on the Navajo reservation with his Navajo spouse and was wanted in Oklahoma for second-degree forgery (a felony).

Oklahoma applied for an extradition warrant through Arizona's governor, who issued a warrant pursuant to Arizona law; the extradition warrant violated the tribe's own extradition laws.

State law enforcement officers executed the Arizona warrant on the Navajo reservation and arrested Turtle, who then filed a writ of habeas corpus after he was turned over to Oklahoma authorities. The rule following *Turtle* is that a tribe's extradition statute must be followed if the state wants to arrest the Indian on the reservation for purposes of having that Indian answer to charges for crimes committed off the reservation.

The New Mexico Supreme Court has adopted the *Turtle* rule, holding that an arrest by a city police officer of an Indian on the reservation for a misdemeanor was illegal and prosecution by the municipality was barred.[87] While in the city limits of Farmington, police officers attempted to stop a Navajo defendant for allegedly committing misdemeanors in their presence. The defendant eluded the officers and drove to the Navajo reservation where the officers apprehended him. He was returned to Farmington where he was jailed and charged in state court with DUI, driving recklessly, and causing an accident involving property damage. The New Mexico Supreme Court specifically ruled that Benally's arrest was illegal "as it violated the sovereignty of the Navajo tribe" by circumventing the tribe's extradition procedure. Control over the extradition process is inherent in the tribe's sovereignty. The New Mexico Supreme Court also held that Benally's illegal arrest deprived the municipal court of jurisdiction. Therefore, it prohibited the municipal court from proceeding further until Benally was legally arrested, through the tribe's extradition process or other legal means. Other courts have also held fresh pursuit and arrest of an Indian on a reservation requires following extradition procedures,[88] regardless of whether the driver leads officers on a high-speed chase three miles inside the reservation boundaries.

Extradition procedures cannot be ignored, even if the crime is a serious felony with an urgent need to preserve evidence.[89] Two sheriff's deputies went onto the Navajo reservation to locate a suspect in a murder case and requested assistance from tribal police in executing a state warrant. Tribal police told the deputies that it would be several hours before tribal police could assist them, so the sheriff's deputies went to the defendant's house and arrested him. The court held that officers had no good faith basis for believing that they had authority to arrest the defendant without going through the extradition proceeding and excluded evidence obtained during the arrest. Exclusion was the appropriate remedy—even if there were no constitutional violation—to deter officers' misconduct.

Contrary to the *Turtle-Benally* line of cases, the Supreme Court of North Dakota held that the on-reservation arrest of an Indian, by a deputy sheriff without a warrant, was legal even though the tribe had an extradition ordinance and no extradition hearing was held by the tribal court. [90] The North Dakota Supreme Court acknowledged that the state had no criminal jurisdiction over the reservation because the state had never assumed jurisdiction under *Public Law 280*. The court also recognized the tribe's authority to enact procedures for the "orderly extradition to state authorities of tribal members suspected of violating state law."

Nonetheless, the court held that the state could exercise jurisdiction and did not resolve the issue of whether the state officials' arrest or extradition of Davis was lawful. Following this decision, Davis petitioned the federal district court for a pretrial writ of habeas corpus, which was denied. He pursued an appeal of this denial to the Eighth Circuit.

The Eighth Circuit distinguished the case from *Turtle* because Davis was already in custody, neither Davis' rights nor tribal

sovereignty were interests great enough to stop a pending state criminal prosecution "in which Davis' rights may be recognized," and no federal policy, treaty, statute, or court decision existed to indicate that the state lost personal jurisdiction as a result of the extradition violation. Had the federal court been presented with a "claim filed to protect the extradition process prior to surrender of the…petitioner to the demanding state," the Eighth Circuit may have exercised federal jurisdiction based on considerations of tribal sovereignty.[91]

3.14 Step-by-Step Jurisdictional Analysis

At the outset of any investigation in Indian Country, it may not be immediately apparent which sovereign has jurisdiction.[92] A step-by-step analysis to criminal jurisdiction in Indian Country is recommended. The application of this analysis applies only to federal criminal laws dealing specifically with Indians and Indian Country, and not to federal laws of general applicability nationwide.

Until the status of the defendant, victim, and land is definite, as well as the type of the crime, no determination about whether the offense will be prosecuted in tribal, federal, or state court can be made:

- Where was the crime committed?
- Was the site of the crime in Indian Country?

If the crime did not occur in Indian Country, the states have exclusive jurisdiction. The tribal and federal courts have no jurisdiction. If the crime occurred in Indian Country, continue the analysis:

• Does *Public Law 280* or a Specific Jurisdictional Statute Apply?

Congress conferred on some states criminal jurisdiction over Indian Country through *Public Law 280*. Through other individual statutes, Congress conferred jurisdiction over all or part of Indian country in New York (*62 Stat. 1224*), Kansas (*54 Stat. 249*), and Maine (*25 U.S.C. §1725*).

Some states have particular types of jurisdiction on specific reservations, such as California and the Agua Caliente Reservation (*63 Stat. 705*); North Dakota and the Spirit Lake Reservation (*60 Stat. 229*), although the state has never taken formal action to assume jurisdiction; Iowa and the Sac and Fox Reservation (*62 Stat. 1161*). There are also special jurisdictional statutes dealing with Oklahoma.

Under some of the specific statutes, tribes have concurrent criminal jurisdiction. The concurrent jurisdiction of tribes under *Public Law 280* has not been conclusively litigated, but there is legal authority that supports concurrent tribal jurisdiction, even in *Public Law 280* states. If *Public Law 280* or one of the special jurisdictional statutes apply, state courts have jurisdiction and federal courts have no jurisdiction, unless the statute so provides. If the crime occurred in Indian Country and neither *Public Law 280* nor a special jurisdictional statute apply, continue the analysis:

• Was the Crime Committed By or Against an Indian?

Because the federal statutory scheme is largely based on the whether either defendant and victim is Indian, the next step is to determine the status of both defendant and victim. If the crime occurred in Indian Country and *Public Law 280* does not apply, the defendant and victim should be categorized:

• Which Defendant-Victim Category Applies?
    - Indian against an Indian?
    - Indian against a non-Indian?
    - Non-Indian against an Indian?
    - Non-Indian against a non-Indian?
    - "Victimless" and "consensual" crimes by an Indian?
    - "Victimless" and "consensual" crimes by a non-Indian?

Once the status of the defendant and victim have been established, continue the analysis by determining the type of crime:

• Is the crime one of the major felonies?

Any 109A felony (sexual crimes).....*18 U.S.C. §§ 2241-2245*
Arson.....*18 U.S.C. § 81*
Assault - dangerous weapon.....*18 U.S.C. § 113(a)(3)*
Assault - intent to commit murder.....*18 U.S.C. § 113(a)(1)*
Assault - serious bodily injury.....*18 U.S.C. § 113(a)(6)*
Assault - under sixteen.....*18 U.S.C. §§ 113(a)(5), (a)(7)*
Burglary.....*Defined by state statute*
Felony Child Abuse or Neglect.....*Defined by state statute*
Felony Theft (Grand Larceny).....*18 U.S.C. § 661*
Incest.....*Defined by state statute*
Kidnapping.....*18 U.S.C. § 1201(a)(2)*
Maiming.....*18 U.S.C. § 114*
Manslaughter.....*18 U.S.C. § 1112*
Murder.....*18 U.S.C. § 1111*
Robbery.....*18 U.S.C. § 2111*

If an Indian has committed one of the crimes listed under the *Major Crimes Act*, then we refer to it as a "major crime." If, however, a non-Indian commits the same crime, e.g. murder, we do not refer to the crime as a "major crime." In other words, only Indians can commit "major crimes" under the Act.

For example, if the facts of the investigation suggest that an Indian has committed a simple assault of a non-Indian on a reservation, the Indian can be prosecuted under the ICCA in federal court, so long as the tribe has not first prosecuted and punished the Indian offender.

Consider the analysis:

- Where was the crime committed?
  Reservation.
- Was the site of the crime in Indian Country?
  Yes.
- Does *Public Law 280* or a Specific Jurisdictional Statute Apply?
  No.
- Was the Crime Committed By or Against an Indian?
  Yes.
- Which Defendant-Victim Category Applies?
  - Indian against an Indian?
    No.
  - Indian against a non-Indian?
    Yes.
  - Non-Indian against an Indian?
    No.
  - Non-Indian against a non-Indian?
    No.
  - "Victimless" and "consensual" crimes by an Indian?
    No.
  - "Victimless" and "consensual" crimes by a non-Indian?
    No.
- Is the crime one of the major felonies?
  No.
- If the tribe can prosecute and punish the Indian offender, have they done so?
  No.

As another example, an Indian burglarizes a non-Indian's residence on the reservation. Based on these facts, the federal court would have jurisdiction under the *Major Crimes Act* because the offender is Indian, the crime occurred in Indian Country, it is one of the Major Crimes, and the status of the victim does not matter.

Consider the analysis:

- Where was the crime committed?
  Reservation.
- Was the site of the crime in Indian Country?
  Yes.
- Does *Public Law 280* or a Specific Jurisdictional Statute Apply?
  No.
- Was the Crime Committed By or Against an Indian?
  Yes.
- Which Defendant-Victim Category Applies?
  - Indian against an Indian?
    No.
  - Indian against a non-Indian?
    Yes.
  - Non-Indian against an Indian?
    No.
  - Non-Indian against a non-Indian?
    No.
  - "Victimless" and "consensual" crimes by an Indian?
    No.
  - "Victimless" and "consensual" crimes by a non-Indian?
    No.
- Is the crime one of the major felonies?
  Yes.
- If the tribe can prosecute and punish the Indian offender, have they done so?
  Tribes cannot prosecute in this instance.

3.15 Need for Cross-Deputization

With scarce resources and a compelling need for public safety over vast geographical areas, federal, tribal, and state law enforcement should consider cross-deputization agreements:

> "*A…satisfactory solution to [Indian Country jurisdictional] problems is for the tribal and state officers to cross-deputize, so that each is empowered to arrest for the other government. The tribal police officer then can arrest a non-Indian who commits a crime against a non-Indian and may take him or her to state court, because the tribal officer is acting in the capacity of a deputy of the state. The same advantages apply in reverse for the state police officer, who can arrest Indians on behalf of the tribe."*[93]

Tribal and state law enforcement officers can seek cross-deputation from the Bureau of Indian Affairs, provided their respective agencies have entered into a Deputation Agreement with the BIA Office of Law Enforcement Services.[94] Tribal or state agencies seeking such deputation are encouraged to discuss the benefits and requirements of Special Law Enforcement Commission (SLEC) with the BIA District Commander in the relevant Office of Law Enforcement Services District; graduates of the Indian Police Academy may be eligible for a SLEC up to three years following graduation at the FLETC.

A compelling reason for states to consider seeking out an agreement with tribal police departments is that warrantless arrests executed outside of the arresting officer's jurisdiction is analogous to a warrantless arrest without probable cause.[95]

Thus, arrests in Indian Country following fresh pursuit or violation of tribal extradition statutes may be illegal and state officers may be sued for damages under *42 U.S.C. § 1983* for an

unconstitutional seizure without appropriate federal or tribal authority if they arrest an Indian defendant in Indian Country without a cross-deputization agreement.

3.16 Courts of Indian Offenses (C.F.R. Courts)

When tribal courts have not yet been established to exercise the particular tribes' jurisdiction over Indians, the Secretary of Interior is authorized to promulgate a law and order code and to establish courts. Courts of Indian Offenses exist throughout the U.S. under the Code of Federal Regulations (CFR), providing the commonly used name — the "CFR Court." Until such time as a particular Indian tribe establishes their own tribal court, the Court of Indian Offenses will act as a tribe's judicial system.

The CFR Court is a trial court and parties present their cases before a Magistrate. Tribal constitutions and the *Indian Civil Rights Act* (*ICRA*) form the basis of due process; persons appearing in the court for criminal matters are entitled to a trial by jury. The CFR Court hears many different types of civil cases, including cases arising in Indian Country where tribal members are defendants and non-Indians are plaintiffs. Cases involving non-Indians or non-tribal member defendants are also permitted by consent of the defendant to the personal jurisdiction of the court. The civil matters heard in the court include divorce, guardianship, custody, child support, determination of paternity, name change, business contracts, personal injury, probate of non-trust property, in addition to other civil disputes.

Criminal cases that can be heard in CFR court include misdemeanor cases involving Indians that occur within tribal jurisdiction; recall that felonies involving Indians within Indian Country that are federal crimes must be heard in Federal court and that criminal cases involving non-Indians in Indian Country are usually brought in state court. Criminal punishments may

include imprisonment, the payment of court costs and fines, or both. The original Court of Indian Offenses was created in 1886 to provide law enforcement for the Kiowa, Comanche, and Apache (KCA) reservation. Several prominent tribal leaders served as judges of the court, including Quanah Parker (Comanche), Lone Wolf (Kiowa) and several others.

A prosecutor acts on behalf of the tribes to enforce criminal laws and are licensed attorneys hired by contract. Criminal offenses, contained within the federal regulations (*25 CFR Part 11*), provides the offenses that are applicable in the court. Unlike tribal courts that have not yet adopted the provisions of the *Tribal Law and Order Act*, defendants in criminal or child welfare cases (involving the termination of parental rights) who cannot afford an attorney may apply to the court to have the public defender appointed to assist in their defense.

Parties have a right to appeal their cases to the Court of Indian Appeals if they believe that one of the judges of the CFR Court has committed an error. Defendants also can apply for relief, such as a writ of habeas corpus, through the Court of Indian Appeals.

The Court of Indian Appeals consists of three judges who review the action of the trial court to determine if the decision made should be upheld or overturned. Unlike the trial, decisions of the Court of Indian Appeals are made primarily by reviewing the written briefs and court record of the trial court. Generally, a party is limited to discuss issues and evidence presented to the trial court, and cannot submit additional evidence or legal arguments on appeal.

[1] See STEPHAN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES, 1 (2004).

[2] See SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 14-15 (1989).

[3] See *Duro v. Reina,* 495 U.S. 676, 680 n.1 (1990).

[4] *Worcester v. Georgia,* 31 U.S.515, 559 (1832).

[5] See *Tee-Hit-Ton Indians v. U.S.,* 348 U.S. 272, 279 (1955); see also *Johnson v. McIntosh*, 21 U.S. 542 (1823).

[6] See *County of Yakima v. Confederated Tribes of Yakima Indian Nation,* 502 U.S. 251, 257 (1994); *Morton v. Mancari,* 417 U.S. 535, 551 (1974).

[7] *U.S. v. Sandoval,* 231 U.S. 28 (1913); *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343 (1993). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

[8] See *Deleware Tribal Business Committee v. Weeks,* 430 U.S. 73, 84 (1977), citing *U.S. v. Tillamooks,* 329 U.S. 40, 54 (1946).

[9] See *LaPier v. McCormick,* 986 F.2d 303, 305 (9th Cir. 1993)(member of the Little Shell Band of Landless Chippewa Indians, which was not federally acknowledged tribe of Indians, was not an Indian for purposes of federal criminal jurisdiction); see also *State v. Sebastian,* 234 Conn. 115, 701 A.2d 13 (1997), *cert. denied*, 118 S.Ct. 856 (1998) (member of Paucatuck Eastern Pequot Tribe, a tribe not acknowledged by federal government, but whose application for acknowledgement is pending with BIA, is not an Indian, therefore state had jurisdiction to prosecute him).

[10] See *United States v. Rogers,* 45 U.S. 567, 572-73 (1846) (a white man adopted by a tribe was not an Indian for purposes of a federal criminal statute). See e.g. U*nited States v. Keys*, 103 F.3d 758 (9th Cir. 1996); *United States v. Torres,* 733 F.2d 449, 456 (7th Cir.), *cert. denied,* 469 U.S. 864 (1984); *United States v. Broncheau,* 597 F.2d 1260, 1263 (9th Cir.), *cert. denied,* 444 U.S. 859 (1979); *United States v. Dodge,* 538 F. 2d 770, 786 (8th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977).

[11] See *United States v. Broncheau*, 597 F. 2d 1260 (9th Cir.), *cert. denied*, 444 U.S. 859 (1979); *United States v. Keys,* 103 F. 3d 758, 761 (9th Cir. 1996). But see *United States v. Lawrence,* 51 F.3d 150 (8th Cir. 1995).

[12] See, e.g., *Menominee Tribe v. United States,* 391 U.S. 404 (1968); *Hackford v. Babbitt*, 14 F.3d

[13] See *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988).

[14] See *United States v. Keys,* 103 F.3d 758, 761 (9th Cir. 1996) (Court had to determine whether a victim was an Indian for purposes of federal criminal jurisdiction under the Indian Country Crimes Act, 18 U.S.C. § 1152. Child-victim, who was one-fourth Indian blood quantum and was eligible for enrollment but not enrolled, and was treated as Indian by both the tribe and her parents, was an Indian for purposes of prosecuting the defendant under § 1152).

[15] See *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974) ("While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status *vis-à-vis* the Federal Government no longer exists").

[16] See *United States v. Nazarenus*, 983 F.2d 1480 (8th Cir. 1998) (federal jurisdiction found where defendant stipulated that the location identified in the indictment is Indian Country).

[17] See *18 U.S.C. § 1151 (a).*

[18] See FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 36 (1982).

[19] See WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL THIRD EDITION 114 (1998).

[20] For example, in *Hagen v. Utah,* 510 U.S. 399 (1994), an Indian was charged and convicted by the state of Utah for distributing a controlled substance in the town of Myton, Utah. The town of Myton lies within the original boundaries of the Uintah Reservation, which was opened to settlement by non-Indians in 1905 and thus has disestablished areas. The Supreme Court held the reservation boundaries were diminished by opening it to non-Indians for settlement, the portion of the Uintah Reservation which included Myton had been disestablished, the disestablished reservation was no longer Indian Country, and as a result, the federal government had no criminal jurisdiction over the defendant.

[21] 231 U.S. 28 (1913).

[22] See GETCHES, WILKINSON & WILLIAMS, FEDERAL INDIAN LAW, 4TH EDITION 441 (1998); see also Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976).

[23] 118 S.Ct. 948 (1998).
[24] See *United States v. Sands,* 968 F.2d 1058, 1062 (10th Cir. 1992), *cert. denied*, 506 U.S. 1056 (1993).
[25] *Oklahoma Tax Commission v. Potawatomi Tribe*, 498 U.S. 505 (1991). The Supreme Court determined that trust land at issue was "validly set apart" and thus qualified as a reservation for purposes of tribal sovereign immunity, even though the land was used to sell cigarettes to non-tribal members. Also, in *Cheyenne-Arapaho Tribes v. Oklahoma,* 618 F.2d 665 (10th Cir. 1980), the Tenth Circuit held that tribal trust land was a "reservation" within the meaning of *18 U.S.C. §1151(a),* and in *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990), the Tenth Circuit held a deputy sheriff had no jurisdiction to arrest an Indian on land they determined to be tribal trust land located within an Oklahoma county was Indian Country (under *18 U.S.C. § 1151*).
[26] 185 F.3d 1125 (10th Cir.), *cert. denied,* 120 S.Ct. 1960 (2000).
[27] See *Draper v. United States*, 164 U.S. 240 (1896); see also *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946).
[28] Although the *Tribal Law and Order Act of 2010* has increased the tribe's jurisdiction many tribe's to date have not adopted the provisions that would allow increased punishment.
[29] See Christopher B. Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction,* 14 B.Y.U. J. Pub. Law 173, 181 (2000).
[30] See *United States v. Long Elk*, 805 F.2d 826 (8th Cir. 1986).
[31] See *United States v. Narcia,* 776 F. Supp. 491 (D. Ariz. 1991).
[32] See Canby, at 146.
[33] See *Williams v. United States*, 327 U.S. 711 (1946).
[34] See e.g. *Quechan Indian Tribe v. McMullen*, 984 F.2d 304 (9th Cir. 1993) (illegal fireworks); see also *United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950).
[35] See *United States v. McBratney*, 104 U.S. 621 (1881); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984).
[36] *Minnesota v. Stone,* 572 N.W. 2d 725, 729, fn. 3 (Minn. 1997) citing ACT OF MAY 23, 1973, CH. 625, 1973 MINN. LAWS 1500.
[37] See Judith V. Royster & Rory SnowArrow Fausett, *Fresh Pursuit Onto Native American Reservations: State Rights 'To*

Pursue Savage Hostile Indian Marauders Across the Border,' 59 U.Colo.L.Rev. 191 Fn. 44 (1988).

[38] See *25 U.S.C. §§ 1301, et seq.*

[39] See Canby, at 236.

[40] See RALPH W. JOHNSON AND RACHAEL PASCHAL, ED., TRIBAL COURT HANDBOOK FOR THE 26 FEDERALLY RECOGNIZED TRIBES IN WASHINGTON STATE – SECOND EDITION 10 (1992).

[41] See *Washington v. Burdman*, 525 P.2d 217 (1974) (Washington Supreme Court interpreted RCW 37.12.010, specifying these eight categories, to apply to all tribes, including Quinault Tribe, regardless of whether the tribe gave consent to state's assumption of jurisdiction).

[42] See *65 Fed. Reg. 75948* (2000).

[43] See *54 Fed. Reg. 19959* (1989).

[44] See *52 Fed. Reg. 8372* (1987).

[45] See *United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979).

[46] See Canby, at 220; see also *United States v. High Elk*, 902 F.2d 660 (8th Cir. 1990); Cf. *Negonsett v. Samuels*, 507 U.S. 99 (1993); *United States v. Cook*, 922 F.2d 1020 (2d Cir.), *cert. denied,* 500 U.S. 941 (1991).

[47] Cf. *Negonsett*, 507 U.S. at 105; see also *State v. Hoffman*, 804 P.2d 577, 586 (1991).

[48] See Cohen, at 344-345; see also Canby, at 220-221.

[49] See *18 U.S.C. § 1163 (b).*

[50] See *25 U.S.C. § 232*; see also Cohen, at 372-376.

[51] See Cohen, at 176 fn. 256

[52] See *Negonsett v. Samuels,* 507 U.S. 99 (1993); see also *United States v. Cook*, 922 F.2d 1026, 1033 (2d Cir.), *cert. denied, sub nom. Tarbell v. United States*, 500 U.S. 941 (1991).

[53] See Cohen, 176 fn. 256; 372.

[54] See Cohen, at 374.

[55] See *Negonsett v. Samuels,* 507 U.S. 99 (1993); see also *United States v. Cook*, 922 F.2d 1026, 1033 (2d Cir.), *cert. denied, sub nom. Tarbell v. United States*, 500 U.S. 941 (1991).

[56] See VERONICA E. VELARDE TILLER, ED., TILLER'S GUIDE TO INDIAN COUNTRY: ECONOMIC PROFILES OF AMERICAN INDIAN RESERVATIONS 343-347 (1996).

[57] See Cohen, Id.

[58] See Cohen, at 373-374; fn. 229-230.

[59] See *Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act*, Pub. L. No. 100-89, 101 Stat. 666 (1987).
[60] See *25 U.S.C. § 1755*.
[61] See 25 *U.S.C. § 1775d (a)*.
[62] See *25 U.S.C. § 1775d(b)(1)*.
[63] See 25 *U.S.C. § 1775d (b)(2)*.
[64] See *Wetsit v. Stafne,* 44 F.3d 823 (9th Cir. 1995).
[65] 435 U.S. 313 (1978).
[66] 552 P.2d 1394, *appeal dismissed*, 492 U.S. 1030 (1976).
[67] 590 P.2d 913 (1979).
[68] 435 U.S. 191 (1978).
[69] 495 U.S. 676 (1990).
[70] *United States v. Wheeler*, 435 U.S. 313, 326 (1978).
[71] See Canby, at 169.
[72] *Duro v. Reina*, 495 U.S. 676, 697 (1990).
[73] See *Duro,* at 695.
[74] *Ortiz-Barraza v.United States*, 512 F.2d 1176 (9th Cir. 1975).
[75] See *State v. Burrola*, 669 P.2d 614 (Ariz. Ct. App. 1983).
[76] See *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975).
[77] *State v. Haskins*, 887 P.2d 1189, 1195-1196 (1994).
[78] See *State v. Schmuck*, 850 P.2d 1332, *cert. denied*, 510 U.S. 931 (1993).
[79] See 25 U.S.C. § 2802 (c) (1).
[80] See *United States v. Patch,* 114 F.3d 131 (9th Cir.), *cert. denied*, 118 S.Ct. 445 (1997).
[81] See JOHN WESLEY HALL, JR., SEARCH AND SEIZURE §22:5 (1993).
[82] 462 N.W.2d 463 (1990), *cert. denied*, 500 U.S. 928 (1991).
[83] 889 P.2d 4 (Ariz.Ct.App. 1994).
[84] 417 N.W.2d 361, 363 (1987).
[85] See U.S. CONST., ART. IV, SEC. 2, CL. 2; See also *18 U.S.C. §§ 3182-3183*.
[86] 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970)
[87] See *Benally v. Marcum,* 553 P.2d 1270 (1976).
[88] See *City of Farmington v. Benally*, 892 P.2d 629 (N.M. Ct. App. 1995), *cert. denied,* 890 P.2d 1321 (1995).
[89] See *State v. Yazzie,* 777 P.2d 916 (N.M.Ct.App. 1989), *cert. denied,* 777 P.2d 1325 (1989).

[90] See *Davis v. O'Keefe*, 283 N.W. 2d 73 (1979).
[91] See *Davis v. Muellar,* 643 F.2d 521 (8th Cir. 1980), *cert. denied,* 454 U.S. 892 (1981).
[92] See Getches, at 485-486.
[93] Canby, 170.
[94] See 1 BUREAU OF INDIAN AFFAIRS, OFFICE OF LAW ENFORCEMENT SERVICES, LAW ENFORCEMENT HANDBOOK, Ch. 2, Sec. 4 (2000).
[95] See *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990).

