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# Court Review

Volume 45, Issues 1-2

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION  
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## EDITOR'S NOTE

The special issue begins with Starita's description of the first US case to give legal recognition to the first Americans as individuals. Although many treaties had been signed (and resigned) with tribes across the nation, the indigenous residents were not considered *persons* under US law. The case of *Standing Bear* changed how the courts were to deal with Native American issues, though the legal treatment of Native Americans continues to evolve in American law to this day.

Fletcher examines state and federal court recognition of tribal court criminal convictions. He provides an overview of the constitutional landscape, and summarizes the key cases and developments as the contours of state and tribal cooperation in criminal enforcement matters continue to unfold. He points out particular challenges and issues related to how both state and federal courts handle prior tribal court convictions.

Hanan and Levit provide perspectives on how jurisdiction is allocated between tribal and state courts in Wisconsin. They both were involved in litigation that has offered significant direction on how Wisconsin deals with tribal and state jurisdictional disputes. Their experiences might shed light for other courts confronting inter-jurisdictional matters.

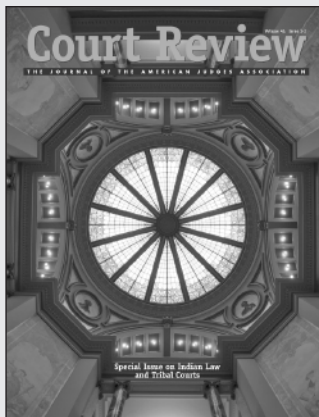
Fort provides an overview of the Indian Child Welfare Act, one of the most frequently litigated federal statutes in Indian law, and one which numerous states courts have had to grapple with. ICWA governs custody proceedings for Native American children, and provides guidance on where tribes have exclusive jurisdiction in proceedings. Fort provides an overview of how state courts have interpreted different provisions of ICWA in handling custody cases, adaptation of ICWA as either state law or court rule, and full faith and credit in non-ICWA situations.

Indian law is commonly perceived as a field fraught with historical anachronisms, complex doctrines, and rich variation. Carter provides a succinct overview of research resources and methods to assist those in the field. She provides an outline of basic authorities, treaties, statutes, and executive and administrative materials helpful to new or veteran judges and practitioners.

Rosser's essay provides commentary on subtext which is often—though not always—present in Indian vs. non-Indian disputes: presumptions about harm to property value. He discusses and confronts these assumptions, and offers thoughts for judges faced with adjudicating such cases.

Organick and Kowalski's essay discuss the importance of tribal, state, and federal cooperation within an historical and contemporary context. They urge courts to treat questions of state and tribal cooperation with the recognition that tribal sovereignty itself may be at stake.

—Tarik Abdel-Monem & Alan Tomkins



*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 52. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Photo credit: Mary Watkins (maryswatkinsphoto@earthlink.net). The cover photo shows the elaborate stained-glass dome of the Silver Bow County Courthouse, which opened in 1912 in Butte, Montana; the floor shown below is also from the courthouse.



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# President's Column

Tam Schumann

The overwhelming concern shared by all courts in the United States today is the financial impact on the courts from these difficult economic times. In my role as president of AJA, I have attended meetings of the Conferences of the Chief Justices, the Conference of State Court Administrators, and the National Association for Court Management. All of these entities have addressed the problems of running a court with less available resources.

I would like to share the current approach California has taken in an area that directly affects its judiciary—the voluntary waiver of a portion of our salary to prevent court-employee layoffs. My understanding is that several other states have considered this approach. I hope by sharing the California experience and research that it will assist you if your state entertains a similar idea.

In California, judicial salaries are set by the legislature. By statute, our salaries cannot be reduced without our consent or without going through the normal legislative procedure regarding the setting of salaries. In short, even though we have a fiscal crisis, any immediate reduction in our pay must be done voluntarily. The notion of the judiciary waiving a portion of our salary arose when the California Administrative Office of the Courts decided that to cut costs and preserve jobs, courts in California would be closed one day out of each month. On those closed days, our employees would be considered as being on furlough and would be unpaid. The feeling was that as leaders of our courts, we should also voluntarily reduce our pay so that all court employees, regardless of whether they wear a black robe or not, would take the same percentage cut in pay. That percentage equals 4.62% of our salary. Needless to say (and as we are all basically lawyers), there were a lot of questions:

**1. Does the 1-day court closure require legislation?**

Yes. Legislation was required to make the one-day closure a legal holiday so that any time requirements for criminal and civil cases would not be impacted. *See* Cal. Gov't Code § 68106(b) (adopted effective July 28, 2009).

**2. Does the waiver of a portion of our judicial salary have to be legislated?**

Yes. Legislation was required to ensure that even though we will not be working several days in the fiscal year, we would still be considered as serving full-time so that calculation of our retirement benefits, supplemental-judicial benefits, or any other job-related benefits would not be impacted. *See* Cal. Gov't Code § 68106(b)(3).

**3. Procedurally, how do we go about making the waiver?**

A form was filled out and sent to the AOC. The waiver can

be month-to-month, quarterly, annually, or any other period, but not less than a month.

**4. Do we still work on the closed day?**

Judges who participate in the waiver program are not required to work. Those who do not participate would have to consult with their presiding judges to determine whether they are to be at the courthouse on closure days.

**5. If we work on closure days, are we covered by liability insurance and absolute immunity?**

Yes. California's liability-insurance program for judges covers all judicial acts regardless of when performed.

**6. What are the tax consequences of the voluntary waiver?**

The informal information provided by the IRS has been that the waived salary would not be included in the gross income for taxation purposes. Tax Court holdings have been that where an employer and employee agree to a reduction of salary, the reduction amount is not included in the gross-income amount.

**7. Where will the waived monies go?**

They will not go to the specific court to which the judge making the waiver is a member. The funds instead go to the state's fund for allocation to all trial courts.

**8. Is there a way a judge can make a donation to his or her own court?**

Yes, through a charitable contribution. For tax purposes, the contribution will be considered to have been made from net income but can be made in any amount for any period of time.

**9. Will there be a public record of who has exercised the voluntary waiver or made a charitable donation?**

Yes, the names will be made available upon request, including from the media. (And stating the obvious, names of those who do not are clearly discoverable by the mere fact of omission.)

The bottom line is that each judge has to make the decision as to whether he or she will participate or not. This is not a clear decision as such considerations as morale of court staff and exposure to an election challenge must be weighed and balanced by our own financial hardship. The California court-closure program began Wednesday, September 16, and will continue on the third Wednesday of each month through June 2010.

I know we would welcome any information from our membership as to how their states have approached the running of their courts in this time of fiscal difficulties.



# The Case of *Standing Bear*:

## Establishing Personhood under the Law

Joe Starita

**A**t ten o'clock on the morning of May 1, 1879, in Omaha, Nebraska, U.S. District Court Judge Elmer Dundy's gavel smacked against a wooden bench and the trial of *Ma-chu-nah-zha v. George Crook*<sup>1</sup> was officially underway. Delayed by heavy spring rains and widespread flooding, the judge had just arrived from Lincoln the night before, but now he was settled at the bench and he asked the attorneys representing Standing Bear to call their first witness.

Willie W. Hamilton, the son of the missionary on the Omaha Reservation, approached the stand. Hamilton, 22, had lived on the reservation for 12 years, working at the agency store for the past six. He spoke both Omaha and Ponca fluently and had first met the prisoners when they arrived on Omaha Reservation land two months earlier. The younger of Standing Bear's two attorneys, John Lee Webster, began the questioning, asking the witness to describe the condition of the prisoners.

When the prisoners first arrived on the morning of March 4, Hamilton testified, they were in bad shape. Those who had them wore white man's clothes. They lived as families, as man and wife, with their children – two of whom were orphans.

What did they do after they arrived? Attorney Webster asked.

All the healthy ones began to break ground and sow crops, mostly wheat, the witness replied.

Did any of the prisoners put in a crop for themselves?

Buffalo Chip had put in four or five acres of wheat on land the Omaha gave him.

On that Sunday, the attorney asked, were the prisoners resting on the Sabbath or working?

The judge: "Is that necessary?"

The attorney: "The theory of this government is to Christianize these Indians, I believe."

The witness: "It is about the same as it is with white men, some do, and some do not."

When his opponent finished, Genio Lambertson had some questions for the witness on behalf of the government and his client, General Crook. Young and brash, Lambertson was trying his first case as the newly minted district attorney.

When the prisoners were on the Omaha Reservation, Lambertson asked, who was their chief?

Standing Bear was the head chief, the witness replied.

"Did they obey his orders?"

"Yes, sir."

The district attorney asked if they depended on the government for their wagons, clothes and blankets.

Yes, for the most part, the witness said.

The young agency store clerk left the stand and Lieutenant Carpenter, the arresting officer, was sworn in as the second witness. Standing Bear's attorney again focused on dress and work habits.

When you arrested the prisoners, he asked, were they wearing citizens' clothing?

The lieutenant said the majority of the men were – only two wore blankets and leggings. And two of the sick Indians had recently said they wanted to go to work.

The general's lawyer approached, focusing again on loyalty to the chiefs.

"How many chiefs are there?" Lambertson asked.

The judge: "Why is that material?"

The district attorney: "To show that these Indians have their chiefs, to whom they profess allegiance."

With that, the trial recessed for lunch, resuming again at 2 p.m. When the plaintiffs announced the name of their third witness, the government lawyer jumped to his feet.

"Does this court think an Indian is a competent witness?" Lambertson asked.

"They are competent for every purpose in both civil and criminal courts," the judge replied. "The law makes no distinction on account of race, color, or previous condition."

Standing Bear approached the bench. He took the oath and the store clerk, Hamilton, was sworn in as interpreter. Webster asked the questions and, sentence by sentence, the store clerk translated the testimony from Ponca to English.

How had things been for them on their old reservation on the Niobrara? Webster asked.

"We lived well," Standing Bear said. "I had my own land, and raised enough so I could get along nicely. My children were going to school, we had a good school, and everything going nicely."

Were they becoming civilized up on the Niobrara?

"He says he wants to work, and become like a white man, and that he has tried his best."

How were things in the Warm Country?

"I couldn't plow, I couldn't sow any wheat, and we all got sick, and couldn't do anything....Instead of our tribe becoming prosperous, they died off every day during the time. From the time I went down there until I left, 158 of us died."

The witness looked up at the judge.

"I thought to myself, God wants me to live, and I think if I come back to my old reservation he will let me live. I got as far

**Authors' Note:** This article is excerpted from JOE STARITA, "I AM A MAN:" CHIEF STANDING BEAR'S JOURNEY FOR JUSTICE (Chapter 6, "The Color of Blood") (2008), reprinted with permission of the publisher, St. Martin's Press.

### Footnotes

1. United States *ex rel.* Standing Bear v. Crook, 25 F.Cas. 695 (C.C.D.Neb. 1879) (No. 14,891).

as the Omahas, and they brought me down here,” he said, his voice getting louder and stronger. “What I have done? I am brought here, but what have I done? I don’t know.”

Standing Bear got up from his chair and began to gesture, speaking louder to the faces staring back from the sides, the back and the benches. “It seems as though I haven’t a place in the world, no place to go, and no home to go to, but when I see your faces here, I think some of you are trying to help me, so that I can get a place sometime to live in, and when it comes my time to die, to die peacefully and happy.”

The judge told the interpreter to tell the witness not to get too excited, to stay calm. Standing Bear sat back down. His lawyer turned to the interpreter.

“Ask him how many of his children died in the Indian Territory before he came away?”

“He says two died down there. He says his son could talk English and write, and was a great help to him...and whenever he thinks of it, it makes him feel bad.”

Does he still consider himself the chief of his people?

“He says he didn’t consider himself a chief...He says he felt himself to be as poor as the rest of them.”

The general’s lawyer approached the witness. He told the interpreter to ask if he was the chief of those Ponca now in the north or any of those in the Territory?

“He says, I was not the head man; I don’t consider myself any better than they are.”

The district attorney wanted to know if the government furnished them with wagons and farming tools.

“He says they got some wagons and some mowing machines.”

Did they escape from the Territory in government-issued wagons?

Two were government-issued. The third – a light spring wagon – he bought himself.

The district attorney wanted to know why he left the Indian Territory.

“He says he wanted to go on his own land, that had always been his own land...that his son when he died made him promise if ever he went back there that he would take his bones there and bury him, and that he has got his bones in a box, and that if ever he goes there he will bury his bones there; that there is where he wants to live the rest of his life, and that there is where he wants to be buried.”

Does he want to go back to the Niobrara and live as he did before?

“He says he might go there and work until he was blind, but that would not change his color; that he would be an Indian in color, but he wants to go and work and become a citizen.”

When Standing Bear finished, his lawyers rested their case. The government offered no witnesses and no testimony and though it had been a long day, the judge instructed the lawyers to begin their closing arguments. Webster started to summarize the important points on behalf of Standing Bear and the Ponca, but he soon informed the judge he was too sick to continue and so the closings were postponed until ten the next morning.

As the first day’s testimony ended, as the boisterous throng began to file out of the courthouse, it was clear to legal observers that the complexities of the case had winnowed

down to one essential issue: Had the Ponca prisoners genuinely expatriated themselves from their tribal past and become firmly lodged on civilization’s path? If so, then they were entitled to the protection of the Fourteenth Amendment and the government had no business trying to deprive them of life, liberty and property. If not, then they were government wards who had illegally left their reservation and it was the military’s duty to return them to the Indian Territory.

Promptly at ten the next morning, the younger lawyer, Webster, still a bit under the weather, began to lay out his case in support of the Indian prisoners. First of all, he told the judge, the Omaha legally owned their reservation and, as such, had every right to share the land with their Ponca friends and relatives. Standing Bear and the Ponca did not want the government’s help. They simply wanted their own land and the chance to work it and become self-supporting. They cannot, he stressed, be moved “at the whim and pleasure of the commissioner at Washington” who does not have “the power to move the Indians when and where he pleases.” In fact, the government’s behavior in this case, he told the judge, openly defies the philosophy of the nation’s third President, who, in a letter to an Indian chief in 1803, had said, “these lands can never go from you but when you wish to sell.” Thomas Jefferson also was emphatic in believing Indian nations were “entirely independent and the government could in no way interfere with their internal relations.” So how could the government now interfere with business between the Omaha and Ponca? Although these tribes are often called barbarous, the Omaha and Ponca “are not savages or wanderers. They cultivate the soil, live in houses, and support themselves.”

For three and half hours, Webster roamed far and wide across the oratorical landscape, alternately quoting William Cullen Bryant, Alexis de Tocqueville and Frederick Douglass to underscore his legal arguments. After a rugged winter march of 60 days, he told the court, the prisoners had finally arrived at the home of the “savage” Omaha. And why had they endured such a harsh journey? Because they had been dumped in a place where malaria was “floating like a cloud over the land,” where, in less than two years, their numbers had dropped from 780 to 580 – a greater mortality rate than that of Union soldiers during the Civil War, greater than the death rate at the infamous Andersonville prison.

But, mostly, Webster began to bear down on the issue that had now taken center stage. If Standing Bear and the Ponca had broken away from the rest of the tribe, he argued, if they had declared their independence and commitment to a new way of life, then they had come out from under the government’s yoke. Then they had the right to return to the lands they owned, or to share the Omaha land, and the government had no legal right to restrain, detain or return them. After all,

**[H]is son when he died made him promise... he would take his bones there and bury him, and that he has got his bones in a box, and... he will bury his bones there....**

**To support his main argument – that only American citizens had access to U.S. courts – the district attorney relied [on the Dred Scott decision].**

wasn't that the point of the Fourteenth Amendment – to promote and protect individual rights and liberties? That the Indian prisoners qualified for its protection, he told the judge, there could be no doubt. As proof, he cited an 1870 U.S. Senate report specifically stating that when tribal relations are dissolved, the Fourteenth Amendment

applies. And when the amendment applies, it made “an Indian who was born in this country and who did not owe allegiance to any other form of government, a citizen beyond all dispute.”

To drive home his point, Webster quoted directly from the amendment: all persons born or naturalized in the United States are citizens of the United States and cannot be deprived of life, liberty or property without due process of law. And so if these prisoners, born on American soil, were not citizens, then what were they? “Are they wild animals, deer to be chased by every hound?”

In the end, he said, it came down to a matter of fundamental civil rights, of basic human liberties, and the prisoners were now asking for the court's help. It was like the slave Douglass had once said: “A man belongs to himself. His hands are his own, his feet are his own, his body is his own, and they will remain his until you storm the citadel of heaven and wrest from the bosom of God man's title deed to himself.”

Webster spoke until three o'clock and after he finished, the young district attorney approached the bench on behalf of the defendant, General Crook. He began with an appreciative tribute to his opponents, Webster and A.J. Poppleton, thanking them for “their generosity in coming to the assistance of these poor people, prisoners and friendless in a strange land.” And then, for the next three hours, Lambertson laid out the case for the government of the United States, offering a variety of reasons and legal arguments underscoring why Standing Bear and the Ponca ended up in the barracks at Fort Omaha and why they should be returned to their reservation in Indian Territory. The 1871 federal law forbidding any more treaties with Indian tribes, he told the judge, absolved the government from needing Ponca consent to move them from their Niobrara homeland to the Territory. He also suggested U.S. laws did not apply to Indian tribes. To be included, Indians had to be either foreign subjects or citizens – and the Ponca were neither. Nor were these tribes independent nations. They were dependent communities, government wards relying upon the United States for their survival. Nowhere in the law of the land, he said, could he find any legal precedent allowing an Indian to file suit in a federal court. And he recounted the history of Indian atrocities against innocent white citizens, implying they were a people too savage to be given legal rights.

But mostly, again and again, his arguments circled back to one central theme, the foundation of his case: The Indian – as far as the law was concerned – was neither a citizen nor a per-

son, and so he could not bring a suit of any kind against the government of the United States. As a result, the court had grievously erred in granting Standing Bear a hearing for a writ of habeas corpus and then awarding him the legal opportunity to sue an Army general. Lambertson maintained this was a legal right available only to American citizens. And since he was not a citizen, the court had no right to issue the writ. Furthermore, he argued, the Ponca had never abandoned their traditional ways. They retained tribal ties, an allegiance to their chief and depended on the government for their survival. So, clearly, they were not entitled to Fourteenth Amendment protection.

To support his main argument – that only American citizens had access to U.S. courts – the district attorney relied a good deal on a decision the nation's highest court had reached 22 years earlier, a case involving a black man who had also wanted his freedom.<sup>2</sup>

Dred Scott, born a slave in Virginia around 1800, had bounced around as the property of several white masters, traveling from the slave states of Virginia, Alabama and Missouri to the free state of Illinois and the free federal territory of Wisconsin. Back in St. Louis in 1843, after his master's widow hired him out to an Army captain, Scott decided he wanted a different way of life. So he offered the widow \$300 for his and his wife's freedom. When she refused, he eventually asked the courts, with the help of anti-slavery lawyers, to set him free – a test case his lawyers and supporters hoped would lead to the freedom of all slaves.

In 1857, after a decade of appeals and court reversals, his case finally landed in the United States Supreme Court. In a 7-2 vote on March 6, the high court settled the matter: Anyone of African ancestry – slaves and those set free by their masters – could never become a U.S. citizen and therefore they could not sue in federal court. Since Scott was black, he was not a citizen and so he could not sue for his freedom – or anything else – in federal court. Slaves were the private property of their owners, the majority ruled, and the court could not deprive owners of their property. To do so would violate the Fifth Amendment guarantee against the government seizing property from an owner “without due process of the law.”

So, according to the court, Scott would remain a slave. The sons of his first master had been his friends since childhood, and they helped pay Scott's legal bills throughout the long court fight. Not long after the Supreme Court decision, Scott and his wife were returned to his boyhood friends, who bought them and then set them free. About a year later, Dred Scott died of tuberculosis.

Although each justice had written a separate opinion in the case, Chief Justice Roger B. Taney issued the court's majority opinion. A loyal advocate of slavery, he said a Negro was not entitled to the legal rights of a U.S. citizen and cited the right to sue in federal court as an example. Furthermore, Taney concluded, Negroes had “no rights which the white man was bound to respect.”<sup>3</sup>

In the spring of 1879, on the third floor of the federal courthouse, District Attorney Lambertson did not want the present

2. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

3. *Id.* at 407.

court to forget its past. In this case, he said in his concluding remarks, Judge Taney's decision remained the guiding legal principle upon which a decision must now be based: So if a Negro did not have access to federal court, he told the judge, then surely an Indian didn't either. When the district attorney finished at six o'clock, the judge ordered a dinner recess. The last summary would begin in an hour.

All along, he had been scheduled to have the final say, and so on the warm, early May evening after the dinner break, the dean of the state's legal community made his way to the front of the courtroom. For the next three hours, Andrew Jackson Poppleton fused history and philosophy, religion and politics, humanity, literature and the law – isolating each of the district attorney's arguments with a focused rebuttal.

No Ponca consent needed?

The district attorney, he told the court, had cited the 1871 resolution banning further treaties as the government's justification for removing the Ponca without their permission. But he neglected to mention that the law was not retroactive. In other words, the language of the original treaty still applied – the government had needed Ponca consent.

U.S. laws don't extend to Indian tribes?

Then why, Poppleton asked, had the government entered into numerous treaties with the Indian people – treaties ratified by Congress obligating the government to honor Indian lands, protect them and provide food, clothing and shelter. The government, he told the judge, can't have it both ways. "When a great nation of forty millions of people, wielding the purse and the sword, and possessing all the arts of civilization, breaks faith with the feeble remnants of humanity which all its life has had the sunlight of civilization excluded from its view, it is simply infamous."

The Indian – as neither citizen nor foreign subject – has no rights?

If the government no longer sees them as tribes or Indian nations, he asked, then what are they? What is their status? "Are we to say that the Ethiopian, the Malay, the Chinaman, the Frenchman and every nationality upon the globe without regard to race, color or creed, may come here and become a part of this great government, while the primitive possessors of this soil...are alone barred from the right to become citizens?"

He did not believe, he said, that this government – his government – would do such a thing. "I have been accustomed to believe that I lived under a beneficent government. I have believed it to be my duty to thank God I was born under the shield and protection of this North America Republic – which has solved so many problems and which in God's good time we hope will solve so many more – but is it possible that this great government, standing here dealing with this feeble remnant of a once powerful nation, claims the right to place them in a condition which is to them worse than slaves, without a syllable of law; without a syllable of contract or treaty? I don't believe, if your honor please, that the courts will allow this; that they will agree to the proposition that these people are wild beasts; that they have no status in the courts. If it be true that these Indians have no souls to save, the churches had better leave them alone; had better not try to induce them to lead a civilized life if they have no rights, not even the right to that salvation which has been proclaimed as free to all."

He wondered aloud about the term "savages"?

"Because we cannot civilize these Indians in a single generation we conclude that we cannot civilize them at all...Because these Indians in 200 years have not reached the degree of civilization which it required us 2,000 years to attain, we lift up our hands in holy horror and call them savages."

And were they really dependent government wards?

The prisoners, he told the court, had established families and communities throughout their Niobrara homeland. They had become skilled farmers and peaceful neighbors who went to church and sent their children to school. And just as they were well on the way down civilization's path, he said, the government illegally pulled them from lands they legally owned and shipped them to strange, barren ones where they died in droves. Now, they had severed their tribal ties and ancient allegiances and once again wanted to take up a civilized life. "I am lacking in the power to show to this court what, to me," Poppleton said, "is as clear as the daylight – that is, to show that if these Indians are honestly desirous of adopting the ways of civilization and becoming civilized men; of pursuing the habits and industries characteristic of the civilization of the present age, there is no power, human or divine, that has a right to interpose a barrier between them and the goal to which they seek to march."

Poppleton had spoken for close to three hours, and as he began to wind down, after he had confronted each of the government's arguments, he slowly began to drive a legal wedge between the slave of yesterday and the Indian who sat before them. Dred Scott, he said, was strictly a citizenship issue. The only question the case resolved was that since Scott was not a citizen of Missouri, he could not sue in federal court. It had also confirmed, the lawyer noted, that a slave at that time in American history had no civil rights. But in his haste to justify slavery, Chief Justice Taney had strayed far from the legal question at hand and now – twenty-two years later – his ruling was out of date. In the spring of 1879, there were no slaves. The Fourteenth Amendment had seen to that. Hence this case now before the court was not specifically about citizenship at all. It was simply about *who* had a legal right to a writ of habeas corpus – a straightforward request compelling the government to justify why it had arrested and detained the prisoners. And the law on this particular point, he told the judge, was quite clear. It said nothing about being a citizen. It said only that "*any person or party*" had the legal right to apply for a writ.

So there was really but one question, and one question only, before the court: Was Standing Bear a person? To deny his legal right to the writ, he said, the court would have to conclude that he and the other Ponca prisoners were not people. They were not human beings.

"And who will undertake that?" Poppleton asked. "Why, I think the most touching thing I have heard in courts of justice or elsewhere for years was the story this old man told on the stand yesterday of the son who had gone with him to the

**So there was really but one question, and one question only, before the court: Was Standing Bear a person?**



**If you pierce your hand, you also feel pain. The blood that will flow from mine will be of the same color as yours. I am a man. The same God made us both.**

Indian Territory, whose education he had care for; whom he had nurtured through the years of boyhood and sent to school in the belief that that boy would be a link between him and that civilization to which he aspired; that he would protect him from the wiles of agents; that there would be one person on the wide earth, the issue of his own loins, who would stand between him and the whites, whom he knew from experience were trying to over-reach him – he said to that boy as his eyes were closing

in death in a foreign country that he would take his bones to his old home on the Running Water, and bury him there, where he was born.”

The lawyer paused and turned, glancing at Standing Bear.

“That man not a human being? Who of us all would have done it? Look around this city and State and find, if you can, the man who has gathered up the ashes of his dead, wandered for sixty days through a strange country without guide or compass, aided by the sun and stars only, that the bones of that kindred may be buried in the land of their birth. No! It is a libel upon religion; it is a libel upon missionaries who sacrifice so much and risk their lives in order to take to these Indians that gospel which Christ proclaimed to all the wide earth, to say that these are not human beings.”

It was well after nine o'clock, almost twelve hours since the day's session began. The three lawyers had spoken for more than nine hours and the large crowd of prominent citizens, of clergy and church faithful, judges and lawyers and newsmen, the general's large staff decked in military uniforms and their wives milled about after Poppleton finished his closing argument, heading for the door.

Before the crowd began to file out, the judge made an announcement. Although the trial now had officially ended and the legal proceedings were finished, one last speaker, he said, had asked permission to address the court. He supposed it was the first time in the nation's history such a request had been made, but he had decided to grant it and he had earlier informed all the lawyers of his intention to do so. The crowd settled back down and turned its attention to the front of the courtroom.

They saw him rising slowly from his seat, and they could see the eagle feather in the braided hair wrapped in otter fur, the bold blue shirt trimmed in red cloth, the blue flannel leggings and deer-skin moccasins, the red and blue blanket, the Thomas Jefferson medallion, the necklace of bear claws. When he got to the front, he stopped and faced the audience and extended his right hand, holding it still for a long time. After a while, it is said, he turned to the bench and began to speak in a low voice, his words conveyed to the judge and the large crowd by the interpreter.

“That hand is not the color of yours, but if I pierce it, I shall feel pain. If you pierce your hand, you also feel pain. The blood that will flow from mine will be of the same color as yours. I

am a man. The same God made us both.”