Chapter Four

Conservation Law

4.1 Importance of Conservation Law

American Indians have long recognized the intricate relationship and delicate balance between human beings, animals, and plants. The ability to harvest plants for nutritional and medicinal purposes, to hunt game in order to nourish, clothe, and protect, and to harvest fish were critical to the health and well-being of traditional societies. With the ever-increasing demands to open up aboriginal lands for settlement, tribes recognized the need to safeguard their abilities to harvest, hunt, and gather for physical sustenance and spiritual preservation. Through treaties and agreements tribes had the foresight to preserve their land bases and insist upon assurances that culturally significant and life-sustaining relationships with the land, the water, and plant and animal-life would remain undisturbed.

Today these centuries-old treaties and agreements, and the hard-fought court battles to enforce the rights they guaranteed, have proven vitally important in protecting cultural resources and religious activities. Treaty rights also have enabled tribes to

develop economic enterprises and generate revenue through commercial and recreational fishing and hunting.

As a result, Indian nations have developed conservation departments with the primary responsibility for conserving and managing wildlife through policies and practices that protect natural resources – these policies and practices are often exercised outside of state supervision or authority. The balance between tribes' direct exercise of treaty rights independent of the several states, the federal government's interest in allowing tribes to develop comprehensive wildlife management systems and policies independent of the several states, and the states' interest in conservation is constantly reviewed by courts and governed by federal statute. For this reason, thorough understanding of several important federal statutes that influence the exercise of treaty rights and regulation of hunting and fishing in Indian Country is essential.

4.2 Implied Rights

Establishment of a reservation by treaty, statute, or agreement includes an implied right to hunt and fish on that reservation free of regulation by the state.[1] Because these rights are "implied," they need not be expressly mentioned in the treaty, statute, or agreement which created the reservation in order for the rights to exist. Indians' implied treaty right to hunt and fish free from state law applies on the reservation. Indians are immune from state law when exercising hunting or fishing rights on the reservation even in *Public Law 280* states, where states have criminal jurisdiction over Indian Country.

State jurisdiction over offenses committed in Indian Country is addressed by *18 U.S.C. § 1162*, and while the statute provides for state jurisdiction in certain matters it also precludes states from "…depriv[ing] any Indian or any Indian tribe, band, or 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."

In *Cheyenne Arapaho Tribes v. Oklahoma*,[2] the Tenth Circuit Court of Appeals held that the hunting and fishing rights of Indians on allotments and tribal trust land survive disestablishment of an Indian reservation, and are not subject to state regulations because the land remains Indian Country.

States have no jurisdiction over Indians in Indian Country unless Congress provides for it, and the *Assimilative Crimes Act* does not assimilate state law that is inconsistent with federal policies expressed in federal statutes.

Even when Congress gave to certain states criminal jurisdiction over Indian Country in *Public Law 280*, it excepted state criminal jurisdiction over hunting and fishing (*see above*). In addition, Congress enacted a federal trespass statute, *18 U.S.C. § 1165*, which makes hunting and fishing on Indian land without permission from the tribe a federal offense. The Court found that these actions on the part of Congress evidence Congress' intention to protect Indian hunting and fishing rights from state interference and that it would be inconsistent to expressly forbid states the right to control Indian hunting and fishing directly but subsequently and indirectly give control to the states through the *Assimilative Crimes Act*.

Thus, state law cannot be applied to Indian hunting and fishing in Indian Country by way of the *Assimilative Crimes Act*, because assimilation would be inconsistent with federal policies expressed in federal statutes.

4.3 Loss of Rights

Treaty rights are property rights protected by the "Just Compensation clause" of the Fifth Amendment. Hunting, fishing, and gathering rights, when guaranteed by treaty, are treated as property rights.[3] Treaty rights can be lost, however, either by cession or abrogation.

While most treaty agreements afford Indians the exclusive right to hunt and fish on lands reserved to them, these rights can be ceded (given up) in a treaty in exchange for other terms. A cession often occurs when a tribe grants lands to the United States in exchange for compensation from its existing reservation. Unlike a reservation that has been disestablished, the reservation subject to cession continues to exist but is reduced in terms of size and boundaries. Usually, the treaty will include a reservation of rights "in common with all other persons." Rarely will the terms of the treaty itself clearly state that the tribe has ceded or otherwise given up the right to hunt or fish. If there is no reservation of rights and the rights are clearly given up, then those rights no longer exist and a tribe cannot sue to enforce or recover the ceded rights later.

Even if a tribe reserved a right in a treaty, Congress can abolish the treaty right by passing legislation under certain circumstances. This is referred to as abrogation of the treaty right (discussed below). Unlike in a cession, abrogation of the treaty right by the federal government gives rise to a claim for compensation, meaning that the tribe could sue the United States to be monetarily compensated for the loss of the right.
Unless cession or abrogation occurs, implied treaty rights to hunt and fish free from state law survive congressional termination of the trust relationship between the tribe and the federal government. Even if Congress terminates the trust or "government-to-government" relationship with a tribe, hunting

and fishing rights are not extinguished unless there is a clear indication of congressional intent to do so when it terminates a tribe.[4]

Such treaty rights have been upheld even for those Indians who withdrew from the tribe upon termination of the trust relationship or for tribes placed together on a reservation by the United States, even when one tribe is placed there in violation of treaty with the other tribe.[5]

4.4 Indian Canon of Construction

During the allotment period, the Supreme Court developed special rules of Indian law that contrasted with mainstream law to protect the tribes from loss of treaty rights. The "Indian canon of construction" used in Indian law requires that "[a] treaty must…be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."[6] The Supreme Court's interpretation of this canon resolves vague or ambiguous language in a treaty in favor of the way an Indian tribe would have understood it, unless the treaty has been abrogated by express action of Congress.[7]

Under the Indian canon of construction, a reviewing court must analyze the wording of the treaties, agreements, and enactments, the prior history, the surrounding circumstances, and the subsequent construction given those documents by the parties to determine both the intent of Congress and understanding of the Indians.[8]
The Supreme Court used this canon of construction as early as 1886 when reviewing treaties between the United States and the Choctaw Nation:[9]

> "[W]e have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.'"

This language was later used to protect Indian treaty rights against private parties when a commercial fishery's fish wheel prevented western tribal members from fishing in treaty-protected areas. Tribal members requested an injunction against the commercial fishery based on an ambiguous treaty promise made by the United States protecting the rights of tribal members related to fishing areas. The Court held that ambiguities in treaty language or other points of dispute between the government and Indian tribes should be resolved in a manner favorable to the understanding that tribes could be presumed to have.

In *United States v. Winans,*[10] the Supreme Court interpreted an 1859 treaty provision between the Yakima Nation (styled today as the Yakama Nation) and the United States which concerned the Yakima Indians' right to fish off the reservation at their "usual and accustomed places, in common with citizens of the Territory."

The relevant portion of the treaty read:[11]

> "The exclusive right of taking fish in all the streams where running through or bordering [the reservation established by the 1859 Treaty] [which is] secured to said confederated tribes…as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing

them, together with the privilege of hunting, gathering roots and berries…"

The Yakimas' ability to access their usual and accustomed sites was an issue because Winans, a non-Indian, owned lands bordering the Columbia River in the Yakimas' usual and accustomed sites. Winans argued that as fee owner of the lands on which the usual and accustomed sites were located, his title was absolute and he had the right to exclude the Yakimas from the land. Winans also argued the language meant that the Yakima Tribe could fish at the usual and accustomed sites just as any other citizen of the state, meaning the tribe had no special rights on its former reservation lands where the usual and accustomed sites were located, and thus no special rights to trespass on the land.

The United States, enforcing its treaty obligations with the Yakima, countered that the language meant members could fish at the usual and accustomed sites even though the sites were outside the present reservation boundaries, and they had a right to access the sites even if the land was held in fee simple by a third party such as Winans.

In interpreting the treaty as the Indians would have understood it, the Court stated that while the treaty placed limits on aboriginal rights, it did not abolish those rights. The Court acknowledged that new conditions (expansion of the United States) required that Indian rights had to be accommodated.

Accommodation, not abolition of the Indians' rights, was intended by the treaty. "In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those [rights] not granted."[12] Known as the reserved rights doctrine, this means that whatever rights the Indians did not cede in the treaty are reserved to the tribe.

Further, the Court acknowledged the importance of salmon fishing to the Yakima way of life. Fishing was so integral to the Yakimas, not only for sustenance but to their culture, the Court characterized it as "not much less necessary to the existence of the Indians as the atmosphere they breathed."[13] Therefore, it was unlikely the tribe would understand the terms of the treaty to give up such a precious right.

With these ideas in mind, the Court interpreted the treaty language at issue to mean that the Yakima Nation had reserved to itself the right to fish off the reservation in its usual and accustomed places without regulation by the state and had an easement over private land in order to exercise their treaty "right of taking fish at all usual and accustomed places, in common with citizens of the Territory."[14]

As to Winans, the Court held that the Yakima Nation's treaty with the United States fixed in the land "such easements as enable the right to be exercised"[15] and allowed for "erecting temporary buildings for curing [the fish taken]."[16]

Winans' argument that his license from the state of Washington to operate a fish wheel gave him the right to prevent Indians from fishing on his land—since the state license for a fish wheel entitled him to the exclusive possession of the space occupied by the wheel—was rejected by the Court, since a license from a state could not circumvent a treaty obligation of the United States as a superior sovereign.

4.5 Usual and Accustomed Places

As in *Winans*, there are many instances when tribes retain off-reservation treaty fishing rights. Courts have established the following principles in relation to off-reservation treaty rights:[17]

• Indians cannot be barred from their usual and accustomed fishing places.
• Indians have an easement over private as well as public land to gain access to usual and accustomed areas and fish there.
• Usual and accustomed fishing places may be either on or beyond the territory ceded by that tribe in its treaty with the United States.
• Their right to fish at those locations is a non-exclusive one that must be shared with non-Indians.
• Indians do not need to purchase state fishing licenses when exercising their treaty fishing rights.
• Areas enjoyed in common with non-Indians may be subject to state regulations necessary for conservation.

The phrase "usual and accustomed places" has since been defined as those sites which one or several different Indian nations have used in a "habitual and customary manner" during a considerable portion of each year.[18]

In *United States v. Washington*,[19] the court defined "all usual and accustomed grounds and stations" as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times…is a usual and accustomed ground [a large area that may include numerous small fishing sites undetermined at the time of treaty] or station [such as fixed locations like a fish weir, fishing platform or some other narrowly limited area] at which the treaty tribe reserved, and its members presently have, the right to take fish."

Where a treaty reserves the right to fish at "all usual and accustomed places," the state may not preclude access to those places, nor may it require a license fee of Indians to fish there.[20] Many states enter into compacts to ensure these rights are protected; for example, the Cherokee Nation and the State of

Oklahoma entered into a hunting and fishing compact in 2015 that allows enrolled tribal members to freely exercise their treaty rights across the state and without fear of arrest or prosecution off tribal land.

In addition to the right to fish and access usual and accustomed fishing places, a treaty right to fish includes the ability to erect structures at those sites. The type of structure permitted and the degree of permanence is still in dispute as of 2015. Some examples of these structures include drying sheds, fishing platforms, removable dwellings, or semi-permanent wooden dwellings. The usual and accustomed places are those of the tribes who signed the treaty. Only those tribes which entered into and signed the treaty, reserving the right to fish at the usual and accustomed sites, have the right to fish at their usual and accustomed sites. A non-treaty tribe that later affiliates with one of the treaty tribes may share the treaty tribe's right to fish, but that non-treaty tribe has no treaty right to fish at its own accustomed places.[21] If, however, two treaty tribes merge and become one tribe, the resulting merged tribe may exercise the treaty rights of both original tribes.[22]

4.6 Disestablishment, Cession, State Regulation

Off-treaty reservation rights may arise from disestablishment or cession. Disestablishment is a Congressional decision to abandon the reservation status of land. In most cases, the disestablishment of the reservation occurred when Congress allotted the reservation land to individual Indians, held some land in trust for Indians, and sold surplus lands to non-Indians.

In *Kimball v. Callahan*,[23] the Ninth Circuit Court of Appeals held that although the Klamath Reservation had been terminated by Congress, plaintiff Indians still possessed hunting, fishing, and trapping rights free of state regulation on their former reservation

lands, including lands within a national forest and privately owned land on which the owners permitted hunting, fishing, and trapping to take place.

The Supreme Court upheld tribal rights to hunt and fish free of state regulation on ceded lands in *Antoine v. Washington*,[24] when a state attempted to impose its hunting laws against an Indian who was exercising a right to hunt on ceded lands, guaranteed by the United States through an agreement with a tribe. The tribal member was convicted in state court of hunting and possessing deer during a closed season. Both the member and his wife were hunting on unallotted, non-Indian land in what was once the northern half of the Colville Indian Reservation.

In 1891, the tribe had ceded 1.5 million acres of their former reservation to the United States—who in turn restored the northern half to the public domain and opened it to settlement by non-Indians—in exchange for monetary compensation and a promise that the right to hunt and fish in common with all other persons on lands not allotted to Indians shall not be taken away or in anywise abridged.

The Court found the argument that the state had no authority to regulate hunting by its members on its former reservation area to be supported by the agreement, and that the tribe and its members had exclusive, absolute, and unrestricted rights to hunt and fish in the ceded portion of the reservation.

Since the agreement limited governmental regulation of the rights as a matter of federal (treaty) law, it precluded application of state law and the tribal member's criminal conviction was overturned.

Indian off-reservation treaty fishing rights are subject to state regulation, but the state's regulation must be for the purpose of conservation and it must meet "appropriate standards." In

Puyallup Tribe v. Department Of Game Of Washington (*Puyallup I*),[25] the United States Supreme Court stated that:

> "The treaty right is in terms the right to fish 'at all usual and accustomed places.' [B]ut the manner in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty…Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State…[b]ut the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

In *Department Of Game Of Washington v. Puyallup Tribe* (*Puyallup II*),[26] the Supreme Court held the state could regulate the fishing of steelhead, a fish that is in decline and remains on the endangered list as of 2015:

> "[Treaty] [r]ights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."

The Supreme Court explained the "appropriate standards" described in *Puyallup I* require the state to demonstrate that regulation is a reasonable and necessary conservation measure.

In *Puyallup Tribe v. Department Of Game Of Washington* (*Puyallup IIII*),[27] the Supreme Court held states could regulate treaty-guaranteed fishing rights on the reservation as well as off-reservation purposes only if reasonable and necessary for conservation (as in the case of endangered steelhead).

Some common regulations include:

• restricting manner of fishing or hunting;
• limiting the size of the take;
• restricting commercial fishing or hunting;
• requiring tribes holding off-reservation treaty fishing rights to issue identification certificates that include a photograph to individual members; and
• requiring tribal members to carry a certificate when approaching, fishing, or leaving either on- or off- reservation fishing areas.

Under *50 C.F.R. §300.64*, "any member of a U.S. treaty Indian tribe who is engaged in commercial or ceremonial and subsistence fishing under this section must have on his or her person a valid treaty Indian identification card issued pursuant to [*25 C.F.R. §249(A)*], and must comply with the treaty Indian vessel and gear identification requirements of [*United States v. Washington*, 384 F. Supp. 312 (W.D. Wash., 1974)]."

In *New Mexico v. Mescalero Apache Tribe*,[28] the state was preempted from regulating hunting and fishing by non-Indians on the reservation when the tribe and the federal government extensively regulated hunting and fishing on the reservation. At issue in *Mescalero* was the exercise of concurrent jurisdiction

over hunting and fishing by non-Indians and application of state regulations to non-Indian on the reservation.

Prior to *Mescalero*, the Mescalero Apache Tribe and the federal government entered into a joint effort to develop a resort funded primarily by the United States. The goal of the resort was to develop the tribe's hunting and fishing resources and create employment for tribal members, generate revenue through sales of hunting and fishing licenses, and support the tribal government and its provision of services to tribal members.

The Mescalero Tribe established eight artificial lakes with federal funding; these lakes were stocked by the U.S. Fish and Wildlife Service, which operated a hatchery on the reservation. The United States also contributed to the development of the tribe's game resources in 1966, when the National Park Service donated a herd of 162 elk to be released on the reservation. Under the tribe's careful management, the herd increased from 162 elk to more than 1,200.

Through its tribal council, the tribe adopted hunting and fishing ordinances each year, on basis of recommendations from a BIA range conservationist, who worked with tribal conservation officers. Working together, the tribe and the federal government conducted a comprehensive fish and game management program; they conducted annual game counts and surveys to determine conservation needs, and determined the need to stock the reservation waters based on surveys of the reservation.

Throughout this period, the state did not dispute the tribe's authority to exclusively regulate hunting and fishing by members of the tribe. Once the tribe permitted non-Indians to hunt and fish on the reservation, the state argued that New Mexico's hunting and fishing regulations should apply to non-Indians on the reservation.

The Supreme Court disagreed:[29]

> "In this case the governing body of an Indian Tribe, working closely with the Federal Government and under the authority of federal law, has exercised its lawful authority to develop and manage the reservation's resources for the benefit of its members. The exercise of concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development. Given the strong interests favoring exclusive tribal jurisdiction and the absence of State interests which justify the assertion of concurrent authority, we conclude that the application of the State's hunting and fishing laws to the reservation is preempted."

In *Antoine v. Washington*,[30] the Supreme Court held that the *Puyallup I* rules allowing state regulation of off-reservation treaty rights applies to Indian hunting rights as well as fishing rights. Since none of the *Puyallup I* factors were present in *Mescalero*, and the state's goal was revenue rather than conservation, the Supreme Court enjoined the state from asserting authority over non-Indians' hunting or fishing activities on the reservation.

4.7 Tribal Enforcement

Generally, the federal government leaves hunting and fishing regulation to the tribes. The tribe's power to regulate includes regulation of hunting and fishing by Indians on non-Indian fee lands within the reservation[31] and the power to regulate treaty hunting or fishing conducted off-reservation by its members.

As tribes may exclude or expel non-Indians who violate tribal hunting or fishing laws, they also retain the power to license hunting and fishing by non-Indians reservation lands held in trust for the tribe or individual Indians.[32]

Therefore, tribes can give permission to enter their lands by using a licensing system for non-Indians; hunting or fishing without a tribal permit would be subject to federal prosecution under the federal trespass statute.[33]

The federal trespass statute, *18 U.S.C. § 1165*, recognizes the exclusive right of Indians to hunt and fish on their reservations by bringing the prosecutorial power of the United States against non-Indians who trespass on Indian lands for the purpose of hunting, fishing, or trapping.

This statute makes it a crime for any person to go on to Indian lands with the intent to hunt, trap, or fish. Lawful authority or permission comes from the tribe with jurisdiction over the land[34]:

> "Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined…or imprisoned…or both, and all game, fish, and peltries in his possession shall be forfeited."

In *United States v. Jackson*,[35] the Ninth Circuit held that the federal trespass statute is inapplicable to Indians. In the *Jackson*

case, a tribal member hunted in violation of a tribal ordinance and entered tribal lands without permission.

As a result, the tribal member was federally prosecuted under *§1165*, but the court held that members of the tribe who violate tribal hunting or fishing ordinances cannot be prosecuted under *§ 1165*. Such prosecutions are left to the tribes with authority to prosecute Indians who violate tribal law. Congress passed *18 U.S.C. §1165* because tribes do not have authority to criminally prosecute non-Indians.

Even though the federal trespass statute is inapplicable to Indians, tribes may punish their members directly. In *Settler v. Lameer*,[36] two members of the Yakima Nation were convicted by their tribal court of violating tribal ordinances at that tribe's usual and accustomed fishing sites off the reservation.

The Ninth Circuit Court of Appeals affirmed a tribe's right to exercise criminal jurisdiction over tribal members exercising treaty fishing rights off-reservation in the usual and accustomed fishing sites and concluded:

> "…Prior to the Treaty the regulations for fishing had been established by the Tribe through its customs and tradition. The Indians must surely have understood that Tribal control would continue after the Treaty."

This means that the tribe can make arrests and seizures off-reservation, at usual and accustomed fishing and hunting sites, for criminal violations of tribal fish and game ordinances committed by tribal members. Those fish and game ordinances may allocate fishing times among members, determine what type of equipment can be used, determine the time of taking fish or game, and determine preferences among fishing purposes.

For example, a tribe could give the highest priority to subsistence fishing or hunting, then ceremonial fishing or hunting, then commercial fishing or hunting. A tribe may also elect to disallow commercial fishing entirely or require special permitting.

As to non-Indians, any tribal enforcement measures must be civil in nature, due to the decision in *Oliphant v. Suquamish Tribe*, which held that tribes have no criminal jurisdiction over non-Indians, and under *Quechen Tribe v. Rowe,*[37] which held that a tribe's use of forfeiture of arms or other property of non-Indians as an enforcement mechanism was an impermissible criminal penalty.

As the tribe has the power to regulate Indian hunting and fishing on the reservation, the choice to directly exercise this power or not lies with the tribe. Tribes often enlist the aid of federal authorities to prosecute violations of tribal game and fish laws by way of federal trespass statute; the United States also prosecutes game violations under several broad environmental statutes such as the *(Bald and Golden) Eagle Protection Act*, the *Endangered Species Act*, the *Migratory Bird Treaty Act*, and the *Lacey Act*.

4.8 Bald and Golden Eagle Protection Act

The federal government's plenary power over Indian affairs extends to regulating Indian hunting and fishing. Through its plenary power, the federal government could extensively regulate hunting and fishing in Indian Country. While the federal government generally leaves hunting and fishing regulation to the tribes, federal statutes have significantly limited the tribes' exercise of treaty rights and rights guaranteed by agreement.

Congress can also wholly abrogate a treaty hunting right through passage of federal legislation, as it did with the *Eagle Protection*

Act, *16 U.S.C. § 668(a)*, and the *Endangered Species Act*, *16 U.S.C. § 1531* et seq.

The *Eagle Protection Act* (also called the *Bald and Golden Eagle Protection Act*) prohibits hunting of the bald or golden eagles anywhere within the United States, except if the person has a permit issued by the Secretary of the Interior, allowing that person to take a bald or golden eagle. The Act was passed to conserve bald eagles in 1940, and amended in 1962 to include golden eagles. Juvenile bald and golden eagles both lack a white cap and tail feathers, and Congress found the confusion between the species caused a decrease in bald eagle population due to hunting.

The *Eagle Protection Act* and its impact on treaty hunting rights was at issue in *United States v. Dion.*[38] An enrolled member of the Yankton Sioux Tribe was convicted of shooting four bald eagles on the Yankton Sioux Reservation in South Dakota in violation of the *Endangered Species Act*. The tribal member was also convicted of selling eagle carcasses and parts and other birds, which violated the *Eagle Protection Act*, the *Migratory Bird Treaty Act*, and the *Endangered Species Act*.

The Supreme Court examined an 1858 Treaty between the States and the Yankton Sioux Tribe. As a result of the treaty, Yankton ceded all but 400,000 acres to the United States, and agreed to remove to and settle within the diminished boundaries of reservation. In return, the tribe received monetary compensation and a promise of quiet and undisturbed possession of reserved land, including an exclusive right to hunt and fish.

The tribal member argued that the Yankton Sioux Tribe had a treaty right to hunt bald and golden eagles within the reservation for noncommercial purposes and that neither the *Eagle Protection Act* nor the *Endangered Species Act* had expressly abrogated that

treaty right. Recall that Congress may abrogate the provisions of an Indian treaty when the circumstances require or justify ignoring treaty provisions in the interest of the country and the Indians themselves.

Before *Dion*, the Supreme Court required that Congress explicitly state its intention to abrogate treaty rights. In passing the *Eagle Protection Act*, Congress could have expressed clear intention to abrogate by simply stating that the legislation eliminated treaty rights in the 1858 Treaty.

Without an express abrogation, Supreme Court relied on legislative history to find evidence that Congress considered the conflict between protecting eagles and Indian treaty rights on the other before choosing to pass legislation that would abrogate those treaty rights as to the hunting of eagles.

The Court found evidence of Congress' intent to abrogate the treaty rights in the broad language of the *Eagle Protection Act* that makes it a federal crime to, "…take, possess, sell, purchase, barter, offer to sell, purchase, or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any nest, or egg thereof."[39]

The prohibition is "sweepingly framed" and the enumeration of forbidden acts is "exhaustive and careful,"[40] thus illustrating Congressional intention to cover every possible way in which eagles and eagle parts can be obtained.

Evidence of consideration of treaty rights is found in a section of the *Eagle Protection Act* that authorizes the Secretary of the Interior to permit the taking, possession, and transportation of eagles "for the religious purposes of Indian tribes" after determining that such taking or possession or transportation is

compatible with the preservation of the bald eagle or golden eagle. The fact that eagles could be taken under permit for Indian religious purposes could only be understood to mean that the statute otherwise bans the taking of eagles by Indians.

4.9 Endangered Species Act

The *Endangered Species Act of 1973* (*ESA*), at *16 U.S.C. § 136* and *16 U.S.C. § 1531* et seq., is among the broadest of environmental laws passed in the 1970s. The Act was designed to protect critically imperiled species from extinction as a "consequence of economic growth and development untendered by adequate concern and conservation."

In *Dion*, the Supreme Court did not address the issue of whether Congress abrogated Indian treaty rights to hunt for bald and golden Eagles through passage of the *Endangered Species Act*.

In the only reported federal case deciding the issue, *United States v. Billie*,[41] the court held the *Endangered Species Act* abrogated the right to hunt the Florida panther—an endangered species—on the reservation. In *Billie*, a tribal member was indicted for taking, possessing, carrying, and transporting a Florida panther in violation of the *Endangered Species Act*.

The tribal member argued that the panther had been killed on the Big Cypress Seminole Indian Reservation in Florida, that he was an enrolled member, that the tribe retained treaty rights to hunting and fishing, and that there was no evidence that Congress intended to abrogate the right to hunt endangered species on the reservation.

The federal court applied the *Dion* test to determine whether there was "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian

treaty rights on the other, and chose to resolve that conflict by abrogating" the Indian rights as it had with the *Eagle Protection Act*. The court concluded that such evidence was present concerning passage of the *ESA*.