Then he turned and faced the audience, pausing for a moment, staring in silence out a courtroom window, describing after a time what he saw when he looked outside.

“I seem to stand on the bank of a river. My wife and little girl are beside me. In front the river is wide and impassable.” He sees there are steep cliffs all around, the waters rapidly rising. In desperation, he scans the cliffs and finally spots a steep, rocky path to safety. “I turn to my wife and child with a shout that we are saved. We will return to the Swift Running Water that pours down between the green islands. There are the graves of my fathers.”

So they hurriedly climb the path, getting closer and closer to safety, the waters rushing in behind them. “But a man bars the passage...If he says that I cannot pass, I cannot. The long struggle will have been in vain. My wife and child and I must return and sink beneath the flood. We are weak and faint and sick. I cannot fight.” He stopped and turned, facing the judge, speaking softly.

“You are that man.”

In the crowded courtroom, no one spoke or moved for several moments. After a while, a few women could be heard crying in the back and some of the people up closer could see that the frontier judge had temporarily lost his composure and that the general, too, was leaning forward on the table, his hands covering his face. Soon, some people began to clap and a number of others started cheering and then the general got up from his chair and went over and shook Standing Bear's hand and before long, a number of others did the same.

The bailiffs asked for order and when it finally grew quiet again, the judge said he would take the case under advisement and issue his decision in a few days. Then he adjourned the court shortly after ten o'clock on a warm spring evening on the second of May, 1879.

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In his office in the building that dominated the corner of Fifteenth and Dodge streets, one floor below the large courtroom, the judge would have much to ponder in the days ahead. He was aware that he was now in a position to bring some clarity to the long-muddled picture of exactly where the American Indian stood upon the nation's legal landscape. He also knew that the location had eluded several generations of his judicial colleagues and that neither the country's legislative nor its executive branch had been much help. And he knew, too, that he would be harshly criticized – from anxious white settlers and a powerful military on one side to newspapers, clergy and a burgeoning East Coast Indian Reform movement on the other – no matter which way he ruled. Still, he knew the legal issues that had landed on his desk were long overdue, and he intended to take his time in sorting through the important questions they raised.

Were these Indian prisoners, as the young district attorney maintained, still loyal to their tribe and chief? Were they dependent government wards who had illegally fled their assigned reservation and must now be returned – as the law required – to the Indian Territory? Were they neither citizens nor foreign subjects in the eyes of the law and therefore ineli-

gible to file a suit of any kind against the government? Were these Indians then, by definition, not entitled to the same constitutional protection, civil rights and legal privileges enjoyed by all other American citizens?

Or were they, as the dean of the state's legal profession contended, a group of people who had broken from their past and genuinely sought a civilized future for themselves and their children? Indians who farmed, went to church, sent their children to school and, much like Dred Scott had once done, were now asking the court to set them free. Indians whom the government had no legal right to arrest and detain and return to the Territory. Indians who were people – human beings within the meaning of the law – who had a legal right to sue the government and were entitled to the full protection and provisions of the Fourteenth Amendment.

So, sitting in his office in the federal courthouse, the judge knew the case had its share of complex questions and broad legal issues to sort through – not the least of which was a meticulous examination of the relevancy of the Fourteenth Amendment. Eleven years earlier, when Congress passed the landmark legislation, debate by and large had focused on slaves becoming free men and women, citizens who would now join the ranks of those born or naturalized in the United States. At one point, the Congressional debate shifted to whether Indians who had abandoned tribal life, were taxed and had set off on a domestic course should also be considered citizens. By a 30 to 10 vote, however, the Senate killed an amendment that would have included citizenship rights for those Indians.

But what did that now mean for the twenty-six Ponca prisoners holed up in Fort Omaha during the spring of 1879? Did the government still have the legal right to tell them when to move? Where to live? How to live? And what if they didn't want to? What if they wanted to find a better way? And if the government tried to stop them, had they been illegally deprived of life, liberty and property? In the early part of May, it was not unusual to see the lights burning late into the night in the office on the second floor of the large building on the corner of Fifteenth and Dodge.

On the morning of May 12, 1879, ten days after hearing about the rising flood waters and the path to safety, about the color of blood, Judge Elmer Dundy delivered his decision in a lengthy written opinion to the Indian prisoners, the Army general and their lawyers.

“During the 15 years in which I have been engaged in administering the laws of my country,” he began, “I have never been called upon to hear or decide a case that appealed so strongly to my sympathy as the one now under consideration. On the one side we have a few of the remnants of a once numerous and powerful, but now weak, insignificant, unlettered and generally despised race. On the other, we have the representative of one of the most powerful, most enlightened, and most Christianized nations of modern times. On the one side we have the representatives of this wasted race coming into this national tribunal of ours asking for justice and liberty to enable them to adopt our boasted civilization and to pursue

the arts of peace, which have made us great and happy as a nation.

“On the other side,” he continued, “we have this magnificent, if not magnanimous, government, resisting this application with the determination of sending these people back to the country which is to them less desirable than perpetual imprisonment in their own native land. But I think it is creditable to the heart and mind of the brave and distinguished officer who is made respondent herein, to say that he has no sort of sympathy in the business in which he is forced by his position to bear a part so conspicuous.”

If sympathy were the only issue before the court, the judge said, the prisoners would have been freed the moment closing arguments ended. But in a nation where law determines liberty, sympathy alone cannot guide the courts. Instead, fundamental legal principles must decide this case. And if it cannot be determined that the prisoners are entitled to constitutional protection, they must be returned to Indian Territory, which they left without government consent.

The judge then broke down each of the government's legal arguments and addressed them one by one.

First of all, the government had argued, there was the problem of jurisdiction. Put simply, the court had overstepped its legal boundaries in allowing this case to see the light of day. The judge, in other words, had no legal right to compel the government to justify its arrest of the Indian prisoners because an Indian has no legal right to sue in federal court. Furthermore, since no Indian had ever been allowed to sue for a federal writ of habeas corpus, there was no legal precedent to let the case proceed.

In his written opinion, Judge Dundy labeled this argument a “non sequitur.”<sup>4</sup> Conceding he didn't know of a similar case, Dundy said it was nevertheless illogical to assume that just because no Indian had ever sought a writ of habeas corpus before that he could never seek one. The court also had jurisdiction in this specific case, the judge noted, because Standing Bear and the Ponca had been restrained of their liberty in violation of an earlier treaty provision. When that occurs, it is the federal courts – and only the federal courts – that can determine if the prisoners' constitutional rights have been violated. It would be “a sad commentary on the justice and impartiality of our laws, to hold that Indians, though natives of our own country, cannot test the validity of an alleged illegal imprisonment,” the judge wrote.

Dundy next addressed the question of who could legally apply for the writ. Throughout the trial, the government had steadfastly argued that only citizens could do so. And since Indians were not citizens, they could not sue and thus the

**[Judge] Dundy next addressed the question of who could legally apply for the writ. Throughout the trial, the government had steadfastly argued that only citizens could do so.**

4. *Standing Bear*, 25 F.Cas. at 697.

**First, [Judge Dundy] concluded, “an Indian is a PERSON within the meaning of the laws of the United States, and has therefore the right to sue out a writ of habeas corpus...”**

court had grievously erred in granting Standing Bear and the Ponca that legal privilege.

But the law, Judge Dundy said, clearly states “persons” or “parties” can do this – it says nothing about citizens or citizenship being a requirement. And the most natural and reasonable way to define a “person,” the judge wrote, is simply to consult a dictionary. “Webster describes a person as ‘a living soul; a self-conscious being; a moral

agent; especially a living human being; a man, woman or child; an individual of the human race.”<sup>5</sup> This, he said, “is comprehensive enough, it would seem, to include even an Indian.”<sup>6</sup>

Having resolved the question of jurisdiction, the judge then turned to the trial’s key issue: Did Standing Bear and the Ponca have the right to expatriate themselves from the tribe, sever their tribal allegiance and pursue a more independent and civilized life? To answer that question, the judge began by reviewing the events and forces that had set in motion the Ponca’s long flight north from the Warm Country.

“The love of home and native land was strong enough in the minds of these people to induce them to brave every peril to return and live and die where they had been reared. The bones of the dead son of Standing Bear were not to repose in the land they hoped to be leaving forever, but were carefully preserved and protected, and formed a part of what was to them a melancholy procession homeward. Such instances of parental affection, and such love of home and native land may be *heathen* in origin, but it seems to me that they are not unlike *Christian* in principle.”<sup>7</sup>

This, the judge noted, demonstrated Standing Bear and the Ponca had done all they could to terminate their tribal allegiance and underscored their desire to become independent farmers intent on adopting the ways of civilization. So did the Ponca prisoners detained at Fort Omaha have a legal right to expatriate themselves? Although there had been decades of heated discussions on the right of expatriation, those arguments had been silenced for eleven years now, the judge said. They were silenced on July 27, 1868, when a Congressional act declared “the right of expatriation is a natural and inherent right of all people, indisputable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.”<sup>8</sup> It was a short step then for the judge to render his decision: An Indian “possesses the clear and God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence.”<sup>9</sup>

Finally, there was the matter of whether the government

had the legal right to remove Standing Bear and the Ponca from the Omaha Reservation and send them back to Indian Territory. A careful reading of the law, Dundy wrote, shows no such power exists. The government could not arbitrarily round up Indians who had severed their tribal ties and simply move them whenever and wherever it wanted. He did note the government could legally remove the Ponca from the Omaha Reservation if they were deemed “detrimental to the peace and welfare” of the reservation.<sup>10</sup> But in such cases, the law required they must be turned over to civilian – not military – authorities. And that had not happened in the Ponca case. The judge said he had looked, and looked carefully, but had found no congressional act or treaty provision that gave the government the power to send the Ponca “back to the Indian Territory to remain and die in that country against their will.”<sup>11</sup>

Judge Dundy wrapped up his lengthy written opinion with a five-point summary that concisely pulled together the essential decisions he had reached. First, he concluded, “an *Indian* is a PERSON within the meaning of the laws of the United States, and has therefore the right to sue out a writ of habeas corpus in a federal court.”<sup>12</sup> Second, Gen. Crook had illegally detained the Ponca prisoners. Third, the military has no legal authority to forcibly remove the Ponca to Indian Territory. Fourth, “Indians possess the inherent right of expatriation as well as the more fortunate white race, and have the inalienable right to ‘life, liberty and the pursuit of happiness....’”<sup>13</sup> And fifth, since they have been illegally detained in violation of their constitutional rights, the Ponca “must be discharged from custody, and it is so ordered.”<sup>14</sup>

For 10 long days and nights, the judge who had been lured in from the wilderness had sat in his office below the courtroom, poring over federal statutes and constitutional amendments, case law and congressional acts, testimony and trial records, trying to chart a course through the legal swamp of U.S.-Indian relations. For more than a century, those relations had been largely overwhelmed by successive waves of broken promises, broken treaties, land grabs, greed, graft, corruption, cultural ignorance, incompetence, indifference and military might. For much of the past decade, it had gotten to the point where government programs and private agencies were often aligned in contradictory orbits, where some federal agents and Army officers increasingly were ordered to implement policies they abhorred. But on the afternoon of May 12, 1879, something else began to emerge from the legal swamp, something beyond the unfocused, uncharted landscape – the first inkling that there might be a better way.

With a stroke of his pen, Judge Dundy had done something unprecedented: He had not only granted the hearing, but had declared for the first time in the nation’s history that an Indian was a person within the meaning of U.S. law. That the country’s Native inhabitants were a people who, if they obeyed the law, now had legal rights whites were bound to respect. People

5. *Id.*

6. *Id.*

7. *Id.* at 698-99.

8. *Id.* at 699.

9. *Id.* at 701.

10. *Id.* at 699.

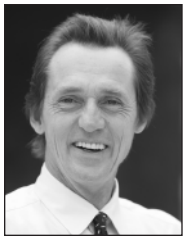
11. *Id.* at 700.

12. *Id.* (emphasis added).

13. *Id.* at 701.

14. *Id.*

who, having dissolved their tribal allegiance, now had the protection of the Fourteenth Amendment and were as entitled to life, liberty and the pursuit of happiness as white citizens. People who were something more than cattle – powerless dependents the government could round up at will and herd to whatever part of the country suited its interests. People who now had the right of expatriation and who, in time of peace, could not be arbitrarily moved about the country without their consent. And if the government violated their constitutional rights, they could now, for the first time as a matter of law, sue the government in federal court.



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# Sovereign Comity:

## Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts

Matthew L.M. Fletcher

State and federal courts increasingly are being confronted with prosecutors moving the court to consider prior convictions in American Indian tribal courts during the sentencing phase, and sometimes earlier. For example, in *People v. Wemigwans*,<sup>1</sup> the Michigan Court of Appeals allowed the use of a defendant's two prior tribal court convictions to support a state-law felony charge for drunk driving, third offense. But in *United States v. Lente*,<sup>2</sup> a divided panel of the Tenth Circuit noted that prior tribal court convictions (that apparently were uncounseled) for drunk driving did not support an upward departure under the federal sentencing guidelines. If the conviction being introduced occurred in state or federal court, the instant court would be obligated to give full faith and credit to that conviction.<sup>3</sup> But if the prior conviction occurred in a tribal court, state and federal courts are often confronted with unforeseen complexities.

This article is intended to parse through much of the political baggage associated with recognizing tribal court convictions. To be frank, the law is unsettled, leaving little guidance for state and federal judges in these cases, while at the same time granting enormous discretion to judges on the questions involved. The first part of this article will provide a quick overview of the constitutional status of Indian tribes and tribal courts, as well providing a basic but sufficient introduction to relevant principles of federal Indian law. The second part will offer a summary of criminal jurisdiction in Indian Country and, in particular, what role tribes play – and how well they play it. The third part offers a short description of the key cases in the field, as well as relevant federal and state statutes, and state court rules. It also offers a short normative argument on the question of what state and federal court judges who are confronted with prior tribal court convictions should look for in these cases, especially where the defendants convicted in tribal court are not represented by counsel.

### I. INDIAN TRIBES AS A THIRD SOVEREIGN IN THE AMERICAN CONSTITUTIONAL STRUCTURE

There are three kinds of sovereigns in the United States – federal, state, and tribal. The Constitution delineates the authorities, duties, and limitations of the United States in rela-

tion to the state governments, but the structure and text of the Constitution provide for two other kinds of sovereign entity – foreign nations and Indian tribes.<sup>4</sup> Foreign nations, of course, are not part of the American constitutional structure, but Indian tribes, which are located within the boundaries of the United States, are part of the American constitutional structure, albeit an unusual part. As Justice O'Connor once stated, they are the “third sovereign.”<sup>5</sup>

The constitutional text, as provided for by the practice of Congress before the ratification of the Constitution, provides for two means by which Indian tribes and the United States will interact. First, the so-called Indian Commerce Clause provides that Congress has authority to regulate commerce with the Indian tribes. One of the first acts of the First Congress was to implement the Indian Commerce Clause in the Trade and Intercourse Act of 1790.<sup>6</sup> And the federal government's treaty power provides the second form by which the United States deals with Indian tribes – by treaty. One of the earliest treaties executed and ratified by the United States came during the Revolutionary War in a treaty with the Delaware Nation.<sup>7</sup> There are over 200 valid and extant treaties between the United States and various Indian tribes.

The Supreme Court interpreted the meaning of the Indian Commerce Clause and how the Clause interacts with Indian treaties in the so-called Marshall Trilogy of early Indian law cases. In *Johnson v. M'Intosh*,<sup>8</sup> an early Indian lands case, Chief Justice Marshall held that the federal government had exclusive dominion over affairs with Indian tribes – exclusive as to individual American citizens and, implicitly, as to state government. In *Cherokee Nation v. Georgia*,<sup>9</sup> Chief Justice Marshall's plurality asserted that while Indian tribes were not state governments as defined in the Constitution, nor were they foreign nations, they were something akin to “domestic ... nations.” And, finally, in *Worcester v. Georgia*,<sup>10</sup> Chief Justice Marshall confirmed that the laws of states have “no force” in Indian Country, and that the Constitution's Supremacy Clause gave powerful effect to Indian treaties as “the supreme law of the land.” However, largely because Congress has authority to abrogate ratified treaties, Congress may also abrogate Indian treaty rights, as the Supreme Court recognized in *Lone Wolf v. Hitchcock*.<sup>11</sup>

#### Footnotes

1. No. 239736, 2003 WL 734257 (Mich. App. March 4, 2003) (per curiam).
2. No. 07-2035, 2009 WL 1143167 (10th Cir. April 29, 2009) (per curiam).
3. CONST., art. IV, § 1; 28 U.S.C. § 1738.
4. See CONST., art. I, § 8, cl. 3 (the Interstate, Foreign Nations, and Indian Commerce Clauses).
5. See Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian*

*Tribal Courts*, 33 TULSA L. J. 1 (1997).

6. See Matthew L.M. Fletcher, *Trade and Intercourse Acts*, in 2 ENCYCLOPEDIA OF UNITED STATES INDIAN LAW AND POLICY 762-64 (Paul Finkelman & Tim Alan Garrison eds., 2009).
7. See Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13.
8. 21 U.S. 543 (1923).
9. 30 U.S. 1 (1831).
10. 31 U.S. 515 (1832).
11. 187 U.S. 553 (1903).

The constitutional text, Indian treaties, acts of Congress, and the Supreme Court's jurisprudence can be reduced to three general, fundamental principles of federal Indian law:

- First, Congress's authority over Indian affairs is plenary and exclusive.
- Second, state governments have no authority to regulate Indian affairs absent express congressional delegation or grant.
- Third, the sovereign authority of Indian tribes is inherent, and not delegated or granted by the United States, but can be limited or restricted by Congress.<sup>12</sup>

The key element of these three principles is the legal term of art, "Indian Country," which is defined by act of Congress to include all reservation lands and other kinds of Indian lands.<sup>13</sup> These three principles, generally, are in strongest force within the boundaries of Indian Country.

It is useful to examine these three principles in detail to understand how they operate in modern federal Indian law and policy. First, Congress's plenary and exclusive power allows Congress to enact statutes defining the "metes and bounds" of tribal and state sovereignty in Indian affairs.<sup>14</sup> Congress has delegated enormous authority to implement federal Indian policy to the executive branch, particularly the Secretary of Interior.<sup>15</sup>

It is the federal government's plenary power over Indian affairs that provide the authority for the United States to recognize Indian tribes. There are 562 federally recognized Indian tribes.<sup>16</sup> Many of these tribes are signatories to treaties with the United States. Many of these tribes have been recognized by an act of Congress or federal court order. And still others have been recognized by the Department of Interior. There are many others – no one knows how many, but likely relatively few – that are not (but should be) federally recognized. The federal government recognizes the inherent sovereignty of these 562 Indian tribes.

This federal recognition has import in many, many ways. For example, Congress appropriates money to the Bureau of Indian Affairs, the Indian Health Service, and the Department of Housing and Urban Development, each of which then spend that money (or deliver that money) to federally recognized tribes, who use the money to operate tribal government ser-

vices ranging from health care to public safety to housing to employment training and education, and many other services.<sup>17</sup> Indian tribes also use their own, independently generated revenues to fund these programs.<sup>18</sup> Key government services paid for by federal and tribal money

includes courts of record developed and operated by the tribes, law enforcement departments, and jail facilities.

Second, there is a long tradition of excluding state governments from Indian Country, dating back to the Constitution. According to James Madison, one of the serious flaws of the Articles of Incorporation was the failure of the Articles to exclude state governments from Indian affairs.<sup>19</sup> States began competing with the federal government for the right to acquire Indian lands and to control Indian commerce, creating tension among the states and with the United States government. The lack of federal control over Indian affairs weakened the nation's position in relation to Great Britain, France, and Spain, each of which had significant and powerful allies among the Indian nations. The Framers intended the so-called Indian Commerce Clause to exclude state governments from the field of Indian commerce, while the federal government's treaty power would be used to deal with Indian tribes as independent sovereign nations.<sup>20</sup> The First Congress enacted the Trade and Intercourse Act as a means to implement the Indian Commerce Clause. But states continued to assert authority to deal in Indian affairs, including executing treaties with Indian tribes, negotiating major Indian land purchases, and asserting their police powers on Indian lands, but they did so in violation of federal law.<sup>21</sup> The situation came to a head in the Cherokee cases, in which the Supreme Court finally declared the State of Georgia's efforts to legally and politically destroy the Cherokee Nation null and void. The Court held that state laws had "no force" in Indian Country.<sup>22</sup>

In the modern era, the notion that state laws have no force in Indian Country is riddled with exceptions, both statutory

**[S]tate governments have no authority to regulate Indian affairs absent express congressional delegation or grant.**

12. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1941); see also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2 (Nell Jessup Newton et al. eds., 2005).

13. 18 U.S.C. § 1151.

14. *United States v. Lara*, 541 U.S. 193, 201 (2004).

15. See, e.g., 25 U.S.C. §§ 2, 9.

16. See Department of Interior, Bureau of Indian Affairs, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 FED. REG. 18553 (April 4, 2008).

17. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 22.02, at 1346-55 (Nell Jessup Newton et al., eds. 2005) (Indian Self-Determination and Education Assistance Act); *id.* § 22.04, at 1375-87 (Indian Health Service); *id.* § 22.05, at 1387-1400 (housing).

18. E.g., *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the United States Attorney for the Western District of Michigan*, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002).

19. See *The Federalist* No. 42, at 284-85 (Madison) (J.E. Cooke ed., 1961).

20. See Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1149 (1995).

21. From these actions arose the so-called Eastern Land Claims that still cost Congress and the northeastern states enormous time and expense. See generally Robert N. Clinton & Margaret T. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17 (1979).

22. *Worcester v. Georgia*, 31 U.S. 515, 561 (1831).

**State courts have no jurisdiction over civil cases brought against individual Indians for disputes arising in Indian Country, with limited exceptions**

and in the common law, but the general rule remains.<sup>23</sup> States may not tax the on-reservation income,<sup>24</sup> the land,<sup>25</sup> or the property of individual Indians,<sup>26</sup> and have no authority over Indian tribes whatsoever.<sup>27</sup> States have no authority to regulate Indian lands, except in extremely narrow circumstances.<sup>28</sup> State courts have no jurisdiction over civil cases brought

against individual Indians for disputes arising in Indian Country, with limited exceptions.<sup>29</sup> And states have no authority to prosecute on-reservation crimes committed by Indians, also with limited exceptions.<sup>30</sup>

The limited exception relevant here is a statute commonly referred to as Public Law 280, a 1953 congressional act extending state government civil and criminal jurisdiction over Indian Country in five states, and authorizing other states to assert jurisdiction if they chose.<sup>31</sup> Other than the six mandatory states – California, Minnesota, Wisconsin, Nebraska, and Wisconsin, with Alaska being added upon statehood in 1959 – several other states chose to assert jurisdiction over some classes of crimes. Congress removed federal jurisdiction in these areas at the same time. However, as a general matter, Public Law 280 was a failure on the ground. Congress did not appropriate money for the mandatory states to take over Indian Country criminal-law enforcement, and many areas of Indian Country literally became lawless as a result.<sup>32</sup> Recent and ongoing studies have concluded that Public Law 280 may actually have

increased crime rates in Indian Country, and surely have decreased tribal-state cooperation.<sup>33</sup>

The third major federal Indian law principle is the inherent sovereignty of Indian tribes. It is a common misconception that Indian treaties were a grant of land and authority to Indian tribes, when the reverse is true. Indian treaties are *reservations* of land and authority by Indian tribes. If a tribe did not relinquish a sovereign right in the treaty, it remains.<sup>34</sup> The exception to this rule is that Congress has authority, according to the Supreme Court, to divest aspects of tribal sovereignty if it so wishes.<sup>35</sup> And finally, the Supreme Court has asserted in recent decades the authority to divest Indian tribes of authority.<sup>36</sup>

Because Indian tribes have independent and inherent sovereignty, tribes retain the authority to make laws and be ruled by them.<sup>37</sup> Since before the beginning of the American Republic, some Indian tribes have exercised their sovereignty to enact criminal codes, establish courts, and exercise criminal jurisdiction over individuals, Indian and non-Indian. Indian nations long have exercised non-Anglo-style law-enforcement authority, and some still do exercise this kind of governmental authority. It was the Cherokee Nation of Georgia in the 1820s that likely was the first Indian nation to establish a written constitution and criminal code, a court system, and a formalized law-enforcement mechanism. By the 1970s, only several dozen Indian nations exercised criminal jurisdiction over individuals.<sup>38</sup> And now, perhaps *three hundred* Indian nations exercise criminal jurisdiction, or soon will.<sup>39</sup>

## II. TRIBAL LAW ENFORCEMENT AND TRIBAL CRIMINAL JURISDICTION

Relatively simple fundamental principles of federal Indian law tend to fall by the wayside on the ground. Often, it is not

23. The Supreme Court in 1973 stated, “The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.” *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172 (1973). But the Court still held, after parsing through the relevant treaties and Acts of Congress, that Arizona’s taxation of the income of reservation Indians was invalid. *See id.* at 165.

24. *See Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 124 (1993).

25. *See McClanahan*, 411 U.S. 164; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

26. *See Bryan v. Itasca County*, 426 U.S. 373, 377 (1978).

27. Indian tribes are immune from suit by state governments in any court, absent their consent or an act of Congress. *See Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991).

28. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983).

29. *See Williams v. Lee*, 358 U.S. 217, 220-21 (1959).

30. *See, e.g., Langley v. Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985) (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n.17 (1978)).

31. Act of August 15, 1953, 67 Stat. 588. *See generally* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, §6.04[3], at 544-81. Before this statute, Congress had extended state criminal jurisdiction to Indian Country in Kansas and New York. *See id.* §

6.04[4][a], at 581-83 (New York); *id.* § 6.04[4][b], at 583-84 (Kansas, and some reservations in Iowa and North Dakota).

32. *See* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

33. *See* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006).

34. *See* *United States v. Winans*, 198 U.S. 371, 381 (1905) (holding that Indian treaties are “not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”).

35. *E.g., Johnson v. M’Intosh*, 21 U.S. 543 (1823) (holding in dicta that Congress can divest Indian tribes and individual Indians of the authority to alienate certain forms of Indian property).

36. *E.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that Indian tribes have no authority to prosecute non-Indians, even absent an Act of Congress stating so); *Montana v. United States*, 450 U.S. 544 (1981) (holding that Indian tribes have no civil regulatory authority over nonmembers unless non-member activity meets one of two limited exceptions).

37. *See Williams v. Lee*, 358 U.S. 217, 220-21 (1959).

38. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 n.7 (1978).