• First, the court characterized the statute as the most comprehensive legislation ever enacted to preserve endangered species;

• Second, the statute contained very limited exemptions, one of which was for Native Alaskans who were permitted to take endangered species, but only for subsistence purposes, and only according to federal regulations governing the exemption; and

• Third, the legislative history witnessed Congress' debate on various versions of the bill and indicated to the court that when Congress passed the ESA with only an exemption for Native Alaskans, it "must have known that the limited Alaskan exemption would be interpreted to show congressional intent not to exempt other Indians."

Collectively, these factors demonstrated to the court that Congress considered Indian interests, balanced them against conservation needs, and struck the balance in favor of endangered species.

4.10 Migratory Bird Treaty Act

The *Migratory Bird Treaty Act of 1918*, *16 U.S.C. §§ 703-712*, is a convention between the United States and Great Britain, acting on behalf of Canada. (In 1918, Britain still maintained control of the Dominion of Canada's foreign affairs under the *Confederation Act*.)

The United States subsequently entered into similar treaty agreements with four other nations—Canada, Mexico, Japan and Russia—to protect migratory birds. The statute makes it unlawful to pursue, hunt, take, capture, kill or sell certain migratory birds listed by statute.

The statute does not discriminate between the taking of live or dead birds and grants full protection to any bird parts including feathers, eggs and nests. Over 800 species are currently on the list.

In *United States v. Bresette*,[42] the court determined whether treaties with the Chippewa had reserved their usufructuary[i] rights, whether those rights included the taking of migratory birds and their feathers, and whether Congress had abrogated those rights with passage of the *Migratory Bird Treaty Act of 1918*.

In the *Bresette* case, tribal members (of the Red Cliff Band of the Lake Superior Chippewa Tribe and Fond du Lac Band of Lake Superior Chippewa) living on their reservations (Red Cliff Reservation and Fond du Lac Reservation) sold dream catchers that contained feathers (Canada goose, blue/snow goose, and red-tailed hawk), which were obtained from land on or near the Fond du Lac Reservation.

The tribal members were charged with violations of the *Migratory Bird Treaty Act*, and the court held that Chippewa tribe reserved full usufructuary rights under cession treaties in 1842 and 1854 with the United States. The tribe and its members reserved right to hunt, fish, and gather, including taking feathers, for personal use and for commercial purposes. The commercial sale of dream catchers, according to the court, is consistent with Chippewa beliefs.

[i] **Usufructuary rights [pron:** *yoòzə frúkchoo èrree***]** are the rights to make a modest living by "hunting and gathering off the land."

Having found that these defendants had a treaty right to sell the feathers, the court's next inquiry was whether the *Migratory Bird Treaty Act* had abrogated these treaty rights. Applying the *Dion* standard for determining abrogation, court examined the Act's statutory language and its legislative history and held that "[g]iven the absence of statutory language implicating treaty rights, the court must conclude that Congress did not abrogate defendants' treaty rights in enacting the *Migratory Bird Treaty Act*."

Finally, the court considered the issue of whether, even if the defendants had an unabrogated treaty right to sell the migratory bird feathers, the Act was a permissible, nondiscriminatory conservation measure under *Puyallup*.

The court held that the "migratory birds of Northern Minnesota and Wisconsin are not faced with extinction due to the likes of [tribal members]" and thus was not a non-discriminatory conservation method intended to prevent the extinction of birds.

Therefore, tribal members had a treaty right to take bird feathers which had not been abrogated and this treaty right was not subject to a *Puyallup* conservation limitation.

4.11 Lacey Act

The *Lacey Act*, *16 U.S.C. § 3371* et seq., prohibits transport of or traffic in fish, wildlife, or plants taken, possessed or sold in violation of any federal, state, or tribal law.

Mere possession of wildlife or fish in territory within the exclusive jurisdiction of the United States (which includes Indian Country, see *18 U.S.C. § 1151*), that was taken in violation of tribal law is also prohibited. Congress intended the *Lacey Act*, which prohibits transporting, selling, or acquiring fish taken or

possessed in violation of Indian tribal law or state law, to apply to Indians as well as non-Indians. Enforcement of the *Lacey Act* is the responsibility of the Secretary of Interior under *16 U.S.C. § 3375(a)* and has been delegated to the U.S. Fish and Wildlife Service.

The Bureau of Indian Affairs also has concurrent jurisdiction to enforce the *Lacey Act* in Indian Country. This means that a tribal conservation officer with a Special Law Enforcement Commission from the Bureau of Indian Affairs has authority to enforce the *Lacey Act* within the exterior boundaries of the reservation.

In *United States v. Sohappy*,[43] the Ninth Circuit stated that, in enacting the *Lacey Act*, Congress "wished to curb trafficking in illegally acquired wildlife in order to help support the web of federal, state and Indian tribal law protecting wildlife" and thus authorized prosecution of Indians who violate its provisions.

Federal prosecutions of Indians who violate tribal fishing or hunting laws was seen as necessary by the court because "Indians who traffic in illegal wildlife harm the…goal of wildlife preservation just as much as non-Indian traffickers," and "the stiff Lacey Act penalties are necessary to 'deter those violators who can net $100,000 per year by trafficking illegally caught salmon.'"

As of 2015, the *Lacey Act* has been applied to takings by a tribal member in violation of a different tribe's conservation code, but not to takings by a tribal member in violation of the same tribe's code.[44] In *Big Eagle*, a member of the Crow Creek Sioux Tribe, was charged in federal court with a *Lacey Act* violation for acquiring, possessing, transporting, and selling fish taken in violation of Lower Brulé tribal law. Big Eagle argued that the federal court had no subject matter jurisdiction to hear the case because the *Lacey Act* does not apply to Indians, but the court

held that the federal government can regulate fishing concurrently with the Indian tribes in the interest of conservation.

The court further held that the Lower Brulé Tribe, like all tribes, has the power to manage use of its territory and resources by both members and nonmembers and may regulate fishing by nonmembers of the tribe on tribal land. A tribe with authority to regulate fishing has the right to determine who may enter the reservation, define conditions upon which they may enter, prescribe rules of conduct, expel those who enter the reservation without proper authority, expel those who violate tribal, state, or federal laws, and refer those who violate state or federal laws to state or federal officials—even if that person is a member of a different tribe.

In *Brown*, tribal members from the Leech Lake and White Earth Bands of the Minnesota Chippewa Tribe took fish by gill net for commercial purposes; this taking violated their own tribe's conservation code, which "prohibits taking fish for commercial purposes within the reservation, except for non-game fish when authorized by a permit from the band's conservation committee."

They were prosecuted by the United States, but the government did not argue at trial that Congress abrogated Chippewa fishing rights through the *Lacey Act*. The *Lacey Act* itself does not abrogate rights[45]:

> "Nothing in this chapter shall be construed as … repealing, superseding, or modifying any right, privilege, or immunity granted, reserved, or established pursuant to treaty, statute, or executive order pertaining to any Indian tribe, band, or community."

The tribal members moved to dismiss the indictments, arguing that the government could not prosecute them because the right to fish on tribal waters under an 1837 treaty had not been abrogated.

Under *Dion*, there must be "clear evidence that Congress actually considered a conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" before treaty rights can be abrogated.[46] The court found that "although Congress may abrogate Indian treaty rights, it must make its intention to do so 'clear and plain.'"[47]

Without a showing by the government that Congress abrogated the rights asserted by the tribal members, the court held that the historic fishing rights of the tribe barred prosecution of tribal members from the same tribe for taking fish within the Leech Lake Reservation and selling them contrary to tribal conservation law. While there is dispute as to whether the *Lacey Act* applies to tribal members who violate their own tribe's conservation law, it is clear that it applies to members of other tribes.

Additionally, even though tribes have the power to exclude non-Indians from hunting or fishing on Indian lands under *Washington v. Washington State Commercial Passenger Fishing Vessel Association,*[48] the Supreme Court held that a tribe has no power to regulate non-Indian hunting and fishing on fee lands owned by non-Indians within the reservation in *Montana v. United States.*[49] In *Montana*, the Crow Tribe passed a resolution prohibiting hunting and fishing by non-Indians. The resolution applied to all lands within the reservation boundaries, including land owned in fee by non-Indians. The Supreme Court held that the extent of the tribe's power to regulate hunting or fishing by non-Indians extended only to lands belonging to the tribe or held in trust by the United States.

The federal trespass statute, *18 U.S.C. § 1165*, does not apply to fee lands within reservations. Fee lands are not considered to be within Indian Country. However, the *Lacey Act* amendments still apply to fee lands within reservations.[50] Nothing in the *Lacey Act* diminishes or increases the authority of a tribe or state "to regulate activities of persons within reservations," so existing authority held by the tribe or state on fee lands within reservations does not change under *16 U.S.C. § 3378 (c)(3).*

[1] See *Menominee Tribe v. United States*, 391 U.S. 404 (1968).
[2] 618 F.2d 665 (10th Cir. 1980).
[3] See *Menominee* at 404.
[4] See *U.S. v. Felter*, 752 F.2d 1505 (10th Cir. 1985).
[5] See *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987).
[6] *Jones v. Meehan*, 175 U.S. 1, 11 (1899). See e.g. *Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *United States v. Winans*, 198 U.S. 371 (1905); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 484 (1979).
[7] See *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970); See also *Winters v. United States*, 207 U.S. 564, 576 (1908).
[8] See *Choctaw Nation v. United States*, 318 U.S. 423, 431 (1943); See also *U. S. v. State of Minn.*, 466 F. Supp. 1382, 1385 (D. Minn. 1979) aff'd sub nom. *Red Lake Band of Chippewa Indians v. State of Minn.*, 614 F.2d 1161 (8th Cir. 1980).
[9] *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886).
[10] 198 U.S. 371 (1905).
[11] ART. III, 1859 TREATY BETWEEN THE UNITED STATES AND THE YAKIMA INDIAN NATION.
[12] *Winans*, at 381.
[13] Id.
[14] Id.
[15] Id. at 384.
[16] Id. at 381.
[17] See *Puyallup Tribe v. Department Of Game*, 391 U.S. 392, 398 (1968), infra.
[18] *Seufurt Bros. Co. v. United States*, 249 U.S. 194 (1919).
[19] 384 F. Supp 312 (W.D. Wash. 1974).
[20] See *Tulee v. Washington*, 315 U.S. 681 (1942).
[21] See *Whakiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir. 1981).
[22] See *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990).
[23] 493 F.2d 564 (9th Cir. 1974), cert denied, 419 U.S. 1019 (1974).
[24] 420 U.S. 194 (1975).

[25] 391 U.S. 392, 398 (1968).
[26] 414 U.S. 44 (1973).
[27] 433 U.S. 165 (1977).
[28] 462 U.S. 324 (1983).
[29] *Mescalero*, at 343-44.
[30] 420 U.S. 194 (1975).
[31] See *Lower Brule Sioux Tribe v. South Dakota*, 711 R.2d 809, (8th Cir.1983), cert. denied, 464 U.S. 1042 (1984).
[32] See e.g., *Montana*, supra; *Mescalero*, supra.
[33] See *United States v. Pollmen*, 364 F. Supp. 995 (D. Mont. 1973).
[34] *Pub.L 86-634, §2* (July 12, 1960), 74 Stat.469.
[35] 600 F.2d 1283 (9th Cir. 1979).
[36] 507 F.2d 231 (9th Cir. 1974).
[37] 531 F.2d 408 (9th Cir. 1976).
[38] 476 U.S. 734 (1986).
[39] *16 U.S.C. § 668(a).*
[40] *Andrus v. Allard*, 444 U.S. 51, 56 (1979).
[41] 667 F. Supp. 1485 (S.D. Fla.1987).
[42] 761 F. Supp. 658 (D. Minn. 1991).
[43] 770 F. 2d 816 (9th Cir. 1985), cert denied, 447 U.S. 906 (1986).
[44] See *United States v. Big Eagle*, 684 F. Supp. 241 (D. S.D. 1988), affirmed, *United States v. Big Eagle*, 881 F.2d 539, (8th Cir. 1989), reh'g denied, *Big Eagle v. United States*, 493 U.S. 1984 (1990), cert. denied.), Cf. *United States v. Brown*, 777 F.3d 1025, 1034 (8th Cir. 2015).
[45] *16 U.S.C. §3378(c)(2).*
[46] *Dion* at 740.
[47] *Brown* at 1034, quoting *Dion* at 738.
[48] 443 U.S. 658 (1979).
[49] 450 U.S. 544 (1981).
[50] See *16 U.S.C. § 3372(a)(3).*

Chapter Five

Indian Child Welfare Act

5.1 Purpose

From the allotment and assimilation periods in the 1880s, Federal policies related to Indian education and youth largely revolved around teaching English instead of tribal languages, encouraging individual rather than tribal identity, and adopting mainstream religion.[1]

To that end, state courts, child welfare agencies, and private adoption agencies worked to remove as many as 25 to 35 per cent of Indian children from their families and tribes in certain states by claiming that traditional Indian child-rearing practices were against the child's best interests. The result was a loss of language, a loss of cultural identity, and the loss of Indian family structures.

By 1978, Congress recognized the need to re-establish tribal authority over the adoption of American Indian children, strengthen families, and preserve traditional languages and cultures. As a result, the *Indian Child Welfare Act* (*ICWA*)[2] was passed to protect the integrity of Indian tribes and ensure their future by requiring that Indian children, once removed from their parents, be placed in homes that reflect their unique traditional values.

The overriding purpose of ICWA is the protection, preservation, and advancement of the integrity of Indian families. It expands and enhances tribal authority over decision-making, enables the preservation of tribal culture and identity by granting tribal courts either exclusive or concurrent jurisdiction over child custody and adoption matters involving an Indian child,[3] and recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.[4]

ICWA addresses proceedings regarding foster care placement, adoptions, pre-adoptive placements and termination of parental rights, but does not address custody disputes between parents arising out of divorce proceedings.

5.2 Text of ICWA

25 U.S.C. § 1901 Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting

Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1902 Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1903 Definitions

For the purposes of this Act [25 U.S.C. §§ 1901 et seq.], except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include--

> *(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon*

demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689) [43 U.S.C. § 1606];

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended [43 U.S.C. § 1602(c)];

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C. § 1911 Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction. An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes. The United States, every State, every

territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1912 **Pending court proceedings**

(a) Notice; time for commencement of proceedings; additional time for preparation. In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel. In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and

the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Examination of reports or other documents. Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures. Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child. No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child. No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1913 Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents. Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent. Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody. In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations. After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years

may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 U.S.C. § 1914 Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act [25 U.S.C. §§ 1911-1913].

25 U.S.C. § 1915 Placement of Indian children

(a) Adoptive placements; preferences. In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

(1) a member of the child's extended family;

(2) other members of the Indian child's tribe; or

(3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences. Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences. In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided that where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable. The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability. A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

25 U.S.C. §1916 Return of custody

(a) Petition; best interests of child. Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act [25 U.S.C. § 1912], that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure. Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act [25 U.S.C. §§ 1901 et seq.], except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

25 U.S.C. §1917 **Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court**

Tribal affiliation information and other information of protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

25 U.S.C. § 1918 Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary. Any Indian tribe which became subject to State jurisdiction pursuant to [Public Law 280] 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.

(b) Criteria applicable to consideration by Secretary; partial retrocession.

> *(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the 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 multitribal occupation of a single reservation or geographic area.*

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act [25 U.S.C. § 1911(a)] are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act [25 U.S.C. § 1911(b)], or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) [25 U.S.C. § 1911(a)] over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval. If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), 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.

(d) Pending actions or proceedings unaffected. Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act [25 U.S.C. § 1919].

25 U.S.C. § 1919 Agreements between States and Indian tribes

(a) Subject coverage. States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of

jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribe.

(b) Revocation; notice; actions or proceedings unaffected. Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

25 U.S.C. § 1920 **Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception**

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

25 U.S.C. § 1921 **Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child**

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title [25 U.S.C. §§ 1911-1923], the State or Federal court shall apply the State or Federal standard.

25 U.S.C. § 1922 **Emergency removal or placement of child; termination; appropriate action**

Nothing in this title [25 U.S.C. §§ 1911-1923] shall be construed to prevent the emergency removal of an Indian child who is a resident

of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this title [25 U.S.C. §§ 1911-1923], transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

5.3 Exclusive Jurisdiction, Full Faith and Credit

In *Public Law 280* states, state courts generally have jurisdiction.

The legislative history of *ICWA* supports the view that Congress intended *Public Law 280* states to retain jurisdiction over all child custody proceedings as defined in *ICWA* because tribes in Public Law 280 states can seek to reassume exclusive jurisdiction over child custody proceedings.

In passing *ICWA*, Congress recognized that *Public Law 280* states should retain, at least initially, jurisdiction over child dependency proceedings until the tribes had the capability to reassume exclusive jurisdiction.

In *Doe v. Mann,*[5] the Elem Indian Colony was located in a *Public Law 280* state but never petitioned for reassumption of jurisdiction over child custody proceedings. The court found that the explicit references to *Public Law 280* in *ICWA* demonstrated that Congress intended *Public Law 280* states to have jurisdiction over Indian child dependency proceedings until tribes resumed exclusive jurisdiction under *§1918*.

The court declined to hold that a *Public Law 280* state could not assert jurisdiction, and noted that the tribe could submit a petition to reassume jurisdiction and that Congress could recognize the tribal sovereignty interests through Congressional action.

In states other than *Public Law 280* states, tribal courts hold exclusive jurisdiction under *25 U.S.C. § 1911* over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe. In addition, the tribal court maintains exclusive jurisdiction over an Indian child who is a ward of the tribal court, regardless of the residence or domicile of the child.

The most critical step, therefore, is to determine that a child is an Indian child; otherwise *ICWA* does not apply. When a state court has reason to believe a child involved in a child-custody proceeding is an Indian, the court shall seek verification of the child's status either from the Bureau of Indian Affairs or the child's tribe.

The determination that a child either is or is not a member of that tribe or eligible for enrollment is conclusive. Absent a contrary determination by the child's alleged tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive. Circumstances under which a state court has reason to believe a child involved in a custody proceeding is an Indian include but are not limited to the following:

a. Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child;
b. Any public or state licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child;

c. The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child;
d. The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community; or
e. An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

A state court is required under *25 U.S.C. § 1911* to transfer a proceeding for foster care placement or termination of parental rights to an Indian child who is not domiciled within the reservation of such tribe, unless good cause is shown as to why the transfer should not take place.

Either of the parents, the tribe, or the child's Indian custodian may petition the State court for the transfer of jurisdiction to tribal court. Either parent may also object to the transfer to tribal court but must show "good cause" as to why the transfer to tribal court should not take place. The tribal court may also choose to decline jurisdiction over the case. This declination of jurisdiction would cause the case to remain in state court.

Finally, *ICWA* requires that the U.S. government, state governments and other Indian tribes give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings.

5.4 Leading ICWA Cases

As of 2015, the only Supreme Court case involving *ICWA* is *Mississippi Band of Choctaw Indians v. Holyfield.*[6] In *Holyfield*, A Choctaw woman, domiciled on the reservation, left the reservation to give birth to her twin, illegitimate children.

She and the father of her children, a Choctaw man, also domiciled on the reservation, signed consents in state chancery court allowing the adoption of the children by non-Indians.

The Choctaw tribe filed a motion to vacate the adoption of the twins, claiming that it had exclusive jurisdiction over the children's adoption under *ICWA*. The chancery court dismissed the motion and was affirmed by the state supreme court.

The case reached the U.S. Supreme Court, which held that because the children's parents were domiciled on the reservation, the children were domicilaries under *ICWA*. The fact that the parents left the reservation prior to the birth of the twins did not change the children's domicile. The Court found that both the parents and the appellant (the tribe) had an equal interest in the placement of the children.

Thus, the tribe had exclusive jurisdiction over the children's adoption. Tribal jurisdiction could not be defeated by the individual actions of tribal members. The Court found that *ICWA* is "based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the Tribe be protected."

The Court vacated the adoption decree finding that the twins were domiciled in the Choctaw reservation and therefore the Choctaw Tribal Court had exclusive jurisdiction over the matter. Once the Supreme Court had vacated the adoption decree, the matter was left to be decided in the Choctaw Tribal Court. The Choctaw Tribal Court allowed the Holyfields to keep custody of the twins.

In *Adoptive Couple v. Baby Girl*,[7] the Supreme Court held *ICWA* was not applicable to a non-custodial Indian father. As *Holyfield* is the only *ICWA* case decided by the Supreme Court, lower federal courts have defined many of ICWA's contours.

In *Sandman v. Dakota*,[8] an Indian mother's case for return of her children was dismissed for lack of jurisdiction where 5 children were taken from her custody by tribal social worker when she was arrested for assault and battery and adjudicated dependent by tribal judge. It was proper for the court to place the children with a maternal aunt and uncle, because *25 U.S.C. § 1911(a)* gives Indian tribes exclusive jurisdiction to determine custody of Indian children in child welfare situations such as proceeding that gave rise to this action.

In *Navajo Nation v. Norris*,[9] state court had concurrent jurisdiction with tribal court over Indian baby's adoption where birth parents were domiciled off-reservation and voluntarily repudiated application of both *Indian Child Welfare Act* and tribal court jurisdiction.

In *Norris*, the child's birth father was a full-blood member of the Navajo Nation and an enrolled member of the Navajo Nation. The child's mother was one-half Navajo and one-half Yakama, and an enrolled member of the Yakama Nation. They moved outside of the Yakama reservation onto non-tribal land, discovered they were expecting, and met with an adoption attorney. Prior to meeting with the adoption attorney, the parents were unaware of the existence of *ICWA*.

One day after the child was born, the parents transferred physical custody of the child to adoptive parents and executed custody documents that contained an objection to the application of *ICWA* and to tribal court jurisdiction.

The tribes attempted to invalidate the adoption under *ICWA*, but their suit was dismissed when the state court considered the provisions of *ICWA* and made a reasoned determination that the parents' off-reservation domicile conferred concurrent jurisdiction upon the state court; the Ninth Circuit found that the district court's dismissal of the tribe's did no harm to the dictates embodied in *ICWA*.

In *Native Village of Stevens v. Smith*,[10] a tribal counsel decision that it was in a minor child's best interest to remove the child from his home and place child under tribal custody must be given full faith and credit by the state under *25 U.S.C. § 1911(d).* For purposes of tribe's eligibility for federal foster care payments under *42 U.S.C. § 672(a)*, the child's removal was result of judicial determination.

5.5 Notice, Time, Invalidation (§§ 1912-1914)

ICWA requires that in any state court proceeding involving an Indian child, the party seeking the foster care, or placement thereof, shall give notice to the parent, or Indian custodian, and Indian tribe by registered mail of the pending proceedings and their right to intervene.

If the parent or Indian custodian is found to be indigent, the court shall appoint counsel for that party. The court also has the right to appoint counsel for the child upon a finding that doing so would be in the best interest of the child. Under *ICWA*, each party has a right to examine all reports or other documents associated with the pending action.

Remedial services and rehabilitative programs must have been actively pursued and proved unsuccessful before seeking adoption to prevent the breakup of the Indian family. Also, no foster care placement may take place without a determination—supported by clear and convincing evidence—that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Finally, no termination of parental rights may be ordered in the absence of a determination—supported by evidence beyond a reasonable doubt—that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

A parent or Indian custodian of a child may voluntarily consent to a foster care placement or a termination of parental rights. However, such consent shall not be valid unless it is executed in writing and recorded before a judge in a court that has jurisdiction over the matter.

The court must certify that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court must also certify that either the parent or the Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child is not valid.

The parent, Indian custodian or Indian tribe may petition the court to invalidate a prior placement or adoption. No adoption which has been effective for at least two years may be invalidated unless otherwise permitted under state law. The petition to invalidate an adoption may be based on any action under *25 U.S.C. §§ 1911-1913*.

In *M. v. H.*,[11] the court held that if a party wishes to defeat the biological parent's petition for return of custody, he or she must prove that such return is not in the child's best interest by showing (1) that remedial and rehabilitative programs designed to prevent the breakup of Indian family had been implemented without success; and (2) that such return of custody is likely to result in serious harm to the child. The serious harm element must be proved beyond reasonable doubt and must be established by testimony of qualified expert witnesses.

5.6 Order Of Preference (§§ 1915 -1916)

Any adoptive placement of an Indian child under state law must follow the preferences in §§ 1915 -1916: first placing the child

with a member of his or her extended family, then other members of the Indian child's tribe, and finally other Indian families.

Deviation from this order is only allowed upon a showing of good cause. However, the order of preference can be changed by resolution of the Indian child's tribe.

A biological parent or Indian custodian may petition the court for return of the child whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parents voluntarily consent to the termination of their parental rights to the child. The court is required to grant the petition unless there is a showing that such return of custody is not in the best interest of the child.

5.7 Notification At Eighteen (§§ 1917-1922)

An Indian individual who was the subject of an adoptive placement has the right under *§1917* to petition the court to learn the identity of his or her biological parents as well as their related tribal affiliation. The individual can petition the court for this information once he or she turns eighteen years of age. The court must provide the requested information to the individual. This notification requirement contrasts with that of adoptive non-Indian children. In general, non-Indian adoption records are kept confidential, even from the adopted child once he or she becomes an adult.

States and Indian tribes are authorized under *§1918* to enter into agreements regarding the custody, care and jurisdiction of Indian child-care cases. However, such agreements can be revoked by either party. Under *§1920*, state courts must relinquish jurisdiction of an Indian child in a custody proceeding if the petitioner to the court has improperly retained or obtained custody of the Indian child.

The only exception to this requirement is when the court finds that returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

Federal, state and tribal courts are required under *§1921* to apply the higher standard of protection for the rights of the parent or Indian custodian when dealing with the placement of an Indian child.

Any sovereign may remove an Indian child from his parents under *§1922* if the child is in imminent physical danger of harm. However, the removing sovereign must expeditiously initiate a child custody proceeding in order to take further action.

[1] See *Nizhone Meza, Indian Education: Maintaining Tribal Sovereignty Through Native American Culture and Language Preservation*, 2015 B.Y.U. Educ. & L.J. 353, 354 (2015).
[2] See *25 U.S.C. § 1901* et. seq.
[3] See *In re H.D.*, 343 Ill. App. 3d 483, 278 Ill. Dec. 194, 797 N.E.2d 1112 (4th Dist. 2003).
[4] See *Dwayne P. v. Superior Court*, 103 Cal. App. 4th 247, 126 Cal. Rptr. 2d 639 (4th Dist. 2002), review denied, (Jan. 15, 2003).
[5] 415 F.3d 1038 (9th Cir. 2005).
[6] 490 U.S. 30 (1989).
[7] 570 U.S. ___ (2013).
[8] 816 F Supp. 448 (W.D. Mich. 1992).
[9] 331 F.3d. 1041 (9th Cir.2003).
[10] 770 F2d 1486 (9th Cir. 1986) cert. den. 106 S Ct 1640 (1986).
[11] 651 P.2d 1170 (Alaska 1982), cert. den. 103 S. Ct. 1983 (1983).

Chapter Six

Juvenile Law

6.1 Early Juvenile Justice Models

At the onset of nineteenth-century American jurisprudence, juvenile justice was strongly influenced by the legal doctrine of *parens patriae* (a Latin term that means "parent of the country"). The *parens patriae* doctrine allowed the state to serve as the guardian (or parent) of juveniles. In line with their "parental" role, juvenile courts emphasized an informal, non-adversarial, and flexible approach to cases. Cases were treated as civil (noncriminal) actions, and the ultimate goal was to guide a juvenile offender toward life as a responsible, law-abiding adult.

Many of our modern juvenile law phrases – "delinquent" instead of "defendant," "detention" rather than "arrest," "adjudication" rather than "trial," "commitment" instead of "incarceration" – come from these early court efforts. Since the focus was on rehabilitation instead of confinement or punishment, there were few procedural rules that the courts were required to follow.

By 1925, nearly two-thirds of the states had adopted, in one form or another, a separate juvenile justice system that followed this model. In 1929, President Herbert Hoover established the Wickersham Commission for the purpose of investigating the

causes of criminal activity and to make recommendations for appropriate public policy in the wake of Prohibition.

The Commission reported that in the state system a “child offender is generally dealt with on a noncriminal basis and has been protected from prosecution and conviction for crime…[but the child offender] approaches the courts of the United States on the same footing as the adult. The concept of juvenile delinquency is unknown to the Federal Penal Code.”[1]

By 1931, federal attention was turned toward eliminating organized crime rather than prosecuting juvenile offenders. The Attorney General recommended that the Department of Justice be authorized to return juveniles charged with violating federal law to the juvenile authorities of their home state, with discretion to prosecute in capital cases and on areas of jurisdiction unique to the federal government (especially Indian Country).

Congress responded by passing the Federal Juvenile Delinquency Act of 1938. The 1938 Act, like its state counterparts, provided that a juvenile (defined as anyone under the age of eighteen) charged with violating federal law would be processed as a delinquent rather than tried as an adult criminal.

A juvenile found delinquent under the 1938 Act would either be placed on probation "for a period not exceeding his minority" or committed to the "custody of the Attorney General," who could subsequently place the youth in "any public or private agency or foster home for . . . custody, care, subsistence, education, and training."

6.2 Leading Cases on Juvenile Rights

Thirty years after the Act was passed, the United States Supreme Court heard a number of cases that would redefine proceedings

in the juvenile courts and bring juvenile proceedings more squarely in line with proceedings involving adult offenders.

In *Kent v. United States,*[2] a sixteen-year old with a past history of housebreaking and purse snatching was charged in the District of Columbia with housebreaking, robbery, and rape. The juvenile court had exclusive jurisdiction under the District of Columbia Code, and the Supreme Court previously held that "it is implicit in [the Juvenile Court] scheme that noncriminal treatment is to be the rule – and the adult criminal treatment the exception which must be governed by the particular factors of individual cases."[3] Given the serious nature of the charge, however, the juvenile was transferred to adult court without any hearing or other aspects of due process. He appealed, and the case was heard by the Supreme Court.

As to the lack of due process in *Kent*, the "courts have relied on the premise that [juvenile] proceedings are 'civil' in nature, and not criminal" as reasons not to afford juveniles the right to bail, to indictment by grand jury, to a speedy and public trial, to trial by jury, to immunity against self-incrimination, to confrontation of his accusers, and right to counsel.

The Supreme Court found in *Kent* that "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children" and held that "that the [transfer or waiver] hearing must measure up to the essentials of due process and fair treatment."

Shortly after *Kent* was decided, the Court decided *In re Gault.*[4] In *Gault*, a juvenile who had previously been on probation for a minor theft made an obscene phone call to his neighbor. The juvenile was arrested without notice to his parents, was held without arraignment, and was denied notice of the charges. He

was also not provided counsel or advised of his rights against self-incrimination.

Following his arrest, he was subjected to a formal hearing in which no witnesses appeared. The arresting officer testified before a judge that "said minor is under the age of eighteen years, and is in need of the protection of this Honorable Court, [and that] said minor is a delinquent minor," the judge committed Gault as a juvenile delinquent to the State Industrial School "for the period of his minority [that is, until 21], unless sooner discharged by due process of law."

As in *Kent*, the juvenile court at issue had virtually unlimited discretion, and did not afford the following basic rights that were available to adults: notice of the charges; right to counsel; right to confrontation and cross-examination; privilege against self-incrimination; right to a transcript of the proceedings; and right to appellate review.

If the juvenile was tried as an adult for the same crime, he would be subject to a fine of not less than $5 and not more than $50, or imprisonment for not more than two months – instead, he was sentenced to six years in a juvenile facility.

The Supreme Court reversed the juvenile's commitment, and held that when juvenile proceedings may result in confinement or incarceration there must be due process: constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults; that adequate written notice must be afforded to juveniles and to their parents or guardian; that juveniles have a right to be represented by counsel and, if they are unable to afford counsel, to have counsel appointed; and that juveniles must be afforded the rights of confrontation and sworn testimony of witnesses available for cross-examination.

The Supreme Court decided *In re Winship* shortly after.[5] Holding that the Due Process Clause of the Constitution required "the essentials of due process and fair treatment during the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult," the Court required charges that may result in a period of confinement to be proved beyond a reasonable doubt.

In re Winship followed an adjudicatory hearing conducted pursuant to a state juvenile court act. In *Winship*, a family court judge found that a 12-year-old boy had entered a locker and stolen $112 from a woman's pocketbook. The petition to the court that the juvenile was delinquent also alleged that the theft, "if done by an adult, would constitute the crime or crimes of Larceny."

The state judge acknowledged that the proof offered in the petition might not establish guilt beyond a reasonable doubt as required by the Fourteenth Amendment, but held that the state juvenile court act permitted a lesser burden of proof because "[a]ny determination at the conclusion of [an adjudicatory] hearing that a [juvenile] did an act or acts must be based on a preponderance of the evidence."

The juvenile was adjudicated as a delinquent and committed for a period of six years by the state judge. The Supreme Court reversed the commitment, noting "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*—notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination."

Note, however, that juveniles do not have a right to a jury trial. In *McKeiver v. Pennsylvania,*[6] the Supreme Court affirmed the Pennsylvania Supreme Court in a consolidated case. In the consolidated case – a case arising from two different incidents but decided together – a sixteen-year-old was charged with robbery, larceny, and receiving stolen goods (all felonies under Pennsylvania law) and a fifteen-year-old was charged with assault and battery on a police officer and conspiracy (misdemeanors under Pennsylvania law). Both juveniles requested a jury trial, were denied, and appealed to the Supreme Court of Pennsylvania to determine the question of "whether there is a constitutional right to a jury trial in juvenile court." The Pennsylvania Supreme Court held that there was no such right, and was affirmed by the United States Supreme Court. The applicable due process standard under *Gault* and *Winship* is fundamental fairness. As other adjudicative processes are fair without trial by jury, the Court concluded that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement.

Kent, *Gault*, and *Winship* demonstrated to Congress a need for closer alignment of policies and procedures in the District of Columbia, the several states, U.S. territories, possessions, and tribal governments; the result was a comprehensive juvenile justice statute.

6.3 Passage of the JJDPA

To improve outcomes for youth and address inconsistencies between the rights of adults and juveniles, Congress passed the *Juvenile Justice and Delinquency Prevention Act* (*JJDPA*) in 1974.

When originally passed, the *JJDPA* focused largely on preventing juvenile delinquency and on rehabilitating juvenile offenders. Subsequent revisions to the act added sanctions and

accountability measures to some existing federal grant programs, and new grant programs to the act's purview.

During the 1980s and 1990s, most states revised their juvenile justice systems to include more punitive measures and to allow juveniles to be tried as adults in more instances. In 1997, Congress created the *Juvenile Accountability Block Grant* (*JABG*), allowing the Attorney General to make grants to states and units of local government to strengthen their juvenile justice systems and foster accountability within their juvenile populations.

Through its reauthorizations in 1988 and most recently in 2002, the *JJDPA* has expanded into a federal-state partnership with funding set aside for Indian tribes and Congress has essentially followed the lead of the states to include a greater emphasis on punishing juveniles for their crimes.

This has marked a significant change in the philosophy of the juvenile justice system, both at the state level and at the federal level, from its original conception. Juvenile justice in general has thus moved away from emphasizing the rehabilitation of juveniles and toward a greater reliance on sanctioning them for their crimes.

With *JJDPA* providing federal funding for state and tribal juvenile justice programs, juvenile matters are often handled by state or tribal authorities whenever possible. The federal government has unique jurisdiction over crimes in Indian Country, however, and the most serious crimes committed on reservations tend to be prosecuted in federal court as a result.

6.4 Arrest Requirements under JJDPA

The requirements placed on federal law enforcement officers when arresting juveniles are outlined in the *Juvenile Justice and*

Delinquency Prevention Act. Specifically, *18 U.S.C. §5033* states:

> Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense. The juvenile shall be taken before a magistrate judge forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate judge.

There are special procedures that must be followed when arresting a juvenile:

• Immediately advise the juvenile of their *Miranda* rights in words that a juvenile can understand.

In *Miranda v. Arizona,*[7] the Supreme Court determined that "in order to combat [the pressures surrounding in-custody interrogations] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."

Whether a waiver is 'knowing and voluntary' is a question directed to a defendant's state of mind, which can be inferred from his actions and statements."[8] Further, as the Supreme Court has stated, "the question of waiver must be determined on 'the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.'"[9] The Court carefully scrutinizes whether a waiver is

made knowingly and voluntarily by a juvenile who "is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights."[10]

With this in mind, the court will look to the totality of the circumstances in determining whether the waiver is knowingly and voluntarily made.[11] If the juvenile understands and waives his *Miranda* rights, statements obtained lawfully and without delay in bringing the juvenile before the magistrate judge will be admissible in court.

• Immediately notify the nearest Assistant United States Attorney (AUSA) of the juvenile's arrest and the charge(s).

The requirements for arresting juveniles are numerous, therefore, whenever practical, an officer who intends or expects to arrest a juvenile should first make reasonable attempts to obtain the approval and guidance of the nearest Assistant United States Attorney (AUSA) before the arrest takes place. There are virtually no federally owned and operated pretrial or post-conviction juvenile bed spaces, therefore the AUSA needs notification of a pending arrest to arrange local contract juvenile bed space with the U.S. Marshal.

At an initial appearance before the magistrate, the juvenile will likely be released to his parents, guardians, custodians, or other responsible party upon the party's promise to ensure the juvenile's presence at court proceedings. Pretrial detention is sometimes ordered if the court determines that detention is required to secure the juvenile's timely appearance in court or to ensure his safety or the safety of others.[12]

A juvenile who is detained must be housed with similarly situated juvenile offenders until he or she is ordered transferred to adult status and reaches eighteen or, if prosecuted as a juvenile delinquent, until he or she reaches age twenty-one. Notifying the AUSA of the juvenile's arrest and the charge(s) will make the process of ensuring a juvenile is taken forthwith to a magistrate and that local contract juvenile bed space is available if the need for pretrial confinement arises.

• Immediately notify the parents or guardian of the juvenile's arrest, the charges, and the juvenile's legal rights under *Miranda*.

The statutory requirement of notification to parents is intended to furnish an additional safeguard to insure that the juvenile's basic right to due process is not violated[13] but does not automatically invalidate a waiver of *Miranda* rights. The presence of parents or counsel is not required for a confession to be valid, but requests by parents to communicate and confer with the juvenile before questioning should be honored by the police—even if the conference results in the juvenile declining to waive his rights.[14]

The failure to notify a juvenile's parents does not require a *per se* exclusion of the juvenile's confession; instead, "the admissibility of [the juvenile's] statements is still a function of whether they were knowingly and voluntarily made"[15] and is closely examined by the courts to see "whether the government's conduct was so egregious as to deprive [the juvenile] of his right to due process of law."[16]

• Take the juvenile forthwith before a United States magistrate judge.

The requirement of "forthwith" requires more speed than "without unnecessary delay," so that "a magistrate may explain and protect the juvenile's rights - among others, the right against compulsory self-incrimination and the right to the assistance of counsel."[17]

In *United States v. Binet,*[18] a juvenile was detained for four hours and was questioned before being brought to a magistrate to be arraigned. The juvenile made incriminating statements, which were suppressed by the court. Even though there was only a four-hour delay before the incriminating statements were made, the court held there was no possible investigatory motive for the questioning (such as establishing age or identity) and that both the delay and prearraignment questioning were solely for the purpose of obtaining a confession.

In *United States v. DeMarce,*[19] a juvenile was detained for eighty hours. Unlike *Binet*, the delay was apparently unintentional and was not for the purpose of seeking a confession. Even so, the juvenile made incriminating statements that were suppressed. In most cases, statements made as a result of questioning or interrogation before a magistrate may explain the right against compulsory self-incrimination and the right to the assistance of counsel to a juvenile will likely be suppressed.

• Do not make routine booking photos, fingerprints or media releases and do not release any information without a court order.

Routine booking photos and fingerprints of juveniles are not permitted under *18 U.S.C. § 5038(d)*, except when there is a specific investigatory need. The federal juvenile statutes provide for fingerprinting and photographing of juveniles only after a finding of guilt for certain types of drug and violent offenses.

As a result, routine booking photographs and fingerprints should not be taken upon arrest of a person known to be a juvenile unless they are required for investigative purposes (e.g., where the identity, age, or criminal record of the arrestee is not settled). Press releases and other publicity identifying the juvenile directly or indirectly are not permitted under *18 U.S.C. § 5038*, unless and until the juvenile is transferred by the court to adult status.[20]

A juvenile may be arrested on a warrant issued either on a complaint or a juvenile information. Where arrest is not needed, the court may be asked to issue a summons on the complaint or information. In either case, it is advisable to have the complaint and/or information placed under seal by the clerk's office to avoid public disclosure of the juvenile's identity.[21]

The government should not make public the name or the picture of any juvenile (or any reports, documents, fingerprints, and the like pertaining to them) without prior approval of the district court as required by *18 U.S.C. §§ 5031-5038*.

6.5 Jurisdiction in Juvenile Cases

The first inquiry into any case involving a juvenile is whether or not the court has jurisdiction to hear the matter. Original jurisdiction of a court is the power to hear a case for the first time, as opposed to appellate jurisdiction, when a court has the power to review a lower court's decision.

Recall the *JJDPA* itself is not a grant of original jurisdiction; it is a federal statute that in many cases allows the United States to surrender juvenile offenders to the appropriate legal authorities of such State even though the United States had original jurisdiction for the underlying offense.

Nearly every state legislature has extended original jurisdiction to state juvenile courts when a federal law has been violated,[22] thus juvenile offenders of federal criminal law are primarily the responsibility of state juvenile court authorities that have original jurisdiction based on state statute. Under *18 U.S.C. §5032*:

> Whenever any person under twenty-one years of age has been arrested, charged with the commission of an offense punishable in any court of the United States or of the District of Columbia, and, after investigation by the Department of Justice, it appears that such person has committed an offense or is a delinquent under the laws of any State or of the District of Columbia which can and will assume jurisdiction over such juvenile and will take him into custody and deal with him according to the laws of such State or of the District of Columbia, and that it will be to the best interest of the United States and of the juvenile offender, the United States attorney of the district in which such person has been arrested may forego his prosecution and surrender him as herein provided, unless such surrender is precluded under section 5032 of this title.

Congress intended to subject juveniles to jurisdiction of state court if: that state has jurisdiction over juveniles, will accept jurisdiction, and has available programs and services adequate for needs of juveniles.[23]

In some cases, states are unable or unwilling to assume jurisdiction, in which case the Attorney General must certify to the appropriate district court of the United States that any of the following conditions of *18 U.S.C. §5032* applies:

> (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction

over said juvenile with respect to such alleged act of juvenile delinquency;
(2) the State does not have available programs and services adequate for the needs of juveniles;

(3) the offense charged is a crime of violence that is a felony and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction;
(4) that the offense charged is a crime described in section 401 of the Controlled Substances Act (21 U.S.C. 841), and that there is a substantial Federal interest in the case or the offense to warrant exercise of Federal jurisdiction; or
(5) that the offense charged is a crime described in the Controlled Substances Import and Export Act *(21 U.S.C. 952(a), 953, 955, 959, 960(b)(1), (2), (3))*, or *18 U.S.C. § 922(x)*, or *18 U.S.C. §§ 924(b)*, *(g)*, or *(h)*, and that there is a substantial Federal interest in the case or the offense to warrant exercise of Federal jurisdiction.

Since the passage of the statute, the Attorney General's authority to make this certification has been redelegated to the United States Attorneys under *28 C.F.R. 0.57*. The certification procedure in *18 U.S.C. § 5032* encompasses recognition of general policy of federal abstention in juvenile proceedings; procedure was designed to insure that only where there is no jurisdiction except in federal court are federal courts to intrude into juvenile delinquency jurisprudence.[24]

Under the statute, if the United States Attorney does not certify that any of the listed circumstances apply, the juvenile shall be surrendered to the appropriate legal authorities of the state, the District of Columbia, or commonwealth, territory, or possession of the United States where the offense occurred. The definition of state in *18 U.S.C. §5032* does not include tribal governments,

however, and the United States Attorney is not required to consult with tribal authorities before certifying federal jurisdiction.[25]

6.6 Federal Jurisdiction

If a state is unable or unwilling to assume jurisdiction and the United States Attorney files a certification that one or more of the circumstances listed in *18 U.S.C. §5032* applies, the juvenile delinquent is not surrendered to the authorities of a state, the District of Columbia, or commonwealth, territory, or possession of the United States. Any further proceedings against the juvenile shall be in an appropriate district court of the United States provided that the juvenile is:

- under 21 years of age when the information is filed,
- alleged to have violated federal criminal law before reaching the age of 18.

The court may be convened at any time and place within the district, in chambers or otherwise, and the United States Attorney is required to proceed by information unless the case is any misdemeanor, other than a petty offense, in which consent to trial before a magistrate judge has been filed. In cases when a consent to trial has been filed, proceedings may be instituted against a juvenile by a violation notice or complaint, provided that the certification required by *§5032* has been filed in open court at the time of arraignment.

Juveniles may request in writing upon advice of counsel to be proceeded against as an adult because the *JJDPA* permits a juvenile to choose between being tried as adult with right to jury trial and as juvenile in delinquency proceeding with no jury; there is no constitutional right to jury trial in juvenile delinquency proceedings.[26]

If the certification has been filed, the juvenile has not requested in writing upon advice of counsel to be proceeded against as an adult, the courts will determine if the juvenile should be proceeded against as an adult.

6.7 Delinquency Proceedings

The juvenile delinquency proceeding itself proceeds essentially like a bench trial. Where detention may follow the proceeding, recall that juveniles have constitutional rights under the due process clause to adequate notice, to the assistance of counsel, to the privilege against self-incrimination, and to confront and cross-examine adverse witnesses.[27] The due process clause also requires proof beyond a reasonable doubt.[28] Juveniles do not have a constitutional right to a jury trial in juvenile court, and the federal statutes do not provide for one.[29]

The Federal Rules of Evidence appear to apply to juvenile delinquency proceedings.[30] The Rules of Criminal Procedure do not apply in any circumstance where their application is inconsistent with the juvenile statutes.[31] The entire proceeding is subject to the limitations set forth in *18 U.S.C. § 5038* on disclosure of the identity of the juvenile defendant and information about the juvenile proceedings. The usual methods of complying with these limitations include filing documents in the case under seal, using the juvenile's initials or "John Doe" to describe the juvenile in any pleadings, and conducting proceedings in a closed courtroom or in chambers.[32]

Upon an adjudication of delinquency, the judge has discretion to impose any of the conditions listed in *18 U.S.C. § 5037*, including restitution, probation (and conditions of probation), and official detention, but not fines. There is no supervised release for juvenile delinquents, therefore juveniles sentenced to official

detention are committed to the custody of the Attorney General and the Federal Bureau of Prisons designates a place of confinement.

Under *18 U.S.C. § 5039*, juveniles adjudicated delinquent who are under 21 may not be placed in an institution in which they have "regular contact" with adults convicted of crimes or awaiting trial on criminal charges. There are at present no long-term federal facilities for juveniles. The Bureau of Prisons ordinarily places juveniles in state juvenile or private facilities under contract, but where possible, juveniles are placed in foster homes or community-based facilities located in or near their home communities.

6.8 District Court Proceedings

Not all federal juvenile offenders commit violent offenses or have a history of responding unfavorably to interventions and preventive measures in the community, and so the court considers a number of factors before juveniles are tried as adults in district court.

Transfer to district court is mandatory when a juvenile who is alleged to have committed any of the following acts after his sixteenth birthday and has previously been found guilty of the same act or a comparable State felony:

- an offense described in *18 U.S.C. §32* (damage or destroy aircraft or aircraft facilities or commits violence on an aircraft), or;
- an offense described in *18 U.S.C. §81* (arson within maritime and territorial jurisdiction on navigation, shipping, naval stores), or;
- an offense described in *18 U.S.C. §844(d)* (receipt of explosives with knowledge or intent; use of explosives to

kill, injure, intimidate individual or damage or destroy property), or;

- an offense described in *18 U.S.C. §844(e)* (bomb threat/arson threat, whether real or false), or;
- an offense described in *18 U.S.C. §844(f)* (use of fire or explosive to damage or destroy U.S. property; injures any person, or kills any person), or;
- an offense described in *18 U.S.C. §844(h)* (use of any fire or explosive in any federal felony), or;
- an offense described in *18 U.S.C. §844(1)* (use of fire or explosive to damage or destroy property involved in interstate commerce; injures any person, or kills any person), or;
- an offense described in *18 U.S.C. §2275* (sets fire to foreign-flagged ship or U.S.-flagged ship engaged in international commerce), or;
- an offense described in *18 U.S.C. §2275* (contempt of court), or;
- a controlled substance or drug offense described in *21 U.S.C. §§ 952 (a)*, 955, 959, or 960, or;
- an offense which if committed by an adult would be a felony offense that has as an element thereof the use, attempted use, or threatened use of physical force against the person of another, or that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense.

Transfer is permissible when the following offenses are committed after a juvenile's fifteenth birthday:

- a felony that is a crime of violence;
- an explosives offense described in *21 U.S.C. §841*;
- a controlled substance or drug offense described in *21 U.S.C. §§ 952 (a)*, 955, 959;
- a youth handgun offense under *18 U.S.C. §922*(x); or

- a firearms offense described in *18 U.S.C. §§ 924 (b), (g),* or *(h)*.

Transfer is permissible when the following offenses are committed after a juvenile's thirteenth birthday and the juvenile is non-Indian or when the governing body of the tribe has elected to allow juvenile prosecutions in the appropriate district court of the United States instead of the tribal court:

- Murder in the first degree (*18 U.S.C. § 1111*);
- Murder in the second degree (*18 U.S.C. § 1111*);
- Attempt to commit murder or manslaughter;
- Assault with intent to commit murder or a violation of *18 U.S.C. § 2241* or *§ 2242* (109A sexual abuse felonies);
- Assault with intent to commit any other felony; or
- Assault with a dangerous weapon with intent to do bodily harm.

For Indian juveniles who have committed the above offenses after their thirteenth birthday, and are subject to the criminal jurisdiction of an Indian tribal government (meaning the tribe can assert criminal jurisdiction in tribal court for the offense), the governing body of the tribe must first elect to allow juvenile prosecutions in the appropriate district court of the United States instead of the tribal court.

This is not a "case-by-case" election; the governing body of the tribe must elect to allow all juvenile prosecutions to be heard appropriate district court of the United States instead of the tribal court, or it must elect to allow no juvenile prosecutions

Take note that the specific provisions of *18 U.S.C. § 5032* modify the general rule that the United States would prosecute "any Indian" for offenses listed in the Major Crimes Act under *18 U.S.C. § 1153* if committed in Indian Country:

- murder;
- manslaughter;
- kidnapping;
- maiming;
- felony under Chapter 109A (sex crimes);
- incest;
- felony assault under *18 U.S.C. §113* (including crimes of domestic violence);
- assault against an individual who has not attained the age of 16 years;
- felony child abuse or neglect;
- arson;
- burglary;
- robbery; or
- felony under *18 U.S.C. §661* (larceny over $1,000).

If a juvenile commits an offense other than those specifically listed in *18 U.S.C. §5032* that may result in mandatory or permissive transfer, courts weigh six additional factors when assessing whether transfer of a qualified juvenile to adult status is in the interest of justice:

(1) age and social background of the juvenile;
(2) nature of the alleged offense;
(3) extent and nature of the juvenile's prior delinquency record;
(4) juvenile's present intellectual development and psychological maturity;
(5) nature of past treatment efforts and the juvenile's response to such efforts; and
(6) the availability of programs designed to treat the juvenile's behavioral problems.

As part of the nature of the alleged offense, the court is also required to consider the extent to which the juvenile played a

leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor does not preclude a transfer.