39. *See* Bureau of Justice Assistance, *Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America* 6 (October 2005), available at [http://www.law.und.edu/tji/web\\_assets/pdf/PathwaysReport.pdf](http://www.law.und.edu/tji/web_assets/pdf/PathwaysReport.pdf).

easy to know where “Indian Country” begins and ends in every situation. Moreover, since many American Indians by blood are not enrolled with a federally recognized Indian tribe, it is often not clear who is an Indian victim or perpetrator. Congress has experimented with granting a few state governments criminal and civil jurisdiction over some areas of Indian Country. And there are three kinds of sovereigns charged with authority to investigate and prosecute crime in Indian Country. Indian Country criminal jurisdiction is accurately described as a “maze.”<sup>40</sup>

In states where no act of Congress such as Public Law 280 has conferred criminal jurisdiction onto the state government, the primary sovereign with felony jurisdiction is the federal government. Under a mishmash of statutes, such as the Major Crimes Act,<sup>41</sup> the Indian Country Crimes Act,<sup>42</sup> and the Assimilative Crimes Act,<sup>43</sup> the United States has jurisdiction over all Indian Country crimes perpetrated against Indians or tribal property. Federal prosecutors have exclusive jurisdiction over Indian Country crimes committed by non-Indians. Unfortunately, local United States Attorneys’ Offices often are ill-equipped to deal with Indian Country crime. Budgetary, political, and geographic difficulties impede federal law enforcement, especially in the government’s misdemeanor docket. Very, very few misdemeanor crimes committed by non-Indians in Indian Country are ever seriously investigated, let alone prosecuted. In recent years, there has been an explosion of violence against Indian women as well as dramatic increases in methamphetamine dealing and possession in Indian Country that many have attributed at least partially to the lack of effective federal law enforcement.<sup>44</sup>

Indian tribes may assert jurisdiction over all crimes committed by Indians within Indian Country, but they have no jurisdiction over crimes committed by non-Indians.<sup>45</sup> Moreover, Congress has severely reduced tribal sentencing authority to one year in jail and a \$5,000 fine, effectively limiting tribal criminal jurisdiction to misdemeanors.<sup>46</sup> And Congress’s acquiescence in the Supreme Court’s determination that Indian tribes cannot have criminal prosecution over non-Indians has allowed a veritable criminal loophole to grow over the past 30 years. Tribal police at least have the authority to detain suspects even if the tribe does not have criminal jurisdiction over them.<sup>47</sup>

Even in states that have criminal jurisdiction in Indian Country, Indian Country crimes rates remain high. State inves-

tigators and prosecutors have the same difficulties that the federal government has in prosecuting Indian Country crime. Local police often are not local to Indian Country, nor do local prosecutors have political incentives to spend state resources on Indian Country, which does not contribute much to the local tax base.

However, in the past 30 years or so, the capacity of Indian tribes to investigate and enforce their own criminal laws is growing exponentially. Tribal gaming money, coupled with federal grants and appropriations, helped to fuel this growth. Moreover, congressional legislation such as the Indian Civil Rights Act and the various Indian Self-Determination Acts has encouraged tribal governments to become more capable of governing. Finally, several of the Supreme Court’s Indian law decisions, even ones that are skeptical of tribal sovereignty, have helped to encourage Indian tribes to develop tribal court systems and law-enforcement departments.

The growth and development of tribal law-enforcement capacity has spurred, though often very grudgingly, cooperation between Indian tribes, states, and local units of government.<sup>48</sup> In many states, the State of Michigan being a prime example, Indian tribes routinely enter into law-enforcement cooperative agreements with municipal governments.<sup>49</sup> These intergovernmental agreements may take many forms, with the cross-deputization agreements being one of the most common. In areas of Indian Country where reservation boundaries are not well-defined or even are contested by the parties, intergovernmental agreements blur or even erase the jurisdictional lines and help to avoid the serious problem of criminal suspects getting off because of a jurisdictional technicality.

Coupled with law-enforcement cooperative agreements, tribal courts and state courts also are routinely entering into agreements, usually represented by tribal and state court rules, in which the courts will recognize the judgments of the other courts along the lines of the comity given to the courts of foreign nations.<sup>50</sup> However, in some states and in some areas of

**In states where no act of Congress... has conferred criminal jurisdiction onto the state government, the primary sovereign with felony jurisdiction is the federal government.**

40. See Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

41. 18 U.S.C. § 1153.

42. 18 U.S.C. § 1152.

43. 18 U.S.C. § 13.

44. See Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, American Constitutional Society Issue Brief 5-7 (March 2009), available at <http://www.acslaw.org/files/Fletcher%20Issue%20Brief.pdf>.

45. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

46. 25 U.S.C. § 1302(7).

47. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, § 9.07, at 764 n.235 (citing *Ortiz-Barraza v. United States*, 512 F.2d

1176 (9th Cir. 1975); *State v. Haskins*, 887 P.2d 1189 (Mont. 1994); *Ryder v. State*, 648 P.2d 774 (N.M. 1982); *State v. Pamperien*, 967 P.2d 503 (Or. App. 1998); *Primeaux v. Leapley*, 502 N.W.2d 265 (S.D. 1993); *State v. Schmuck*, 850 P.2d 1332 (Wash. 1993)).

48. See Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 FED. LAW., March/April 2006, at 38; Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007).

49. E.g., *Deputization Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and Leelanau County*, March 19, 1997, [http://www.ncai.org/ncai/resource/agreements/mi\\_grand\\_traverse\\_deputization-3-19-1997.pdf](http://www.ncai.org/ncai/resource/agreements/mi_grand_traverse_deputization-3-19-1997.pdf).

50. E.g., MICH. CT. RULE 2.615.



**[T]here is the likelihood in the coming years that Congress will see fit to expand current contours of tribal criminal jurisdiction....**

law, the judgments of tribal courts must be given the same full faith and credit as state and federal courts give each other. The Violence Against Women Act and the Indian Child Welfare Act, for example, require state and tribal courts to give full faith and credit to each other's judgments and orders for purpose of enforcing those Acts.<sup>51</sup>

Finally, there is the likelihood in the coming years that Congress will see fit to expand current contours of tribal criminal jurisdiction to increase tribal sentencing capacity or even to restore tribal criminal jurisdiction over non-Indians for certain classes of crimes. Given the spectacular increase in Indian Country crime, it is likely that Congress will take some action, but it is not clear what Congress will choose to do. The leading discussion bill currently is the so-called Tribal Law and Order Act, which would expand tribal criminal-sentencing capacity to three years for some crimes.<sup>52</sup>

### III. THE SPECIAL PROBLEM OF TRIBAL COURT CONVICTIONS AND COMITY

As Indian tribes develop the capacity to investigate and prosecute Indian Country crime, state and federal courts are increasingly faced with the question of how to handle prior tribal court convictions. As the two cases mentioned in the introduction suggest, there are multiple ways of handling these prior convictions. As some Michigan courts have done, the court could recognize the tribal court conviction for purposes of sentencing or establishing a prior criminal history. Or as some states and federal courts have done, the court could ignore those prior convictions. There are plusses and minuses to each path.

The United States Federal Sentencing Guidelines allow, but do not require, federal courts to consider prior tribal court convictions for purposes of sentencing.<sup>53</sup> As such, federal judges have significant discretion on the weight to place on tribal court convictions. Federal judges who know nothing about tribal courts, understandably, might be less inclined to give them much weight. The few federal judges who do know something about tribal courts have a great deal to teach other judges. Consider South Dakota federal district court Judge Charles Kornmann's commentary about criminal trials in the Rosebud Sioux Tribal Court:

This Court respectfully disagrees with the statements in [*United States v.*] *Doherty* that tribal court proceedings

are informal and not adversarial and that Congress did not wish to impose on such systems "an exclusionary rule that presumes the existence of an adversarial method of trying criminal cases." ... I have no information as to how a tribal court serving a total tribal membership of 300 people works in the upper peninsula of Michigan. I do have knowledge how tribal courts dealing with thousands of Native Americans work in South Dakota. In particular, I have knowledge and take judicial notice as to how the tribal court in Rosebud works. I am also aware that federal courts are obligated to extend respect and act with principles of comity toward tribal courts. I decline to jump to the assumptions or conclusions advanced in *Doherty* that tribal courts, and by extension the tribal court on the Rosebud, operate as something of a family gathering and counseling session. The description of the tribal court in *Doherty* sounds, very frankly, like a description of "teen courts" now in vogue in various high schools. That is not the way the Rosebud Sioux Tribal Court works in South Dakota and it is clear that, at least in the present case, criminal adversarial judicial proceedings had been initiated. Red Bird, unlike *Doherty*, had more than "the mere existence of a statutory right to counsel...." Nor is there any evidence or argument to suggest that tribal court criminal prosecutions in South Dakota and particularly in Rosebud are not adversary proceedings. They are "adversary judicial criminal proceedings." ... They are certainly adversarial in the eyes of the Rosebud Sioux Tribe or a public defender's office would not have been established and funded. While sentences resulting from tribal court convictions are not counted in computing the criminal history of a defendant who is later to be sentenced in federal court, they may be considered under U.S.S.G. § 4A1.3 (adequacy of criminal history category). See U.S.S.G. § 4A1.2 (i). The government sometimes argues for an upward departure based upon a defendant's previous convictions or even charges pending in tribal court. Such convictions are certainly matters to be considered by the sentencing judge.<sup>54</sup>

The Sixth Circuit in *Doherty* had cited to the legislative history of the Indian Civil Rights Act where "[w]itnesses ... testified that a wholesale exportation of the Sixth Amendment to the tribes would be not be [sic] feasible; since many tribes do not have prosecutorial systems, but instead rely on informal and non-adversarial questioning from the tribal courts, the introduction of outside defense counsel could 'disrupt the entire court system.'"<sup>55</sup> Incidentally, Michigan's modern tribal

51. 25 U.S.C. § 1911(d) (Indian Child Welfare Act); 28 U.S.C. § 1738A (Violence Against Women Act).

52. S. 797, 111th Cong. (2009); H.R. 1924, 111th Cong. (2009).

53. See U.S.S.G. § 4A1.2(i).

54. *United States v. Red Bird*, 146 F. Supp. 2d 993, 998-99 (D. S.D. 2001) (discussing *United States v. Doherty*, 126 F.3d 769 (6th Cir. 1997); other citations omitted). Judge Kornmann later wrote that he opposed amending the United States Sentencing Guidelines to

treat tribal court convictions in the same manner as state or local misdemeanor convictions. See Charles Kornmann, *Commentary on Reconsidering the Commission's Treatment of Tribal Courts*, 17 FED. SENTENCING RPTR. 222 (2005).

55. *Doherty*, 126 F.3d at 780 (citing *Hearings on S. 961-968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965)).

courts are adversarial courts much like the South Dakota tribal courts described by Judge Kornmann.<sup>56</sup>

The critical question is the right to indigent counsel. As the Supreme Court long ago recognized in *Talton v. Mayes*,<sup>57</sup> Indian tribes are not subject to the Constitution, having not been party to the Convention nor having ratified the text. As such, at least until 1968, Indian tribes are not beholden to the Constitution's criminal-procedure duties. In 1968, Congress purported to apply the Bill of Rights to Indian tribes in the Indian Civil Rights Act, also known as the Indian Bill of Rights.<sup>58</sup> But the key question is the substantive deviations of the Indian Bill of Rights to the Constitution; namely, the fact that the Indian Bill of Rights does not contain a right to indigent legal defense.<sup>59</sup>

It is worth recalling the legal landscape in 1968 in Indian Country. In 1968, many tribal courts were creatures of the federal government, so-called Courts of Indian Offenses (CIOs) or CFR Courts created and regulated by the Department of Interior.<sup>60</sup> These courts enforced Law and Order Codes, also promulgated by the Department of Interior, and usually a local Bureau of Indian Affairs official dominated the proceedings. In many CIOs or CFR Courts, the tribal judge was not law-trained, the tribal prosecutor was also the tribal chief of police, and lawyers were not allowed in the tribal courtroom. In the hearings leading up to the Indian Civil Rights Act, many tribal witnesses complained of abuses by tribal judges and tribal police officers though, to be fair, these stories were anecdotal and outnumbered by complaints about abuses by federal and state officials.<sup>61</sup> In the lead up to the passage of the Act, the Department of Interior and Department of Justice complained that a right to indigent counsel would require the United States to foot the bill for public defenders, and so Congress did not mandate the right to indigent counsel.<sup>62</sup> Importantly, however, Congress did authorize the right to counsel, effectively wiping out tribal laws (often pushed through by federal officers) banning lawyers in tribal courts.

Modern tribal courts are nothing like the CIOs and CFR Courts. More and more tribal judges are lawyers, and those non-law-trained tribal judges often have lawyer clerks or consultants. More and more tribal governments provide for public defenders, although that number is still a distinct minority. More and more tribal courts are conducting jury trials with juries consisting of people representative of the tribal community, including non-Indians. And modern tribal courts are courts of record, with tribal court opinions being generated and

published in periodicals like the *Indian Law Reporter*, and online on tribal court websites and on VersusLaw and Westlaw.

Luckily, there are a few valuable cases from which state judges can draw upon to determine whether to give credence to a prior *uncounseled* tribal court conviction. The cases roughly follow two parallel tracks. In the first track, the court weighs the impact of assessing the prior conviction on the tribe's sovereignty. In the second track, the court applies the analysis of *Nichols v. United States*, a 1994 Supreme Court opinion.<sup>63</sup>

The first track tends to focus on the tribal sovereignty aspects of considering a prior uncounseled tribal court conviction. In *State v. Spotted Eagle*, for example, the Montana Supreme Court held that prior *uncounseled* misdemeanor tribal court convictions may be used in Montana courts for purpose of sentencing:

Montana judicial policy avoids interfering with the tribal courts and the respective tribe's sovereignty. ... This Court treats tribal court judgments with the same deference as those of foreign sovereigns as a matter of comity. ... In most instances, comity requires this Court to give full effect to the judgments of foreign sovereigns.... Comity requires that a court give full effect to the valid judgments of a foreign jurisdiction according to that sovereign's laws, not the Sixth Amendment standard that applies to proceedings in Montana.

To disregard a valid tribal court conviction would imply that Montana only recognizes the Blackfeet Tribe's right to self-government until it conflicts with Montana law. Moreover, it would suggest that Montana recognizes the legitimacy of the judgments of the tribal courts to the extent that the procedures mirror Montana procedure. Such a position would contradict the judicial policy of this state and indirectly undermine the sovereignty of the Blackfeet Tribe.<sup>64</sup>

There was a lone dissenter in the 4-1 decision, who rhetorically stated: "In true oxymoronic fashion, our Court has said to Mr. Spotted Eagle, 'Out of deference to your Tribe, we accord

**...Indian tribes are not subject to the Constitution, having not been party to the Convention nor having ratified the text.**

56. See Michael D. Petoskey, *Tribal Courts*, 67 MICH. B. J. 366, 368-69 (1988); Matthew Fletcher & Zeke Fletcher, *A Restatement of the Common Law of the Grand Traverse Band of Ottawa and Chippewa Indians*, 7 TRIBAL L. J. 1 (2008).

57. 163 U.S. 376 (1896).

58. See 25 U.S.C. § 1302; Matthew L.M. Fletcher, *Indian Bill of Rights*, 2 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 806 (2006).

59. See 25 U.S.C. § 1302(6) ("No Indian tribe in exercising powers of self-government shall ... deny to any person in a criminal proceeding the right ... at his own expense to have the assistance of counsel for his defense....").

60. See generally VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 82-89 (1983).

61. See JUSTIN B. RICHLAND & SARAH DEER, *INTRODUCTION TO TRIBAL LEGAL STUDIES* 247-48 (2004).

62. See JOHN R. WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 240 (1994); see also *United States v. Doherty*, 126 F.3d 769, 780 (6th Cir. 1997) ("In particular, tribal representatives testified that their governments could not afford to provide counsel to indigent defendants, and that a bill that required them to do so without providing for federal funding would be disastrous.").

63. 511 U.S. 738 (1994).

64. 71 P.3d 1239, 1245 (Mont.) (citations omitted), *cert. denied*, 540 U.S. 1008 (2003).

**[S]tate courts  
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you fewer protections than guaranteed to individual citizens by the Montana Constitution.”<sup>65</sup> There is some scholarly dispute about whether deference to tribal sovereignty is sufficient to justify the consideration of prior uncounseled tribal court convictions in federal court for sentencing purposes,<sup>66</sup> but there are more sound constitutional reasons that will allow state and federal courts to set adequate standards for the consideration of tribal court convictions. To understand the argument, it is worth assessing how *Nichols v. United States* may affect the analysis.

The *Spotted Eagle* Court relied upon a Tenth Circuit decision, *United States v. Benally*, which reached the same conclusion without significant analysis, other than to note that tribes are not required to provide paid counsel to indigent defendants.<sup>67</sup> The Tenth Circuit also has held that guilty pleas before tribal courts may be introduced in federal courts for purposes of direct impeachment of defendant testimony.<sup>68</sup> A more recent Tenth Circuit opinion rejected a claim that to consider prior uncounseled tribal court convictions was a violation of the Equal Protection Clause, relying heavily on *Nichols*.<sup>69</sup>

In *Nichols*, the Court held that that prior uncounseled federal court convictions could be used for sentencing purposes if no prison term resulted from the prior conviction.<sup>70</sup> The Eighth Circuit refused to consider prior uncounseled tribal court convictions in *United States v. Norquay*,<sup>71</sup> but that opinion was later abrogated by the court in a non-Indian-law-related case.<sup>72</sup> In *Norquay*, the court (speaking without the benefit of the *Nichols* decision), stated:

The Supreme Court has stated that misdemeanor convictions obtained in the absence of counsel for the defendant may not be used as a basis for enhancing a sentence of imprisonment to be imposed upon a defendant.... At least one appellate court has held, in addition, that where a defendant was not represented by counsel at tribal court proceedings, any consequent tribal court conviction may not be used as a basis for upward departure. *United States v. Brady*.... We believe this is to be a correct statement of the law.<sup>73</sup>

The Ninth Circuit in *United States v. Brady*, referenced in *Norquay*, held that prior uncounseled tribal court convictions resulting in imprisonment could not be used by federal courts for sentencing purposes.<sup>74</sup> The court wrote:

[B]oth of Brady’s convictions were obtained in uncounseled proceedings. The Sixth Amendment requires that “no indigent criminal defendant be sentenced to a *term of imprisonment* unless the State has afforded him the right to assistance of appointed counsel in his defense.” ... We agree ... that an “uncounseled misdemeanor conviction [may] not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction.” ...

The government’s main argument is that the prior tribal convictions played only a small role in the departure. Because the sentencing court did not indicate the extent each factor played in the sentence departure, it is impossible to determine the precise sentence enhancement attributable to the court’s reliance on the uncounseled convictions. Nonetheless, we hold that any term of imprisonment imposed on the basis of an uncounseled conviction where the defendant did not waive counsel violates the Sixth Amendment....<sup>75</sup>

The *Brady* opinion predates the *Nichols* decision and therefore may be suspect, but the reasoning should survive. In *Brady*, the court noted that the prior tribal court convictions resulted in jail terms, albeit shorter than 30 days.<sup>76</sup> But under *Nichols*, the key is whether the prior uncounseled convictions resulted in jail terms, and so the outcome in *Brady* would have been same even after *Nichols*.<sup>77</sup>

As such, while there is no definitive Supreme Court statement on the subject, it is likely that federal courts may use prior uncounseled tribal court convictions, so long as those convictions did not result in jail time.

How does this affect state courts? Well, it doesn’t, because state courts should consider their own constitutional rights and rules. For example, in a case decided before *Nichols*, the New Mexico Court of Appeals in *State v. Watchman* refused to consider prior uncounseled tribal court convictions.<sup>78</sup> However, a later NM appellate court overruled *Watchman* after *Nichols* (a non-Indian law case); thus, *Watchman* may no longer be good law.<sup>79</sup>

65. *Id.* at 1246 (Leaphart, J., dissenting).

66. Compare Kevin K. Washburn, *Reconsidering the Commission’s Treatment of Tribal Courts*, 17 FED. SENTENCING RPTR. 209 (2005), with Jon M. Sands & Jane L. McClellan, *Commentary: Policy Meets Practice: Why Tribal Court Convictions Should Not Be Counted*, 17 FED. SENTENCING RPTR. 215 (2005).

67. 756 F.2d 773, 779 (10th Cir. 1985).

68. See *United States v. Denetclaw*, 96 F.3d 454, 458 (10th Cir. 1996), cert. denied, 519 U.S. 1141 (1997). The court did not discuss whether the guilty pleas were made while being represented by counsel.

69. See *United States v. Lonjose*, No. 01-2303, 42 Fed. Appx. 177 (10th Cir. June 19, 2002) (citing *Nichols v. United States*, 511 U.S. 738 (1994)).

70. 511 U.S. at 746-47.

71. 987 F.2d 475 (8th Cir. 1993).

72. See *United States v. Thomas*, 20 F.3d 817 (8th Cir. 1994) (en banc).

73. *Norquay*, 987 F.2d at 482 (citing *Brady*, 928 F.2d 844, 853-54 (9th Cir. 1991); other citations omitted).

74. 928 F.2d at 854.

75. *Id.* (citations and quotations omitted).

76. See *id.* at 853.

77. Another Ninth Circuit case following *Brady* is *United States v. Grey Hawk*, No. 91-30385, 977 F.2d 592 (Table), 1992 WL 245979 (Sept. 30, 1992).

78. 809 P.2d 641 (N.M. App. 1991), cert. denied, 807 P.2d 221 (N.M. 1991).

79. See *State v. Hosteen*, 923 P.2d 595 (N.M. App. 1996).

That brings us to the Michigan Court of Appeals in *People v. Wemigwans*.<sup>80</sup> The court there, in an unpublished per curiam opinion, described the workings of a modern typical modern American tribal court:

There are many significant similarities between the criminal procedure followed in the tribal court and the procedure followed in Michigan courts. The record establishes that defendant was informed of the following rights and opportunities: to be informed of the nature and the cause of the accusations against him; to be confronted with witnesses against him; to have a speedy and public trial in which he could present witnesses in his favor; to have a trial by jury, in which the government has the burden to prove defendant's guilt beyond a reasonable doubt; to be protected against self-incrimination and to be free from the threat of double jeopardy; to have counsel at his own expense; and to be protected against cruel or unusual punishment, excessive bails, or fines. Indian Civil Rights Act, 25 USC § 1302. These rights are substantially similar to rights afforded defendants in Michigan courts.

The tribal court informed defendant of his rights prior to accepting each of his guilty pleas. In both prior cases before the tribal court, the tribal judge tested defendant's competency before accepting his pleas. The record establishes that defendant acted freely, made a knowing and voluntary waiver of the many rights that were enumerated to him prior to his pleas, and made an intelligent, informed and conscious decision to plead guilty in each case. In so doing, defendant received the benefit of sentencing agreements that eliminated the threat of long-term incarceration. In addition to the protections of the Indian Civil Rights Act, defendant had, among other things, the right to access the tribal appellate courts. Saginaw Chippewa Tribal Code §§ 1.513, 1.514. Defendant elected not to assert his right to seek appeal of the tribal convictions.<sup>81</sup>

Of import, while the tribal court in *Wemigwans* had sentenced the defendant to 60 days in jail, the sentence was suspended, bringing the case into the *Nichols* framework.<sup>82</sup> The Michigan appellate court reviewed the convictions under principles of comity, as would be used for any foreign court judgment, and concluded that despite the uncounseled character of the convictions, Michigan courts could use them:

The only significant difference between the procedural process afforded in the two judicial systems, as pointed out by the trial court, relates to the appointment of counsel to indigent defendants. Under Michigan law, if defendant established indigency and the risk of incarceration, then he would have been entitled to the benefit of coun-

sel. Under tribal law, a defendant receives no such guarantee. Instead, a defendant only receives the benefit of counsel at his own expense. Preliminarily we note that Michigan law does not require that all process be identical. Rather, we review in its entirety the process afforded defendant in the foreign jurisdiction for an intolerably high risk of unfairness. In the present case, the substantive laws in question are identical, the procedural protections afforded in the foreign jurisdiction are generally consistent with the procedural protections afforded under Michigan law and defendant was found to have made a knowing, free and voluntary waiver of the many rights that were expressly explained to him in order to tender a plea of guilty. Thus, it would not be without reason to conclude, regardless of defendant's indigency status, that defendant was afforded sufficient due process in the foreign jurisdiction to allow the use of the foreign convictions for purposes of enhancing the charge against defendant.<sup>83</sup>

A second issue involves the question of whether the tribe in a prior conviction has provided access to "lay advocates," or law-trained individuals who are not licensed attorneys. Judge Kornmann's flat rejection of the quality of lay advocates – they do not "cut it"<sup>84</sup> – seems reasonable for tribal court convictions resulting in jail time.

#### IV. CONCLUSION

In the coming years, state and federal judges will increasingly be confronted with prosecutors introducing prior tribal court convictions for sentencing and enhancement purposes. This article hopefully provides a sufficient overview of the reasons why tribal court convictions are becoming more prevalent, why tribal court convictions usually should be entitled to comity, and what kinds of tribal court convictions should be examined carefully (namely, uncounseled convictions).



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80. 2003 WL 734257 (Mich.App.) (per curiam).

81. *Id.* at \*2-3.

82. *See id.* at \*3 n.3.

83. *Id.* at \*3. Of note, adult members of the Saginaw Chippewa Indian Tribe receive significant gaming-revenue per capita distributions,

and it is unlikely that any of them would qualify as indigent. *Lincoln v. Saginaw Chippewa Indian Tribe*, 967 F. Supp. 966 (E.D. Mich. 1997).

84. Konmann, *supra* note 54, at 222.

# Wisconsin's Experience in Allocating Jurisdiction between State and Tribal Courts

Beth Ermatinger Hanan and William H. Levit, Jr.

Eleven federally recognized Indian tribes are located in Wisconsin. When civil disputes arise between tribal and non-tribal members, one of the first questions is which court has jurisdiction to resolve the parties' quarrel. It may be that both the state and tribal courts have jurisdiction, such that the next question is, which court should proceed? Over the past several years, the Wisconsin Supreme Court, using both its decision-making and rule-making powers, along with sustained, cooperative efforts of tribal and state court judges, has devised various rules and guidelines by which many inter-jurisdictional issues can be decided.

Decisions by the Wisconsin Supreme Court in *Teague v. Bad River Band of Lake Superior Chippewa Indians*<sup>1</sup> resulted in jurisdictional allocation protocols for the two judicial districts where the bulk of the state's Indian tribes are located. More recently, the state Supreme Court approved statutory guidelines for a less formal discretionary transfer of state court cases to tribal courts within Wisconsin.

Other states may wish to use one or both mechanisms for assigning or transferring jurisdiction between tribal and state courts. To better explain the Wisconsin experience and to help readers identify areas of possible jurisdictional overlap, this article first will describe some of the procedural background of *Teague* and of the first case to apply the *Teague* protocol. Then we discuss the more recent development of the discretionary transfer rule.

## BACKGROUND OF THE TEAGUE CASES

Jerry Teague, a non-tribal member, was employed under contract as general manager of the Bad River Band's casino. After he was terminated, Teague filed suit in Ashland County Circuit Court, seeking to compel arbitration.<sup>2</sup> Early on, the Circuit Court determined that the Band had waived sovereign immunity. The Band asserted that Teague's employment contracts were invalid because they lacked the required tribal council and federal approval.<sup>3</sup>

Over a year into Teague's suit, the Band filed its own action in Bad River Tribal Court, seeking to invalidate the employment contracts and reasserting its claim that the requisite approval was lacking.<sup>4</sup> The Band asked the Circuit Court for a stay until the Tribal Court ruled on the tribal law challenges to the contracts and until all tribal remedies were exhausted.<sup>5</sup>

The Circuit Court denied a stay because the Tribal Court action would not entirely dispose of Teague's claim. The Circuit Court acknowledged that the Tribal Court could address the limited issue of actual authority before the Circuit Court resolved the rest of the case.<sup>6</sup> The Band then amended its Tribal Court complaint, adding that the Tribal Court should invalidate the contracts based on apparent authority.