To ensure that the extent and nature of a juvenile's prior delinquency record is considered, prior juvenile court records of such juvenile must be received by the court, or the clerk of the juvenile court must certify in writing that the juvenile has no prior record, or must certify that the juvenile's record is unavailable and provide the reason for its unavailability before any finding of delinquency or before a transfer to adult prosecution. The district court may use its discretion to weigh all factors listed under *§5032* in any way that seems appropriate, and may weigh the seriousness of an offense more heavily than the other criteria.[33]

If a transfer motion for adult prosecution is granted, the AUSA must either seek to indict the juvenile, or supersede the pending indictment of the juvenile's adult codefendants and treat the juvenile as an adult defendant for all trial and sentencing purposes. If the U.S. Attorney's Office proceeds with a juvenile adjudication, it will proceed as a speedy closed trial that follows nearly all the same rules as a criminal prosecution. The proceeding is conducted before a district court judge, since a magistrate cannot impose jail time on a juvenile under *18 U.S.C. § 3401(g)*.

Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency is barred.

Whenever a juvenile transferred to district court is not convicted of the crime upon which the transfer was based or another crime which would have warranted transfer had the juvenile been initially charged with that crime, further proceedings concerning the juvenile are conducted pursuant to the provisions of *18 U.S.C. §§ 5031 et seq.*

[1] 2 REPORT ON THE CHILD OFFENDER IN THE FEDERAL SYSTEM OF JUSTICE (1931).
[2] 383 U.S. 541 (1966)
[3] *Harling v. United States*, 111 U.S. App. D.C. 174, 177-178 (1961).
[4] 387 U.S. 1 (1967).
[5] 397 U.S. 358 (1970).
[6] 403 U.S. 528 (1971).
[7] 384 U.S. 436 (1966); see also *Legal Division Handbook 2015* at 12.1.
[8] *United States v. Spencer*, 995 F.2d 10, 11 (2d Cir. 1993).
[9] *North Carolina v. Butler*, 441 U.S. 369, 374-75, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)(quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)).
[10] *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).
[11] See *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979); see also *United States v. Burrous*, 147 F.3d 111, 116 (2d Cir. 1998) ("In the case of interrogation of a juvenile, we examine the totality of the circumstances culminating in the waiver."
[12] See *18 U.S.C. § 5034*.
[13] See *United States v. White Bear*, 668 F.2d 409, 412 (8th Cir. N.D. 1982).
[14] See *United States v. Doe*, 219 F.3d 1009, 1017 (9th Cir. 2000).
[15] *United States v. Doe*, 226 F.3d 672, 679 (6th Cir. 2000).
[16] *United States v. Juvenile Male*, 595 F.3d 885, 902 (9th Cir. 2010), quoting *United States v. D.L.*, 453 F.3d 1115, 1120 (9th Cir. 2006), internal quotation marks omitted.
[17] *United States v. Glover*, 372 F.2d 43, 46 (2d Cir. 1967).
[18] 442 F.2d 296 (2d Cir. 1971).
[19] 513 F.2d 755 (8th Cir. 1975).
[20] See *United States v. A.D.*, 28 F.3d 1353 (3rd Cir. 1994)(publicity limitations discussed).
[21] See *Horn v. Madison County*, 22 F.3d 653 (6th Cir. 1994) (discussing personal liability if violation of juvenile defendant's rights was proximate cause of injury).

[22] See *Ala. Code §12-15-1* ("When used in this chapter, the following words and phrases shall have the following meanings . . . Delinquent Act. An act committed by a child that is designated a violation, misdemeanor, or felony offense under the law of this state . . . or under federal law . . . ."); see also *Ariz.Rev.Stat.Ann. §8-201*; *Cal.Wel.& Inst. Code §602*; *Colo.Rev.Stat. §19-2-104*; *Conn.Gen.Stat.Ann. §46b-120*; *Del.Code Ann. tit.10, §1009*; *Fla. Stat.Ann. §985.03*; *Ga.Code Ann. §15-11-2*; *Hawaii Rev.Stat. §571-11*; *Idaho Code §20-505*; *Ill.Comp.Stat.Ann. ch.705 §405/5-105*; *Iowa Code §232.2*; *La.Child.Code art. 804*; *Mich.Comp.Laws Ann. §712A.2*; *Minn.Stat.Ann. §260B.007*; *Miss.Code §43-21-105*; *N.D. Cent Code §27-20-02*; *Ohio Rev. Code §2152.02*; *Okla.Stat.Ann. tit.10 §7301-1.3*; *Ore.Rev. Stat. §419C.005*; *Pa.Stat.Ann. tit.42 §6302*; *R.I.Gen.Laws §14-1-3*; *S.D.Cod.Laws §26-8C-2*; *Tenn. Code Ann. §37-1-102*; *Tex.Fam.Code Ann. §51.03*; *Utah Code Ann. §78-3a-104*; *Vt.Stat.Ann. tit.33 §5502*; *Va. Code §16.1-228*; *Wash.Rev.Code Ann. §13.40.020; Wis.Stat. Ann. §938.02*.

[23] See *State in Interest of S.*, 349 A2d 105 (1975).

[24] See *United States v Juvenile*, 599 F. Supp. 1126 (1984, D. Or.).

[25] See *United States v. Hayes*, 590 F.2d 309, 310 (9th Cir. Cal. 1979).

[26] See *United States v C.L.O.* 77 F3d 1075 (8th Cir., 1996); see also *McKeiver*, infra.

[27] See *Gault*, infra.

[28] See *Winship*, infra.

[29] See *McKeiver*, infra.

[30] See *Fed. R. Evid. 1101.*

[31] See *Fed. R. Crim. P. 54(b)(5).*

[32] See generally, *United States v. A.D.*, 28 F.3d 1353 (3d Cir. 1994).

[33] See *United States v. Nelson*, 68 F.3d 583, 588-590 (2d Cir. 1995).

Chapter Seven

Chapter 109A Felonies

7.1 Sex Crimes are Major Crimes

Children in Indian Country are vulnerable to physical and sexual abuse. Finding that incidents of child abuse on reservations are grossly underreported, Congress mandated reporting of actual or suspected child abuse occurring in Indian Country and allows for criminal prosecution when reports are not made as required

by law. Congress also included certain sexually-motivated felonies among the offenses enumerated in the *Major Crimes Act*.

These "Chapter 109A felonies" consist of five categories of federal sexual offenses in *The Sexual Abuse Act*, passed in 1986, revised in 1996 and codified in *18 U.S.C. §§ 2241* through *2248*. The 1996 revisions:

- Reformed and modernized federal law regarding rape and other sexual offenses;
- Defined offenses in gender neutral terms;
- Defined offenses in a way that focuses on the defendant's conduct;
- Expanded the offenses to reach all forms of sexual abuse;
- Abandoned the doctrines of resistance and spousal immunity; and
- Expanded federal jurisdiction to include federal prisons.

The crimes included in the *Act* are:

- Aggravated Sexual Abuse (requires act);
- Sexual Abuse (requires act);
- Sexual Abuse of a Minor (requires act);
- Sexual Abuse of a Ward (requires act); and
- Abusive Sexual Contact (requires contact, not act).

As a result, if any of the federal sexual abuse offenses are committed by an Indian in Indian Country, the federal courts have jurisdiction over such offenders and prosecution would be through the appropriate United States Attorney's Office.

Likewise, if a non-Indian commits one of these offenses against an Indian in Indian Country, the offender can be prosecuted under the Indian Country Crimes Act, *18 U.S.C. §1152*.

Incest is one of the enumerated felonies under the *Major Crimes Act.*[1] Generally speaking, the crime of incest involves sexual intercourse between members of a family, or those among whom marriage would be illegal because of blood relations. This crime is not defined by federal law, but is instead defined by assimilating the incest statute of the state where the crime was committed. In a federal prosecution for incest, the elements of the state statute must be proven beyond a reasonable doubt.

Example: Weddell Anderson is a member of the Running Bull Tribe and he lives on the Running Bull Reservation, which is located in the State of New Mexico. For the past three years, Anderson and his adult niece, who also lives on the reservation, have had an incestuous relationship. If Anderson and his niece are indicted for the crime of incest, the United States will prosecute them under the State of New Mexico's incest statute.

7.2 Distinguishing Acts and Contacts

To understand the differences among the various Chapter 109A felonies, it is vital to know the difference between a sexual act and a sexual contact. Conduct defined as a sexual act is treated much more seriously than conduct that includes only sexual contact.

Thus, the law enforcement officer must become familiar with the types of sexual acts, as well as what constitutes a sexual contact. It is also of critical importance that law enforcement officers, prosecutors, and investigators help social workers, health care professionals, and others involved in the process understand the legal meaning of "penetration" under federal law in these cases.

A common misconception is that "penetration" involves an actual intrusion, however slight, into the interior of the vagina or the rectum. This is not required, as discussed below. Incorrect use

of terms can mean the difference, in some instances, between declining a case for lack of resources (if it is believed not to involve penetration) and sending an offender to prison for a substantial number of years (if the matter is accepted and penetration is proved at trial).

7.3 Sexual Acts

There are four ways in which sexual acts, as defined in *§2246(2)*, are committed.

The first way in which a sexual act may be committed is through contact between the penis and the vulva, or contact between the penis and the anus. *Section 2246(2)(A)* defines one form of sexual act: "contact between the penis and the vulva or the penis and the anus." It specifically states that "contact involving the penis occurs upon penetration, however slight." So, if the penis "penetrates" either the vulva or the anus, the defendant has engaged in the sexual act.

The anatomical terms used are "vulva" and "anus," not "vagina" and "rectum." The "vulva" is commonly held to mean the external genital organs of the female, including specifically the labia majora. Similarly, the "anus" is the tissue that constitutes the opening of the rectum, which includes the outer surface of the tissue.

Consequently, "penetration" need not involve insertion of the penis into the vagina or rectum. Rubbing the penis against the vaginal opening between the labia majora constitutes a sexual act, as does pushing the penis up against the anus and penetrating the external opening to any degree.

Because penetration can be slight and involve the outer layers of the vulva or rectum, physical injury or trauma to the victim may

not be present even when a defendant confesses to act involving penetration.

The second way in which a sexual act may be committed is through oral sexual acts, defined in *Section 2246(2)(B)* as involving contact between the mouth and the penis, between the mouth and the vulva, or between the mouth and the anus.

No penetration is required, and the definitions are such that oral contact with the external surfaces of the penis, vulva, or anus would fall within the definition of the sexual act.

The third way in which a sexual act may be committed is defined in *Section 2246(2)(C)* as digital penetration or penetration by any object "however slight, of the anal or genital opening of another by a hand or finger, or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

There are four key points to remember in cases involving digital penetration or penetration by an object.

First, this type of sexual act always requires that the prohibited act be done with the specified unlawful intent, that is, with "intent to abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person."

Second, it need not be the defendant whose sexual desires are intended to be aroused or gratified.

Third, the anatomical terms change from "vulva" and "anus" to "genital opening" and "anal opening." Without definitions of those terms, it is still possible to argue that "penetration" includes penetration of the outer labia or the outer surface of the anal tissue.

Fourth, penetration through clothing is sufficient to support a prosecution under this statute.[2]

The fourth way in which a sexual act may be committed is through the direct touching of child's genitalia. *Section 2246(2)(D)* defines this sexual act as "the intentional touching, not through the clothing, of the genitalia of another person who has not reached the age of 16."

As with digital penetration or penetration by an object, the statute requires the intent to abuse, humiliate, harass, degrade, arouse, or gratify the sexual desire of any person. Touching is not restricted to touching with the defendant's hands or fingers, and the victim's full "genitalia" as defined by statute are included but since "genitalia" commonly means one's reproductive organs, it does not include the victim's anus, buttocks, groin, inner thighs, or breasts.

Sexual acts are required in any prosecution for aggravated sexual abuse, sexual abuse, or sexual abuse of a ward or minor.

7.4 Sexual Contact

"Sexual contact" is distinguished from a "sexual act" in Chapter 109A. "Sexual contact" is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

Clothing has been expanded by the courts beyond wearing apparel, and includes items such as blankets.[3] The requisite intent is the same as that required under *§2246(2)(C)* and *(D)* for digital penetration and direct genital touching: "with an intent to

abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

Note that there is no age restriction and depending on the way that the contact was achieved, it can be:

1) Aggravated abusive sexual contact
• By force or fear/threat;
• By rendering the victim incapable of refusing;
• With children under 12 years of age; or
• With children between 12 and 16 years of age through force or threats.

2) Abusive sexual contact
• By threats or fear (fear other than the high degree of fear associated with an aggravated sexual contact); or
• Sexual contact of a person unable to consent.

7.5 Aggravated Sexual Abuse

Aggravated sexual abuse is defined in *18 U.S.C. §2241.* It is the most serious of the federal sexual abuse statutes, and always involves a sexual act rather than sexual contact:

(a) By force or threat.-Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal Prison, knowingly causes another person to engage in a sexual act

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death serious bodily injury, or kidnapping; or

attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By other means.- Whoever, in the special maritime and territorial jurisdiction of the United States, or in a Federal prison, knowingly-

(1) renders another person unconscious and thereby engages in a sexual act with that person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby-

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children.- Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years 9 and is at least 4 years younger than that person), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

If the defendant has previously been convicted of another Federal offense under this subjection, or of a State offense that would have

been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of mind proof requirement.- In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

Attempts to commit aggravated sexual abuse also constitute in themselves aggravated sexual abuse. That the defendant and the victim are married is not a defense, so committing these acts upon one's spouse is criminal.

7.5.1 Aggravated Sexual Abuse Factors

Engaging in a sexual act under the following five circumstances is aggravated sexual abuse: (1) by force; (2) by threat or placing the victim in fear that any person will be killed, kidnapped, or subjected to serious bodily injury; (3) by knowingly rendering the victim unconscious by knowingly administering drugs or intoxicants; (4) without the victim's knowledge or permission; or (5) with children under 12 or with children between 12 and 16 when more than a four year age difference exists between the defendant and the victim.

7.5.2 By Force or by Threat of Force

Aggravated sexual abuse may occur when the defendant knowingly causes another person to engage in a sexual act by either using force against the victim, or threatening or placing the victim in fear that someone will be killed, kidnapped, or subject to serious bodily injury. "Knowingly" means that the defendant is aware of the act and does not act through ignorance, mistake or accident. The defendant need not know that his or her acts are unlawful.

The force requirement may be satisfied by showing either: the use or threatened use of a weapon, sufficient force to overcome, restrain, or to injure a person; or the use of a threat or harm sufficient to coerce or compel the submission of the victim.

Various court decisions have found the following evidence of force sufficient: restraint is sufficient to satisfy the force element if the victim cannot escape from the sexual act and no evidence of trauma is required;[4] use of force was appropriately found where the defendant slapped and choked his victim;[5] evidence that included defendant pushing victim to the floor and victim stating that defendant was stronger and that he hurt her established the force element.[6]

In *United States v. Lauck*,[7] the defendant walked alongside the victim, put his arm around her and held her to stop her from walking, backed her into a corner, and held her there for several minutes while fondling and groping the victim. The defendant unsuccessfully argued that no "significantly violent" actions or threats took place; the court held that under *18 U.S.C. §2244* the force used to make the contact does not have to be part of the sexual contact itself.

7.5.3 Rendering the Victim Incapable of Refusing

When the defendant knowingly makes the victim incapable of refusing to engage in a sexual act and "thereby" engages in the sexual act with the victim, the defendant has committed aggravated sexual abuse. Deliberately causing a person to be unable to assert his or her will is legally as reprehensible as overcoming the victim's will with force or threats. The victim can be rendered incapable of refusing consent under the statute in two ways:

- Knowingly rendering the victim unconscious, "thereby" engaging in a sexual act with the unconscious victim; or

• Knowingly administering a drug, intoxicant, or other similar substance to the victim by force or threat of force, or without the victim's knowledge or permission, "thereby" substantially impairing the victim's ability "to appraise or control conduct" and engages in a sexual act with the impaired victim.

Example: If the defendant cuts off the victim's oxygen through strangulation until s/he passes out, then commits a sexual act with the victim, the defendant has committed aggravated sexual abuse.

Example: If the defendant forcibly administers an intoxicant ("date rape" drug) by holding the victim's throat and pouring liquid into the victim's mouth and the victim becomes intoxicated to a degree that prevents awareness or refusal, the defendant has committed aggravated sexual abuse.

Example: If the defendant administers an intoxicant ("date rape" drug) without the victim's knowledge and the victim becomes intoxicated to a degree that prevents awareness or refusal, the defendant has committed aggravated sexual abuse.

7.5.4 With Children Under 12

It is aggravated sexual abuse under *18 U.S.C. §2241(c)* for a defendant to knowingly engage, or knowingly attempt to engage, in a sexual act with a child under the age of 12 years. This offense does not require the use of threats or force, or the administration of a drug or alcohol or similar substances. This offense does not require that the defendant know the child is less than 12 years old. Thus, there is strict liability as to the age of the child element under *18 U.S.C. §2241 (d)*.

Unlike the case with statutory rape of a child between 12 and 16, which is contained in *§2243(a)* and discussed below, the age of the defendant does not matter in a prosecution for aggravated sexual abuse with a child under the age of 12. A seven-year-old

boy could be proceeded against as a juvenile offender for engaging in a sexual act with an 11-year-old girl; the 11-year-old girl could also be proceeded against as a juvenile offender for engaging in a sexual act with the seven-year-old boy.

In one of the 1996 revisions, Congress added a definition to *§2241 (c)*, making it a separate offense to cross a state line with the intent to engage in a sexual act with a child under 12.

This crime is not specific to Indian Country and does not include crossing into or out of Indian Country with the required intent. Therefore, a defendant could be charged when crossing from one state to another with intent to sexually abuse a child under 12 in Indian Country, even if the suspect was stopped before he was able to initiate or complete the act.

After the revisions, *§2241(c)* also includes crime of committing sexual abuse "under the circumstances described in subsection (a) and (b)" with victims between 12 and 16. This crime consists of a person, at least four years older than the victim, who knowingly causes a child between the ages of 12 and 16 to engage in a sexual act to engage in a sexual act:

- by force or threat;
- by rendering the victim unconscious;
- by administering drugs or intoxicants through force or threats; or
- without the child's knowledge or permission.

While aggravated sexual abuse through use of force or threats, or by rendering the victim unconscious or incapable of refusing consent, was already a criminal offense regardless of the victim's age, the penalty for this crime is greatly enhanced for second offenders. Under this statute, second offenders now face a mandatory term of life imprisonment for sexual abuse.

7.6 Sexual Abuse

Sexual abuse is defined in *18 U.S.C. §2242*, and always involves a sexual act, rather than sexual contact:

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly-

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious body injury, or kidnapping); or

(2) engages in a sexual act with another person if that person is-
(A) incapable of appraising the nature of the conduct; or
(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

One type of sexual abuse occurs when the defendant knowingly causes another person to engage in a sexual act by threatening or placing the victim in fear (other than the high degree of fear specified in *§2241* (a)(2) that someone will be killed, kidnapped, or subjected to serious bodily injury).

Under this statute, the requirement of threats or placing the victim in fear may be satisfied by showing that the threat or intimidation created apprehension or fear of harm to self or others in the victim's mind.

7.6.1 Degree of Fear in Sexual Abuse Cases

The degree of fear for purposes of establishing Sexual Abuse is a lesser degree of fear than required for Aggravated Sexual Abuse:

• Sexual Abuse fear is apprehension or fear of harm to self or others; and
• Aggravated Sexual Abuse fear is fear that someone will be killed, kidnapped, or subjected to serious bodily injury.

The definition of "fear" for purposes of Sexual Abuse is very broad. The defendant's actions can implicitly put the victim in fear of bodily harm. For a child, an older person creates substantial risk that physical force will be used, so the jury can infer, simply from the nature of the circumstances, that the child was put in fear by the parent's attempts to perform a sexual act.

The following three examples illustrate the element of fear in different contexts:

• The element of fear can be established where the defendant, a self-proclaimed spiritual leader and live-in boyfriend of victim's mother, selected the victim as his assistant in conducting religious ceremonies and convinced the victim that she would be rejected by the spirits if she did not comply with his sexual dictates. The victimization lasted for seven years, between the ages of 14 to 21. The defendant also completely dominated the victim's life by choosing her clothing, isolating her from family and friends, and slapping her;

• The evidence was sufficient to show that the victim, a 13-year-old, was placed in fear because the defendant's conduct at least implicitly made her afraid of at least some bodily harm; and

• The fear element was satisfied in an indictment when the government alleged that the victim's father was a strict disciplinarian, and asked his daughter to take nap with him in order to have sex. The court rejected the defendant's argument that *§2242(1)* requires fear on the date and time in question.

Court held that a strong disciplinarian parent may create a general fear in the child sufficient to sustain a conviction under *§2242(1)*.

7.6.2 Inability to Consent

It is sexual abuse under *§2242(2)* if a defendant engages in a sexual act with a victim who is either:

(A) Incapable of appraising the nature of the conduct; or

(B) Physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

It is sexual abuse under *§2242(2)* if a defendant engages in a sexual act with a victim who is either:

(A) Incapable of appraising the nature of the conduct; or

(B) Physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

If the defendant happens across a victim who is already impaired and cannot refuse, and then takes advantage of the circumstance, the crime is sexual abuse. The sexual abuse statute is commonly used to prosecute in circumstances where the victim knowingly and voluntarily became intoxicated (usually through alcohol or marijuana).

Example: The victim was incapable of declining participation in a sexual act where, on the night of abuse, the victim drank eight beers and smoked a marijuana cigarette before she went to sleep; the victim vaguely remembered her clothes being pulled off and she awakened when she realized the defendant was on top of her performing a sexual act.[8]

7.7 Sexual Abuse of Minor or Ward

Sexual abuse of a minor or ward is defined in *18 U.S.C. §2243*, always involves a minor or ward, and always involves a sexual act rather than sexual contact. As with aggravated sexual abuse and sexual abuse, attempts are included within the definition of the crime. Attempts to commit sexual abuse of a minor are in themselves sexual abuse of a minor. Attempts to commit sexual abuse of a ward are in themselves sexual abuse of a ward.

The statute reads as follows:

Sexual abuse of a minor or ward of a minor:

(a) Of a minor.-Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who – has attained the age of 12 years but has not attained the age of 16 years; and is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Of a ward. – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is – in official detention; and under the supervisory, or disciplinary authority of the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than fifteen years, or both.

(c) Defenses. – In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence that the defendant reasonably believed that the other person has attained the age of 16 years.

In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of mind proof requirement. – In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew – the age of the other person engaging in the sexual act; or (2) that the requisite age difference existed between the persons so engaging.

7.7.1 Sexual Abuse of a Minor

Sexual abuse of a minor under *18 U.S.C. §2243(a)* is the federal version of many states' statutory rape law. The offense consists of engaging in a sexual act with a person between the ages of 12 and 16 or crossing a state line with the intent to engage in a sexual act with a person between the ages of 12 and 16. Consent is never a defense to sexual abuse of a minor; sexual abuse of a minor is a felony.

If the victim is less than 12 years old, an offense has been committed, no matter what the age of the defendant.

If the victim is between the ages of 12 and 16 years old, the age of the defendant is relevant. The defendant must be at least four years older than the victim to constitute the offense. The Government does not have to prove that the defendant knew how old the victim was and the Government does not have to prove that defendant knew there was a four year age difference between them. If the defendant is less than four years older than the victim, there is no offense.

If the victim was at least 16 years of age at the time of the offense, the defendant's reasonable belief that the victim of statutory rape

was at least 16 may be offered as a defense and the court may allow witnesses to relate their opinions as to how old the victim looked on the night in question.[9] Being married to the victim at the time of the offense is also a valid defense.

7.7.2 Sexual Abuse of a Ward

Sexual abuse of a ward is defined by *18 U.S.C. §2243(b)* and consists of engaging in a sexual at with a person who is in "official detention" and "under the custodial, supervisory, or disciplinary authority" of the defendant at the time of the act. There is no age requirement, but marriage is a defense. There is no requirement that force or threats be used to constitute the crime.

"Official detention" is defined at *18 U.S.C. §2246(5)* and includes: being detained by, or at the direction of, a federal officer or employee after charge, arrest, conviction, or adjudication of juvenile delinquency; or being in the custody of, or in someone's custody at the direction of, a federal officer or employee for purposes incident to the detention, such as transportation, medical services, court appearances, work, and recreation. Official detention specifically does not include persons released on bail, probation, or parole.

7.8 Abusive Sexual Contact - Generally

Abusive sexual contact is the fourth category of sexual offenses in Chapter 109A. There are various felony alternatives for sexual contact under *18 U.S.C. §2244*, which track the sexual act statutes under *18 U.S.C. §§2241-2243*.

The various types of abusive sexual contact parallel the elements of aggravated sexual abuse, sexual abuse, and sexual abuse of a minor or sexual abuse of a ward, except that they involve sexual contacts rather than sexual acts:

Abusive sexual contact

Sexual conduct in circumstances where sexual acts are punished by this chapter. -

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if to do so would violate – section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both; -section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;-subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or- *subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than six months, or both.*

In other circumstances. - Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than six months, or both.

The various types of abusive sexual contacts parallel the elements of aggravated sexual abuse, sexual abuse, and sexual abuse of a minor or ward, except that they involve sexual contacts, rather than sexual acts. The offenses under Section 2244 (a) include: aggravated abusive sexual contact: This crime consists of knowingly engaging in or causing a sexual contact with another person if to do so would violate § 2241 had the sexual contact been a sexual act. The types of aggravated sexual contact are summarized below:

Aggravated Abusive Sexual Contact

By force of threat. Whoever knowingly engages in or causes sexual contact with another person-

(a) by using force against that other person; Or

(b) by threatening or placing that other person in fear that any person will be subjected to death; serious bodily injury, or kidnapping has committed aggravated abusive sexual contact.

Example: A defendant, brandishing a knife, says to a 14 year old, "If you tell your parents what I am doing to you, I will kill them." He then proceeds to intentionally touch the child's genitalia through the clothing and has the requisite intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. This constitutes an aggravated abusive sexual contact.

Under this statute, aggravated abusive sexual contact is a felony which carries a maximum penalty of ten years, unless death results, then the maximum penalty is death or imprisonment for any term or years or for life. However, if the offense was committed against a child under the age of 12, the maximum penalty shall be doubled.

Knowingly engaging in or causing a sexual contact with another person if to do so would violate *18 U.S.C §2242* had the sexual contact been a sexual act. Abusive sexual contact is summarized below:

(a). By threats or fear. Whoever knowingly engages in or causes sexual contact with another person by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, OR

(b). Sexual contact of a person unable to consent. Whoever knowingly engages in or causes sexual contact with another person-

(1). If that person is incapable of appraising the nature of the conduct, or

(2). If that person is physically incapable of declining participation in or communicating unwillingness to engage in the sexual contact has committed abusive sexual contact.

7.8.1 Abusive Sexual Contact - Minor

Any person who knowingly engages in or causes a sexual contact with another person commits abusive sexual contact of a minor, if to do so would violate *§2243(a)* had the sexual contact been a sexual act. Abusive sexual contact of a minor is summarized below:

(a). Whoever knowingly engages in or causes sexual contact with another person-

(1). Who is between the ages of 12 and 16, or;

(2). Crosses a state line with the intent to engage in a sexual contact with a person between the ages of 12 and 16, and;

(3). The defendant is at least four years older than the victim has committed abusive sexual contact of a minor.

Abusive sexual contact of a minor is a felony.

7.8.2 Abusive Sexual Contact - Ward

Any person who knowingly engages in or causes a sexual contact with another person commits abusive sexual contact of a ward, if to do so would violate *§2243(b)* had the sexual contact been a sexual act. Abusive sexual contact of a ward is summarized below:

(a). Whoever knowingly engages in or causes sexual contact with another person

(1). Who is in official detention, and;

(2). Under the custodial, supervisory, or disciplinary authority of the person engaging in the sexual contact has committed the crime of abusive sexual contact of a ward.

(b). Abusive Sexual Contact of a Ward is felony.

(c). However, if the offense was committed against a child under the age of 12, the maximum penalty shall be doubled.

7.8.3 Abusive Sexual Contact - Other Circumstances

Under *18 U.S.C. §2244(b)*, abusive sexual contact under "other circumstances" that would not fit any of the situations described in *18 U.S.C. §§2241-2243* may still be prosecuted as a felony. When a defendant knowingly engages in a sexual contact with another person without that person's permission, the defendant has committed abusive sexual contact. This is a lesser-included offense of *18 U.S.C. §2242(1).*[10]

7.9 Duty to Notify or Report

In recognition of the federal government's trust responsibility to protect Indian children and Indian tribes, Congress passed the *Indian Civil Protection and Family Violence Prevention Act* ("*Indian Child Protection Act*") in 1990.

This statute—found in *25 U.S.C. § §3201-3211* with supporting provisions in *18 U.S.C. §1169*, *18 U.S.C. §3509(d)* and *18 U.S.C. §403*—addresses problems of child abuse on Indian reservations attributed to the lack of a federal mandatory reporting law.

Congress found that persons employed or funded by the Federal Government have perpetrated multiple incidents of sexual abuse

of children on Indian reservations, therefore Congress amended Title 18 of the United States Code by adding criminal sanctions for failure to report child abuse occurring in Indian Country. These criminal sanctions are codified at *18 U.S.C. § 1169*.

Two additional relevant statues require law enforcement officers maintain the privacy of child victims or child witnesses. Criminal sanctions apply for failing to maintain confidentiality and failing to protect the privacy of a child victim or child witness.

7.9.1 Reporting Definitions and Duties

Child abuse is any case in which an individual who is not married, and has not attained 18 years of age has died or exhibits evidence of the following:

- Skin bruising or bleeding;
- Malnutrition or failure to thrive;
- Burns;
- Fracture of any bone, subdural hematoma, or soft tissue swelling, and such condition is not justifiably explained or may not be the product of an accidental occurrence; or
- Sexual assault, sexual molestation, sexual exploitation, sexual contact, or prostitution.

A number of professionals, paraprofessionals, and lay people who may come into contact with children are required under *18 U.S.C. § 1169(a)(1)* to report in these circumstances:

- Law enforcement officer;
- Probation officer;
- Worker in a juvenile rehabilitation or detention facility;
- Person employed in a public agency who is responsible for enforcing statutes and judicial orders;
- Medical personnel;
- School personnel such as teachers, aides, and child care

workers; and
• Mental health professionals.

Reports of abuse or suspected abuse must be reported "immediately." Under *25 U.S.C. §3203(b)(2)*, it is presumed that either the "local" law enforcement agency or local child protective services agency will receive the initial notification of child abuse concerning a child in Indian Country. Under this statute, "local child protective services agency" means the Federal, Tribal, or State agency that has the primary responsibility for child protection on any Indian reservation or within any community in Indian Country. If the local law enforcement agency receives the initial notification, the law enforcement agency is required by law to immediately notify appropriate officials of the local child protective services agency, immediately initiate an investigation of such allegation, take immediate and appropriate steps to secure the safety and well-being of the child or children involved, and complete a written report that includes:

• Child's name, address, age, and sex (gender);
• Grade and school in which child is currently enrolled;
• Name and address of the child's parents or other person responsible for the child's care;
• Name and address of the alleged offender;
• Name and address of the person who made the report to the agency;
• Brief narrative as to the nature and extent of the child's injuries, including any previously known or suspected abuse of the child or the child's siblings and the suspected date of the abuse; and
• Any other information the agency or the person who made the report to the agency believes to be important to the investigation and disposition of the alleged abuse.

Upon completing the written report of child abuse required by *25 U.S.C. §3203(c)*, the law enforcement agency is also required to furnish a copy of its report to the child protective services agency.

Example: An officer working on the Rocky Boy Indian Reservation receives a call from a physician's assistant (PA) at an Indian Health Services Hospital on the reservation. The physician's assistant reported that she just put a cast on a six year old girl's arm. The nature of the fracture (a spiral fracture) and the parent's explanation for how the fracture occurred, as well as the child's explanation, lead the physician's assistant to believe that the child's broken bone was not an accident. The physician's assistant is required under the *Indian Child Protection Act* to notify law enforcement; the officer is required under the *Indian Child Protection Act* to immediately notify local child protective services, begin an investigation of this allegation of child abuse, take immediate appropriate steps to secure the safety and well-being of the child, and prepare a final report contacting the information required by *18 U.S.C. 3203(c)*.

If the local child protective services or local law enforcement officials have reason to believe that an Indian child has been abused in Indian Country, they have a duty to immediately investigate and take immediate and appropriate steps to safeguard victims. Since victims may be abused by family members or parents, 25 U.S.C. §3206(a) allows law enforcement officers to take any of the following without first obtaining parental consent:

- Photographs;
- X-rays;
- Medical examinations and interviews; or
- Psychological examinations and interviews.

Under *25 U.S.C. §3206(b)*, law enforcement officials that have reason to believe that the Indian child has been abused in Indian Country shall also be allowed to interview an Indian child without

first obtaining the consent of the parent, guardian, or legal custodian. If necessary, local law enforcement officials can obtain a court order from a Federal Magistrate or U.S. District Court judge for physicians, psychologists, or local child protective services officials to conduct required interviews.

Example: A BIA officer, who has reason to believe that a 10-year-old Indian child has been abused on the Pine Ridge Indian Reservation in South Dakota, requested that a psychologist who works for the Indian Health Services, perform a psychological evaluation on the child, under authority of *25 U.S.C §3206(a)*. The psychologist refused, stating that he needed permission from the child's parent before he could perform the evaluation. In this situation, the officer can seek an order under *25 U.S.C. §3206 (d)* from the appropriate Federal Magistrate or U.S. District Court Judge, directing the psychologist to perform the evaluation, if the judge finds that there is "reasonable suspicion" that the Indian child has been abused in Indian Country.

7.9.2 Mandatory Reporting to FBI

The FBI has primary responsibility for investigating Indian Country crimes, therefore local law enforcement agencies are required to report certain abuse crimes to the FBI once a preliminary inquiry indicates that a criminal violation has occurred and the report involves:

- any unmarried person who is under age eighteen and a member of an Indian tribe;
- any unmarried person who is under age eighteen, is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe; or
- any abuser who is a member of an Indian tribe.

7.9.3 Confidentiality, Protection from Liability

The duty to report suspected child abuse has a "carrot" and "stick" aspect; persons making reports are granted confidentiality and protection from liability (the "carrot").

Under *25 U.S.C. §3203(d)*, the identity of any person who makes a report of child abuse or suspected child abuse to a local law enforcement agency or local social services agency is protected from disclosure without that person's permission, except to a court of competent jurisdiction or a government (tribal, state or federal) employee who needs to know the information in the performance of such employee's duties.

Under *25 U.S.C. §3205*, tribal, state, or federal government agencies that investigate and treat incidents of child abuse may provide information and records to tribal, state, or federal government agencies that need to know the information in order to perform their duties. Release of records and information under these circumstances complies with the *Privacy Act of 1974* (*Pub.L. 93–579, 88 Stat. 1896*) and the *Family Educational Rights and Privacy Act of 1974* (*20 U.S.C. § 1232g*).

Example: An Indian Health Services doctor works on a reservation where she treated a four-year-old child for a sexually transmitted disease. She reported this to the tribal police who, in turn, reported this case to the Federal Bureau of Investigation. The FBI agent investigating this case has requested copies of the doctor's records concerning the doctor's treatment of this child, as well as the tribal police officer's report. Both the doctor and the tribal police officer can provide these records to the FBI agent for the following reasons:

- The doctor works for a federal agency (IHS) which treats incidents of child abuse;

• The police officer belongs to a tribal agency that investigates incidents of child abuse; and
• The agent belongs to a federal agency (FBI) that needs to know this information in order to perform her duties.

Example: Under this provision, a childcare worker makes a good faith report of suspected child abuse based on his reasonable belief to a tribal officer. The officer could reveal the identity of the person who made the report of child abuse to tribal protective services worker, an FBI agent, and an Assistant U.S. Attorney who may seek an indictment against the alleged abuser in federal court, but could not reveal the person's identity to:

• The Neighborhood Watch Association in the reservation community where the alleged abuser lives;
• A journalist writing an article on the alleged abuse for the tribal newspaper's monthly crime report; or
• The investigating officer's friend who works in tribal government but does not have a "need to know" to further her duties.

Under *18 U.S.C. § 1169(d)*, any person who reports child abuse or suspected child abuse to the local child protective services agency or local law enforcement agency is protected from civil or criminal liability for making that report if the report was based upon that person's reasonable belief and was made in good faith.

7.9.4 Failing to Report or Maintain Privacy

The duty to report suspected child abuse has a "carrot" and "stick" aspect; persons making reports are granted confidentiality and protection from liability (the "carrot") but are subject to criminal penalties if they fail to report as required by law (the "stick").

Under *18 U.S.C. § 1169(a)*, a required reporter who fails to report actual or suspected child abuse, can be prosecuted and punished

by fine, or imprisonment, or both. *Under 18 U.S.C. §1169(b)*, anyone who "supervises" or "has authority over" a required reporter and inhibits or prevents that person from making the report can also be prosecuted and punished by fine, or imprisonment, or both.

The rights of child victims and child witnesses are outlined in 18 *U.S.C. 3509(d)* and protected by *18 U.S.C. § 3509(d)* and *18 U.S.C. §403*. Through these statutes, Congress has created safeguards for the privacy and confidentiality of child victims and child witnesses.

In a federal criminal proceeding involving child physical or sexual abuse, *18 U.S.C. §3509(d)* requires that all employees of the government or any law enforcement agency involved in the case shall keep all documents that disclose the name or any other information concerning a child in a secure place. A secure place is one in which a person who has no reason to know the contents of the documents cannot access those documents. "A child" is a person who is under age 18 who is or alleged to be a victim of a crime of physical or sexual abuse or a witness to a crime committed against another person. These secured documents or the information in them may only be released to persons who "need to know" by reason of their participation in the criminal proceeding.

Employees of the government or law enforcement officers who violate these privacy protections are guilty of an offense under *18 U.S.C. §403*. This section of the federal criminal code punishes violations of the privacy of child victims and child witnesses. A knowing or intentional violation of the privacy protection in *18 U.S.C. §3509* is criminal contempt. This criminal contempt is a felony that may be punished by imprisonment, or fine, or both.

7.10 Statute of Limitations

For physical and sexual abuse involving a child under the age of 18 years, *18 U.S.C. §3282* extends the statute of limitations to allow prosecutions until the child reaches her or his 25th birthday.

Example: A tribal or BIA officer is approached by a 21-year-old adult. The officer has established good rapport with this person as a result of his community policing. This adult reveals to the officer that when he was 15 years old, he received therapy in Indian Country from an IHS psychologist. During several sessions, the psychologist touched this young man's genitalia. Based on these facts, the tribal or BIA officer may determine that the crime of Sexual Contact of a Minor has been committed and that crime is still within the statute of limitations because the victim has not reached his 25th birthday.

[1] See *18 U.S.C. § 1153.*
[2] See United States v. Norman T (A Juvenile), 129 F.3d 1099 (10th Cir. 1997).
[3] See *United States v. Sanders*, 30 F. 3d 140, 1994 WL 395877 (9th Cir. 1994), cert. denied, 514 Y,S, 1007 (1995) (unpublished).
[4] See *United States v. Jones*, 104 F.3d 193, 197 (8th Cir. 1996), *cert. denied*, 520 U.S. 1282 (1997).
[5] See *United States v Graves*, 4 F.3d 450 (6th Cir. 1993).
[6] See *United States v. Fulton*, 987 F.2d 631 (9th Cir. 1992).
[7] 905 F.2d 15 (2d Cir. 1990).
[8] See *United States v. Barrett*, 937 F.2d 1346 (8th Cir.), *cert denied*, 502 U.S. 916 (1991).
[9] See *United States v. Yazzie*, 976 F.2d 1252 (9th Cir. 1992).
[10] See *United States v. Gavin*, 959 F.2d 788, 791 (9th Cir. 1992).

Chapter Eight

Rights of Inmates

8.1 Role of the Detention Officer

The lawful functioning of a detention facility, correctional center, or jail depends heavily on officers responsible for carrying out the institution's policies and regulations. Presumably, these policies and regulations are based on constitutional principles and comply with statutory requirements.

The primary role of the detention officer and detention facility is to maintain internal order and discipline and to create and maintain a safe environment for the inmates so that each inmate

may achieve rehabilitation. By keeping order and maintaining a safe environment, the detention/correctional officer becomes an influential force in an inmate's life and plays a role in an inmate's positive change.

Keeping order and discipline must be carried out within the limits set by the Constitution and the *Indian Civil Rights Act*; officers are responsible for carrying out their duties according to the policies, rules, and regulations of the facility. Understanding and protecting the rights of inmates is the duty of every detention officer.

8.2 Balancing Rights and Interests

Sometimes an inmate's rights come into conflict with the legitimate interests of the government. For example, although there is a guaranteed right of free speech, that right of free speech does not extend to making false and malicious statements that harm the reputation of another person.

This is no less true in jails and correctional facilities where an inmate may desire to exercise a constitutional right that conflicts with the government's desire to restrict the exercise of that right.

When confinement and the needs of the penal institution impose limitations on rights, such as the right to free speech, the courts must decide whether the government's interest outweighs the inmate's interest in exercising the constitutional right.

In *Bell v. Wolfish,*[1] the Supreme Court noted that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." This is because "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[2] Thus, while

inmates may lose many of their freedoms at the prison gate, they retain "those rights [that are] not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."[3]

In *Turner v. Safley,*[4] the Supreme Court balanced the inmate's constitutional right against the prison, jail, or detention center's interests by holding that when a prison regulation interferes with an inmate's constitutional right, the regulation is valid if:

• the regulation is reasonably related to a limited number of legitimate penological interests; and
• there is reasonable relationship between a restriction on an inmate's constitutional right and the claimed legitimate penological interest.

Legitimate penological interests include:

• Deterrence of crime;
• Rehabilitation of offenders;
• Institutional security and order; or
• Equal opportunity.

Legitimate penological interests, unless otherwise directly related to security concerns, do not include:

• Administrative convenience;
• Saving money; and
• Efficiency.

Under *Turner*, courts examine the relationship between a restriction on an inmate's constitutional right and a legitimate penological interest listed above to determine if the relationship is reasonable by inquiring:

(1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it;

(2) whether there are alternative means of exercising the right;

(3) what impact that accommodation of the constitutional right will have on guards, on other inmates, or on the allocation of prison resources; and

(4) whether the regulation or policy is an "exaggerated response" to prison concerns.

The burden is on an inmate to show that a challenged regulation is unreasonable.[5] The *Turner* balancing test applies in every situation where the inmates' constitutional rights come into conflict with a legitimate penological interest. These include:

- First Amendment issues—
  religious practices and publication rejection;
- Fourth Amendment issues—
  searches;
- Fifth Amendment issues—
  due process; and
- Eighth Amendment issues—
  cruel and unusual punishment.

8.2.1 Religious Expression

Inmates have the right to practice religion and attend religious services, but that right is not without limitations. Restriction of the right to free exercise of religion must be reasonably and substantially justified by considerations of prison discipline and order.[6]

Congress has provided additional protections to inmates with the passage of the *Religious Land Use and Institutionalized Persons Act* (*RLUIPA*).[7] *RLUIPA* applies to a program or activity that receives Federal financial assistance as well as "commerce with foreign nations, among the several States, or with Indian tribes," so it applies to facilities managed by the BIA or by tribal governments:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in [*42 U.S.C. §1997*], even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> > (1) is in furtherance of a compelling governmental interest; and
> > (2) is the least restrictive means of furthering that compelling governmental interest.

Adherents of a "minority religion," such as those persons practicing traditional medicine, must be afforded "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts," such as allowing Muslim inmates to grow a short beard that cannot hide contraband[8] or Navajo inmates to consume venison and wear a headband during an annual Ghost Feast.[9]

However, "prison officials need not provide exactly the same religious facilities or personnel to prisoners of every faith" to accommodate religious practices.[10] *RLUIPA* does not, for example, require a federal, state, or tribal government to provide, furnish, or supply every inmate with the materials, facilities and staff to exercise the religion of their choosing; failing to do so is not a substantial burden under the statute. Likewise, the Free

Exercise Clause does not require that inmates "have the particular clergyman of his choice provided to him."[11]

Facilities may also be restricted if the restriction is reasonably related to one of a limited number of legitimate penological interests and there is reasonable relationship between a restriction on an inmate's constitutional right and the claimed legitimate penological interest.[12] Courts have upheld refusals by prison officials to allow inmate spiritual leaders to conduct a Pipe Ceremony when no outside Pipe Bearer is available because of security concerns, or to allow a sweat lodge ceremony when "the ceremony requires the use of an axe to chop wood for a fire, red hot stones to heat the lodge, and a pitchfork to transport the stones from the fire to the lodge interior."[13]

Courts require specific facts in making a determination under Turner, however. In *Thomas v. Gunter* ("*Thomas I*"),[14] prison officials restricted use of a sweat lodge without offering any specific facts to demonstrate that the restriction was reasonably related to a legitimate penological interest. The case was remanded and subsequently appealed.

On appeal in *Thomas v. Gunter* ("*Thomas II"),*[15] prison officials provided specific facts that the restriction on a sweat lodge located by a "truck delivery entrance where deliveries were made during business hours […]posed a security risk and required defendants to station more guards at the entrance" and asserted that "daily access to the sweat lodge at the requested time would have been in direct conflict with scheduled [work, educational, and vocational] activities." The additional facts allowed the court to determine that the regulation satisfied the *Turner* test. Nonessential elements of religion may also be withheld from inmates in a disciplinary segregation unit, even if provided to inmates in the general population.

Examples of other types of restrictions that have been unsuccessfully challenged include:

• Attendance at religious services when the inmate is temporarily segregated;
• Wearing religious clothing or medallions that could be mistaken for gang identification;
• Ability to wear long hair or beards that could conceal contraband;
• Participation in special ceremonies outside of prison facilities (sweat lodge); and
• Refusal to provide special meals which comply with religious diets.

8.2.2 Censoring/Rejecting Incoming Mail

Receipt of mail by inmates is protected by the Free Speech clause of the First Amendment. However, as with other rights, this right is not absolute and incoming mail is subject to greater restriction than outgoing mail. Publications are often challenged. A "publication" is defined as "a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus such other materials addressed to a specific inmate as advertising brochures, flyers, and catalogues."[16]

In *Thornburgh v. Abbott,*[17] the Supreme Court held that the *Turner* test must be used to determine whether specific publications or other general non-legal mail may be censored. A publication cannot be rejected "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant."[18]

However, incoming publications found to be detrimental to institutional security may be rejected when the warden personally makes the determination that the publication is

"detrimental to the security, good order, or discipline of the institution or […]might facilitate criminal activity."[19] The warden is prohibited from establishing an excluded list of publications: each issue of a subscription publication is to be reviewed separately.

In *Bell v. Wolfish,*[20] the U.S. Supreme Court held that allowing inmates to receive hardback books only from a publisher, book club, or bookstore, does not violate the First Amendment rights of inmates in light of the smuggling problems that could be created if books could enter the institution from any source.

Materials that tend to cause strong feelings of anger, indignation, or other type of upset are known as inflammatory materials. In the Eighth Circuit, courts have consistently held "[a] regulation that allows for censorship of incoming items that are likely to incite violence is related to the institutional needs of maintaining a controlled and secure environment among the prison population."[21] Courts must be deferential to the prison officials' views of what material may be inflammatory.[22]

BOP regulations state that publications cannot be rejected solely because the content is sexual in nature, but prison rules restricting sexually explicit or obscene materials may be considered reasonably related to legitimate penological interests in security, discipline, order, public safety, and rehabilitation when additional facts are given.[23]

A policy prohibiting commercially available pornography is valid where it is reasonably related to the penological goal of rehabilitating sex offenders, even though such offenders represent only a small fraction of the entire prison population, where the need to rehabilitate such offenders is much more important than the rights of other inmates to view the material in question.[24]

A regulation prohibiting inmates from receiving sexually explicit materials through the mail is also related to legitimate penological interests where inmates sexually harassed guards by displaying publications containing frontal nudity and engaged in unwanted sexual behavior[25] or where sexually explicit materials are generally highly valued as barter in prison and may result in prohibited sexual activity.[26]

Regulations must not be underinclusive, however. A policy of prohibiting inmates from receiving obscene materials is not reasonably related to a legitimate penological interest where the policy bans one type of sexually explicit material (such as reading material) but not others (such as commercial pornography).[27]

8.2.3 Censoring/Rejecting Outgoing Mail

Censorship (refusing to mail the prisoner's letter) is permissible if it furthers an important or substantial governmental interest – security, order, and rehabilitation – and it is not for the reason of suppressing expression. In other words, mail cannot be censored simply because the jail administrator wants to eliminate unflattering or unwelcome opinions or factually inaccurate statements.

Inmates and their correspondents retain a First Amendment right of free speech, and that right has fewer competing interests when applied to outgoing mail. In *Procunier v. Martinez,*[28] the Supreme Court held "outgoing mail presents substantially less of a security threat than does incoming mail," which makes the *Turner* test less applicable.

Recall that under *Turner*, the burden is "on the prisoner challenging the regulation, not on the prison officials, to show that there are obvious, easy alternatives to the regulation" restricting incoming mail.[29] Under *Martinez*, the facility, not the

inmate, has the burden of proof that there is no less restrictive way of responding to the threat other than refusing to mail the letter.

In order to censor or reject an outgoing piece of mail under *Martinez*, the facility must make a stronger case than required under *Turner* that the letter actually threatens security of the facility or rehabilitation of the inmate. In general, jail staff may read all "non-legal" mail before it is mailed to determine if there is a threat to security of the facility or rehabilitation of the inmate, such as coded messages, maps or plans of the facility, escape plans, or other like communications.

8.2.4 Censorship and Due Process

Censoring or rejecting letters or publications, whether incoming or outgoing, raise another constitutional concern of due process. For this reason, the Supreme Court outlined the following requirements in *Martinez* when the decision to censor or withhold delivery of a particular letter has been made:

•The inmate must be notified of the rejection of a letter written by or addressed to him;
•The author of the letter must be given a reasonable opportunity to protest the censorship decision; and
•Complaints about rejection must be referred to a prison official other than the person who originally made the decision.

Special rules apply to "legal mail," or mail to inmates from lawyers, persons working for lawyers, courts, and other government officials. Jail or prison staff cannot read legal mail because it may be protected by a legal privilege (attorney-client), as well as by the Constitution. Inmates have the right to freely correspond with the courts, lawyers, people working for lawyers, and government officials.

While prison officials may not read legal mail, it may be possible to get a search warrant to legally monitor an inmate's mail and legal mail may be opened in the presence of the inmate and examined at that point for contraband. Because publication censorship is such a sensitive legal area, prison officials should ensure the official responsible for decisions to reject incoming mail/publications thoroughly understands the legal tests, agency policies, rules and rejection criteria involved in rejection.

8.2.5 Inmate Communication with the Media

In *Pell,* the U.S. Supreme Court held that while inmates have First Amendment right to free expression, inmates have no right to face-to-face communication with the media. Because alternative means of correspondence such as writing letters exist, there are reasonable alternatives to exercising the First Amendment right. Likewise, the press does not have a right of access to prisons or inmates.[30] Mail between an inmate and television, radio stations, newspaper reporters, does not have any special privilege afforded to it.

8.2.6 Visiting

While visitation in jails and prisons implicates the First Amendment right of free association, the right for prisoners is very limited. Unless an inmate is visiting with his attorney, visits and phone calls can be monitored with notice to all parties. In *Block v. Rutherford,*[31] the Supreme Court upheld a general ban on contact visits in a county jail, noting the smuggling threat posed by such visits and the difficulty of carving out exceptions for certain detainees. Some correctional facilities may allow conjugal visits as a matter of policy, but inmates do not have any right to contact visits and the institution may choose to allow or deny contact visits at its discretion.[32]

In *Overton v. Bazzetta,*[33] the Supreme Court also upheld withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline, regulations requiring children to be accompanied by a family member or legal guardian, and limiting the total number of visitors that inmates may receive.