For reasons not clear from the record, Teague's trial counsel accepted service of the amended Tribal Court complaint but did not plead responsively in Tribal Court. The Tribal Court granted the Band's motion for default judgment on the ground that the contracts were invalid.<sup>7</sup>

The Band sought full faith and credit in the Circuit Court for the Tribal Court default judgment, pursuant to Wis. Stat. § 806.245. But the Court declined to grant full faith and credit based on a "prior action pending" rule.<sup>8</sup> As the Circuit Court understood things, the Tribal Court, a court of concurrent jurisdiction, did not properly have jurisdiction over the matter because the case was filed first in state court. After an Ashland County jury found Teague's employment contracts valid, an arbitrator awarded him over \$390,000 in damages. The Band appealed.<sup>9</sup>

The Court of Appeals (in "*Teague I*") reversed.<sup>10</sup> On review, the Supreme Court agreed that the "prior action pending" rule did not apply to a court of an independent sovereign. Principles of comity, however, required that the state and tribal courts confer and allocate jurisdiction between them, so as to avoid a race to judgment and the inconsistent results that had occurred. The Supreme Court remanded for a novel interjurisdictional conference.<sup>11</sup>

**Authors' Note:** A portion of this article appeared in 2006 in the *Wisconsin Lawyer* magazine. The views expressed herein are those of the authors and not of Mr. Jerry Teague, whom Ms. Hanan represented on appeal in *Teague v. Bad River Band*, nor of the Forest County Potawatomi Community, which Mr. Levit represented in the *Mohr* litigation described herein.

## Footnotes

1. 2000 WI 79, 236 Wis. 2d 384, 612 N.W.2d 709 ("*Teague II*").
2. *Teague II*, 2000 WI 79, ¶ 2.

3. *Id.* at ¶ 6.
4. *Id.* at ¶ 7.
5. *Id.* at ¶ 8.
6. *Id.* at ¶ 9.
7. *Id.* at ¶ 11.
8. 6 Wis. 2d 154, 94 N.W.2d 161 (1959).
9. *Id.* at ¶ 15.
10. *Id.* at ¶ 2. The Court of Appeals decision, 229 Wis.2d 581, 593-94, 599 N.W.2d 911 (Ct. App. 1999), is referred to as *Teague I*.
11. *Id.* at ¶ 2.

The Wisconsin Supreme Court has no jurisdiction over tribal courts within this state. So the *Teague II* Court exercised its authority over the Circuit Court by ordering it to invite the Tribal Court judge to a unique meeting. As envisioned, the two judges virtually would step back in time to the point when they had first learned of the parties' parallel actions. The judges then would discuss applicable comity concerns and decide which court should have proceeded to exercise its jurisdiction and which court should have refrained. This joint meeting, dubbed a "jurisdictional allocation conference" and now known colloquially as a "Teague Conference," can be used to divide jurisdiction between state and tribal courts when the parties are identical and there is issue overlap.

### WISCONSIN'S FIRST JURISDICTIONAL ALLOCATION CONFERENCE – COMITY IN ACTION

Comity is a doctrine of respect for the proceedings of another system of government, reflecting a spirit of cooperation. Comity recognizes the sovereignty and sovereign interests of each governmental system and its unique features, including cultural and religious values. Overall, grants of comity are discretionary, highly fact specific, and reviewable on appeal for an erroneous exercise of discretion.<sup>12</sup>

At the March 2001 jurisdictional allocation conference, the Band asked the Circuit Court to reopen its judgment approving the arbitration award. The parties also considered a draft proposed protocol then under discussion by a forum of state, federal and tribal judges. The draft protocol proposed particular comity factors that should be weighed at a jurisdictional allocation conference.<sup>13</sup>

The conference was held on the record at the Ashland County Courthouse with both judges and lawyers for each party. In extensive discussion, each judge explained his view of the proceedings that had transpired in his court.<sup>14</sup> The Circuit Court judge discussed the comity principles identified by the *Teague II* Court, as well as the principles set forth in the forum's draft protocol and in an alternative proposal submitted by the Wisconsin Tribal Judges Association (WTJA).<sup>15</sup> After almost two hours of colloquy, stalemate remained. Both courts declined to reopen their respective judgments.<sup>16</sup>

### THE FIRST TRIBAL/STATE COURT JURISDICTIONAL ALLOCATION PROTOCOL IS APPROVED

The Band appealed again, and the Court of Appeals certified the case to the Supreme Court. While Supreme Court review was pending, Chief Judge Edward Brunner of the Tenth Judicial District<sup>17</sup> convened an *ad hoc* committee to develop a tribal/state protocol governing the exercise of jurisdiction between Wisconsin state courts and tribal courts within his district. The committee's final version was a meld – it retained

portions of the forum's draft proposed protocol, and added other considerations identified in the WTJA draft.<sup>18</sup>

The protocol signed by the Tenth Judicial District and four Chippewa tribes (Bad River, Lac Courte Oreilles, St. Croix and Red Cliff) in December, 2001, was the first of its kind.<sup>19</sup> The Protocol sets forth the following factors to be considered in allocating jurisdiction:

**The protocol signed by the Tenth Judicial District and four Chippewa tribes (Bad River, Lac Courte Oreilles, St. Croix and Red Cliff) in December, 2001, was the first of its kind.**

- (1) Whether there are issues which directly touch on or require interpretation of a Tribe's Constitution, By-Laws, Ordinances or Resolutions;
- (2) Whether the nature of the case involves traditional or cultural matters of the Tribe;
- (3) Whether the action is one in which the Tribe is a party, or where tribal sovereignty, jurisdiction, or territory is an issue in the case;
- (4) The tribal membership status of the parties;
- (5) Where the case arises;
- (6) If the parties have by contract chosen a forum or the law to be applied in the event of a dispute;
- (7) The timing of the motion to dismiss or stay, taking into account the parties' and courts' expenditures of time and resources, and compliance with any applicable provisions of either court's scheduling orders;
- (8) The court in which the action can be decided most expeditiously;
- (9) Such other factors as may be appropriate in the particular case.<sup>20</sup>

To prevent a deadlock such as the one which occurred between the two courts in *Teague*, the Tenth District Protocol provides in Section 5(c) for a mechanism to select a third judge drawn from a standing pool of four circuit court and four tribal court judges. That judge then is directed to sit with the two judges from the courts where the two actions are pending to conduct a hearing *de novo*, at the close of which the three judges are to deliberate and allocate jurisdiction on the basis of the factors listed above.

Back in Madison, and mindful of the Tenth District's Protocol, a majority of the Supreme Court ("*Teague III*") reversed the Circuit Court's refusal to reopen the lower court judgment. The Court refrained from focusing its decision on a race to the courthouse, or on formal constitutional provisions.

12. *Teague III*, at ¶ 69.

13. See *Teague III*, at ¶¶ 5, 92.

14. See *Teague III*, at ¶ 91 (Wilcox, J., dissenting).

15. See *Teague III*, at ¶¶ 5, 92.

16. 2003 WI 118.

17. Judge Brunner is now on the Wisconsin Court of Appeals, District III, but remains involved with a group of Wisconsin tribal and

state court judges that meets to promote understanding and cooperation between those courts.

18. See *Teague III*, at ¶ 5.

19. *Historic State Court-Tribal Court Agreement to be Signed at Bad River Reservation*, <http://www.wicourts.gov/news/archives/2001tribal120401.htm>.

20. See *id.*

**[T]he twelve counties of the Ninth Judicial District and five Indian bands with reservations or property within the district signed their own tribal/state protocol on the judicial allocation of jurisdiction.**

Instead, *Teague III* clarified that when state and tribal courts exercise concurrent jurisdiction over the parties and subject matter, and each court knows of the other's proceedings, the full faith and credit statute is not yet applicable.<sup>21</sup> Instead, each court should stop its proceedings, consult with the other, and as a matter of comity decide which court should proceed.<sup>22</sup>

The *Teague III* Court further instructed that when comity principles are applied in this circumstance, the

application is weighted toward the Tribal Court:<sup>23</sup> "In the context of state-tribal relations, principles of comity must be applied with an understanding that the federal government is, and the state courts should be, fostering tribal self-government and tribal self-determination."<sup>24</sup> This instruction applies even when the tribal entity has waived a claim of sovereignty in the state court. It is an instruction that forces litigants and state courts to recognize that judicial qualifications are determined by the appointing sovereign, and not by other governments.

The *Teague III* majority then listed a host of factors from various sources, including the Tenth District's Protocol, noting that the weight given each would vary from case to case:

1. Where the action was first filed and the extent to which the case has proceeded in the first court;
2. The parties' and courts' expenditures of time and resources in each court and the extent to which the parties have complied with any applicable provisions of either court's scheduling orders;
3. The relative burdens on the parties, including cost, access to and admissibility of evidence and matters of process, practice, and procedure, including whether the action will be decided most expeditiously in tribal or state court;
4. Whether the nature of the action implicates tribal sovereignty, including but not limited to, the following:
  - a. The subject matter of the litigation.
  - b. The identities and potential immunities of the parties.
5. Whether the issues in the case require application and interpretation of a tribe's law or state law;

6. Whether the case involves traditional or cultural matters of the tribe;
7. Whether the location of material events giving rise to the litigation is on tribal or state land;
8. The relative institutional or administrative interests of each court;
9. The tribal membership status of the parties;
10. The parties' contractual forum selection;
11. The parties' contractual choice of the law to be applied;
12. Whether each court has jurisdiction over the dispute and the parties and has determined its own jurisdiction;
13. Whether either jurisdiction has entered a final judgment that conflicts with another judgment entitled to recognition.<sup>25</sup>

With the decision in *Teague III*, that case came to an end, but its legacy continues.

**A SECOND TRIBAL/STATE COURT JURISDICTIONAL ALLOCATION PROTOCOL IS DEVELOPED**

On July 28, 2005, the twelve counties of the Ninth Judicial District and five Indian bands with reservations or property within the district signed their own tribal/state protocol on the judicial allocation of jurisdiction. The signatory tribes are the Bad River Band, Forest County Potawatomi Community, Lac du Flambeau Band, Sokaogon Chippewa Community (Mole Lake) and Stockbridge-Munsee Band. The Ninth District Protocol applies where there is concurrent jurisdiction in both state and tribal court and provides for dismissal by either court if it determines it lacks jurisdiction.<sup>26</sup>

Section 7 of the Ninth District Protocol enumerates the same 13 factors identified in *Teague III* and provides that these factors "shall be considered in determining which court shall exercise jurisdiction." The tie-breaking procedure is the same as in the Tenth District Protocol.<sup>27</sup>

Notably, the Ninth District Protocol does not apply to one tribe with a presence in that district, based on a federal distinction. Public Law 280 (28 U.S.C. section 1360) gives Wisconsin courts civil jurisdiction over matters involving Indians which arise in Indian country. The Menominee are a non-P.L. 280 tribe – Wisconsin's only such tribe – and as a result, an assertion of jurisdiction by a Wisconsin court over a claim arising in Indian country and brought by a non-Indian against a Menominee tribal member would infringe that tribe's sovereignty. Because of its status as a non-P.L. 280 tribe, the Menominee Tribe did not sign the Ninth District Protocol.

21. *Teague III*, at ¶ 58.

22. *Id.*

23. *Id.*, at ¶ 79:

The principles of comity applicable to state court-tribal court relations are built upon the goal of fostering tribal self-government through recognition of tribal justice mechanisms. Consequently, the significance of the plaintiff's choice of a forum and the application and interpretation of state law are outweighed by the fact that the litigation involves tribal sovereignty and the interpretation of tribal law, and that the material events occurred on tribal land. Even where a circuit court had con-

ducted significant proceedings before the tribal court even began to hear the case is outweighed by the tribal court's institutional interest in determining the validity of contracts made with the tribe.

*Id.*

24. *Id.*, at ¶ 70.

25. *Id.*, at ¶ 71 and n.38.

26. Copies of the Ninth District Protocol may be obtained from the District Court Administrator, Susan Byrns, (715) 842-3872, 2100 Stewart Avenue, Suite 310, Wausau, WI 54401.

27. *Id.*

## THE SECOND JURISDICTIONAL ALLOCATION CONFERENCE IS HELD IN THE MOHR LITIGATION

In January, 2005, a *Teague* Conference was held in a case arising out of a 2003 consultant contract the Forest County Potawatomi Community's ("FCPC") Executive Council, but not its General Council, entered into with James B. Mohr. "All actions of the Executive Council are subject to review and rescission by the General Council."<sup>28</sup> The four-year contract was to pay Mohr, a recently retired state court judge, a substantial sum for assisting the tribe with the development of its tribal court system, a juvenile justice action plan and other related programs. The contract contained a sovereign immunity waiver and provided for arbitration in the event of a dispute. The immunity waiver, however, was not implemented in accordance with FCPC tribal law, which requires that the General Council approve any waiver of the tribe's sovereign immunity.

In January 2004, the tribe's General Council rejected the Mohr consultant contract. Efforts to reach a settlement were unavailing and on April 21, 2004, Mohr's counsel gave notice of his intent to proceed with arbitration.

On May 6, 2004, the tribe commenced an action in FCPC Tribal Court against Mr. Mohr,<sup>29</sup> seeking to enjoin him from commencing or pursuing arbitration and ultimately to declare the contract void. Days later, Mohr began his own action in Oneida County Circuit Court against the tribe,<sup>30</sup> in an effort to compel arbitration and challenge the Tribal Court's jurisdiction to adjudicate the dispute. At the same time Mohr filed a motion for a conditional stay pending an "inter-jurisdictional consultation." Counsel for the tribe and Mohr agreed to take no further action in their respective lawsuits to permit the consultation to take place.

On July 25, 2004, a reserve judge sitting in Oneida County Circuit Court sent a letter to the Chief Judge of the FCPC Tribal Court, adopting the parties' suggestion that a *Teague* Conference be held after two rounds of briefing. Counsel agreed that both actions should be stayed in the interim. They also advised the judges that, unlike the protocol adopted by the Tenth Judicial District, in the event there was a deadlock at their *Teague* Conference, the parties would then confer as to how it should be resolved.

The *Teague* Conference for the FCPC-Mohr cases was held January 25, 2005, in a Wisconsin circuit court courthouse. After oral argument, the proceedings were adjourned to permit the two judges to deliberate. After deliberations the proceedings resumed on the record. First the Tribal judge and then the Circuit Court judge delivered his ruling. Both agreed that jurisdiction should be allocated to the FCPC Tribal Court, although they reached their conclusions in a somewhat different way. Judge Butterfield, as a judge of a tribal court of a sovereign Indian nation who was not bound by decisions of the Wisconsin Supreme Court, used the nine factors set forth in the August 3, 2004, draft protocol for the Ninth District,

which had been approved by the state court judges but had not yet been acted upon by the tribal courts in that district. The nine factors listed in the draft protocol are the same as those in the Tenth District's Protocol. Judge Williams of the Circuit Court, on the other hand, applied *Teague III*'s 13 factors. He then entered a stay of any further proceedings in his court.

The interesting dynamic underlying the FCPC-Mohr *Teague* Conference was that it was convened in recognition of and reinforced by principles of comity. The FCPC-Mohr conference also was guided by the policy articulated by both the United States Supreme Court and the Wisconsin Supreme Court that promoting tribal justice systems is essential to foster tribal self-government and self-determination. Had the Circuit Court action been permitted to proceed, it would have divested the Tribal Court of the right to interpret tribal laws and the right to adjudicate challenges to its jurisdiction, both critical elements of the right of tribal self-government. Under the federal exhaustion of tribal remedies doctrine established by the United States Supreme Court in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*,<sup>31</sup> the Tribal Court must be allowed to address questions of its own jurisdiction and fully and finally adjudicate a dispute before a party can challenge the existence of tribal jurisdiction as a federal question in district court. As the *Teague III* court held, "general principles of comity, including principles of abstention, must be used to resolve" conflicts between state and tribal courts.<sup>32</sup>

## WISCONSIN'S NEW RULE ON DISCRETIONARY TRANSFERS FROM STATE COURT TO TRIBAL COURT

The FCPC-Mohr case is the first known use of a *Teague* Conference. Court staff believe that the protocols developed in the Ninth and Tenth Districts have been used successfully by courts and parties, but infrequently. Instead, it seemed that as time went on, tribal and state courts have been using informal approaches to resolve jurisdictional differences. As Judge Brunner reports, the state and tribal courts with the most overlapping activity have, over time, developed a very good relationship, and in situations where both sides feel jurisdiction may be questionable, the judges often give each other a phone call to resolve where the litigation best belongs.<sup>33</sup> Several state court judges have held court in tribal courtrooms.<sup>34</sup>

Aware of this evolution, on July 24, 2007, the Wisconsin

**[T]he state and tribal courts with the most overlapping activity... developed a very good relationship, and ...the judges often give each other a phone call to resolve where the litigation best belongs.**

28. CONST. OF FOREST COUNTY POTAWATOMI COMMUNITY, WISCONSIN, ART. V, §II.

29. Case No. 04-CV-27.

30. Case No. 04-CV-152.

31. 471 U.S. 845 (1985).

32. *Teague III*, at ¶ 66.

33. Telephone Interview with Judge Edward Brunner, Wisconsin Court of Appeals (June 2, 2009).

34. *Id.*



**The purpose of this rule is to enable circuit courts to transfer civil actions to tribal courts in Wisconsin as efficiently as possible where appropriate.**

Director of State Courts submitted a Petition on behalf of the State-Tribal Justice Forum<sup>35</sup> seeking promulgation of a rule governing discretionary transfer of state court cases to tribal court. The Petition noted that the State-Tribal Justice Forum had learned of a number of situations in which courts were transferring cases in an exercise of discretion as the

interests of justice require. Given the large number of pro se tribal court litigants, particularly in family law matters, the Forum advocated a user-friendly, discretionary transfer mechanism that could be used when there is concurrent jurisdiction.

In his Petition, the Director of State Courts made reference to research conducted by the State-Tribal Justice Forum on how other states handle the concurrent civil jurisdiction. In particular, the Forum, as well as the Petition, cited § 10.02 of Rule 10 of the Minnesota General Rules of Practice for District Courts. Title I, Section 10.02 outlines the factors to be considered when recognition of Tribal Court orders and judgments is discretionary. The comment to Rule 10 provides that when there is no applicable statute, recognition of Tribal Court orders and judgments is governed by principles of comity.<sup>36</sup> The Petition also cited State of Washington Court Rule 82.5(b) on concurrent Tribal and Superior Court jurisdiction. That rule authorizes a superior court to transfer an action to a Tribal Court in the interests of justice, taking into account “the nature of the action, the interests and identities of the parties, the convenience of the parties and witnesses, whether state or tribal law will apply to the matter in controversy, and the remedy available in such Indian tribal court.”

The rule proposed by the Petition was adopted by the Wisconsin Supreme Court on July 31, 2008, and became effective January 1, 2009.<sup>37</sup> Unlike the *Teague* Protocol, which requires dual filings in both state and tribal courts, the new WIS. STAT. § 801.54<sup>38</sup> gives a circuit court, after notice and a hearing on the record, the discretion to transfer an action to tribal court when there is concurrent jurisdiction and when transfer is warranted after consideration of all relevant factors, including the following:

- (a) Whether issues involve interpretation of tribal laws.
- (b) Whether the action involves traditional or cultural matters of the tribe.
- (c) Whether a tribe is a party, or tribal sovereignty, jurisdiction or territory is involved.

- (d) The tribal membership status of the parties.
- (e) Where the claim arose.
- (f) Whether the parties have by contract chosen the forum or law to be applied.
- (g) The timing of any motion to transfer, taking into account the expenditure of time and resources by the parties and the court and compliance with any scheduling orders.
- (h) The court in which the dispute can be decided most expeditiously.
- (i) The institutional and administrative interest of both courts.
- (j) The relative burdens on the parties, including cost, access to and admissibility of evidence and where the action can be heard and resolved most promptly.
- (k) Any other factors having a substantial bearing on the selection of a convenient, reasonable and fair place of trial.

As can be seen, these 11 factors are strikingly similar to the 13 points enumerated by the *Teague III* majority. Upon a discretionary transfer to tribal court, further proceedings in state court are stayed for up to five years, subject to modification on motion and notice to the parties as the interests of justice may require. A discretionary transfer to tribal court may be appealed as a matter of right.

The following comment to WIS. STAT. § 801.54, although not adopted, may be consulted for guidance in interpreting it:

The purpose of this rule is to enable circuit courts to transfer civil actions to tribal courts in Wisconsin as efficiently as possible where appropriate. In considering the factors under sub. (2), the circuit court shall give particular weight to the constitutional rights of the litigants and their rights to assert all available claims and defenses.<sup>39</sup>

#### **DISCRETIONARY TRANSFER RULE IS AMENDED**

After consideration at several open administrative conferences, the Wisconsin Supreme Court on July 31, 2009, adopted an amendment to § 801.54, effective as of that date, that permits a circuit court on its own motion or that of any party, to transfer a post-judgment child support, custody or placement provision of an action in which the state is the real party in interest to a tribal court located in Wisconsin which is receiving Federal funding to operate child support programs. Once the circuit court has made an explicit finding of concurrent jurisdiction, transfer will occur unless a party timely objects or establishes good cause to prevent transfer. If there is a timely objection, the court must hold a hearing on the record to consider § 801.54(2) factors.<sup>40</sup> Permitting such transfers in child support cases is consistent with the practice in a number of other states.<sup>41</sup>

35. The Forum is a joint committee of representatives of state and tribal courts established by the Chief Justice of the Wisconsin Supreme Court to promote communication and cooperation among Wisconsin's state and tribal court systems.

36. See Minnesota General Rules of Practice for the District Courts tit. 1, § 10.02, Tribal Courts and Judgments, [http://www.courts.state.mn.us/Documents/0/Public/Rules/GRP\\_Tit\\_1\\_3-12-09.pdf](http://www.courts.state.mn.us/Documents/0/Public/Rules/GRP_Tit_1_3-12-09.pdf).

37. Sup. Ct. Order No. 07-11-2008 WI 114, issued July 31, 2008, eff.

January 1, 2009.

38. WIS. STAT. § 801.54(2)(a)-(k) (West Supp. 2008).

39. WIS. STAT. § 801.54 cmt. (2008).

40. See WIS. STAT. § 801.54(2m) (2008); Sup. Ct. Order 7-11A, 2009 WI 63 (issued July 31, 2009, eff. July 31, 2009).

41. See, e.g., Alaska (ALASKA STAT. § 47.10) (eff. Oct. 15, 2004); California (Cal. Rules of Court 5.483) (eff. Jan. 1, 2008); Colorado (COLO. REV. STAT. § 19-1-126) (eff. May 30, 2002); Iowa

## CONCLUSIONS

Although we are not aware of any post-Mohr formal *Teague* Conferences, we understand that the principles of comity identified in *Teague III* have been significant in facilitating discussions and cooperation between state and tribal court judges faced with duplicative litigation. In the short time since Wis. Stat. § 801.54 took effect, there is no data on the frequency of its usage. We anticipate that § 801.54 transfers will be made when it makes sense to do so. Such transfers can be done without the formality of a *Teague* Conference, which, in any event, cannot bind a tribal court. Section § 801.54(2m), the 2009 amendment, was adopted at the behest of the Oneida Indian Nation, which had added a child support enforcement agency to its judicial system.<sup>42</sup> This amendment will facilitate transfer of post-judgment child support, custody and placement matters of which it has been estimated there may be more than 4,000 statewide.<sup>43</sup>

In the future, parties and courts in the Ninth and Tenth Judicial Districts have at their disposal formal and informal mechanisms to avoid the race-to-judgment problems presented in *Teague*. If non-child support parallel actions should arise involving the non-signatory Menominee Tribe, or with tribes located in other judicial districts such as the Ho-Chunk Nation or Oneida Indian Nation, the parties and judges or judicial officers may convene a *Teague* Conference on an *ad hoc*, voluntary basis, not unlike what occurred in *Mohr*, but they also are free to use the discretionary transfer rule of Wis. Stat. § 801.54. Absent a controlling protocol with a tie-breaking mechanism, there remains some risk of a deadlock between

the two judges, as occurred in *Teague*. But the federal tribal exhaustion doctrine, as formulated by the United States Supreme Court and recognized by the Wisconsin Supreme Court in its *Teague* decisions, makes deference to proceeding in tribal court more likely. Likewise, the development of the discretionary transfer rule itself reflects that the fruit of sustained communication and cooperation between state and tribal court judges can yield not only formal protocols, but a more collegial, cooperative relationship that facilitates informal means of deciding to transfer a case from one court's sovereign jurisdiction to another. In short, the informal, cooperative process has become more useful than the protocol. This is progress.



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(IOWA CODE § 232B.5) (adopted 2003); Michigan (Mich. Court Rule 3.980) (eff. May 1, 2003); Minnesota (MINN. STAT. § 260.771) (eff. July 1, 2007); Nebraska (NEB. REV. STAT. § 43-1504) (adopted 1985); New York (N.Y. Ch. 55 CONS. LAWS Art. 2 § 39) (eff. Dec. 21, 2005); Oklahoma (10 OKLA. STAT. Ch. 1B § 40.4) (eff. Sept. 1, 1994); Oregon (34 OR. REV. STAT. 419C.058) (adopted 2003); South Dakota (S.D. CODIFIED LAWS § 26-7A-15.1) (adopted 2005); Washington (WASH. REV. CODE §§ 26.10.034, 13.34.070, 13.32A.152 and 26.33.040) (all eff. June 10, 2004).

42. Recently available federal funds have encouraged a number of tribal courts to develop their own child support enforcement agencies, which tend to pursue enforcement more effectively than over-burdened state courts are able. See Telephone Interview (June 2, 2009), *supra* note 33.

43. Telephone interview with A. John Voelker, Wisconsin Director of State Courts (May 26, 2009); D. Ziemer, *Cases Can Transfer to Tribal Court*, Wis. L.J., May 11, 2009.

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# Beyond Minimum Standards: Federal Requirements and State Interpretations of the Indian Child Welfare Act

Kathryn E. Fort

A woman comes to state court with a tribal custody order, seeking to modify its provisions. The state removes a child from her home and her mother is a tribal citizen. A couple seeks a divorce in state court but both are tribal citizens. When these cases appear in state courts, practitioners need to know how and where family law and Indian law intersect, and how that intersection shifts the cases out of the majority of family law cases in state courts. Because family law is such a large portion of the civil docket, it is easy for certain procedures to become routine. However, some cases involving tribal citizens require the application of different laws and different standards which are hardly routine. The intersection of family law and Indian law may account for a small number of cases, but particularly in states with high Native populations it is necessary for all state court practitioners to have a basic understanding of the issues involved.

The appearance of a tribal citizen or tribal court order in state court may cause confusion for state court judges and practitioners. Judges and lawyers may try to handle the case under the state family laws with which they are already familiar. However, there are specific federal and state laws which govern many of these situations. On the federal level, the most important is the Indian Child Welfare Act (ICWA).<sup>1</sup> ICWA requires certain minimum federal standards be met when an Indian child is in state court. However, courts are also grappling with the Violence Against Women Act (VAWA),<sup>2</sup> and the Adoption and Safe Families Act (ASFA).<sup>3</sup> In addition, state laws can provide more than the federal minimum standards provided by ICWA and also affect cases when ICWA does not apply. Specifically, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)<sup>4</sup> as adopted by the state, and various full faith and credit rules and interpretations, address tribal courts and tribal court orders when in state court.

## THE INDIAN CHILD WELFARE ACT

Of the federal laws which come into play in state courts, by

far the most important is the Indian Child Welfare Act (ICWA). ICWA is the law governing cases involving the removal of Indian children from their homes and tribes. Passed in 1978, ICWA governs the removal of an “Indian child” from the home, the termination of parental rights, and pre-adoption and adoption placement procedures.<sup>5</sup> The goal of ICWA is to preserve Indian families and keep children connected to their tribe against an onslaught of state agency attempts to break up these families and place the children with non-Indian families. For example, from 1971 to 1972, Indian children were adopted at eight times the rate of non-Indian children, and virtually all of these children were placed in non-Indian homes.<sup>6</sup> Because the very existence of a tribe is in its children, this taking of children strikes at the heart of tribes and their existence.<sup>7</sup> Understanding ICWA’s dual goals – to protect both the child and the tribe – is the first step in understanding the various provisions of the law.

ICWA changes the rules of traditional family law practice by requiring different, and higher, standards based on a child’s tribal status. Though ICWA singles out a specific group for different treatment, such as higher standards of proof for terminating parental rights, or requiring more effort by the state in maintaining family ties, this federal law is not unconstitutional. The group ICWA seeks to protect are tribal citizens and their nations. ICWA is based on the government-to-government relationship between the federal government and Indian nations, and the political status of tribal citizens as citizens of their nations.<sup>8</sup> The federal government has long recognized a “trust relationship” with tribes, based on treaties, statutes and court cases. Some also trace the relationship to the Commerce Clause and Treaty Clause of the Constitution. As stated in the *Handbook of Federal Indian Law*, “[t]he commerce clause has become the linchpin in the more general power over Indian affairs recognized by Congress and the courts.”<sup>9</sup> The Commerce Clause, therefore, “anticipat[es] and affirm[s] federal law singl[ing] out Indian nations and their members for separate

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## Footnotes

1. 25 U.S.C. §§1901-1963.
2. Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).
3. PL 105-89; 111 Stat 2115.
4. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997), available at <http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.htm> (versions of the UCCJEA have been passed by 40

- states, <http://www.nccusl.org/Update/docs/UCCJEAadoptions.pdf>).
5. See B.J. JONES, MARK TILDEN & KELLY GAINES-STONER, THE INDIAN CHILD WELFARE ACT HANDBOOK (2nd ed. 2008).
6. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).
7. See Matthew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History* (Michigan State University Indigenous Law & Policy Center Occasional Paper Series, 2009-04 (April 10, 2009)). available at <http://www.law.msu.edu/indigenous/papers/2009-04.pdf>.
8. 25 U.S.C. §1901.
9. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, §5.01[4] (Nell Jessup Newton et al. eds. 2005).

treatment.”<sup>10</sup> The Supreme Court also provides a basis for the trust relationship in various decisions as early as 1831.<sup>11</sup>

The trust relationship now covers a broad range of federal legislation designed to provide services and benefits to tribes and tribal citizens, and is often cited by Congress when passing legislation designed for tribes or tribal citizens. In ICWA, Congress started the findings section by “recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people....”<sup>12</sup> Because of this special relationship, the Supreme Court has held that Congress has the power to “legislate on behalf of federally recognized Indian tribes.”<sup>13</sup> This singling out is also based on tribal citizens’ own political relationship as citizens of their tribes.<sup>14</sup> As citizens, or potential citizens, of a tribe, a child is due both the benefits and responsibilities as a tribal citizen and the benefits of the federal trust relationship. In removing a child from a tribe, not only does a tribe lose one of its citizens, the child loses her tribe.

For these reasons, ICWA is a particularly important statute. However, while ICWA itself is not long or complex, state interpretations of it are wide ranging. Most importantly, ICWA slows down the usual practices regarding the removal and placement of Indian children outside of their homes and their tribes. This is because of the abuse, or complete lack, of due process procedures when children were systematically removed from parents by the state.<sup>15</sup> Indeed, even with the implementation of ICWA, certain due process procedures required by the statute are still systematically not followed.<sup>16</sup>

While the only Supreme Court case interpreting the statute, *Mississippi Band of Choctaw Indians v. Holyfield*<sup>17</sup> strongly encouraged uniform state application of the law, stating “a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind,”<sup>18</sup> interpretations of the provisions of ICWA do vary widely from state to state. In addition, ICWA provides for the “minimum federal standards” for protection of Indian children in state court. Some states have passed laws with higher standards for Indian children in their state courts. Regardless, the federal provisions of ICWA require state courts to follow certain procedures in ICWA cases.

ICWA applies to specific “child custody proceedings.” These proceedings are usually non-voluntary, such as foster care or guardianship placement where the child “cannot be returned upon demand” of the parent, or permanent, such as termination of parental rights, pre-adoption and adoption placement procedures.<sup>19</sup> For example, while deciding to allow

a child to be adopted may be a voluntary act by the parent, it is a permanent severance of the child from the parent, and likely the tribe, and therefore falls under the ICWA. ICWA does not apply in custody disputes stemming from divorce cases. However, as discussed below, laws other than ICWA or state divorce laws may govern in those cases.

For ICWA to apply in these situations, the child must be considered an “Indian child.” The state agency bringing the action falling under ICWA has the affirmative duty to determine whether the child might be a tribal member or eligible for tribal citizenship and a biological child of a tribal citizen. Since only the tribe has the ability to determine whether the child would be considered an Indian child under the act, the tribe must be contacted by the state in these proceedings. While the court does not have the ability to determine the child’s status as an Indian child, it does have a role in determining whether the *tribe* qualifies under ICWA, specifically, whether the tribe is federally recognized.

While the court must determine if the child is potentially an “Indian child,” it is not, nor is it ever, the state court’s role to determine if the child is *eligible* for tribal membership. That is a decision of the tribe, and implicates a key area of tribal sovereignty. The Supreme Court, in *Santa Clara Pueblo v. Martinez*, stated “a tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”<sup>20</sup> Most states around the country have upheld this fundamental provision of tribal sovereignty.<sup>21</sup>

In conjunction with determining if ICWA applies to the case, the state also must comply with the notice provision. The state is required to notify the tribe, the parent, the “Indian custodian” and the regional BIA office of the proceedings as soon as the state has any knowledge the case might fall under ICWA. The agency making the petition has the duty to make the notification and make it properly. Lack of notice at the start of a case can be an incurable flaw later in the case. For example, the Michigan Appeals Court has held that “failure to comply with the requirements of the ICWA may render invalid a proceeding terminating a parent’s rights.”<sup>22</sup> California routinely remands

**...ICWA is a particularly important statute. However, while ICWA itself is not long or complex, state interpretations of it are wide ranging.**

10. *Id.*, §14.03[2][b][i].

11. *Id.*, §5.04[4][a].

12. 25 U.S.C. §1901.

13. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

14. *Id.* at 554.

15. Fletcher, *supra* note 7, at 4.

16. See, Kathryn Fort, *The Cherokee Conundrum: California Courts and the Indian Child Welfare Act* (MSU Legal Studies Research Paper No. 07-07 (April 20, 2009)), available at SSRN [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1392293](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392293).

17. 490 U.S. 30 (1989).

18. *Id.* at 46.

19. 25 U.S.C. §1903(1).

20. 436 U.S. 49, 72 n.32 (1978).

21. See *In re N.E.G.P.*, 626 N.W.2d 921, 924 (Mich. App. 2001); NATIVE AMERICAN RIGHTS FUND, A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT 5 (2007), available at <http://narf.org/icwa/print/application.pdf>.

22. *In re N.E.G.P.*, 626 N.W.2d at 923.

**Improper notice means ICWA cannot be applied to the rest of the proceeding, since the tribe may have no way of knowing the case even exists.**

ICWA cases for noncompliance with the notice provisions of the statute.<sup>23</sup> Without notice, the tribe is unable to exercise its right of intervention and petition for transfer. Improper notice means ICWA cannot be applied to the rest of the proceeding, since the tribe may have no way of knowing the case even exists. This notice is of particular importance given the jurisdictional aspects of

ICWA. Finally, notifying and communicating with the tribe is one way a state court may determine whether the child is considered an Indian child by the tribe.

Initially ICWA shifts jurisdiction slightly from the usual civil tribal jurisdiction interpretation. In an ICWA case, if the Indian child resides off of the reservation, the state and tribe have *concurrent* jurisdiction. If the child resides on the reservation the tribe has *exclusive* jurisdiction. These cases are not evaluated under principles of civil tribal jurisdiction; ICWA clearly provides for the jurisdictional boundaries in these cases. If the state is exercising its concurrent jurisdiction, the tribe, or Indian custodian, has the right to intervene in the case. The tribe also has the right to petition for transfer of the case to tribal court. Absent “good cause to the contrary” the state court “shall” transfer the case to the tribal court.<sup>24</sup>

ICWA is a highly litigated statute, and both the intervention and transfer provisions have been the subject of cases in state court. “Good cause” is a difficult standard to quantify, and each state has determined for itself what “good cause” may be. One area of guidance is the Bureau of Indian Affairs *Guidelines for State Courts; Indian Child Custody Proceedings*.<sup>25</sup> The Guidelines are not binding on state courts, though many states find them persuasive. While the Guidelines provide different factors involved to determine “good cause,” including the timeliness of the petition for transfer, the best interests of the child standard is not to be considered by the court. Because the best interest standard is used by most family law courts, there have been some cases where courts have incorrectly applied the best interests standard to this jurisdictional standard. In South Dakota, the supreme court overturned a decision by the trial court to deny a transfer to tribal court based on an evaluation of the best interests of the child. The court held “that a substitute parent might provide a child with good care or even better care than its natural parent is not an appropriate standard for determining the best interests of the child in the context of a ICWA transfer decision.”<sup>26</sup> As an appellate court in Illinois pointed out, the best interests test was “relevant not to determine juris-

diction but to ascertain placement.”<sup>27</sup>

If the tribe does not seek to transfer the case to tribal court, or if the state fails to transfer the case because of good cause, the state is still bound by ICWA and required to follow its provisions. Among others, these include the placement provisions and active efforts provision. When a child is removed from her family and placed in foster care or with an adoptive family, the court must place the child in accordance with the ICWA’s placement preferences. Importantly, the court first must determine if the tribe has passed a law regarding placement preferences, as these are to be the primary guidance for a state court to follow. Otherwise, children in foster care must be placed in the “least restrictive setting” in “reasonable proximity to his or her home” and placed with either a member of the child’s extended family, a foster home approved or licensed by the tribe, an Indian foster home licensed by the state, or an institution run by an Indian organization or approved by the tribe. Children being adopted must be placed with a member of the child’s family, members of the child’s tribe, or another Indian family.<sup>28</sup>

There is, however, a “good cause,” exception to the ICWA placement preferences as well, and some state courts have inserted the best interests test into this determination as well. For a court to deviate from the placement preferences, it must provide “good cause to the contrary.”<sup>29</sup> Again, the BIA Guidelines provide some guidance as to what “good cause” might consist of, but specifically does not list a best interests standard as good cause. ICWA assumes the best interests of the Indian child are served by following the placement preferences. Using the best interests standard of the state court to undermine the placement preferences ignores Congressional intent and fails to acknowledge the reasons ICWA had to be passed in the first place. The best interests test is amorphous, and allows the court to insert the very standards and values ICWA tries to counter.

Another vital provision in the act is the active efforts section. The phrase “active efforts” refers to the portion of the law which requires that in the event of foster care placement or termination of parental rights, the party seeking to remove the child must demonstrate 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.”<sup>30</sup> Unfortunately, the statute does not define what these active efforts need to be, and are often the subject of litigation. The BIA Guidelines do provide some instruction, stating that the efforts should “take into account the prevailing social and cultural conditions and way of life of the Indian child’s tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.”<sup>31</sup> At the very least, active efforts require more than pas-

23. Fort, *supra* note 16, at 18.

24. 25 U.S.C §1911.

25. Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 FEDERAL REGISTER 67584 (Nov. 26, 1979) (“BIA Guidelines”).

26. In re J.C.D., 686 N.W.2d 647, 650 (S.D. 2004).

27. Interest of Armell, 550 N.E.2d 1060, 1065 (Ill. 1990) (cited in

Michael J. Dale, *State Court Jurisdiction under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 390 (1992)).

28. 25 U.S.C. §1915.

29. *Id.*

30. *Id.* at §1912(d).

31. BIA Guidelines, D.2, 44 Fed Reg 67584, 67592.

sive efforts, and also must include tribal services and culturally appropriate services.<sup>32</sup>

Because of the relatively amorphous definition, there are not many cases listing what satisfies the active efforts requirement. Rather, the courts tend to focus on the facts of each individual case to determine whether active efforts occurred. A majority of state courts have found active efforts require more than the normal services offered to non-Indian parents.<sup>33</sup> In South Dakota, the Supreme Court followed the Holyfield directive for the statute to be applied uniformly across the country and determined that active efforts did require more than the regular services offered by the state.<sup>34</sup>

More recently, courts have been struggling with the interplay between ICWA and AFSA. However, AFSA and ICWA have contradictory goals, and ought not to be read together. Generally the biggest conflict comes under ICWA's requirement of active efforts to rehabilitate and reunite the Indian family separated by the court. Under AFSA, in certain circumstances, reasonable efforts are not required by the court before terminating parental rights. Indeed, the goals of AFSA, to hurry up adoption proceedings and streamline the process, are the opposite of ICWA, which is to slow down the parental termination process and make sure proper procedures are followed before the permanent removal of Indian children from their families. Where ICWA applies, AFSA should not.<sup>35</sup>

Even after the application of active efforts, there are different standards of proof in non-ICWA and ICWA cases. Under ICWA, removal of an Indian child from the home requires clear and convincing evidence, and testimony by qualified experts, that leaving the child in the home will lead to "serious emotional or physical damage to the child." Under ICWA, termination of parental rights requires evidence beyond a reasonable doubt, and testimony by qualified experts, that the child will suffer "serious emotional or physical damage."<sup>36</sup> Different states have applied these standards in various ways. For example, in Michigan, both the federal and state levels of evidence must be met. Therefore, to terminate the parental rights of a parent to an Indian child, the court must prove the ICWA standard, and also "find clear and convincing evidence that one or more enumerated statutory grounds for termination exist."<sup>37</sup>

ICWA also provides rules for the enforcement of any tribal court orders a state court might encounter in an ICWA case. Under ICWA, tribal court judgments are to be enforced by the state court without any question into the nature of the tribal court or previous tribal court proceedings. In other words, in ICWA cases, tribal court orders, tribal laws and judicial proceedings are granted full faith and credit by the state courts.<sup>38</sup>

Finally, some courts have used the judicially created existing Indian family exception to avoid applying ICWA at all. Courts created the existing Indian family exception for children and families the court determines should have no contact with the tribe. In other words, the court puts itself in the position of determining the "Indian-ness" of a child, and ignores the federal requirements of ICWA's Indian child definition. Many states have rejected this exception, and – notably – it was also recently rejected in Kansas, the state to first introduce the exception.<sup>39</sup> States which have also rejected the existing Indian family exception include Michigan, New York, Illinois and Alaska, among many others.<sup>40</sup>

**Some states have adopted ICWA as either a state law or court rule.**

### STATE LAWS, COURT RULES, AND ICWA

Some states have adopted ICWA as either a state law or court rule. These laws or rules may be different than the federal statute. As Congress wrote, ICWA is considered the "federal minimum standards" governing cases involving Indian children. Some states have chosen to go beyond those minimum standards, while some adopt the law with no changes. Under ICWA, when a state or federal law provides a "higher standard of protection" for the parents or Indian custodian of an Indian child, the state or federal law applies.<sup>41</sup> However, state courts react to these laws and rules in different ways. One issue with state law adaption of ICWA is the state court's ability to review, and determine the state constitutionality of, these laws.

In Iowa, the state legislature adopted ICWA as state law, with some changes to various parts of the federal statute. The Iowa ICWA statute extended the definition of Indian child to include children recognized as members of the tribal community.<sup>42</sup> Recently the Iowa Supreme Court found that portion of the ICWA statute unconstitutional. Citing the U.S. Supreme Court's holding in *Morton v. Mancari*, the Iowa Court determined that the state definition impermissibly included "racially" Indian children, not just children who are tribal citizens or eligible for tribal citizenship.<sup>43</sup>

After a series of cases in the California appellate courts, the California legislature passed a law banning the courts from using the existing Indian family doctrine to prevent the application of ICWA.<sup>44</sup> At least one appellate court found that statute to be unconstitutional and applied the existing Indian family doctrine.<sup>45</sup> However, the legislature passed the law again, now as Welfare and Institutions Code §224, and a 2007

32. See *In re Children of SW*, 727 NW2d 144, 149 (Minn. App. 2007).

33. See, e.g., *In re JS*, 177 P3d 590, 593-4 (Okla. Civ. App. 2008); Fletcher, *supra* note 7, at 9.

34. *In re JS*, 177 P3d at 593.

35. Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed Reg 4020-01, 4029-30 (January 25, 2000) (While AFSA is silent on ICWA, the Federal Regulations interpreting AFSA conclude that "nothing in this regulation supersedes ICWA requirements.").

36. 25 U.S.C. §1912(e),(f).

37. *In re Dougherty*, 599 N.W.2d 722, 776 (Mich. Ct. App. 1999).

38. 25 U.S.C. §1911

39. *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

40. NATIVE AMERICAN RIGHTS FUND, *supra* note 21 at 2-3.

41. 25 USC §1921.

42. IOWA CODE §232B.3 (2003).

43. *In re A.W.*, 741 N.W.2d 793 (Iowa 2007).

44. CAL. WELF. & INST. § 360.6 (1999).

45. *In re Santos Y.*, 92 Cal. App. 4th 1274 (Cal. App. 2 Dist., 2001).

**Generally, the treatment of tribal court orders in family law cases is governed by both state and federal law**

appellate court case upheld the law as constitutional.<sup>46</sup> There is still a split, however, in the California appellate courts regarding the application of the existing Indian family exception.

In Michigan, the Department of Human Services of course must follow the notice requirements of

ICWA.<sup>47</sup> The Michigan Appeals Court agreed with a Vermont Supreme Court case that “it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child.”<sup>48</sup> However, Michigan also provides for more extensive notice proceedings than the ICWA notice provisions. Michigan’s court rule on ICWA requires a court to inquire about the child or parent’s status as a tribal citizen. The appellate court cited to ICWA and stated that “Michigan imposes a more stringent standard than that found in §1912(a) of the ICWA to ensure that inquiry and notification are performed.”<sup>49</sup>

In another case, though, the Michigan appeals court maintained ICWA’s narrow definition of an Indian child, holding that ICWA does not apply when the “minor child is claimed to be an Indian child from an Indian tribe that is not recognized as eligible for services provided to Indians by the Secretary of the Interior,”<sup>50</sup> contrary to the state’s own *Children’s Foster Care Manual*, which encouraged the courts to extend ICWA to state-recognized or Canadian tribes. The tribe in question in the case was neither a non-federally recognized tribe located in Michigan nor a Canadian First Nation. Whether the Michigan court would consider those under Michigan ICWA standards is questionable.

Finally, Wisconsin has also found that when trying to “harmonize” its children’s code and ICWA, the state law may be invoked when it provides higher standards of protection. Specifically, the court stated when the state law “provides a higher standard of protection than is mandated by the ICWA, we find it appropriate that where the children’s code provides additional safeguards beyond what is mandated by ICWA, those additional safeguards should be followed.”<sup>51</sup>

At this time at least two states, Michigan and North Carolina, are contemplating incorporating ICWA into state statutes to both clarify and potentially extend ICWA’s federal minimum protections.<sup>52</sup>

**FULL FAITH AND CREDIT IN NON-ICWA FAMILY LAW CASES**

There are family law cases where ICWA does not apply, but other state and federal laws may. Generally, the treatment of tribal court orders in family law cases is governed by both state and federal law. Part of the issue comes down to distinguishing between full faith and credit, comity and various state court rules regarding comity or full faith and credit.

Full faith and credit is guaranteed in Art. IV of the United States Constitution, to ensure the sister states give full force to the judicial proceedings in other states. When faced with an order from another state, the implementation and enforcement of it ought to be automatic. There are no discussions of due process standards or reading behind the order itself. A federal statute, 28 USC §1738, expanded the full faith and credit clause to territories and possessions of the United States. The statute does not explicitly include tribes. However, two states – Idaho and New Mexico – interpret the statute to include tribes.<sup>53</sup> These states conclude the tribes are equivalent territories, and therefore grant full faith and credit to tribal court judgments. The vast majority of states do not interpret that statute or the Constitution to ensure full faith and credit for Indian tribes. However, other federal statutes such as the Violence Against Women Act and the Child Support Order Act include full faith and credit for tribal court order provisions. When these statutes apply, the state court does not invoke a state statute, rule or comity when enforcing the judgment. Enforcement of the judgment is automatic under these federal statutes.

When faced with a foreign court order, a state or federal court will invoke principles of “comity.” Comity is a far more amorphous concept, based on the respect of another sovereign. The Supreme Court, in *Hilton v. Guyot*,<sup>54</sup> stated that comity was “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation,” which it has cited approvingly in later cases.<sup>55</sup> Enforcing a foreign court order is not guaranteed or required. Comity requires a discussion of a number of factors, including due process concerns and public policy issues. Indeed, it has been noted that the use of comity may even bring up concerns of separation of powers and political question issues, as only Congress and the Executive Branch have the power to deal with foreign nations. The granting, or not granting, of comity to a foreign court may have the potential to cause larger foreign policy problems.<sup>56</sup>

A majority of states, when enforcing tribal court judgments not governed by federally mandated full faith and credit laws still use principles of comity to determine the enforcement of

46. *In re Vincent M.*, 150 Cal. App. 4th 1247 (Cal. App. 6 Dist., 2007).

47. *In re IEM*, 592 N.W.2d 751, 756 (Mich. App. 1999).

48. *Id.* at 757 (quoting *In re M.C.P.*, 571 A.2d 627 (Vt. 1989)).

49. *In re Elliot*, 554 N.W.2d 32, 38 (Mich. App. 1996).

50. *In re Fried*, 702 N.W.2d 192 (Mich. App. 2005).

51. *In re D.S.P.*, 480 N.W.2d 234, 238 (Wis. 1992).

52. Interview with Allie Maldonado, General Counsel for the Little

Traverse Bay Bands of Odawa Indians, in Lansing, MI (May 11, 2009).

53. *Jim v. City Financial Services Corp.*, 533 P.2d 751 (N.M. 1975); *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982).

54. 159 U.S. 113, 164 (1895).

55. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408 (1964).

56. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Intern.*, 493 U.S. 400 (1990).

the judgment. Some states, however, have passed a statute or court rule to provide guidance for state courts when enforcing a tribal court judgment. In Michigan, a unique court rule governs the enforcement of tribal court judgments when there is no other state or federal law dictating otherwise. M.C.R. 2.615 is not quite full faith and credit, but is a higher standard than comity, and is a reciprocal rule. In order for a tribe to have its orders enforced in a Michigan state court, it must pass a law or rule ensuring its tribal courts enforce state court judgments. The tribe must notify the State Court Administrative Office (SCAO) of their rule. The SCAO maintains a list of which tribes qualify under M.C.R. 2.615. In addition, M.C.R. 2.615 does not limit reciprocity to tribes located in Michigan. Any federally recognized tribe can file with the SCAO, provided the tribe has passed the rule regarding the enforcement of Michigan state court judgments in their court.

Under M.C.R. 2.615, a tribal court judgment is presumed valid. The party challenging the order must prove otherwise. This is a distinct difference from comity, where the burden of proof is on the party seeking to enforce the foreign order. Therefore, a tribal court judgment is presumed valid by the court unless challenged, and when challenged, that party must demonstrate one of five factors applies to the order. Four of the factors are types of evaluations the state courts do in other comity cases, including whether the order was obtained through fraud or duress, without notice or hearing, “repugnant” to public policy, or not final. The fifth factor, however, is a lack of personal or subject matter jurisdiction, a determination which requires an understanding of civil tribal jurisdiction.

Regardless of state court rules, in all cases, a court must determine whether the tribe had jurisdiction over the case under which the order arises. Civil tribal jurisdiction requires a complex analysis and complete understanding of the parties’ tribal citizenship and residence.<sup>57</sup> As a sovereign entity, a tribe has inherent jurisdiction over its own citizens residing on the reservation. If the tribal citizens are not domiciled on the reservation, the state and tribe may have concurrent jurisdiction, depending on the tribe’s code. In some instances, the tribe has jurisdiction over non-Indians as well. If a dispute occurs between a tribal citizen and a non-Indian on the reservation, the tribe may have jurisdiction, but if the same dispute arises off the reservation, the state has jurisdiction. Of course, a non-Indian can consent to tribal jurisdiction, and in some cases the tribal code extends jurisdiction to non-Indians living on the reservation.

One additional issue regarding full faith and credit implicates the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA).<sup>58</sup> Many states have adopted this model statute as state law. In the draft published by the National Conference of Commissioners on Uniform State Laws, tribes were included in section 102 and 104. Specifically, the draft law stated that if ICWA applies to a case, the UCCJEA does not. However, the draft law also requires states to treat tribes as if they are sister states for the purposes of applying the

law, and also states that tribal determination of child custody must be “recognized and enforced.”<sup>59</sup> If the tribal court had proper jurisdiction over the custody proceeding, then the state cannot later exercise jurisdiction other than to enforce the custody order. While some states may not have chosen to add the additional language when they codified the UCCJEA as state law, some have. Since the UCCJEA is used every day by family court practitioners, treating tribes as states does not require a difficult analysis. The same rules apply to a tribal court order as to a state court order.

## CONCLUSION

The interplay of these laws can be confusing, particularly if the practitioner is not familiar with their language or application. Family law cases are already emotionally difficult, with multiple parties trying to achieve what they believe will be the best conclusion for a child. When the family court routine shifts with the introduction of different laws, confusion and miscommunication is not uncommon. An understanding of these laws and why they apply makes it easier for all involved parties. However, ignoring ICWA or misapplying ICWA early on only leads to extended litigation. The court’s adherence to the federal law can ensure the relatively quick resolution of difficult cases.

Many tribes now have fully functioning tribal courts at both the trial and appellate level. Both highly educated tribal citizens and traditional tribal elders sit as judges and justices on these courts. Acknowledging and respecting the work these tribal courts do on a daily basis is a first step for any state court judge when faced with a tribal court order or a motion to transfer a case to tribal court. Cooperation and communication between tribal and state courts make difficult cases easier and lead to better resolutions for those involved.



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57. For a more detailed discussion of tribal civil jurisdiction, see COHEN’S HANDBOOK, *supra* note 9, at 7.

58. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, *available*

at <http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997.act.pdf>

59. *Id.* at §104.



# American Indian Law Research for State Courts

Nancy Carol Carter

**A**merican Indian law commonly describes the body of law by which the United States government regulates its relationship to Indian tribes and Native American citizens. First explorations of Indian law tend to surprise and intrigue the researcher. Unique legal rules characterize the field and extensive historical research may be required. Basic legal principles that govern a factual situation involving non-Indians may not apply to an Indian-law case of similar facts. Appellate decisions may lack broad applicability because they are so closely tied to treaty language or the history of a single tribe. Questions involving Indian law are beginning to arise in new contexts and have become more complex. Specialty legislation applies to Alaska Natives and questions about the legal status of Native Hawaiians and their land rights remain unresolved. Increasingly, there are efforts to invoke international human-rights standards and to use comparative law in the analysis of domestic indigenous issues. Assumptions must be avoided in favor of careful research on every point.