8.3 Unreasonable Searches and Seizures

In prison, "official surveillance has traditionally been the order of the day"[34] but a prisoner is also entitled to the protection against unreasonable searches and seizures under the Fourth Amendment and *ICRA*, even if the expectation of privacy is lesser than that of the general public:[35]

> "[T]he right to be free from unreasonable searches and seizures is one of the rights retained by prisoners subject, of course, to such curtailment as may be made necessary by the purposes of confinement and the requirements of security."[36]

In practical terms, search warrants are generally not required for all types of searches and are seldom required for the searches of cells and cell blocks that might be made in a prison or jail by the facility staff based on the purposes of confinement and requirements of security. "The inherent characteristics of a prison society…are such that guards must make prompt decisions as search problems confront them. The governmental interest in preventing and detecting smuggling outweighs the individual interest in perfect justice."[37]

In *United States v. Palmateer,*[38] a warrantless search of the plaintiff prisoner's cell was reasonable within the meaning of the Fourth Amendment. In affirming the conviction of the defendant

inmate for possession of narcotic drugs found during the search in question, the court stated that the necessity of maintaining proper security and discipline of prisoners served as a basis for dispensing with warrant requirements. Searches of inmates and their persons face increasingly higher levels level of scrutiny by the courts when they involve frisks, strip searches, or body cavity searches.

A "pat down" or frisk is a quick and limited search which is done by patting the outer clothing to detect, through the sense of touch, if a concealed weapon is being carried. Random pat downs, or frisks, are usually held to be reasonable by reviewing courts. Pat downs that are conducted solely for the purpose of harassing inmates, rather than for a legitimate penological interest, may lead to inmate lawsuits and liability for the facility.

Federal appeals courts across the nation have uniformly condemned the traditional practice of strip searching everyone booked into the jail, regardless of the reason for arrest, unless there is real suspicion that the person might be carrying contraband:[39]

> "Real suspicion' justifying the initiation of a strip search is subjective suspicion by objective, articulable facts…The objective, articulable facts must bear some reasonable relationship to suspicion that something is concealed on the body of the person to be searched…"[40]

By the time the arrested person is taken to the detention center, the police officer should already have conducted the search incident to arrest and, theoretically, should already have found any evidence on the person of the arrestee. Detention officers should search for contraband, not evidence of crimes for which the detainee has been arrested, because they usually lack probable cause to conduct an evidence search.

Just as strip searches are disfavored by courts, blanket policies subjecting all newly-arrested detainees in a local correctional facility to visual body cavity searches have been condemned as unconstitutional.[41]

In order for a visual body cavity search to be found reasonable under the circumstances, there must be either "particularized suspicion, arising either from the nature of the charge or specific circumstances relating to the arrestee and/or the arrest."[42] Body cavity searches should be performed when there are objective facts known to the detention officer and the officer can reasonably conclude from those facts, based on her or his experience, that the inmate may be concealing contraband.

Best practices for strip searches and body cavity searches include:

• Written policy or guidance limiting strip searches or body cavity searches of an arrested person should be strictly followed;
• Unnecessary observation by others should not be allowed during a strip search or body cavity search;
• Reasons for searching should be relative to the security of the facility, such as contact visits or trips outside the secure perimeter of the jail;
• Reasons for conducting a strip search or body cavity search should be carefully documented;
• Strip searches or body cavity searches should never be conducted for the sole purpose of obtaining evidence with only reasonable suspicion.
• Body cavity searches should be done only by medical staff and in a reasonable manner respecting the inmate's dignity and in as private a manner as possible; and
• A higher standard of cause—such as probable cause—should be adopted and used when conducting strip searches or body cavity searches.

Random blood or urine tests in prison do not violate the Fourth Amendment when collection methods are reasonable and when the prison system's security interests in detecting the unauthorized use of narcotics are implicated.[43] Further, urine and blood tests are neither communicative nor testimonial and are therefore not subject to the privilege against self-incrimination.[44]

As to blood tests, "such tests are commonplace, the quantity of blood extracted is minimal, and for most people the procedure involves virtually no risk of harm, trauma, or pain."[45] However, failing to collect samples in a reasonable way—such as forced catheterization for urine samples—may render the search unreasonable.[46]

8.4 Visitor Searches

In general, visitors to a detention center, jail, or prison have more privacy protections than inmates, but less than they would have on the street. The courts have approved routine searches of visitors, such as pat downs, searches of purses and briefcases, and requiring visitors to pass through magnetometers.

A more intrusive search, such as a strip search, requires reasonable suspicion. To justify the strip search of a particular visitor under the reasonable suspicion standard, prison officials must point to specific objective facts and rational inferences that they are entitled to draw from those facts in light of their experience.[47] "Inchoate, unspecified suspicions fall short of providing reasonable grounds to suspect that a visitor will attempt to smuggle drugs or other contraband into the prison."[48]

Even if the detention officer has reasonable suspicion to believe that the visitor may have contraband, the officer can only request

that the visitor submit to a strip search. The visitor can refuse, be denied a visit with the inmate, and leave the facility.

A jail cannot grant a contact visit with an inmate on the condition that the visitor give up his or her constitutional right against an unreasonable search and seizure. This means that the facility cannot require a visitor, for whom no reasonable suspicion exists, to submit to a strip search before the visitor will be allowed to see the inmate.

8.5 Cross-Gender Searches

Issues concerning inmate privacy and cross-gender supervision are unresolved among circuits. Cross-gender supervision means that a male or female officer supervises, observes, or pat searches an inmate or arrestee of the opposite gender.

In *Grummet v. Rushen,*[49] the Ninth Circuit upheld pat-down searches of male inmates by female officers that included the groin area. Analyzing these claims under both the Fourteenth and Fourth Amendment, the court concluded that the pat-down searches did not violate the privacy interests of the male inmates and found the cross-gender aspect of the searches "reasonable" because they were done briefly and professionally while inmates were fully clothed.

In *Timm v. Gunter,*[50] the Eighth Circuit held that cross-gender pat-down searches of male inmates by female officers did not violate male inmates' privacy rights. The Court concluded that prohibiting female officers from conducting pat-down searches, which included the groin area of male inmates "[could] severely impede overall internal security."

In *Jordan v. Gardner,*[51] however, the Ninth Circuit held that "routine or random clothed body searches of female inmates

which include touching of and around breasts and genital areas…by male corrections officers" constituted an objectively cruel and unusual condition of confinement in limited circumstances when there is psychological impact from the perspective of the female inmates.

8.6 Officer/Inmate Sexual Acts or Contact

Sexual acts or sexual contacts between an officer and inmate are federal felonies, as described in *Chapter 109A Felonies*.

An officer who knowingly attempts to engage or actually engages in a sexual act with an inmate (a ward) has committed sexual abuse of a ward under *18 U.S.C. §2243(b)*. This crime is punishable by a fine, or imprisonment for up to fifteen years, or both.

One of the sexual contact offenses with which an officer can be charged and prosecuted is abusive sexual contact of a ward, under *18 U.S.C. § 2244(a)(4)*. Abusive sexual contact of a ward is a federal felony and carries a maximum penalty of a fine, two years imprisonment, or both.

8.7 Cruel and Unusual Punishment

Inmates have a right to be free of cruel and unusual punishment under the Eighth Amendment and the *Indian Civil Rights Act*; most lawsuits involving Constitutional violations are based on inappropriate use of force, access to medical care, failure to protect, overcrowding and other conditions of confinement. The basic concept underlying the Eighth Amendment is "nothing less than the dignity of man."[52]

To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on prison officials

to provide food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates "may actually produce physical 'torture or a lingering death.'"[53] If government fails to fulfill its obligation to provide for inmates, the courts have a "responsibility to remedy the resulting Eighth Amendment violation."[54]

Note that the Eighth Amendment does not provide any rights specifically to pre-trial detainees, because they have not yet been convicted. Pretrial detainees have been arrested based on probable cause, but are awaiting trial and have not yet been convicted of any crime. Pretrial detainees are normally housed in jail while awaiting trial because there is cause to believe that they are dangerous or because they are unable to make bail. In reality, however, most jails are used to house persons convicted of minor crimes as well.[55]

Unlike convicted prisoners, the government has no right to punish pretrial detainees at all. Therefore, the proper standard for analyzing conditions of confinement for pretrial detainees arises under the due process clause of the Fifth and Fourteenth Amendments instead of the Eighth Amendment. The inquiry is whether the pretrial detainees have been denied their liberty without due process. The court will not find a denial of due process unless the conditions of confinement amount to punishment of the detainee.[56]

To address this disparity, the Supreme Court has held that a pre-trial detainee's rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner,"[57] but it repeatedly has left open the question of whether pre-trial detainees are entitled to greater rights.[58] The Courts of Appeals generally have applied the same constitutional standard to convicted inmates and pre-trial detainees.[59] Pre-trial detainees in the federal courts are required to be confined "in a corrections

facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal."[60]

8.7.1 Use of Force Under Eighth Amendment

While detention and correctional officers are authorized to use force against inmates in appropriate circumstances, that power is derived from penological interests rather than an interest in search or seizure. Thus, many uses of force in a corrections setting are governed by the Eighth Amendment rather than the Fourth Amendment. Under the Eighth Amendment, uses of force are reviewed with a subjective standard rather than an objective reasonableness standard. Corrections officers must be able to understand and apply use of force concepts from both the Fourth and the Eighth Amendments.

In *Whitley v. Alberts,*[61] the Supreme Court found that "the infliction of pain in the course of a prison security measure … does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable." Rather, the Court held in *Hudson v. McMillan,*[62] that "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause," the issue is "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."

In deciding whether the force used was excessive under the Eighth Amendment, the court must consider five factors:

- What was the reason for the use of force?
- How much force was actually used?
- What were the extent of the injuries sustained by the inmate?

• Would a reasonable corrections officer have perceived the threat as one which required the use of force?
• What efforts were made to temper the use of force?

The Eighth Amendment prohibits use of force "totally without penological justification." In *Hope v. Pelzer,*[63] the Court drew a careful distinction by stating "controlling an emergency situation and maintaining order are legitimate penological justifications, but when safety concerns have abated or an emergency has been dispelled, the justification may disappear."[64]

Generally speaking, the use of force may be justified under the Eighth Amendment if a reasonable detention officer, under the circumstances, believes that there are no other available alternatives, and the force is used for:

• Enforcing prison rules and discipline, only when alternatives less than force cannot accomplish enforcement and discipline;
• Protecting property; or
• Defense of self or others.

In assessing the use of force, "the extent of the injury suffered by [the] inmate is one factor," but an Eighth Amendment excessive force claim can be established even without showing "serious injury."[65]

Given the serious consequences in using deadly force under the Eighth Amendment, its proper use is much more limited than the use of non-deadly force. Officers need to be very familiar with guidance from the Fourth Amendment use of force concepts found in the *Legal Division Handbook* as well their agency's policy about the use of deadly force:

• Deadly force is the use of any force that is likely to cause death or serious physical injury.

• Deadly force may be used in self-defense or in the protection of others from death or serious bodily injury.

Force can never be used to punish inmates; officers who beat prisoners for the purpose of inflicting punishment face agency discipline, up to and including termination, civil damages and criminal charges. A supervisor who ignores improper use of force may also face criminal or civil liability for failing to properly supervise the officer.

In *U.S. v. McQueen,*[66] a detention officer was charged with conspiring to deprive inmates of their rights and obstruction of justice and sentenced to twelve months imprisonment when he administered a beating to an inmate and sanctioned a fist-fight between other inmates.

In *U.S. v. Strange,*[67] a detention officer was charged with one count of conspiracy to deprive an inmate of his civil rights and one count of deprivation of those rights and sentenced to 21 months imprisonment when he beat an inmate in retaliation for assaulting a deputy sheriff.

In *U.S. v. Bailey,*[68] a detention officer was charged with conspiracy to deprive inmates of their civil rights, deprivation of rights under *18 U.S.C. § 242*, obstruction of justice, and perjury and sentenced to 41 months imprisonment when he and another detention officer beat an inmate and bragged to other officers about the assault.

8.7.2 Inadequate Medical Care

Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, whether the indifference is manifested by “prison doctors in their response to the prisoner's needs, by prison guards in

intentionally denying or delaying access to medical care, or intentionally interfering with the treatment once prescribed."[69]

An inadvertent failure to provide adequate medical care, such as when a doctor is negligent in diagnosing or treating a medical condition, is not by itself "an unnecessary and wanton infliction of pain." Instead, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.[70]

Medical staff can violate the Eighth Amendment by refusing to treat inmates. A delay in treating non-life-threatening but painful conditions may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged a prisoner's pain. Consciously choosing a less effective treatment for reasons of cost or convenience to the prison can also constitute deliberate indifference.[71]

A determination of deliberate indifference requires the court to look at two elements:

- Seriousness of the prisoner's medical need or risk of injury; and
- Response to the medical need.

A serious medical need is one "for which treatment has been recommended or for which the need is so apparent that even laymen would recognize that care is required."[72]

While some courts have required a condition to be life-threatening or cause excruciating pain, others have noted that factors might include (1) whether a reasonable doctor or patient would perceive the medical need in question as "important and worthy of comment or treatment," (2) whether the medical condition significantly affects daily activities, and (3) "the existence of chronic and substantial pain."[73]

The risk "must be cognizable, but the consequences of that risk need not yet have materialized, in order to define the time to begin to determine whether the defendant disregarded the risk."[74] The applicable *mens rea* of deliberate indifference demands subjective knowledge of a substantial health risk and disregard for the substantial health risk.[75]

Detention officers or other custody staff are often found by courts to be deliberately indifferent to a serious medical need if they prevent an inmate from accessing medical staff or treatment. Examples of ways in which custody staff may prevent access to medical staff or treatment:

• Custody staff fails to convey written or oral requests for medical care through the appropriate channels;
• Custody staff fails to inform medical personnel of an inmate with an emergency during the night;
• Custody staff ignores a medical order for bed rest or light work duty for an inmate, and instead require the inmate to resume a strenuous workload; or
• Custody staff ignores a medical order in favor of security regulations.

Courts have also given increasing recognition to the right of an inmate to receive hormone therapy or continue gender reassignment treatment; the Seventh and Eighth Circuits have previously held that gender identity disorders may constitute a serious medical need to which prison officials may not be deliberately indifferent without violating the Eighth Amendment.[76]

8.7.3 Mental Health and Suicide

Courts have repeatedly held that treatment of the mental disorders of mentally disturbed inmates is a "serious medical need."[77] Suicidal ideation or previous suicide attempts also present a serious medical need under *Estelle*.[78]

It is well settled that detention officers have a legal duty under both the United States Constitution and the *Indian Civil Rights Act* to protect inmates from themselves. Therefore, officers need to understand:

- How the duty to protect is defined; and
- What steps the facility must take to carry out this duty to protect required by the law.

Under tort law, the duty to protect means that the detention officer must take reasonable steps to protect those in custody from themselves and others. The duty to protect will depend on the facts and circumstances of that particular inmate. What is reasonable for one inmate who is not a serious suicidal threat may not be reasonable for another inmate who, for example, has attempted suicide in the past.

As in the case of inadequate medical care, courts will examine whether officers and the facility were deliberately indifferent to the medical or safety needs of the inmates. Best practices to reduce the most common allegations of deliberate indifference are:

- Train staff in recognizing behavioral indicators of potential suicides, such as statements from the inmates, reports from arresting officers, or self-destructive behaviors;
- Identify suicide risks or implement screening procedures such as screening questionnaires;

• Monitor inmates by making rounds at proper intervals, observing cameras, and making sure audio/visual monitoring works correctly; and
• Respond by providing immediate emergency care and contacting emergency medical services.

Detention officers cannot be held liable for a delay in medical personnel's arrival once jail staff have contacted them, but there might be liability if delays are due to the distance that must be traveled in order to provide medical care.

In Indian Country, getting prompt attention from medical personnel may be difficult because of distance or location, thus detention officers must be adequately trained to respond to suicide attempts as medical emergencies and respond as quickly as possible.

8.7.4 Sexual Assault and Rape

A jail or prison has a duty to maintain generally acceptable levels of safety in the institution. While the institution cannot guarantee an inmate's safety, it has a duty not to be deliberately indifferent to the safety needs of inmates.[79]

In *Farmer v. Brennan*, the Supreme Court held that deliberate indifference "entails something more than negligence, but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." Thus, it is the equivalent of acting recklessly.[80]

In other words, deliberate indifference occurs when a prison official has actual knowledge that an inmate faces a substantial risk of serious harm and the official disregards the risk by failing to respond to the risk in a reasonable way.

In *Farmer*, a transsexual inmate was transferred by federal prison officials from a correctional institute to a penitentiary—typically a higher security facility with more troublesome prisoners—and placed in its general population. After the transfer, the inmate was beaten and raped.[81]

The court found that placing a transsexual inmate—especially one that projected feminine characteristics, was slightly built, and was a non-violent offender—into the general population at a high-security institution posed a significant threat to internal security in general and to the inmate in particular.

The Supreme Court emphasized that a prisoner "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."[82]

Failure to protect usually manifests as inmate-on-inmate sexual assault or rape. Courts have held that a jury can infer deliberate indifference based upon any of a multitude of factors that are typically present in prisoner rape cases:

- deliberate failure of guards to patrol dormitories, particularly at night;[83]
- failure to consider the rape victim profile in making cell assignments;[84]
- failure to consider the victim's appearance, traits, or mannerisms that fits a profile for prisoner rape victims;[85]
- failure to protect where prison officials previously had acknowledged an inmate's vulnerability;[86]
- failure to transfer known or likely sexual predators to areas where they could be controlled;[87]
- housing inmates with known predators that have a history of coercing their cellmates for sex;[88]

• knowingly placing an inmate in a cell with an HIV positive inmate who has a history of rape;[89]
• failing to provide protection despite actual knowledge that threats of rape were made against an inmate;[90]
• failing to provide protection despite actual knowledge that one inmate had attacked the same inmate before;[91]
• denying formal requests to be removed from a cell because the inmate is being raped;[92] or
• setting inmates up to be raped or attacked by other prisoners as a form of discipline.[93]

In 2003, Congress passed a sweeping federal law that was designed to eliminate the sexual assault of prisoners. The *Prison Rape Elimination Act of 2003* (*PREA*) sets a "zero tolerance" standard for prison rape, requires data collection and analysis of prison rape, provides grants "to prevent and prosecute prisoner rape," and directs the United States Attorney General (AG) to adopt "national standards for the detection, prevention, reduction, and punishment of prison rape."[94]

The Department of Justice (DOJ) and the Department of Homeland Security (DHS) have since promulgated implementing regulations, pursuant to the statutory mandate to detect, prevent, reduce, and punish prison rape.[95]

Both Congress and the DOJ indicated that compliance with *PREA* may reduce Eighth Amendment violations on the part of prison officials, but even if an agency complies fully with everything in the *PREA* regulations, it may still be in violation of the Eighth Amendment on different grounds.[96]

8.7.5 Overcrowding and Facilities

Conditions of confinement are often alleged to violate an inmate's right to be free from cruel and unusual punishment; suits based

on overcrowding have become increasingly common in Indian Country. Crowding, by itself, does not amount to cruel and unusual punishment and is not *per se* unconstitutional, but crowding could produce conditions which cause the facility to violate the Eighth Amendment or the *Indian Civil Rights Act*, such as high levels of violence or illness:[97]

> "Cramped conditions promote unrest and violence, making it difficult for prison officials to monitor and control the prison population…[O]vercrowding may prevent immediate medical attention necessary to avoid suffering, death, or spread of disease… [and] living in crowded, unsafe, and unsanitary conditions can cause prisoners with latent mental illnesses to worsen and develop overt symptoms."

To address the question of whether or not particular conditions rise to a level that violates a Constitutional right, courts look to whether there is a culpable state of mind on the part of prison officials and whether inmates have alleged, at a minimum, deliberate indifference to serious needs.[98]

The Bureau of Justice Statistics (BJS) has conducted an *Annual Survey of Jails in Indian Country* (*SJIC*) since 1998, with the exception of 2005 or 2006. In 1999, eleven facilities under a court order had restrictions on the maximum number of inmates held in custody. Other court orders or consent decrees restrictions from the Colville Nation and Navajo Nation tribal courts in the late 2000s involved items such as hygiene, cleanliness, and meals.

• *No adequate ventilation system.* The court noted that the one vent in the facility had been sealed because inmates were escaping through it.
• *Outdated electrical system.* Light bulbs routinely shorted out, there was no emergency lighting system installed, the wiring

sometimes sparked, and the circuits were overloaded when appliances were used.

• *Health hazards.* Holding cells, floors, toilets, and sinks were not sanitized; plumbing was inadequate and repaired with duct tape; cells were too small for the number of inmates placed in them and there was no space outside the cells for the inmates to move around; and there was no exercise area for the inmates.

• *Severe overcrowding.* Nearly 300 prisoners were crowded into five jails designed for only 113 people. Due to neglect and years of overcrowding, the jails were falling apart. Inmates slept on floors without mattresses or blankets wherever there was space – near leaking toilets, in the hallways, on the dining tables.

• *Sanitation.* The prison budget did not include money for sanitation supplies. The prisons failed to meet even minimal standards of sanitation, health, and safety.

• *Food Budgets.* One tribal jail received a food budget based on the design capacity of 17 prisoners, but regularly housed 60 prisoners. The lack of a proper food budget led to inadequate nutrition.

As a result of these conditions, the tribal court ordered closure of two of the five tribal jails on the reservation, except for short-term confinement not to exceed 48 hours; maximum population limits for jails and cells were set; and the tribal legislature agreed to appropriate funds for updated facilities and improvements in fire safety, health care, nutrition, sanitation, exercise.

8.7.6 Due Process

The Due Process Clause prohibitis infringment of a prisoner's liberty interest by the government without due process of law; prisoners are afforded protection against arbitrary action by the government.[99]

Arbitrary action is an action taken by the government to deprive an inmate of life, liberty, or property without the due process of law as guaranteed by the Fifth and Fourteenth Amendments.[100]

To determine whether there has been arbitrary action or infringement on an inmate's liberty interest by the government without due process of law, courts look to the following factors:[101]

(1) whether the state has interfered with an inmate's protected liberty or property interest; and
(2) whether procedural safeguards are constitutionally sufficient to protect against unjustified deprivations.

Some examples of safeguards include:

• Requirement of at least a twenty four (24) hour notice of charges, ability to call witnesses, present evidence, and be judged by impartial decision maker during disciplinary hearings;[102]
• Opportunity for defendants to make evidentiary showing that defendant should be released on bail;[103] and
• Restraint on "arbitrary deprivations" of liberty[104] or arbitrary and purposeless use of authority.[105]

An inmate's due process rights are generally violated when conduct that is not proscribed by rules or policy is punished arbitrarily:

• Due process violation when charge failed to specify what rule inmate violated when inmate waved at visitor through security fence;[106] and
• Due process violation when prisoner charged with offense had no fair warning or opportunity to know that behavior was unlawful.[107]

These rights are not absolute, however:

• No due process violation when prisoner is not deprived of life, liberty, or property;[108]
• No due process violation when inmate was afforded hearing and opportunity to respond to allegations of misconduct, even when report was allegedly filed in retaliation;[109]
• No liberty interest in avoiding transfer to "less amenable and more restrictive quarters"[110] in the same facility;
• No liberty interest in avoiding transfer to discretionary segregation;[111]
• No liberty interest in freedom from intrastate transfer to different facility;[112]
• No liberty interest in discretionary early release from valid sentence;[113]
• No liberty interest in parole unless prisoner has reasonable expectation of release;[114] and
• No due process violation when prisoner was isolated without hearing pending criminal investigation after he killed fellow inmate.[115]

A liberty interest will be created by court order only if the decision results in an "atypical and significant deprivation in relation to the normal incidents of prison life."[116] Prison life includes many hardships that are not atypical or significiant deprivations of liberty:

• No atypical and significant hardship in withholding of opportunity to participate in work release;[117]
• No atypical and significant hardship in administrative segregation without showing of difference between conditions in segregation and conditions in general population;[118]
• No atypical and significant hardship in placement in discretionary segregation for 59 days;[119] and

• No atypical and significant hardship in placement in shared lockdown cell for 12 months with permission to leave only for showers, medical appointments, and family visits.[120]

When a liberty interest is implicated (generally life, liberty, or property), and when a prison official intends to take action against that interest, due process protections require committed offenders be given notice and opportunity to be heard before being deprived of privileges.[121]

Note that in the correctional setting, procedural due process is significantly reduced for inmates compared to procedural due process generally as a result of balancing of penological interests against individual rights.

When facility rules are violated, disciplinary measures must be quickly and effectively enforced, and the offending inmates held accountable; on the other side of the balance is the inmates' interest in not being punished for violations they did not commit.

Violations can have serious consequences for inmates:

• An inmate may lose a level of freedom and the privileges associated with being in the general population; or
• An inmate may lose or be denied credits, which could directly affect an inmate's release date.

Courts strike a balance between correctional facilities' interest in disciplining inmates for rule violations and inmates' liberty interests by outlining the due process requirements that must be guaranteed in any inmate disciplinary hearing that directly affect an inmate's release date:[122]

• A hearing at which the inmate has a right to be present;

• Advance written notice of the charge given to the inmate at least 24 hours before the hearing that alleges the time and place of the alleged incident, the nature of the infraction, and facts supporting a belief that an infraction has occurred;
• An impartial hearing officer;
• The right to call witnesses and present evidence on the inmate's own behalf, unless calling a particular witness would be unduly hazardous to institutional safety or correctional goals;
• A right to assistance in the hearing where the inmate is unable to read or write, where the issues in the case are complex, or where the inmate is incapable of collecting evidence and presenting it adequately. This may include tribal court advocates or other trained lay advocates, but generally does not include attorneys; and
• A right to a written decision that outlines any evidence relied upon by the hearing officer and the reasons for any decision made by the hearing officer.