## AMERICAN INDIAN LAW RESEARCH IS DIFFERENT

Once viewed as an esoteric legal cul-de-sac, Indian law was short on research sources. The subject had no law-school casebook until 1973. In the absence of an academic treatise, it long relied on the *Handbook of Federal Indian Law*<sup>1</sup> written as a federal government guide by Felix Cohen in 1942. The ubiquitous nutshell series did not deal with the topic of American Indian law until 1981.

Awareness of American Indian law has dramatically increased, helped in part by the Indian-rights movement and increased and effective legal advocacy. Media coverage has brought popular attention to specialized legislation like the Native American Graves Protection and Repatriation Act of 1990,<sup>2</sup> national news when Indian tribes claimed the ancient bones of Kennewick Man in a protracted legal dispute. Extensive coverage of an ongoing class action alleging federal fiduciary failures in the management of Indian trust funds is alerting many for the first time that the federal government serves as a trustee for some Native Americans. Conflicts over religious practices and disputes over areas claimed as sacred sites have been widely reported. Likewise, the emergence of Indian gaming and new tribal economic power has drawn a great deal of attention to the once obscure field of Indian law. Academia has seen a growth in Native American studies programs and more law schools than ever teach courses in American Indian law and offer graduate law degrees in the field.

For researchers, this higher profile is a welcome development because many more scholars and legal commentators are

working in the field. Over the past 30 years, an increase in the production of books, articles, microform, websites, and digitized original documents has largely overcome the former scarcity and inaccessibility of American Indian law materials. Researchers are thus confronted with the classic challenge of selecting the most authoritative sources from an array of possibilities, a particular challenge in a field fraught with political questions, rich with advocacy literature, and tied to a history of national policy fluctuations and reversals.

Further complications arise because American Indian tribes govern and adjudicate. As governments with sovereign powers, they join the federal government and state governments to form a triangle of competing jurisdictional powers. While the federal government claimed preemption over Indian affairs from the earliest history of the United States and recognized the powers of tribes to be self-governing, Congress has subsequently legislated federal intrusions into tribal affairs and extended the jurisdictional powers of states into tribal lands and over tribal citizens. Cases that appear to be relevant legal precedent may have arisen during a period when jurisdictional lines were different than in the present instance. Likewise, legislation may still be on the books, although very basic elements of the legal relationship have altered. Notably, this is an area of domestic law in which treaties matter, so historical context is always important. The field of Indian law is also plagued by ambiguity and troublesome legal black holes, sometimes created by inattentive legislative drafting. Too often Congress does not specify whether tribal governments are intended to be subject to legislative or regulatory provisions, or that an action intentionally and mindfully conflicts with prior legislation or treaty terms.

## FOUR BASIC INDIAN-LAW REFERENCES

The Internet provides quick access to many of the once arcane sources of American Indian law, but four works in traditional printed format are recommended for basic reference.

The only treatise in the field is the one-volume *Cohen's Handbook of Federal Indian Law, 2005 Edition*.<sup>3</sup> This work updates and expands upon the 1982 edition, which had used Felix Cohen's 1942 *Handbook* as the starting point for producing an Indian-law treatise. Researchers may also come across a 1958 edition of Cohen's classic work. This Department of the Interior rewrite was produced during the period when federal policy was to terminate the federal-tribal relationship and to downplay tribal self-government and Native American land rights. This official government work is criticized for bias and poor legal scholarship. When federal policy changed completely, the 1958 work was set aside as obsolete.

## Footnotes

1. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1942).
2. 25 U.S.C. §§ 3001-3013 (2006).

3. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* (Nell Jessup Newton, ed., 2005).

As with every good treatise, *Cohen's* 2005 edition is an excellent starting point to gain an overview of the law and to find citations to the leading cases and statutes. The book provides a concise history of federal Indian policy and explains interpretive principles applied in Indian law. A chapter is devoted to the tribal-state relationship, and others to topics such as civil and criminal jurisdiction, taxation, environmental regulation, and rights regarding water, hunting, fishing, and gathering. A chapter on the Indian Child Welfare Act<sup>4</sup> may be particularly useful to state court researchers.

Federal judge and former law professor William C. Canby, Jr., contributes a very useful work with his *American Indian Law in a Nutshell*.<sup>5</sup> A new edition was recently published. While the nutshell format is necessarily truncated, Canby's work is regarded as a scholarly standout in this series. He presents a valuable history of Indian policy and serves up an excellent introduction to the main themes and principles of Indian law. This work is useful for background, identification of issues, and discussions of prominent cases and legislation.

Works with an obvious viewpoint usefully highlight issues, and two are recommended for a basic collection. Stephen L. Pevar's *The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indian and Tribal Rights*<sup>6</sup> is a quick starting point for basic questions about the civil rights of tribal members and tribal rights under federal law. Subject coverage is fairly complete but succinct; the question-and-answer style is practical and to the point. Extensive footnotes lead to primary sources for further research.

State attorneys general interact closely with tribes. These lawyers practice on the knife edge of the federal-tribal-state jurisdictional conflict and deal directly with issues arising from the existence of Indian reservations and the operations of tribal governments and tribal courts within state boundaries. That experience has produced the *American Indian Law Deskbook*<sup>7</sup> by the Conference of Western Attorneys General. The work aims at a broad audience by keeping legal jargon to a minimum and focusing on a clear and straightforward presentation of topics such as Indian lands, criminal jurisdiction in Indian country, water rights, and tribal sovereignty in the context of Indian gaming, environmental matters, and child welfare. A treatment of the statutory and judicial foundations of Indian law is included, along with extensive analysis of federal and state court decisions. The first edition of this deskbook was criticized by one Indian-law scholar as a legal brief in favor of extending state powers into Indian country. Subsequent editions are credited with achieving more balance, but awareness of the viewpoint is relevant when consulting this widely relied upon and useful reference book.

#### **PRIMARY SOURCES: UNITED STATES STATUTES, CODES, AND LEGISLATION**

Tribal governments and the lives of their citizens are heavily touched by federal law and always have been. This means that contemporary researchers in the field of Indian law often look back to the earliest days of the republic for relevant case and statutory law. The works of Charles J. Kappler and Felix S. Cohen aid historical statutory research in Indian law. Kappler's *Indian Affairs: Laws and Treaties*<sup>8</sup> (now digitized and online) devotes four of its five volumes to statutes. A Department of Interior update of Kappler's work includes laws in force as of 1967. The original 1942 edition of Cohen's *Handbook of Federal Indian Law* has an "Annotated Table of Statutes and Treaties."

As final authority, the *United States Statutes at Large*<sup>9</sup> must be relied upon in most instances. However, exacting historical statutory research also will lead to the earliest federal codification, the *Revised Statutes of the United States*.<sup>10</sup> All laws included in this edition were reenacted as positive law, meaning that the text of laws published in the *Revised Statutes* replaces the *Statutes at Large* as the authoritative source.

Most laws pertaining to Indians and currently in force are codified at Title 25 of the *United States Code*. However, other important legislation is scattered throughout the federal codes. Title 18, for example, contains definitions of Indian country and jurisdictional legislation for crimes and criminal procedure involving certain Indians. Statutory research in contemporary Indian law may be conducted online or in the General Index volumes of *United States Code Annotated* or *United States Code Service*. Use of an annotated code is especially helpful in this field where policy changes can set entirely new directions for legislation.

New and pending legislation on Indian affairs is easily tracked through various online sources, including Thomas, the Library of Congress congressional information source (<http://thomas.loc.gov/>), and the Senate Committee on Indian Affairs home page (<http://indian.senate.gov/public/>). The House of Representatives does not have a separate committee on Indian affairs, and parcels out legislative work on Indian-law matters to various committees.

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federal codes.**

4. 25 U.S.C. §§1901-1963 (2006).

5. WILLIAM C. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* (5th ed. 2009).

6. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* (3d ed. 2002).

7. *AMERICAN INDIAN LAW DESKBOOK* (3d ed., 2004).

8. C. KAPPLER, *INDIAN AFFAIRS: LAWS & TREATIES* (1904) (online

from Oklahoma State University, available at <http://digital.library.okstate.edu/Kappler/>.)

9. The official source of laws and resolutions passed by Congress, *Statutes at Large* contains every public and private law arranged in chronological order by the date of passage. Other documents are included, such as treaties with Indian tribes.

10. Containing all laws in force on Dec. 1, 1873, the *Revised Statutes* were published in 1875.

**The continuing force of Indian treaties partially accounts for the inability to generalize about Indian law.**

Legislative history is often illuminating for Indian-law matters, but only a few compiled legislative histories have been published within the field. The best sources for finding citations to relevant legislative history documents are case law and the often exacting and detailed tracking of legislative history found in student law-

review notes or comments. Many historical documents of the United States Congress are now digitized and searchable in full text, making the once tedious task of compiling a legislative history much easier. The *United States Congressional Serial Set*<sup>11</sup> available in paper, on microform, and in a digital collection is a treasure trove of legislative history material.

**PRIMARY SOURCES: TREATIES**

Today, ratified treaties remain important primary sources of Indian law. Following the tradition of the colonial powers in America, the United States entered into treaties with Indian tribes from its earliest years. The form and ratification procedures for Indian treaties were the same as for any international treaty. Likewise, an Indian treaty can be unilaterally abrogated by the United States, as can treaties with other countries.

The formal end of treaty making came in 1871 as the House of Representatives asserted its determination to wield more control over Indian affairs. By this date, great tracks of land already had been shifted away from Indians and tribes were a waning military power. Incentives for treating with tribes were on the decline. At the same time that Congress ended treaty making, it reaffirmed the national obligations created by treaties in existence. After 1871, agreements were made between tribes and the federal government or its agents. These executive agreements have been enforced similarly to treaties.

The continuing force of Indian treaties partially accounts for the inability to generalize about Indian law. Federal obligations to individual tribes can vary greatly, depending on treaty terms. Treaty rights can survive the termination of the special federal-tribal relationship denoted by federal recognition. Treaties also may act as a proscription on tribal rights and powers. Contemporary litigation over hunting, fishing, and water rights, including the power of a state to regulate activities on Indian land, often involves treaty interpretation. Approximately 80% of the 375 treaties ratified by the United States Senate have been the subject of litigation.

The resolution of Indian-law questions may require study of an original treaty text. It also may be necessary to confirm the treaty's continuing validity, to study the circumstances sur-

rounding treaty negotiations, trace the tribal and federal courses of conduct under a treaty, and find all administrative, executive, or judicial interpretations of treaty terms.

While there are many sources of treaty texts, including many Internet postings, legal research demands a text with unquestionable authoritativeness. However, classic compilations of treaty texts, such as the Department of State publication, *Treaties in Force*,<sup>12</sup> exclude Indian treaties. Researchers must look to the *United States Statutes at Large* as the official and authoritative source of Indian-treaty texts. Volume 7 is a compilation of Indian treaties entered into from 1778 through 1845. The treaties are in chronological order and are indexed by tribal name. After Volumes 7 and 8 (the first compilations of Indian and non-Indian treaties), texts of treaties were regularly published in a separate section at the end of each *Statutes* volume. Indian treaties are intermingled with all others. They are indexed within each volume by tribal name and also listed under the index headings. Volume 16 of the *Statutes* carries the last substantial number of Indian treaties, although stray treaty texts do show up in later volumes, as they were found and published. In addition to furnishing official treaty texts, *Statutes at Large* can be used to trace subsequent congressional action in furtherance of treaty obligations. For example, appropriations for meeting treaty obligations to furnish supplies, schools, and farm implements to tribes are easily researched through the index of the *Statutes*.

For quick reference to treaties, the original or online version of Charles J. Kappler's *Indian Affairs: Laws and Treaties*<sup>13</sup> may be consulted. Volume 2 is a reliable compilation of Indian treaties presented in chronological order. The index to Volume 2 doubles as a guide to the name and number of treaties signed by various tribes, although the most careful researcher must note that Kappler did not break out individual tribal names from confederated groups.

Constitutionally, all treaties are the supreme law of the land. But treaties are subject to interpretation, modification, and abrogation. That Congress can unilaterally abrogate an Indian treaty by enacting legislation that conflicts with treaty terms is not in doubt.<sup>14</sup> The degree to which Congress is required to explicitly express its intent to abrogate has been the subject of litigation and court interpretation. Gauging the present force and effect of an Indian treaty is not an easy matter, but Charles D. Bernholz has provided a highly useful aid citing all references to Indian treaties in cases decided by the United States Supreme Court between 1799 and 2001.<sup>15</sup>

**PRIMARY SOURCES: CASE LAW**

Judicial interpretation established basic tenets of Indian law in the first decades of American legal history and continues to shape the field to this day. Federal case law is of prime impor-

11. Commonly called the "Serial Set," this publication collects House and Senate documents and reports and some executive-branch materials from 1817 to the present. Earlier federal documents are published in the *American State Papers*.  
12. Washington, D.C.: U.S. G.P.O., 1944-. This Department of State publication provides citations to bilateral and multilateral treaties in force as of January of the current year and is now

online at: <http://www.state.gov/s/l/c8455.htm>.  
13. Kappler, *supra* note 8.  
14. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).  
15. CHARLES D. BERNHOLZ, *AMERICAN INDIAN TREATIES AND THE SUPREME COURT: A GUIDE TO TREATY CITATIONS FROM THE OPINIONS OF THE UNITED STATES SUPREME COURT* (2004).

tance, although state courts hear an increasing number of Indian-law cases.

Leading Indian-law cases are identified in Cohen's *Handbook of Federal Indian Law* and the other basic research source books described above. The National Indian Law Library of a Boulder, Colorado, public-interest law firm – the Native American Rights Fund – has for several years published a collection of leading cases. Previously titled *Top Fifty: A Collection of Significant American Indian Law Cases from the United States Supreme Court*, the latest edition of the work is called *Landmark Indian Law Cases*.<sup>16</sup> It reprints in chronological order 53 cases that resolve important questions or set forth broad principles of federal Indian law and are useful to lawyers, scholars, judges, and other practitioners of Indian law. A basic subject index is provided, along with an alphabetical index by case name. No interpretive information is included.

Law-school casebooks are useful compilations of illustrative cases and other readings. In *American Indian Law: Native Nations and the Federal System, Fifth Edition*,<sup>17</sup> the authors' stated approach is to merge jurisprudence, history, comparative law, ethnology, and sociology to bring meaning to the tribal-federal relationship. There is also an effort to accurately portray Indian tribal perspectives and voices on questions of federal Indian law.

The fifth edition of *Cases and Materials on Federal Indian Law*<sup>18</sup> provides a history of federal Indian law and policy in Part I and federal Indian law in its contemporary perspective in Part II, covering topics like the federal-tribal relationship; tribal sovereignty, federal supremacy, and states' rights; the jurisdictional framework; criminal- and civil-court jurisdiction; taxation and regulation of reservation economic development; Indian religion and culture; water rights; fishing and hunting rights; rights of Alaska natives and native Hawaiians; and comparative and international legal perspectives.

A new 2008 casebook, *American Indian Law, Cases and Commentary*,<sup>19</sup> aims to provide an introduction to the legal relationships between American Indian tribes and the federal government and the individual states. It incorporates the foundational cases with statutory text.

A historic collection was brought together in 1900 when the Commissioner of Indian Affairs was funded to compile a digest of court decisions (federal, state, territorial), opinions of the attorney general, and Interior Department decisions. This Bureau of Indian Affairs *Digest of Decisions Relating to Indian Affairs* is a key source of nineteenth-century judicial thought on Indian law.<sup>20</sup>

## PRIMARY SOURCES: PRESIDENTIAL PROCLAMATIONS AND EXECUTIVE ORDERS

The president of the United States has been an involved and powerful maker of Indian law and policy. Between 1855 and

16. NATIONAL INDIAN LAW LIBRARY, COMP. (AALL PUBL. SER. 65, 2002).

17. ROBERT N. CLINTON, CAROLE E. GOLDBERG, AND REBECCA TSOSIE, EDS. (2007).

18. DAVID H. GETCHES, CHARLES F. WILKINSON, AND ROBERT A. WILLIAMS, EDS., 2004.

19. ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY, AND

1919 (when Congress voted itself exclusive power to set aside public lands for Indian reservations), large tracts of public land became reservation land by executive order. The executive also acted to extend federal trust periods over allotted reservation land, redefine reservation boundaries, and otherwise prescribe Indian land holdings. After 1871 when treaty making ended, the diplomacy of Indian affairs continued with negotiated documents looking very much like treaties, but called executive agreements. In other words, agreements were concluded and effectuated by presidential decrees establishing reservations and making land transfers that might once have been accomplished by treaty.

Research in presidential documents may be required to clarify issues involving reservation land, or the reserved rights of a tribe, or even the potential jurisdictional powers of a state over aspects of Indian life on a reservation. This kind of research was once complicated by the lack of a consistent numbering scheme for proclamations and orders and their haphazard publication. Now, the pre-1936 historical documents are organized and indexed and, with the creation of the *Federal Register* in 1936, newly issued proclamations are sequentially numbered and consistently published.

Legally, there is no difference between presidential proclamations and executive orders, but modern custom assigns weighty business to executive orders, while proclamations are more often used for ceremonial pronouncements. Indian-law researchers will encounter historical anomalies in this pattern and must regard both proclamations and executive orders as substantial sources of law.

The *CIS Index to Presidential Executive Orders and Proclamations* (1987) indexes more than 74,000 executive orders and proclamations issued from 1789 through 1983, with texts appearing in a companion set of microfiche. The subject index may be approached by tribal name or terms like Indian reservations. Research by geographical area may also yield results. Under Minnesota territory, for example, there are several references to Indian matters. Proclamations from 1846 forward (but not executive orders) are published in a separate section of each volume of *Statutes at Large*, most of which are available through online databases or at free Internet sites.

The United States Government Printing Office produced two volumes of *Executive Orders Relating to Indian Reservations, 1855-1922*.<sup>21</sup> This publication usefully arranges executive orders geographically by the state in which the Indian reservation is located. An index by reservation name is provided for

**The president of the United States has been an involved and powerful maker of Indian law and policy....**

SARAH A. KRAKOFF, EDS., 2008.

20. H.R. Doc. No. 538 (2d Sess. 1901), reprinted Kraus, 1973.

21. Issued in various editions by the United States Government Printing Office, with the 1912 edition combining two volumes in one as the most commonly relied upon. Reprinted commercially by Scholarly Resources, 1975.

**[A]dministrative rules establish the procedure by which a tribal group is federally recognized as being in a government-to-government relationship with the United States.**

the first volume, but not the second. The complete table of contents does, however, make it easy to find orders relating to a particular reservation.

Finally, this is yet another area in which Charles J. Kappler's *Indian Affairs: Laws and Treaties*<sup>22</sup> can be helpful. Kappler is one of the best sources for early proclamations and executive orders relating to Indian law and policy. The table of contents of the "Laws" volumes lists

"Executive Orders Relative to Indian Reservations" in a state-by-state arrangement. Proclamations also are listed with a brief explanation of their content, e.g., "Ponca lands, Indian title extinguished."

**PRIMARY SOURCES: ADMINISTRATIVE MATERIALS**

The lives of Native Americans are influenced by administrative agency programs, rules, regulations, and decisions to a greater degree than most citizens. As a threshold matter, administrative rules establish the procedure by which a tribal group is federally recognized as being in a government-to-government relationship with the United States. Administrative contact also flows from the federal responsibility to provide services to Indians in fulfillment of treaty obligations or in furtherance of the federal trust responsibility. Trust responsibility can be of a general nature, growing from the history of federal dealings with a group of Indians, or it can be tied to property held in trust by the federal government for individuals or tribes.

Federal administrative rules and regulations relating to Indians, particularly Bureau of Indian Affairs organization and operation, are gathered in Title 25 of the *Code of Federal Regulations (CFR)*, but several other titles contain relevant entries. Research on administrative aspects of Indian law conceivably can lead to any federal agency or department, including the Bureau of Land Management, Office of Economic Opportunity, and the Departments of Agriculture, Commerce, Education, Health and Human Services, etc. The Office of Tribal Justice serves as the primary channel of communication for Native Americans with the Department of Justice, and helps coordinate a broad range of Native American issues with all other federal entities. Some of the issues that come to the Office of Tribal Justice include: religious freedom, protection of sacred sites, environmental enforcement in Indian country, gaming issues, taxation of Indian tribes, tribal justice systems, law enforcement, Public Law 280 policy, and international indigenous rights. The Office of Tribal Justice maintains a website at <http://www.usdoj.gov/otj/>.

The *Code of Federal Regulations* is updated annually while

*Federal Register* keeps up-to-date with proposed and newly adopted administrative rules and regulations. The formerly daunting work of administrative-law research has been mercifully transformed by the United States Government Printing Office's GOP Access website (<http://www.gpoaccess.gov/index.html>) providing instant keyword access to rules and regulations in the *CFR* and *Federal Register*.

The federal administration of Indian affairs has been delegated to the Department of the Interior since 1849. The Bureau of Indian Affairs (BIA) is a major division within the Department. Twelve BIA area offices across the country administer its local and tribal units. The statutory authority for the BIA is established in the first sections of Title 25 of the *United States Code*; organizational information is found in Title 25 of the *Code of Federal Regulations* and at the BIA website (<http://www.doi.gov/bia/>).

A major responsibility of the BIA is to determine whether a tribe will be legally recognized under federal law. "Recognition" is a term of art describing federal acknowledgment of a government-to-government relationship between an Indian tribal entity and the United States. Federal recognition is a watershed legal determination affecting all manner of tribal rights, privileges, and obligations. Services delivered by the BIA and other agencies, as well as immunity from certain state laws, are conditioned upon federal recognition.

The BIA historically made ad hoc and unexplained decisions about the recognition of tribes. As an increased number of Indian groups sought federal recognition and experienced long waits, the shrouded BIA procedures drew criticism. Complaints eventually led to the 1978 establishment of a formal administrative process for reviewing petitions from tribal groups. The process was substantially revised in 1994 and today is handled by the Office of Federal Acknowledgment (OFA). This office operates with notice and public comment according to procedures published in the *Code of Federal Regulations* for establishing that an American Indian group exists as a tribe.<sup>23</sup>

The BIA has completely opened the process, and its website has comprehensive information on the disposition of petitions for acknowledgment. Researchers wanting to know if tribal groups in their state have applied for acknowledgment will find a list of pending petitions organized by state on the BIA website. The BIA is mandated to regularly publish a list of recognized tribes in the *Federal Register*. Because the list is officially titled Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, its retrieval by keyword on the GPO Access website is not instinctual. More convenient access is through a link on the BIA website.

Administrative handling of recognition by the BIA has long created friction among states, Congress, Indian groups, and the agency – a conflict made more combustible by the possibility that newly recognized tribes will initiate gaming operations. While largely a delegated administrative process, recognition remains a congressional prerogative and recognition is occasionally achieved or restored through the passage of a bill spe-

22. Kappler, *supra* note 8.

23. 25 C.F.R. § 83.1 (2009).

cific to a single Indian governmental entity. The testimony and documents used in a determination of tribal status create a valuable research record, delineating tribal history and the course of dealings between a tribe and the federal government, and collect in one place otherwise difficult-to-assemble information.

Historic research in administrative law relating to Indians leads back to the *Official Opinions of the United States Attorney General*.<sup>24</sup> The frequent exercise of executive authority over Indian affairs, particularly after 1871, heightens the value of attorney general opinions advising the president and executive agents in Indian-law matters. Attorney general opinions are strongly persuasive, although they are not binding on executive officers or the courts. Taxation, leasing, reservation boundaries, trust matters, and general land questions have all been frequent subjects for attorney general opinions on Indian affairs. Attorney general opinions for the nineteenth century are more easily accessed than contemporary ones.

The solicitor is the chief legal officer of the Department of the Interior. Within the Solicitor's Office there is a Division of Indian Affairs. When requested by the secretary or another officer of the Department, the solicitor renders opinions on Indian matters. These opinions are not binding on courts, but are often accorded great weight. More frequently, these opinions are the last word on a subject because few are appealed or litigated. In the field of Indian law, Solicitor opinions have interpreted statutes, determined the status of Indian lands, defined tribal powers, and analyzed many other important issues. Most early Solicitor opinions were inaccessible to the researcher until the 1979 publication of *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974*.<sup>25</sup>

New appeals boards were created in 1970 to consolidate the quasi-judicial functions of the Department of the Interior. Two boards were to deal exclusively with Indian matters. A third, the Interior Board of Land Appeals, eventually took over some Indian cases. The functions and published decisions of the boards are important to researchers in the administrative law area. All fall under the Office of Hearings and Appeals.

Appeals on decisions of the Bureau of Indian Affairs and of other Department of the Interior officials in matters of Indian probate, lease agreements, grants and funding, and Indian entitlement under federal legislation are reported in the United States Department of the Interior Board of Indian Appeals' *Decisions*, beginning in 1970.

Appeals from decisions on land selection under the Alaska Native Claims Settlement Act are published in volumes one through seven of the United States Department of the Interior Alaska Native Claims Appeals Board *Decisions*. After the Alaska Native Claims Appeals Board was abolished in 1982, cases arising under the Alaska Native Claims Settlement Act were transferred to the Interior Board of Land Appeals which

began publishing *Decisions* in 1970.

Administrative decisions and legal opinions rendered by the United States Department of the Interior, including those on Indian matters, are published in the official *Decisions of the Department of the Interior*, dating back to 1881. Coverage is selective and can include decisions of the Solicitor and decisions from any of the boards of the Office of Hearings and Appeals. For the Indian law researcher, this set is one of the most readily accessible administrative law sources and the best indexed.

**Administrative decisions and legal opinions rendered by the United States Department of the Interior... on Indian matters, are published in the official Decisions of the Department of the Interior, dating back to 1881.**

#### **A HIDDEN RESOURCE: INDIAN-CLAIMS REPORTS**

Despite federal immunity, Indian tribes were occasionally provided a mechanism for lodging a claim against the federal government. Executive commissions, Congress, and federal and special courts have all acted to hear disputes and determine remedies for tribal claims. However, in the decade after the Court of Claims was created in 1855 to hear claims against the federal government, Indian claims were specifically barred. Consequently, claims by Indian tribes against the government could not be brought in any forum. From time-to-time Congress responded to petitions by passing jurisdictional acts that allowed a specific tribal grievance to go before the Court of Claims. Under this system, only 142 Indian-claims cases were adjudicated in 90 years.

In 1946 Congress created the Indian Claims Commission (ICC) as a temporary tribunal to hear every pre-1946 Indian claim against the United States. Claims arising after August 13, 1946, were to be heard in the Court of Claims. The causes of action could be based on legal, equitable, or even "moral" grounds, including failure of the government to deal fairly and honorably with Indians. Within the five-year period for filing ICC claims, over 600 dockets were set (some cases were split into multiple dockets). No personal claims of individual Indians were accepted. Generally, claims related to compensation for land ceded to the federal government by treaty.

The ICC first made a determination on the claimant tribes' title and the specific amount of land ceded. Next, the value of the land at the time of transfer was determined. If past compensation to the tribe was found inadequate, a cash settlement (without interest) was awarded. Finally, the commission considered General Accounting Office evidence of any federal gratuities granted a tribe or payments made to the tribe under

24. U.S. DEPT. OF JUSTICE., OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES: ADVISING THE PRESIDENT AND HEADS OF DEPARTMENTS, IN RELATION TO THEIR OFFICIAL DUTIES (1873- ).

25. U.S. DEPT. OF THE INTERIOR., OFFICE OF THE SOLICITOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS, 1917-1974 (2 vols., 1979).

**Justice Sandra Day O'Connor described tribes as a "third sovereign," standing with states and the federal government.**

treaty terms. All federal compensation to the tribe was offset against the award.

The Indian Claims Commission was expected to complete its work in ten years, but its life was extended several times by Congress. The ICC was finally dissolved on September 30, 1978, at which time it transferred about 100 pending cases to the Court of Claims (now called the United

States Court of Federal Claims).

The decisions of the ICC are published in various formats, but the most convenient access is the digitized 43 volumes and index (incomplete) available online through Oklahoma State University (<http://digital.library.okstate.edu/icc/index.html>). The hidden resource of the ICC is an exceptionally rich evidentiary record. There are transcripts of testimony and written reports from anthropologists, archaeologists, economists, forestry experts, geographers, geologists, historians, and linguists whose expertise helped commissioners determine the extent of tribal land holdings and their value. This is a source of tribal history, a record of the course of dealings between tribes and the federal government, and a documented background of tribal land holdings within state borders. Unfortunately, the records of the U.S. Indian Claims Commission containing this evidence are hard to access, but have been reproduced in microform<sup>26</sup> and collected by major libraries. Indexing is incomplete, but some help is found in *Index to the Expert Testimony Before the ICC: The Written Reports*.<sup>27</sup>

### RESEARCHING TRIBAL LAW

American Indian tribes are self-governing, autonomous entities that may legislate, regulate, police, and adjudicate. Justice Sandra Day O'Connor described tribes as a "third sovereign,"<sup>28</sup> standing with states and the federal government. With more Indian tribes being recognized and with the reinvigoration of tribal governments and tribal courts, and with the renewed economic power of some tribes, an increasing number of citizens and lawyers are encountering the third American sovereign. These interactions can be confusing because there is little understanding that tribes are politically acknowledged governmental units – with sovereign immunity – not simply racial defined groups, and that tribal law is unique to each Indian nation.

The primary sources of a tribe's law can include the tribal constitution, tribal code, miscellaneous laws, statutes, ordinances, and administrative regulations. Only a few tribes formally publish their tribal codes. If the tribal courts issue writ-

ten opinions, they also constitute primary law for the tribe, but some tribes adhere to orally transmitted, non-written, customary law. Primary sources affecting tribal law may also include treaties with the United States government, agreements and executive orders specific to the tribe, and federal laws applicable to the tribe.

In 1993, an estimated 170 tribes had a court system; today more than 280 tribal courts are operational. The *United States Tribal Courts Directory*<sup>29</sup> provides tribal court contact information, listing administrators, judges, and whether or not opinions are published.

There are three types of tribal courts functioning in the United States: (1) traditional courts, which are most prevalent in the Southwest where pueblo cultures were somewhat insulated from the massive breakdown of tribal social and political traditions in the second half of the nineteenth century; (2) tribal courts or IRA courts, which are the predominate model and are authorized by tribal constitutions and apply tribal law (often established under the provisions of the Indian Reorganization Act and as a replacement for Courts of Indian Offenses); and (3) Courts of Indian Offenses (also called "CFR courts" because their authority and operational rules are specified by the Bureau of Indian Affairs in the *Code of Federal Regulations*).

Researching tribal law requires persistence, but the online Tribal Law Gateway at the National Indian Law Library (<http://www.narf.org/nill/>) offers access to a large collection of tribal codes and constitutions. This electronic gateway also links to tribal law documents found elsewhere. Tribal court opinions are selectively published in the *Indian Law Reporter*,<sup>30</sup> but the best way to find tribal court decisions is online. Two websites offering tribal court decisions are the National Tribal Justice Resource Center (<http://www.ntjrc.org/>) and the Tribal Law and Policy Institute (<http://www.tribalinstitute.org/>). These websites have a great deal of other information and are excellent starting points for research on tribal law and government, tribal courts, and tribal judges.

### RESEARCHING TRIBAL-STATE INTERSECTIONS

Jurisdictional issues and controversies have long been a center point of tribal-state-federal contact. This is an area requiring the careful research suggested in the introduction: it is innately complicated, and over the years, the rules have drastically changed. There is also inconsistency from state-to-state. Reference to *Cohen's Handbook of Federal Indian Law* and *Indian Law in a Nutshell* will provide an informed backdrop for further research specific to the state and tribal jurisdictional question at issue. For a policy discussion of this issue, see *Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts*, a report with recommendations sponsored by the State Justice Institute, Conference of Chief Justices, the Native American

26. *Expert Testimony Before the Indian Claims Commission* [microform] (1973- ).

27. NORMAN A. ROSS, COMP. AND ED., *INDEX TO THE EXPERT TESTIMONY BEFORE THE ICC: THE WRITTEN REPORTS* (2001).

28. Sandra Day O'Connor, *Lessons from the Third Sovereign*, 33 TULSA

L.J. 1 (1997).

29. APRIL SCHWARTZ, *UNITED STATES TRIBAL COURTS DIRECTORY* (3d ed. 2008).

30. Published by the American Indian Lawyer Training Program since 1974.

Tribal Courts Committee of the National Conference of Special Court Judges of the American Bar Association, the National American Indian Court Judges Association, and the National Center for State Courts. This report is posted on the Tribal Court Clearinghouse website (<http://www.tribal-institute.org>) under the “State Law” tab.

The appropriate treatment of tribal court outputs poses questions for states. While the full-faith-and-credit clause of the United States Constitution requires every state to respect and enforce the judgments of other states, there is no single mandate to guide state courts in handling tribal court judgments and orders. With mixed results, federal legislation has occasionally included a full-faith-and-credit provision, such as the Violence Against Women Act<sup>31</sup> requirement that tribes and states respect each others’ protection orders. But as a general matter, each state must adopt court rules on this point. Some are looking to comity, the doctrine allowing enforcement of foreign judgments in domestic courts, as a legal theory for the enforcement of tribal judgments. Other states are less caught up in the theoretical considerations, but find that controversy impedes timely solutions. Minnesota worked on the issue for years with a joint task force of tribal judges and state judges. Wisconsin and South Dakota set a fairly high bar, but North Dakota and Oklahoma were early adopters of a reciprocal approach. The 1994 Oklahoma court rule is posted on the Oklahoma State Courts Network at <http://www.oscn.net>.<sup>32</sup>

Minnesota legislators have access to *Indians, Indian Tribes, and State Government*,<sup>33</sup> a guidebook discussing major issues between tribes and state government, including criminal and civil jurisdiction, gaming, liquor regulation, taxation, human services, and education. Loaded with maps and statistics, this remarkable document was written by legislative analysts in the Research Department of the Minnesota House of Representatives and can serve as a model for any state seeking to make informed policy decisions.

Some innovative work on a broad spectrum of other tribal-state issues results from the teamwork of the National Conference of State Legislatures (NCSL) and the National Congress of American Indians. Their State-Tribal Relations Project is addressing several specific, substantive issues between states and tribes. Both organizations claim a commitment to education and practical problem solving. The project maintains a list of all the state committees and commissions on Indian affairs (<http://www.tribal-institute.org>).

An excellent website for tapping into state-tribal reports and shared information is that of the previously cited Tribal Court Clearinghouse. Under the “State Law” tab there are pages of “Tribal-State Relations” information with excellent links. Researchers can access state gaming compacts, tax agreements, and the increasingly important law-enforcement agreements (more than 200 tribes now have a police force). This page also links to policy papers and a host of other resources and organizations. Unlike just a decade ago, Internet research on best practices for almost any aspect of the state-tribal law is likely to be profitable and informative.



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31. 42 U.S.C. § 13701 (2000).

32. Rules of District Courts, Title 12, Chapter 2, Appendix B, Rules for District Courts in Oklahoma, Rule 30—Standard for Recognition of Judicial Proceedings in Tribal Faith and Credit.

33. HOUSE RESEARCH DEPARTMENT, INDIANS, INDIAN TRIBES, AND STATE GOVERNMENT (4th ed. 2007), available at <http://www.house.leg.state.mn.us/hrd/pubs/indiangb.pdf> (last visited July 15, 2009).

## AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

### 2010 Midyear Meeting

Tucson, Arizona  
May 19-21  
Loews Ventana Canyon Resort  
\$189 single/double

### 2010 Annual Conference

Denver, Colorado  
Westin Tabor Center  
October 3-8  
\$205 single/double

### 2011 Midyear Meeting

Hilton Head, South Carolina  
Westin Hilton Head Island  
April 14-16  
\$209 single/double

### 2011 Annual Conference

San Diego, California  
Westin Gaslamp  
September 11-16  
\$249 single/double



# Assumptions Regarding Indians and Judicial Humility:

## Thoughts from a Property-Law Lens

Ezra Rosser

Two Indians refuse to move until their complaints are heard. Stoically they stand. Waiting. Eventually a staffer promises them a meeting. This image of stoic and mostly silent Indians formed a mini-drama on the TV-show *The West Wing*. The treatment of Indian issues on HBO's *The Sopranos* was similarly curt: sitting out on the curb, mobsters complain that Indians are getting stuff – from gambling – without having to work for it like Italian-Americans have had to. This anger culminates in an attack on Indians protesting Columbus Day. Largely missing from both stories are Indian voices; instead, Indians are understood only as they relate to non-Indians. The same holds true for how the U.S. Supreme Court understands Indians, or doesn't understand them.

Awareness and understanding – real or assumed – of Indian legal issues varies considerably by location. Non-Indians in Arizona or New Mexico living near an Indian reservation have a distinct set of experiences from, say, Connecticut residents reading about the rise of Foxwoods Casino. And judges or justices living in large metropolises such as Washington, D.C. may have to go far out of their way to learn a little bit about the continent's original inhabitants.<sup>1</sup> Unfortunately, an *assumption* that Indians harm non-Indians can be found throughout the relatively recent Indian-law jurisprudence of the U.S. Supreme Court.

The recent decision in *City of Sherrill v. Oneida Indian Nation of New York*<sup>2</sup> attests to the power of this assumption of harm. Briefly, *Sherrill* involved a tribe that, after buying up land within its original reservation boundary, claimed the right not to pay taxes on this property because through such purchases the tribe had unified fee and aboriginal title. The Supreme Court disagreed and under an (un-briefed) *laches* theory ruled that too much time had passed since the land had passed out of Oneida hands for the tribe to assert such sovereignty. A secondary basis for the decision was the idea that were the Oneida to be successful in reasserting sovereignty it would be *disruptive* and harm the expectations of non-Indians in the area.

Indian-law academics have focused their ire on *Oliphant v. Suquamish Indian Tribe*,<sup>3</sup> which rejected tribal criminal jurisdiction over non-Indians. The *Oliphant* assumption that non-Indians would not be treated justly by tribal courts, to say

nothing of the case's denial of Indian sovereign territorial rights, has been rightly criticized by scholars. Just as the *Oliphant* assumption that non-Indians would be harmed by Indian courts is problematic, so too are assumptions regarding how Indian land holdings impact neighboring non-Indians and off-reservation communities.

### JUDICIAL ASSUMPTIONS

It comes as quite a shock for my first-year law students to learn that they have to read an Indian-law case for their first day of property law. Yet *Johnson v. M'Intosh*<sup>4</sup> is the first case in the two leading property-law textbooks – Krier et al. and Singer.<sup>5</sup> The second case, the first case for those for whom law-school memories are more removed, is the tale of a dispute between two fox hunters: *Pierson v. Post*.<sup>6</sup> There are some professors who skip *Johnson v. M'Intosh*, either because it is too complicated or they do not want to bother with the Doctrine of Discovery or the fact of conquest. But in general only the most conservative members of the faculty do not teach both cases; since my primary field is Indian law, I follow the textbook order and the cases work well together.

My first year teaching, I walked up to the podium and within 20 seconds asked one student, "What are the facts in *Johnson v. M'Intosh*?" His startled reaction before getting to the case: "Wow, that was fast." This was the first type of push-back I got from students reading about Indian rights to land, but by no means the last. During a break the second time I taught *Johnson v. M'Intosh*, a student came down to the podium quite perturbed and declared that I "shouldn't use the word Indian." I assured her that it was alright. Students at my school are either too comfortable with the case – they *enjoy* finding the racist language in the opinion and denounce students who approach the case in a detached way – or they feel that they have little they can contribute and seem to long for the impersonal esoteric rules of civil procedure from their first semester.

*Johnson v. M'Intosh* is a largely invented case. According to the opinion it is a dispute between one party who acquired title to land from an Indian tribe and another party whose title traced back to a non-Indian sovereign. Chief Justice John Marshall writes that because of the Doctrine of Discovery, a

### Footnotes

1. Justices Breyer and O'Connor toured the Navajo Nation in 2001 and while there praised the restorative aspects of the Navajo judicial system. See Jim Maniaci, *Judges Laud Navajo System: Peacemaker Court Called Impressive*, GALLUP INDEPENDENT, July 20, 2001.
2. 544 U.S. 197 (2005).

3. 435 U.S. 191 (1978).
4. 21 U.S. (8 Wheat.) 543 (1823).
5. JAMES E. KRIER ET AL., PROPERTY (6th ed. 2006); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES (4th ed. 2006).
6. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

racist doctrine under which European nations were said to acquire sovereign authority over land they “discovered” without regard to the Indian tribes already living on the land, and the fact of conquest, the party with Indian title must lose out in such a dispute. But as Eric Kades proved, in fact there was no real dispute – the land claims of the two parties never in fact overlapped! The Court did not trouble itself with the minor problem of a looking at whether there in fact was a real dispute, instead the case was decided and helped pave the way for an efficient transfer of land from Indians to non-Indians.<sup>7</sup>

What students usually fail to pick up on is that Indian title survived the ethnocentrism of *Johnson v. M'Intosh*.<sup>8</sup> The party who bought land directly from an Indian tribe rather than acquiring it from the U.S. Government does have recourse, albeit not recourse before a U.S. court, according to Chief Justice Marshall: “The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.”<sup>9</sup> The Court acknowledged Indians as “the rightful occupants of the soil” while at the same time arguing that Indian “rights to complete sovereignty, as independent nations, were necessarily diminished.”<sup>10</sup>

The second case involves a fox, two hunters, and hounds. Lodowick Post and his hounds are chasing a fox (“poor reynard” as the fox is called in the dissent) when “Jesse Pierson jumps out of nowhere and grabs the fox.”<sup>11</sup> The question before the court was whether through his pursuit alone Post acquired a right to the fox sufficient to “sustain an action against Pierson for killing and taking” the fox.<sup>12</sup> The majority opinion, written by Justice Tompkins, was that Post had no right to the fox. For support, Tompkins looked to the writings of, in his own language, various “ancient writers.”<sup>13</sup> Post’s claim was doomed because he had not “deprived the fox of his natural liberty, and brought him within his certain control,”<sup>14</sup> as Tompkins held was required by the sources he surveyed. Tompkins concludes with a policy argument: that the rule adopted will help preserve “peace and order in society” by limiting “quarrels and litigation.”<sup>15</sup>

But Justice Livingston’s dissent is a powerful one. He argues that rather than relying upon the majority’s ancient writers, the dispute “should have been submitted to the arbitration of sportsmen.”<sup>16</sup> Livingston calls into question the utility of hunting codes written “many hundred years ago,” and argues for the right to “establish” a new rule given the time that has passed.<sup>17</sup> From an ancient writer, Livingston finds a distinction

between “large dogs and hounds” and mere “beagles,” a distinction that beagle owners may object to and which obscures the more powerful parts of the argument. Reading the dissent provides its share of entertainment – the fox is referred to as “poor *reynard*” whose memory “has not been spared” – but Livingston’s main point is that a new rule might be more efficient and better encourage the hunting of foxes.

Most students come to property law without much interest in either the rights of Indians to land or fox hunting, and by such metrics perhaps material on gated communities would be a better place to start. But students soon begin to raise questions: Should the racism in *Johnson v. M'Intosh* be forgiven as a product of its time? Did Marshall really believe in the assumptions underlying the Doctrine of Discovery or was he sufficiently apologetic about using the Doctrine? Perhaps because the challenges of the decision are readily apparent to even those encountering the case for the first time, it makes for a great way to start Property law. But I have found that many students only truly start questioning *Johnson v. M'Intosh* after they have read *Pierson v. Post*. Livingston’s primary contribution to property-law courses is not that he distinguishes between hounds and beagles, it is that he forces students to question judicial assumptions. Chief Justice Marshall’s voice in *Johnson v. M'Intosh* is just too authoritative, but the back-and-forth of *Pierson v. Post* brings out the need to think critically about the often unstated assumptions and the descriptions of the world found in judicial opinions.

## CROSSING BOUNDARIES

Indian contact with non-Indians, or vice versa, invites assumptions from both sides. Indians may assume that non-Indians are after their land or resources (perhaps a fair assumption) and non-Indians may assume that all Indians are casino Indians or are alcoholic (frequent but unfair assumptions). The places where contact is most frequent and perhaps most troublesome are often border towns, cities located just off-reservation whose consumer base includes a sizable number of reservation Indians.

In 1974, the bodies of three “beaten, tortured, and burned” Navajo men were found in the canyon country near Farmington, New Mexico.<sup>18</sup> Three Anglo teenagers were

**Indian contact with non-Indians, or vice versa, invites assumptions from both sides.**

7. Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000).

8. Professor Robert A. Williams, Jr. has been the leading scholar on the nature and historical development of the eurocentricism of federal Indian law. See, e.g., ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST* (1990); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

9. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 593 (1823).

10. *Id.* at 574.

11. Bethany Berger, *It's Not About the Fox: The Untold History of Pierson v. Post*, 55 DUKE L.J. 1089, 1091 (2006).

12. *Pierson v. Post*, 3 CAL. R. 175, 177 (N.Y. Sup. Ct. 1805).

13. *Id.*

14. *Id.* at 178.

15. *Id.* at 179.

16. *Id.* at 180 (J. Livingston dissenting).

17. *Id.* at 181 (J. Livingston dissenting).

18. NEW MEXICO ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *THE FARMINGTON REPORT: A CONFLICT OF CULTURES I* (July 1975), available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/35/64/c0.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/35/64/c0.pdf).

## What should courts do when faced with a conflict involving Indian and non-Indian contact?

charged with the murders.<sup>19</sup> Sparked by the murders, the New Mexico Advisory Committee to the U.S. Commission on Civil Rights held hearings in Farmington and ultimately released its report in July 1975. “It was

perhaps inevitable,” the Farmington Report notes, “that someday the presence of conflicting races, cultures, and value systems would lead to violence and confrontation.”<sup>20</sup>

By the 30th anniversary of the first report, when the advisory committee returned to check on how things had changed in three decades, “it found significant progress in race relations between Navajos and whites in Farmington.”<sup>21</sup> And yet a year after the second Farmington Report was released, three Anglo teenagers picked up a 47-year-old Navajo hitchhiker and on the outskirts of “the Selma, Ala., of the Southwest,” kicked, punched, and beat him with a stick while using “racial slurs as they pummeled him.”<sup>22</sup> Things may have progressed since 1974, but there is still a ways to go in Farmington and in many other border towns, from Gallup, New Mexico, to the City of Sherrill, New York.

Recently, much has been asked of non-Indians living within the original reservation boundary of the Oneida Indian Nation. The success of Turning Stone Resort and Casino allowed the Oneida Indian Nation of New York to buy up land within their original reservation, and non-Indians were asked to respect the right of the tribe to claim treaty-protected territory. When the land claims of the Oneida threatened non-Indians, non-Indians balked. Without going into the details – the tribe faced a bomb threat and repeated use of racially charged language – it is safe to say that non-Indians suddenly realized and reacted against the idea that an Indian nation could have an impact on their lives or their property values.<sup>23</sup>

What should courts do when faced with a conflict involving Indian and non-Indian contact? The last time that the U.S. Supreme Court squarely took this on was in *Brendale v. Confederated Tribes*,<sup>24</sup> a case involving the power of a tribe to exercise zoning authority over its original reservation. According to a plurality, the tribe could zone the “closed” portions of the reservation – areas with few non-Indians – but the “open areas” of the reservation were a different story. Because the tribe “no longer possesses the power to determine the basic character” of an area that had become predominantly non-Indian in both ownership and population, the tribe could not exercise its zoning regulatory power over the open area.<sup>25</sup> The decision only seems like a split decision until you realize that

by treaty the United States supposedly had guaranteed the tribe “exclusive use and benefit” of the reservation.<sup>26</sup> There is nothing new about the problem of line drawing, but one might have hoped that the Court would have been more protective of promises memorialized in treaties that purport to respect reservation boundaries.

*Ex Ante* it is hard to list all the possible disputes between Indian and non-Indian neighbors or community members that may end up before a court. Disputes have erupted over whether non-Indian corporations should develop natural areas that have religious or spiritual significance to area Indian tribes. Similarly, whether stores on Indian land should be able to sell gasoline or cigarettes without charging customers the same taxes found off-reservation has been a hotly contested issue. But the disputes can be more mundane: What powers should state police officers have in checkerboard areas – areas with alternating reservation and fee lands – within reservation boundaries? What limits are there on the rights of a non-Indian bank to discriminate against Indian borrowers and what courts get to hear such cases?

To illustrate the challenges even in a garden-variety dispute involving two neighbors, one Indian, one non-Indian, I am going to use a nuisance hypothetical. Suppose that the Non-Indian, Bob Johnson, is your fairly typical white suburbanite. He drives an oversized SUV, has a house surrounded by a six-foot-tall privacy fence, and owns a full-bred yellow lab. The city he lives in prohibits junk cars from being kept on the lawns of residents and also has a noise ordinance for residential areas. Fortunately, Bob’s yellow lab cannot jump the privacy fence and therefore does not need to be kept chained up, which keeps him happy and ensures he does not bark very much. Moreover, Bob’s house has a three-car garage that houses his SUV, an old junker, and his motorcycle, so he has never been in violation of the city’s prohibition on visible junk cars. Just beyond Bob Johnson’s fence is a section of tribal trust land, on which Margarita Yellowhair has a single-wide trailer, three dogs, a horse, and seven chickens. Margarita also owns three dilapidated Ford F-150s. At any one time she can only seem to keep one truck running and she tends to use the others – parked or on blocks in her front yard – as a source of needed parts. Initially she let her dogs roam free, but after a neighbor’s dog got pregnant from one of her dogs, she decided to keep them on chains. Having once been free, her dogs bark constantly in protest of the new arrangement.

Readers familiar with reservation life may rightly question the above depiction of Bob and Margarita. The wealthy non-Indian, Bob, and less wealthy Indian, Margarita, are problematically stereotypical. Of course, if the hypothetical was based

19. *Id.* at 2.

20. *Id.* at 15.

21. NEW MEXICO ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, THE FARMINGTON REPORT: CIVIL RIGHTS FOR NATIVE AMERICANS 30 YEARS LATER 52 (Nov 2005), available at [http://www.usccr.gov/pubs/122705\\_FarmingtonReport.pdf](http://www.usccr.gov/pubs/122705_FarmingtonReport.pdf).

22. Evelyn Nieves, “In Navajo Country, Racism Rides Again,” SALON.COM, Sep. 2, 2006, <http://www.salon.com/news/feature/2006/09/02/navajo/>.

23. For a more complete account of non-Indian reactions, see Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 ORE. L. REV. 175, 198-209 (2008).

24. 492 U.S. 408 (1989).

25. *Id.* at 446.

26. Treaty of the United States and the Yakima Nation of Indians, Mar. 8, 1959, 12 Stat. 951 (1859).

on a casino tribe with high per capita payments in a poor community, the identities could be flipped. But it remains the case that overall Indians on reservations are of a notably lower socioeconomic class compared to the United States average. Therefore, given the truth behind the stereotypes, perhaps most apparent in border towns, I hope I will be forgiven for relying upon stereotypes in the hypothetical.

But who is harming who? Property scholars developed the infamous “box of four” out of one of the most influential law-review articles of all time – Guido Calabresi and A. Douglas Melamed’s *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*<sup>27</sup> – in part to answer this question. Figure 1 is the box of four as it is often presented for nuisance cases (Calabresi and Melamed rely heavily upon nuisance examples):

**FIGURE 1: CALABRESI & MELAMED BOX OF FOUR**

		Protection Type	
		Property	Liability
Initial Entitlement	Resident	<b>Rule 1</b>	<b>Rule 2</b>
	Polluter	<b>Rule 3</b>	<b>Rule 4</b>

According to this framework, Rule 1 means that the Resident gets the initial entitlement (say to be free from pollution) and sets the price that he or she is willing to sell the entitlement to the Polluter. Rule 2 means the Resident gets the initial entitlement but the state, or a court, sets the price at which the Resident must sell the entitlement (often called a damage award). For Rule 3 and Rule 4, the Polluter gets the initial entitlement (say to pollute), and in Rule 3 the Polluter sets the price and in Rule 4 the state sets the price.

Many non-lawyers, or those new to the law (such as students), instinctively equate “Resident” with “Good Actor” and “Polluter” with “Bad Actor.” Some of the cases reinforce this mental shortcut: A sympathetic homeowner is subjected to smoke from a factory or to excessive noise from an apartment building’s industrial strength air-conditioning unit. From the perspective of the Resident, they are being harmed by the way that the Polluter is using his or her land; however, from the perspective of the Polluter, they are being harmed by the way Resident is using his or her land. The Resident cannot use his or her property as desired, say to peacefully look up upon the night sky because of the Polluter’s use *and similarly* the Polluter cannot freely pollute because of the competing desires of the Resident. One way property law deals with this simultaneous benefit and harm is by limiting Resident claims when the Polluter employs a large number of people in the community or when the Resident “comes to the nuisance.”

27. 85 HARV. L. REV. 1089 (1972).

28. See also Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 611 (2006)

**Property scholars developed the infamous “box of four” out of one of the most influential law review articles of all time... in part to answer this question.**

The first challenge when thinking about the conflicting land-use decisions of Bob and Margarita is to figure out who is the “Polluter.” Ultimately, it is a matter of perspective. Most Americans probably instinctively will view Margarita – with her junk cars and barking dogs – as the “Polluter.” When the city’s zoning rules are included it seems almost

self-evident that Margarita is the “Bad Actor.” Such a judgment arguably reflects middle-class values, and perhaps non-Indian ones as well, more than a meaningful distinction between Bob and Margarita’s actions. If Bob and Margarita live in an open area where most people do not wall off their homes, then Bob’s privacy fence could well be viewed as an eyesore breaking up the view Margarita can enjoy. And in poorer communities or in areas where most lots are spaced far apart, broken down cars may be viewed as normal rather than something that a neighbor could be upset about. Even expectations about the noise from barking dogs can reflect class-based biases. Bob and Margarita are, therefore, both the Resident and the Polluter.