There are some limitations to a *Wolff* hearing:

• A hearing is not required for minor infractions;
• A hearing is not required for disciplinary or administrative segregation so long as these actions do not affect the inmate's release date;
• A hearing is required only when a disciplinary hearing could result in a later release date;
• An inmate has no right to confront or cross-examine witnesses, thus a facility may deny an inmate request that a particular witness be called, provided there is adequate justification;
• An inmate has no right against self-incrimination;
• An inmate has no right to counsel (whether paid or appointed);
• An inmate has no right to a particular advocate; and

• A facility controls who can serve as an assistant and can prohibit other inmates from serving in this role.

There is a practical reason that inmates have no right to cross-examination. Institutions may consider information from anonymous informants, as anonymous informants may be the only way that evidence about rule violations could be obtained in prison. Many inmate violations are witnessed by other inmates, rather than staff, and inmates who testify against other inmates (commonly known as "snitches") place themselves in great danger if they openly testify.

Using anonymous informants has the potential for abuse, however, because an inmate with a grudge against another inmate could simply lie about a rule violation. Thus, two criteria must be satisfied before information from an informant can be considered: reliability and credibility. (The issues of reliability and credibility of informants are more fully addressed in the *Legal Division Handbook*.)

8.7.7 Access to Courts

In *Bounds v. Smith*, the Supreme Court established that prisoners have a constitutional right of access to the courts. Prison authorities must assist inmates in the preparation and filing of meaningful legal papers by providing "adequate law libraries or adequate assistance from persons trained in the law"[123] and must provide pretrial detainees with meaningful access to the courts.[124]

Almost every class of inmate or pre-trial detainee is entitled to this right.[125] The Supreme Court has protected the right of access to courts by prohibiting state prison officials from actively interfering with inmates' attempts to prepare or file legal

documents, or from charging filing fees or transcript fees for indigent inmates.[126]

In *Lewis v. Casey,*[127] the Supreme Court held that the assistance must be sufficient to give inmates the means for challenging their sentence or conditions of confinement by filing non-frivolous lawsuits. This assistance must be in the form of adequate law libraries or persons trained in the law to assist inmates in filing suits.

Most institutions have opted to meet this requirement of assistance by:

- Providing some form of law library;
- Teaching inmates how to do legal research; and
- Giving inmates tools for completely and comprehensively researching criminal law issues and civil rights issues.

For inmates who cannot read or write (including inmates who do not speak English), or who are intellectually incapable of preparing comprehensible legal pleadings, a library alone is not adequate for such inmates. In such cases, the facility should provide the inmate with a person who is trained in the law to assist the inmate in protecting his due process rights.

8.8 Barriers to Suits in Federal Court

Following *Bounds* and *Lewis*, inmates have steadily burdened the courts with frivolous lawsuits and filed directly with district courts rather than affording corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.

Congress enacted the *Prison Litigation Reform Act* (*PLRA*) in response to a significant increase in prisoner litigation in the

federal courts; *PLRA* was designed to decrease the incidence of litigation within the court system and eliminate unwarranted federal-court interference with the administration of prisons.

Under *42 U.S.C. § 1997e(a)*, an inmate seeking only money damages must complete any prison administrative process capable of addressing the inmate's complaint and providing some form of relief, even if the process does not make specific provision for monetary relief.[128]

A petition for writ of habeas corpus is not a civil action for purposes of *PLRA*; *PLRA* was primarily aimed at prisoners' suits challenging prison conditions, many of which are routinely dismissed as frivolous. Congress has made filing habeas corpus petition easier than filing typical civil actions, and Congress gave specific attention to perceived abuses in filing habeas petitions by enacting the *Antiterrorism and Effective Death Penalty Act.*[129]

PLRA has amended the *in forma pauperis* (or waiver of filing fee for indigent persons) provisions of *28 USCA § 1915* to bar inmates from bringing a civil action or appeal without pre-payment of the court's filing fees if the inmate had three or more prior actions dismissed on grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted.[130]

Under the Prison Litigation Reform Act (PLRA), exhaustion of available administrative remedies is required for any suit challenging prison conditions, not just for suits under *42 U.S.C. §1983.*[131] A prison must prove that the prisoner-plaintiff failed to exhaust each of his claims; there is no "total exhaustion" rule permitting dismissal of an entire action because of one unexhausted claim.[132]

Failure to exhaust is an affirmative defense under the PLRA unless prison officials inhibit an inmate's ability to utilize grievance procedures.[133] Inmates are not required to specially plead or demonstrate exhaustion in their complaints.[134]

Oral complaints alone regarding conditions of confinement do not excuse an inmate's failure to exhaust administrative remedies before bringing suit under *§1983,*[135] but if prison officials fail to respond to a properly filed grievance, an inmate is considered to have exhausted remedies under *PLRA* and may file suit.[136]

As an example, a complaint that states officials refused medical assistance following an alleged beating by prison officers is sufficiently "exhausted" where it was clear that the state had considered the implied allegation when reviewing prisoner's grievance, despite fact that inmate's grievance did not explicitly discuss the misconduct by medical personnel.[137] For inmates bringing suit against tribal correctional facilities, there are additional barriers of sovereign immunity that generally prohibit bringing suit against the tribe in district court.[138]

8.8.1 Writ of *Habeas Corpus*

In federal prisons or in tribal jails with a BIA contract, a writ of *habeas corpus* is the primary mechanism for challenging conditions of confinement or violations of *ICRA*. Federal courts, rather than tribal courts, hear these claims through a writ of *habeas corpus.* A writ of *habeas corpus* is the only means to have a detention-related claim under *ICRA* heard by federal courts instead of tribal courts.

The basic purpose of a writ of *habeas corpus* is to enable those unlawfully incarcerated to obtain their freedom; it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.[139]

The Supreme Court has "constantly emphasized the fundamental importance of the writ of *habeas corpus* in our constitutional scheme."[140] It is unconstitutional for a writ to be made available only to prisoners who could pay a filing fee, even a nominal one.[141] Post-conviction proceedings must be more than a formality for an inmate, regardless of an inmate's financial resources.[142]

In tribal jails not operated by the BIA or under federal contract, most conditions of confinement have been challenged directly in the tribal courts. The question the tribal court will ultimately have to answer is whether the conditions of confinement amount to cruel and unusual punishment under *ICRA*.[143]

[1] 441 U.S. 520, 545 (1979).
[2] *Price* v. *Johnston,* 334 U.S. 266, 285 (1948); See also *Pell* v. *Procunier,* 417 U.S. 817, 822 (1974); *Wolff* v. *McDonnell,* 418 U.S. 539, 555 (1974).
[3] *Hudson v. Palmer,* 468 U.S. 517, 523 (1984).
[4] 482 U.S. 78 (1987).
[5] See *Covino v. Patrissi,* 967 F.2d 73 (2d Cir.1992); see also *Abdullah v. Gunter,* 949 F.2d 1032 (8th Cir.1991), *cert. denied,* 504 U.S. 930, (1992).
[6] See *Gallahan v. Hollyfield,* 670 F.2d 1345, 1346 (4th Cir.1982), quoting *Sweet v. South Carolina Dept. of Corrections,* 529 F.2d 854, 863 (4th Cir.1975); *Teterud v. Burns,* 522 F.2d 357 (8th Cir.1975). See also *Dreibelbis v. Marks,* 742 F.2d 792, 794 (3d Cir.1984) (right to practice religion may be reasonably restricted in order to facilitate the maintenance of proper discipline in prison).
[7] See *42 U.S.C. § 2000cc*.
[8] See *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015).
[9] See *Schlemm v. Wall*, No. 14-2604, 2015 WL 1787400, at 4 (7th Cir. Apr. 21, 2015).
[10] See *Cruz v. Beto*, 405 U.S. 319, 322 (1972).
[11] *Reimers v. Oregon,* 863 F.2d 630, 632 (9th Cir.1988).
[12] See *Turner*, supra.
[13] *Allen v. Toombs*, 827 F.2d 563 (1987).
[14] 32 F.3d 1258 (8th Cir. 1994).
[15] 103 F.3d 700, 703 (8th Cir. 1997).
[16] 28 CFR 540.70(a) (1988).
[17] 490 U.S. 401, 413 (1989).
[18] Id.
[19] See *28 C.F.R. §540.70*; see also *28 C.F.R. §540.71.*
[20] 441 U.S. 520 (1979)
[21] *Murphy v. Missouri Dep't of Corr.,* 372 F.3d 979, 986 (8th Cir.2004); see also *Dean v. Bowersox*, 325 Fed.Appx. 470, 472 (8th Cir.2009).
[22] See *Murchison v. Rogers*, 779 F.3d 882, 887 (8th Cir. 2015).
[23] See *Thompson v. Patteson*, 985 F.2d 202 (5th Cir. 1993); see also *Gray v. Cannon*, 2013 WL 3754191 (N.D. Ill. 2013); see also

Moses v. Dennehy, 523 F. Supp. 2d 57 (D. Mass. 2007), *judgment aff'd*, 333 Fed. Appx. 581 (1st Cir. 2009).
[24] See *Ramirez v. Pugh*, 486 F. Supp. 2d 421 (M.D. Pa. 2007).
[25] See *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999).
[26] See *Bahrampour v. Lampert*, 356 F.3d 969 (9th Cir. 2004).
[27] See *Cline v. Fox*, 319 F. Supp. 2d 685 (N.D. W. Va. 2004).
[28] 416 U.S. 396 (1974).
[29] See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987).
[30] See *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974).
[31] 468 U.S. 576 (1984).
[32] See *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1511 (2012).
[33] 539 U.S. 126, 137 (2003).
[34] See *Lanza v. State of N.Y.*, 370 U.S. 139, 143 (1962).
[35] See generally *Brown v. Kearney*, 355 F.2d 199 (5th Cir. 1966); see also *United States v. Hallman*, 365 F.2d 289 (3d Cir. 1966).
[36] See *Palmigiano v. Travisono*, 317 F. Supp. 776, 790 (D.R.I. 1970).
[37] *Gettleman v. Werner*, 377 F.Supp. 445, 451 (W.D.Pa.1974).
[38] 469 F.2d 273 (9th Cir. 1972).
[39] (See e.g., *Masters v. Crouch,* 872 F.2d 1248, 1253 (6th Cir.), cert. denied, 493 U.S. 977, (1989); *Watt v. City of Richardson Police Dep't,* 849 F.2d 195, 199 (5th Cir.1988); *Walsh v. Franco,* 849 F.2d 66, 68 (2d Cir.1988); *Weber v. Dell,* 804 F.2d 796, 801 (2d Cir.1986), cert. denied, 483 U.S. 1020, 107 (1987); *Ward v. County of San Diego,* 791 F.2d 1329, 1332 (9th Cir.1986), cert. denied, 483 U.S. 1020 (1987); *Jones v. Edwards,* 770 F.2d 739, 742 (8th Cir.1985); *Stewart v. Lubbock County,* 767 F.2d 153, 156-57 (5th Cir.1985), cert. denied, 475 U.S. 1066, (1986); *Giles v. Ackerman,* 746 F.2d 614, 617 (9th Cir.1984), cert. denied, 471 U.S. 1053 (1985); *Hill v. Bogans,* 735 F.2d 391, 394 (10th Cir.1984); *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1273 (7th Cir.1983); *Logan v. Shealy,* 660 F.2d 1007, 1013 (4th Cir.1981), cert. denied, 455 U.S. 942, (1982); Chapman v. Nichols, 989 F.2d 393, 395 (10th Cir. 1993).)
[40] See Hodges v. Klein, 412 F. Supp. 896, 902 (D.N.J. 1976), quoting *United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970); see also *United States v. Diaz*, 503 F.2d 1025 (3d Cir. 1974).

[41] See *Shain v. Ellison,* 273 F.3d 56, 64–65 (2d Cir.2001); *Wachtler v. County of Herkimer,* 35 F.3d 77, 82 (2d Cir.1994); *Walsh v. Franco,* 849 F.2d 66 (2d Cir.1988); *Weber v. Dell,* 804 F.2d 796, 802 (2d Cir.1986).
[42] See *United States v. Montoya de Hernandez,* 473 U.S. 531, 540 (1985); see also *Murcia v. Cnty. of Orange*, 226 F. Supp. 2d 489, 493 (S.D.N.Y. 2002). ("[t]here must be a clear indication or plain suggestion that contraband may be located in a body cavity…")
[43] See *Spence v. Farrier*, 807 F.2d 753, 755 (8th Cir.1986).
[44] See e.g., *United States v. Edmo,* 140 F.3d 1289, 1292–93 (9th Cir.1998); see also *Lucero v. Gunter,* 17 F.3d 1347, 1350 (10th Cir.1994).
[45] *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625, 109 S. Ct. 1402, 1417, 103 L. Ed. 2d 639 (1989).
[46] See *Sparks v. Stutler*, 71 F.3d 259 (7th Cir.1995); see also *Levine v. Roebuck*, 550 F.3d 684, 687 (8th Cir. 2008).
[47] See *Terry v. Ohio*, 392 U.S. 21, 27 (1968); see also *United States v. Clay*, 640 F.2d 157, 159 (8th Cir. 1981); *United States v. Asbury*, 586 F.2d 973, 976 (2d Cir. 1978); *United States v. Himmelwright*, 551 F.2d 991, 994 (5th Cir. 1977).
[48] See *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982).
[49] 779 F.2d 491, 492 (9th Cir. 1985).
[50] 917 F.2d 1093, 1099 (8th Cir. 1990).
[51] 986 F.2d 1521, 1526 (9th Cir. 1993).
[52] See *Atkins v. Virginia,* 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles,* 356 U.S. 86, 100, (plurality opinion)).
[53] *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (quoting In re Kemmler, 136 U.S. 436, 447 (1890)).
[54] *Hutto v. Finney*, 437 U.S. 678, 687 (1978).
[55] See *Johnson-El v Schoemehl*, 878 F2d 1043, (CA8 Mo., 1989).
[56] See *United States v Salerno*, 481 U.S. 739 (1987), on remand 829 F.2d. 345 (2d. Cir. 1987).
[57] See *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983).
[58] See e.g., *City of Canton v. Harris*, 489 U.S. 378, 388 n.8 (1989); *City of Revere*, 463 U.S. at 244.
[59] See e.g., *Weiss v. Cooley*, 230 F.3d 1027, 1032 (7th Cir. 2000) ("[T]here is little practical difference between the two standards."; see also *Cottrell v. Caldwell*, 85 F.3d 1480, 1490

(11th Cir. 1996) (holding that "the applicable standard is the same").
[60] *18 U.S.C. §3142(i)(2).*
[61] 475 U.S. 312, 319 (1986).
[62] 503 U.S. 1, 6–7 (1992).
[63] 536 U.S. 730, 737 (2002).
[64] *United States v. Budd,* 496 F.3d 517, 531 (6th Cir.2007), citing *Bell v. Wolfish,* 441 U.S. 520, 546–47 (1979); see also *United States v. Bunke,* 412 Fed.Appx. 760,765 (6th Cir.2011)("In the absence of any legitimate penological justification, the pain inflicted upon [the inmate] was, by definition, cruel and unusual punishment.")
[65] *Hudson,* 503 U.S. at 7.
[66] 727 F.3d 1144 (11th Cir. 2013).
[67] 370 F.Supp.2d 644 (N.D. Ohio 2005).
[68] 405 F.3d 102 (1st Cir. 2005).
[69] *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).
[70] Id., at 105-06.
[71] See e.g. *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974).
[72] *Hill v. Dekalb Regional Youth Detention Center*, 40 F.3d 1176, 1187 (11th Cir.1994).
[73] *Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003).
[74] *Gates v. Cook*, 376 F.3d 323, 341 (5th Cir.2004).)
[75] See *Gobert v. Caldwell*, 463 F.3d 339, 349 (5th Cir. 2006).
[76] *See White v. Farmer,* 849 F.2d 322, 325 (8th Cir.1988); see also *Merriweather v. Faulkner,* 821 F.2d 408, 417 (7th Cir.1987), cert. denied, 484 U.S. 935 (1987).
[77] *Ramos v. Lamm,* 639 F.2d 559, 574 (10th Cir.1980), cert. denied, 450 U.S. 1041 (1981); *Inmates v. Pierce,* 612 F.2d 754, 763 (3d Cir.1979); *Bowring v. Godwin,* 551 F.2d 44, 47 (4th Cir.1977); *Finney v. Mabry,* 534 F.Supp. 1026, 1037 (E.D.Ark.1982); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983).
[78] See *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); see e.g., *Partridge v. Two Unknown Police Officers of City of Houston, Tex.*, 791 F.2d 1182 (5th Cir. 1986).
[79] See *Farmer v. Brennan,* 511 U.S. 825 (1994).
[80] Id., at 826.
[81] Id., at 849.
[82] Id., at 843.

[83] See *Alberti v. Klevenhagen*, 790 F.2d 1220, 1228 (5th Cir. 1986).
[84] See *Gates v. Collier*, 501 F.2d 1291, 1308 (5th Cir. 1974), see also *Pugh v. Locke*, 406 F. Supp. 318, 324 (M.D. Ala. 1976).
[85] See *Lewis v. Richards*, 107 F.3d 549, 553 (7th Cir. 1997).
[86] See *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991).
[87] See *Jones v. Diamond*, 636 F.2d 1364, 1374 (5th Cir. 1981).
[88] See *Redman v. County of San Diego*, supra, 1444-45; see also *Withers v. Levine*, 615 F.2d 158, 160 (4th Cir. 1980); *Kish v. County of Milwaukee*, 48 F.R.D. 102, 103 (E.D. Wis. 1969).
[89] See *Billman v. Indiana Dep't of Corr.*, 56 F.3d 785, 788 (7th Cir. 1995); see also *Glick v. Henderson*, 855 F.2d 536, 541 (8th Cir. 1988).
[90] See *Young v. Quinlan*, 960 F.2d 351, 362 (3d Cir. 1992); *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991); *Roland v. Johnson*, 856 F.2d 764, 770 (6th Cir. 1988).
[91] See *Richardson v. Penfold*, 839 F.2d 392, 396 (7th Cir. 1988); *Holland v. DeBruyn*, No. 3:95-CV-525RM, 1997 WL 284813, at *8 (N.D. Ind. Mar. 6, 1997).
[92] See *Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1988).
[93] See LaMarca v. Turner, 995 F.2d 1526, 1532 (11th Cir. 1993); see also McGill v. Duckworth, 944 F.2d 344, 347 (7th Cir. 1991).
[94] See *Prison Rape Elimination Act of 2003*, Pub. L. No. 108-79, 117 Stat. 972 (2003); see also *42 U.S.C. § 15602*.
[95] See *42 U.S.C. § 15602(3)*; see also *28 C.F.R. §115.*
[96] See *National Standards To Prevent, Detect, and Respond to Prison Rape*, 77 Fed. Reg . 37107 (June 20, 2012).
[97] *Brown v. Plata*, 131 S. Ct. 1910, 1933 (2011).
[98] See *Wilson v. Seiter*, 501 U.S. 294 (1991).
[99] See *Dent v. West Virginia*, 129 U.S. 114, 123 (1889).
[100] See *In Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); see also *Wilkinson v. Austin*, 545 U.S. 209, 220-24 (2005).
[101] See *Wilkinson v. Austin*, 545 U.S. 209, 222-23 (2005); *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989), overruled on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995); see e.g., *Skinner v. Cunningham*, 430 F.3d 483, 486 (1st Cir. 2005); *Shakur v. Selsky*, 391 F.3d 106, 118 (2d Cir. 2004); *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 285 (3d Cir. 2008); *Coleman v.*

Dretke, 395 F.3d 216, 221 (5th Cir. 2004); *Bazzetta v. McGinnis*, 430 F.3d 795, 801 (6th Cir. 2005); *Scruggs v. Jordan*, 485 F.3d 934, 939 (7th Cir. 2007); *Carver v. Lehman*, 558 F.3d 869, 872 (9th Cir. 2009); *Estate of DiMarco v. Wyo. Dep't of Corr.*, 473 F.3d 1334, 1342-44 (10th Cir. 2007); *Kirby v. Siegelman*, 195 F.3d 1285, 1292 (11th Cir. 1999).

[102] See *Surprenant v. Rivas*, 424 F.3d 5, 16 (1st Cir. 2005).

[103] See *U.S. v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004).

[104] See *Hatch v. D.C.*, 184 F.3d 846, 849 (D.C. Cir. 1999).

[105] See *Leslie v. Doyle*, 125 F.3d 1132, 1136 (7th Cir. 1997).

[106] See *Coffman v. Trickey*, 884 F.2d 1057, 1058 (8th Cir. 1989).

[107] See *Reeves v. Pettcox*, 19 F.3d 1060, 1062 (5th Cir. 1994).

[108] See *Chambers v. Colo. Dep't of Corr.*, 205 F.3d 1237, 1242 (10th Cir. 2000).

[109] See *Smith v. Mensinger*, 293 F.3d 641, 652-54 (3d Cir. 2002).

[110] See *Torres v. Fauver*, 292 F.3d 141, 150 (3d Cir. 2002).

[111] See *Townsend v. Fuchs*, 522 F.3d 765, 7711 (7th Cir. 2008).

[112] See *Montanye v. Haymes*, 427 U.S. 236, 243 (1976).

[113] See *Cook v. Wiley*, 208 F.3d 1314, 1322-23 (11th Cir. 2000).

[114] See *Barna v. Travis*, 239 F.3d 169, 171-72 (2d Cir. 2001).

[115] See *Skinner v. Cunningham*, 430 F.3d 483, 487 (1st Cir. 2005).

[116] *Sandin v. Conner*, 515 U.S. 472 (1995).

[117] See *Kitchen v. Upshaw*, 286 F.3d 179, 186 (4th Cir. 2002).

[118] See *Johnson v. Hamilton*, 452 F.3d 967, 973 (8th Cir. 2006).

[119] See *Townsend v. Fuchs*, 522 F.3d 765, 771 (7th Cir. 2008)

[120] See *Hernandez v. Velasquez*, 522 F.3d 556, 561 (5th Cir. 2008).

[121] See *Hydrick v. Hunter*, 466 F.3d 676, 696 (9th Cir. 2006), vacated on other grounds and remanded, 129 S. Ct. 2431 (2009).

[122] See *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974).

[123] *Smith v. Bounds*, 538 F.2d 541 (4th Cir. 1975), aff'd *Bounds v. Smith*, 430 U.S. 817 (1977).

[124] See *O'Bryan v. County of Saginaw, Michigan*, 437 F. Supp. 582 (E.D. Mich. 1977).

[125] See *Eldridge v. Block*, 832 F.2d 1132 (9th Cir. 1987) (county jail inmate on extradition hold entitled to access law library); *Brown v. Manning*, 630 F. Supp. 391 (E.D. Wash. 1985) (indigent persons imprisoned for more than three days in county jail

entitled to access); *Lloyd v. Corrections Corp. of America* (W.D. Tenn. 1994) (inmates in private prisons retain right to meaningful access to courts); *Campbell v. Miller*, 787 F.2d 217 (7th Cir. 1986) (maximum security inmates retain right); *Cornett v. Donovan*, 51 F.3d 176 (9th Cir. 1995) (*Bounds* applies to involuntarily committed inmates at state hospitals); *Canell v. Bradshaw*, 840 F. Supp. 1382 (D.Or. 1993) (inmates temporarily housed at intake center retain right of access to courts); *Berry v. Department of Corrections*, 697 P.2d 711 (Ariz. App. 1985) (mandates meaningful access for short-term inmates held in diagnostic facility pending transfer to permanent prison); *Griffin v. Coughlin*, 743 F. Supp. 1006 (N.D. N.Y. 1990) (legal assistance provided to protective custody inmates); *Boyd v. Wood*, 52 F.3d 820 (9th Cir. 1995) (prisoners housed in out-of-state facilities must have access to home-state legal assistance).

[126] See e.g., *Johnson v. Avery*, 393 U.S. 483 (1969); *Ex parte Hull*, 312 U.S. 546, 547–549 (1941); *Burns v. Ohio*, 360 U.S. 252, 258 (1959); *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 590–591, 100 L.Ed. 891 (1956).

[127] 518 U.S. 343 (1996).

[128] See *Booth v. Churner*, 532 U.S. 731 (2001).

[129] See generally *Reyes v Keane*, 90 F3d 676 (CA2 NY, 1996).

[130] See generally *Orr v. Clements*, 688 F.3d 463 (8th Cir. 2012); *Hampton v Hobbs*, 106 F.3d 1281 (CA6 Ohio, 1997); *Roller v Gunn*, 107 F.3d 227 (CA4 SC, 1997).

[131] See *Woodford v. Ngo*, 126 S. Ct. 2378 (2006).

[132] See *Small v. Camden County*, 728 F.3d 265 (3d Cir. 2013).

[133] See Abney v. McGinnis, 380 F.3d 663 (2d Cir. 2004).

[134] See *Jones v. Bock*, 549 U.S. 199, 216 (2007).

[135] See *Albino v. Baca*, 697 F.3d 1023 (9th Cir. 2012).

[136] See *Ebrahime v. Dart*, 899 F. Supp. 2d 777 (N.D. Ill. 2012).

[137] See *Espinal v. Goord*, 554 F.3d 216 (2d Cir. 2009).

[138] See generally *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165 (1977); *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506 (1940); *Turner v. United States*, 248 U.S. 354 (1919);

Oneida Indian Nation of N.Y. v. Madison Cnty., 605 F.3d 149, 156 (2d Cir. 2010), cert. granted, 131 S. Ct. 459, vacated and remanded, 131 S. Ct. 704 (2011) (per curiam).

[139] See *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

[140] *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).("The Court has steadfastly insisted that 'there is no higher duty than to maintain [the writ of *habeus corpus*] unimpaired.")

[141] See *Smith v. Bennett*, 365 U.S. 708 (1961).

[142] See *Long v. District Court*, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966); Cf. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

[143] See *25 U.S.C. §1302(a)(7)(A).*

FLETC
LEGAL DIVISION WEB SITE

---

www.fletc.gov/legal-resouces

THE INFORMER

Case Law Digests
Podcasts
Articles
Training Programs
Links
Videocasts