One way to solve the question of who is being harmed would be to apply the “coming to the nuisance” idea. In a dispute involving Indian and non-Indian land-use decisions, non-Indians, including Bob, arguably “came to the nuisance,” in that Indians were the initial occupiers of the continent. This solution has the advantage that it is simple – Indians are always right – but it is not reflective of values all but the most strident Indian advocate would have. Even if the dispossession of Indians was accomplished through manifest destiny – arguably genocidal – policies, often with the imprimatur of legality, the “newcomers” surely have obtained rights with time.<sup>28</sup> So we must be careful not to take the “coming to the nuisance” argument too far.

One way to appropriately limit its power would be to take seriously reservation boundaries. The expectations of non-Indians who live inside original reservation boundaries – the boundaries that are memorialized through treaty or executive orders, not the boundaries post-allotment – should not be the same as they might be if they lived off-reservation. To put it back in terms of Bob and Margarita’s land-use conflicts: If Bob’s land is located within the boundaries of a reservation, then he should not expect Margarita to hide her cars and Margarita should have a greater right regarding her unobstructed view. The challenge is what to do when the boundary between Bob and Margarita is also the reservation boundary. I submit that in such a case both parties should have little recourse regarding their neighbor’s choices.

The law tolerates all sorts of boundaries, even arbitrary or inefficient ones. The town of Crater Lake, Iowa, is a great case

(noting that in *Sherrill* “the Supreme Court appears to have given whole-hearted support for what I have called the “reliance interest in property””).

**Humility is required when courts are asked to weigh in on disputes between Indians and non-Indians.**

in point. As the *New York Times* reported, Crater Lake is a little “nub” of land that juts into Omaha, Nebraska.<sup>29</sup> The Missouri River made an oxbow curve around Crater Lake, making the land connect with Iowa; that is until 1877 when the river changed course, cutting off the oxbow and leaving Crater Lake, Iowa, stranded in Nebraska!<sup>30</sup> In a more familiar example, in 1922 the U.S. Supreme Court upheld the Village of Euclid, Ohio’s authority to limit industrial expansion using its zoning authority even though Euclid was fast becoming a suburb of Cleveland.<sup>31</sup> Though the Court left open the future possibility that “general public interest” might at some point “far outweigh the interest of the municipality” in determining municipal development through zoning, the Court upheld Euclid’s “authority to govern itself as it sees fit.”<sup>32</sup>

Indian nations should also have the ability to govern reservations as they see fit, but there will be challenges. The U.S. Supreme Court has limited tribal authority over non-Indians in several important respects: first by curtailing criminal jurisdiction and more recently by limiting tribal authority in the civil context. But it is important that assumptions regarding the nature of tribal governance or the nature of Indian land not form the basis for further limitations on tribal sovereignty. Non-Indians may believe any number of things about how Indian sovereignty or the reservation status of nearby land harms them, but it is important to distinguish between non-Indian assumptions and demonstrated harm.

In the tribal court context, many non-Indians assume that non-Indians cannot get a fair hearing before a tribal court. This assumption, shared by many non-Indian judges, can form the basis for denying tribes’ jurisdiction over non-Indians that tribes would have if jurisdiction was determined, as it is in the state context, by geographic boundaries. As with most assumptions, it has an intuitive basis: non-Indians might be nervous for example that an Indian jury might not be a jury of their peers or they might fear that Indians might have justifiable prejudice against non-Indians. Yet, as Professor Bethany Berger’s research shows, the treatment of non-Indians who appear before Navajo Nation courts is “remarkably balanced,” both in terms of their win-loss ratios and in qualitative terms.<sup>33</sup> While the assumption may seem reasonable at first blush, there is no proof that it is accurate.

Another assumption non-Indians may make is that it is “bad” to live next to an Indian reservation or have Indian

neighbors. The research I am currently working on explores one aspect of this assumption, using tax data from upstate New York to test if non-Indian property values are negatively affected by proximity to Indian land. The research was inspired by the U.S. Supreme Court’s unexplored assumption of harm to non-Indians in *City of Sherrill v. Oneida Indian Nation of New York*.<sup>34</sup> The challenges exploring this harm reveal the assumptive nature of the Court’s claimed harm to non-Indians. Lawyers are generally not comfortable with Geographical Information Systems programming or with statistical data analysis, so to do the exploration, I had to find co-authors with such expertise. Even having assembled people with the expertise needed, the answer to whether non-Indians are harmed has not jumped out of the analysis; therefore, our work continues. These challenges suggest two important things: (1) the assumption of harm may well not be accurate, at least as it relates to non-Indian property values, and (2) the Court did not adequately investigate its assumption of harm before the assumption was used as a reason to limit tribal sovereignty.

There is much that can be said in defense of the Court’s assumption of harm, but it is important to notice that it is in fact an assumption. The same can be said of Justice Tompkins’s majority opinion in *Pierson v. Post* – there may in fact be good reasons that pursuit alone should not give a hunter a right to the fox, but assumptions relied upon should be acknowledged. Doing so may inspire a little judicial humility.

## **HUMILITY AND COURTS**

Humility is required when courts are asked to weigh in on disputes between Indians and non-Indians. Why humility? Because decisions should not be based upon stereotypes of Indians or assumptions, based on limited experiences or anecdotal evidence, regarding how Indians affect non-Indians. The good news is that state courts and lower federal courts could play a leading role in this. The U.S. Supreme Court has been fairly unconcerned with learning what life on a reservation is like, or even with mastering the precedent applicable to Indian-law cases. State court, and to some degree lower federal court, judges, especially judges in states with larger Indian populations, have the ability to help set a new course for Indian/non-Indian relations, one that rejects the American legacy of colonialism rather than embraces it.

State courts have in the past recognized the right thing to do well before the U.S. Supreme Court. The California Supreme Court invalidated a state antimiscegenation law in 1948, nineteen years before the United States Supreme Court caught up in *Loving v. Virginia*.<sup>35</sup> And as noted in its recent unanimous

29. William Robbins, “Standing by a Capricious Neighbor,” *N.Y. TIMES*, Apr. 21, 1988, at 18.

30. *Id.*

31. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

32. *Id.* at 389-90. Fifty years later, the New Jersey Supreme Court famously overrode a municipality’s exclusionary zoning outside of Camden and Philadelphia in support of the general public interest in affordable housing. *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151 (1975).

33. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 *ARIZ. ST. L.J.* 1047, 1047 (2006).

34. 544 U.S. 197 (2005).

35. *Perez v. Sharp*, 32 *CAL. 2D* 711 (1948); *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967). For commentary on these cases and antimiscegenation laws, see RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 259-80 (2003).

decision on gay marriage, the Iowa Supreme Court struck blows against slavery and segregation “long before” the United States Supreme Court.<sup>36</sup> Beating the U.S. Supreme Court to recognize a right might seem anything but an example of humility, but in cases involving Indian tribes, the right thing to do is the recognition of existing rights rather than the creation of new rights. Any time that a non-Indian court considers an Indian/non-Indian dispute, the resulting opinion has the potential to limit the authority of sovereigns whose societies pre-date the War of Independence and the U.S. Constitution. The decisions of the Rehnquist Court, and now the Roberts Court, with few exceptions have *taken away* the sovereignty of tribes when such sovereignty impacts non-Indians. State courts need not dogmatically follow this trend. Humility – here I mean recognition that sovereign nations, even nations located entirely within the United States, should not have their powers stripped lightly – regarding the role the judiciary should play when courts hear disputes involving the powers of tribal nations, would seem to require affording greater respect to tribal sovereignty and greater deference to tribal decisions on how to govern reservations.

If you surveyed Indian-law professors about where the U.S. Supreme Court has made the biggest mistake or caused the most problems in the field, I suspect that the leading contender would be *Oliphant*, though more radical scholars might highlight *Johnson v. M’Intosh*. But I am particularly troubled and disheartened by the mistaken assumptions and arrogance of *Atkinson Trading Co. v. Shirley*.<sup>37</sup> In a unanimous decision the Court invalidated the Navajo Nation’s 8% hotel-occupancy tax after the tax was challenged by Atkinson Trading Company, the owners of Cameron Trading Post. The Court held that the tax did not fit within either of the *Montana* exceptions. In *Montana v. United States*,<sup>38</sup> the Court limited civil authority of tribes over nonmembers as a general matter, but provided two exceptions. The first is that tribes can regulate “the activities of nonmembers who enter consensual relationships with the tribe or its members.”<sup>39</sup> The second exception is that tribes “may exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”<sup>40</sup> The *Atkinson* Court quickly rejected application of either exception, holding that Cameron Trading Post had not met the consent test – for if there was in this case “the exception would swallow the rule” – nor did it have a large enough direct effect.<sup>41</sup>

Looking out from the chambers of the Supreme Court this might make sense – how important can a hotel or trading post really be after all? But from the Navajo Nation, and perhaps from anywhere in rural parts of the southwest, it is out of

touch with the reality of life in such areas. In Washington, D.C., there may be countless hotels and other forms of commercial activity, but on the Navajo Nation the scattered trading posts play a critical role in the economic and social life of tribal members. Moreover, as the Court acknowledges in the opinion, trading posts are connected to the tribe through a web of relationships and interdependencies; to allow the trading-post owners to pretend

that they should not have to contribute to area governance that they benefit from makes the two exceptions virtually meaningless.<sup>42</sup> The *Atkinson* decision is based on the assumption that a hotel or trading post means the same in northern Arizona, on the Navajo Nation, as it does in wealthier, more densely populated, non-Indian parts of the country. The Court could have been more humble before it stripped the Navajo Nation of one of the central government powers, taxation; it could have required more of Atkinson Trading Company than simply showing that Cameron Trading Post was located on fee land. The U.S. executive branch attorneys, while not using the language of humility, joined the tribe in urging the Court to appreciate the unique role that traders play on reservations and leave in place the Navajo Nation’s power to impose this tax.<sup>43</sup> The Court balked.

Like all neighbors, Indians and non-Indians will not always get along; yet it is important that such disagreements not become cause for destroying tribal sovereignty. The parties involved mean that many cases will end up in the federal court system, but not all will reach the Supreme Court, and some will be heard by state court judges. At a recent and rare public appearance, Justice Thomas stated:

I’m very very reluctant to, to have a strong opinion on something without having briefs or opinions to read and think through. It slows you down because, you know this job is easy for people who’ve never done it. [laughter, clapping] And what I have found in this job is that they know more about it than I do, especially if they have the title “law professor.”<sup>44</sup>

Justice Thomas’s stated reluctance to have a strong opinion about a controversy without having first read and thought about it is a step in the right direction. Hopefully, judges closer to reservation life will be able to add a local understanding and a skepticism regarding what is “known” about Indian tribes and

**Like all neighbors, Indians and non-Indians will not always get along; yet it is important that such disagreements not become cause for destroying tribal sovereignty.**

36. *Varnum v. Brien*, 2009 Iowa Sup. LEXIS 31, at 24, available at <http://www.judicial.state.ia.us/wfData/files/Varnum/07-1499.pdf>.

37. 532 U.S. 645 (2001).

38. 450 U.S. 544 (1981).

39. *Id.* at 565.

40. *Id.* at 566.

41. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655-57 (2001).

42. The reverse of the justices’ fears is true: the *rule* has swallowed the *exceptions*!

43. *Atkinson*, 532 U.S. at 656 (2001).

44. Justice Clarence Thomas, “Keynote Address,” Bill of Rights Institute’s *Being an American Awards Gala*, Mar. 31, 2009, transcript available at [http://www.beinganamerican.org/files/essays/thomas\\_keynote.pdf](http://www.beinganamerican.org/files/essays/thomas_keynote.pdf).

reservations to this reluctant stance. Professor Jeffrey Rosen writes, “Humility, ultimately, is a character trait as well as a judicial disposition. It describes the spirit, as Judge Hand put it, ‘which is not too sure that it is right.’”<sup>45</sup> As a term “judicial humility” seems loaded, a rhetorical tool of (conservative) court commentators to decry activist judges. I do not mean to employ “judicial humility” in that way. Rather, judicial humility as it relates to disputes involving Indian tribes counsels for caution regarding what is “known” about Indian nations. Cursory treatment of Indian issues in shows like *The West Wing* and *The Sopranos* should not be mirrored by equally shallow judicial assumptions regarding how Indians affect neighboring non-Indians.



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45. Jeffrey Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L. J. 1, 10 (2007) (quoting from LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (1953)). See also Paul L. Caron & Rafael Gely, “A Need for Judicial Humility,” NATIONAL

LAW JOURNAL, Nov. 24, 2003 (“Judicial humility is neither liberal nor conservative. It recognizes that judges and lawyers hold no monopoly on wisdom . . .”).



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# From Conflict to Cooperation:

## State and Tribal Court Relations in the Era of Self-Determination

Aliza G. Organick and Tonya Kowalski

The Indigenous nations<sup>1</sup> of the United States have long been subject to federal policy. Since the Civil Rights Era, that federal policy purportedly has been to encourage self-determination and tribal sovereignty. One of the hallmarks of self-determination is the development of Tribal legal systems, which have been actively encouraged and funded by the federal government. As a result, Tribes have been exercising their jurisdiction in ways that were not contemplated decades ago. As Tribes have expressed their sovereignty through their court systems, it is not surprising that states sometimes feel that their own jurisdiction is threatened. This conflict creates a need for increased understanding, communication, and cooperation between Tribal and state governments. The extent to which Tribal-state cooperation succeeds or fails depends in large part upon their ability to understand each other's philosophical, legal, and historical realities. Cultural barriers to communication can, if left unattended, prevent meaningful cooperation from taking place. Historical myths and prejudices about the First Peoples of the United States threaten to keep Indigenous communities impoverished and marginalized. These myths stem from first contact, and form the root of modern, anti-Tribal policies, legislation, and court decisions.<sup>2</sup> If we agree that Tribal-state relationships should evolve, we must first accept that the historical animosity and distrust are the products of a powerful legacy of colonization, genocide, and oppression.

Furthermore, Tribal-state tensions result from a clash of political philosophies and differing worldviews. From the Euro-American standpoint, the concept of national statehood evolved from the philosophy of natural law, as well as from the pragmatic desire to centralize power and encourage long-distance trade.<sup>3</sup> Modern states are also typically characterized by large, somewhat diverse populations.<sup>4</sup> In contrast, from the Indigenous standpoint, sovereignty is “interwoven with the social, spiritual, intellectual, and economic aspects of the communities they serve.”<sup>5</sup> Historically speaking, Indigenous

nations tended to form around kinship ties or other community-based relationships. They also tended to have “decentralized political structures often linked in confederations, and have enjoyed shared or overlapping spheres of territorial control.”<sup>6</sup> These differences can make it difficult for Westerners to comprehend Indigenous sovereignty.<sup>7</sup> Nevertheless, even by the colonizers' definition, Indigenous peoples of the emerging United States were sovereign entities, and governments engaged with them on an international basis.<sup>8</sup> There is ample evidence that early, pre-colonial settlers, the British Crown, and the fledgling American government dealt with Indigenous nations as coequal sovereigns, recognizing that North American lands were already occupied by Indigenous nations.<sup>9</sup>

As with any topic involving Indigenous peoples, Tribal-state cooperative arrangements must be viewed within their historical context. History shows that the hundreds of early treaty relationships between Indigenous nations and colonial governments recognized the potential for cooperative arrangements in establishing trade, building alliances, and defining territory.<sup>10</sup> These relationships remained the status quo while the balance of power between Indigenous peoples and colonists remained relatively balanced. However, as the United States grew in wealth, military might, and population, that balance of power changed.<sup>11</sup> The colonies—and eventually the states—coveted Indigenous territory for settlement and expansion. Before long, it became evident that the Crown could not control its subjects in their hunger for Indigenous lands and for gold.<sup>12</sup> The United States Supreme Court made a decisive move that set the tone for Tribal-state relations for centuries to come. In the landmark case *Worcester v. Georgia*,<sup>13</sup> the State of Georgia attempted to extend its laws and jurisdiction over the Cherokee Nation. The Supreme Court “unequivocally rejected any role for states . . . in favor of an exclusive federal-tribal relationship.”<sup>14</sup> The Court premised its holding on inherent Tribal sovereignty vis à vis the hostile, encroaching state, but, as a matter of policy, clearly also

### Footnotes

1. This essay refers to Indigenous peoples of the United States by a number of names, including First Peoples, Indigenous nations, Indigenous peoples, and Tribes.
2. See generally JEFF CORNTASSEL & RICHARD C. WITMER, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD 3-83 (2008).
3. See MARYANN CUSIMANO LOVE, BEYOND SOVEREIGNTY: ISSUES FOR A GLOBAL AGENDA 11-13 (2d ed. 2003).
4. *Id.*
5. Angelique A. EagleWoman (Wambdi Awanwicake Wastewin), *The Philosophy of Colonization Underlying Taxation Imposed upon Tribal Nations within the United States*, 43 TULSA L. REV. 43, 44 (2007).
6. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 22 (2d ed. 2004).

7. *Id.*
8. ROBERT N. CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 11-26 (4th ed. 2003).
9. *Id.*
10. *Id.*
11. *Id.* at 23-49.
12. See RICHARD J. PERRY, FROM TIME IMMEMORIAL: INDIGENOUS PEOPLES AND STATE SYSTEMS 13-17 (1996).
13. 31 U.S. 515 (1832).
14. Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 503.

wished to reserve to the government profitable trade relationships. This political sovereignty was qualified by the Court's decision one year earlier, declaring the Tribes to be "domestic dependent nations," a unique brand of internal sovereign that was neither a state nor a foreign country.<sup>15</sup>

In the era immediately following these early decisions from the Marshall Court, the federal government became the exclusive entity to enter into formal relations with Indigenous nations in the United States. However, this exclusivity created points of conflict that continue to this day. Additionally, federal policy—both judicial and legislative—has consistently eroded Tribal sovereignty, creating a paradox in Tribal-federal-state relations: Tribes have inherent sovereignty, however limited, and yet are continually undermined by federal initiatives to erode, assimilate, and ultimately terminate them.<sup>16</sup> Federal erosion of Indigenous sovereignty leaves the Tribes vulnerable to state encroachment, furthering the process of sovereign destruction.

This cultural and historical context also frames the issue of cooperation between Tribal and state court systems. One of the most profound expressions of a sovereign's power to manage the affairs of its people is the exercise of civil and criminal jurisdiction. Historically, Tribes have always had dispute-resolution mechanisms that expressed the cultural values of each Tribe.<sup>17</sup> In 1934, the federal government encouraged Tribes to create their own court systems under the Indian Reorganization Act, but pressured them to adopt largely Anglo-American models of jurisprudence.<sup>18</sup> In the past few decades, Tribal courts have experienced explosive growth, hearing complex cases and responding to federal pressure to maintain many aspects of Anglo-American jurisprudence, while also "crafting a unique jurisprudence of vision and cultural integrity."<sup>19</sup> There are currently over 560 federally recognized Tribes and over 250 Tribal courts in the United States.<sup>20</sup> As Tribal courts have grown in number, ever more practitioners find themselves practicing in Tribal jurisdictions on a wide variety of civil, criminal, and family matters.<sup>21</sup> Typically, as a result of the IRA, Tribal courts have largely Western-style legal systems, often including written Tribal constitutions and codes, appellate courts, rules of civil and criminal procedure, and even rules for appearance *pro hac vice*. In addition to the vertical, Western form of justice familiar to state and federal practitioners, Tribes also have rich sources of internal common law, as well as holistic dispute resolution

bodies—both traditional and contemporary—such as Peacemaker circles<sup>22</sup> and Healing-to-Wellness courts.<sup>23</sup>

Just like other aspects of sovereignty, Tribal courts and their jurisdiction have suffered from erosion by Congress and by state and federal judicial decisions. Underlying these decisions is the myth that Tribal courts somehow lack transparency or even competence, especially when dealing with non-Indian entities. This myth is reflected in the erosion of criminal jurisdiction for "major crimes" and for crimes involving non-Indian defendants. One of the most famous examples comes from the aftermath of *Ex parte Crow Dog*,<sup>24</sup> in which the Supreme Court reversed the North Dakota territorial courts' negation of a Tribal decision to resolve a homicide through a traditional form of restitution<sup>25</sup> rather than by capital punishment, thereby recognizing the Tribes' right to express their sovereignty through criminal jurisdiction. The cultural norms reflected by this more holistic, community-centered solution were simply beyond the ken of the non-Indigenous, territorial courts that reviewed the decision. In fact, the Supreme Court's holding in *Crow Dog* prompted Congress to divest the Tribes of much of their felony jurisdiction. The Major Crimes Act<sup>26</sup> extended federal jurisdiction over an extensive list of felonies occurring in Indian country. Even today, this lack of cultural awareness and understanding continues, ironically articulated as a lack of transparency or competence on the part of the Tribal courts.<sup>27</sup>

In this era of political, judicial, and economic growth for our First Peoples, there is the potential for either increased conflict or increased cooperation. Fortunately, in at least a handful of states, Tribes and states are increasingly looking for opportunities to cooperate, and the last two decades have seen the development of a number of programs. In the legislative arena, the National Conference of State Legislatures and the National Congress of American Indians have joined forces to study and promote cooperative agreements based on mutuality and trust.<sup>28</sup> In the judicial arena, one promising result of recent cooperative movements has been the Civil Jurisdiction in Indian Country Project.<sup>29</sup> A number of Tribal-state court forums have also begun around the country, developed largely under an initiative by the National Center for State Courts and Conference of Chief Justices.<sup>30</sup> State courts and Tribal courts are most likely to resolve jurisdictional differences and protect the integrity of their Native communities when they establish

15. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

16. See DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 24 (1997).

17. Christine Zuni Cruz, *Strengthening What Remains*, 7 KAN. J. L. & PUB. POL'Y 18 (1997).

18. Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110, 112 (1995).

19. *Id.*

20. Pat Sekaquaptewa, *Tribal Courts and Alternative Dispute Resolution*, 18 BUS. L. TODAY 23, 23-24 (2008).

21. Cf. Gabriel S. Galanda, *A Need to Know Indian Law*, 64 OR. ST. B. BULL. 62, 62 (Nov. 2003).

22. See Zuni Cruz, *supra* note 17, at 19.

23. See generally Tribal Law & Policy Institute, *Tribal Healing to Wellness Courts*, [http://www.tribal-institute.org/LISTS/drug\\_court.htm](http://www.tribal-institute.org/LISTS/drug_court.htm) (last accessed June 5, 2009).

24. 109 U.S. 556 (1883).

25. SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 119 (1994).

26. 18 U.S.C. § 1153.

27. Philip P. Frickey, *Tribal Law, Tribal Context, and the Federal Courts*, 18 KAN. J.L. & PUB. POL'Y 24, 30-31 (2008).

28. E.g., NATIONAL CONFERENCE OF STATE LEGISLATURES & NATIONAL CONGRESS OF AMERICAN INDIANS, *GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES* 8 (2002).

29. Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 JUDICATURE 154, 155 (1995).

30. James A. Bransky & Hon. Garfield A. Wood, *The State/Tribal Court Forum: Moving Tribal and State Courts from Conflict to Cooperation*, 72 MICH. B. J. 420, 421 (1993).

31. *Id.* at 156.

agreements recognizing comity and full faith and credit for Tribal court judgments; possibly share resources like jails, court personnel, and probation officers; jointly develop legislation that contemplates cooperation on Indian child-welfare, taxation, and criminal-law enforcement; and promote awareness of Tribal affairs by the state bench and bar.<sup>31</sup> One fruitful path for opening these intergovernmental and intercultural discussions is the listening conference. In one example, the New York Federal-State-Tribal Courts Forum, in conjunction with several other organizations, “convened state and federal judges and court officials in sessions with tribal judges, chiefs, clan mothers, peacemakers, and other representatives from the justice systems of New York’s Indian Nations and Tribes, to exchange information and learn about [their] respective concepts of justice.”<sup>32</sup>

Another way in which state courts can support Tribal courts is by developing jurisdictional agreements to adopt a form of Indian abstention doctrine. Although the federal Indian-abstention doctrine may be eroded by the holding in *Nevada v. Hicks*,<sup>33</sup> the Supreme Court has encouraged federal courts to abstain from exercising concurrent jurisdiction in Indian country over suits involving “reservation affairs.”<sup>34</sup> The Indian-abstention doctrine is similar to various abstention principles between state and federal courts.<sup>35</sup> Arguably, state courts that have concurrent jurisdiction with Tribal courts, such as Public Law 280 jurisdiction, should exercise their discretion to abstain from matters pertaining to Tribal lands or affairs and should mindfully employ choice of law principles to defer to Tribal court jurisdiction where Tribal law applies.<sup>36</sup> For example, in 2005, the Wisconsin courts and Wisconsin-based Tribes held a conference on jurisdiction, in which they developed a thirteen-factor protocol for determining the proper forum in cases with concurrent jurisdiction.<sup>37</sup>

This discussion has focused primarily on the state courts’ role in cooperating with Tribal communities. But Tribal-state cooperation can also reduce conflict in legislative and executive matters, such as taxation, gaming, natural resources, social services, policing, and so on.<sup>38</sup> While it is generally accepted that better relationships will emerge from increasing intergovernmental collaboration, there are also major, legitimate concerns. The devolution of many federal-Tribal programs to state, Tribal, and local governments creates pressure for Tribes to enter into state compacts and contracts, and sometimes even mandates joint programs.<sup>39</sup> By abdicating its role, the federal government is forcing Tribes to negotiate matters that should be reserved to the Tribal-federal trust relationship.<sup>40</sup>

In this era of “forced federalism,” it is critical for the courts, as well as state and local governments, to understand that the issue at stake for Tribes is nothing less than their sovereignty.<sup>41</sup> Cultivating healthy Tribal-state relationships requires conscious, mindful efforts to engage in cross-cultural communication based on “mutual understanding and respect.”<sup>42</sup> Jurisdictional agreements and other cooperative arrangements that support Tribal sovereignty flow back to the states in the form of increased economic activity and social well-being. Therefore, when the opportunity arises for courts to engage in problem-solving across Tribal-state lines, it benefits both sovereigns, and most importantly, their people.



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Tonya Kowalski is an associate professor of law at Washburn University School of Law. She earned her B.A. from the University of Florida in 1992, and her J.D. from Duke University School of Law in 1995. Professor Kowalski teaches legal analysis, research, and writing, and occasionally guest lectures in the Washburn Law Clinic on both legal writing and on tribal court practice.

She is a former staff member and former visiting assistant professor in the Indian Legal Clinic at the Sandra Day O’Connor College of Law at Arizona State University. Professor Kowalski is co-author of the forthcoming Tribal Court Practice Handbook (Carolina Academic Press 2011) (with Aliza G. Organick).

32. Marcy L. Kahn, Edward M. Davidowitz & Joy Beane, *Building Bridges Between Parallel Paths: The First New York Listening Conference for Court Officials and Tribal Representatives*, 78 N.Y. ST. B. J. 10, 11 (2006).  
 33. 533 U.S. 353 (2001).  
 34. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985).  
 35. John J. Harte, *Validity of a State Court’s Exercise of Concurrent Jurisdiction over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court*, 21 AMER. INDIAN L. REV. 63, 76 (1997).  
 36. *Id.* at 84-102.

37. Robert A. Blaeser & Andrea L. Martin, *Engendering Tribal Court/State Court Cooperation*, 63 BENCH & BAR MINN. 18, 21 (2006).  
 38. See NATIONAL CONFERENCE OF STATE LEGISLATURES & NATIONAL CONGRESS OF AMERICAN INDIANS, *GOVERNMENT TO GOVERNMENT: UNDERSTANDING STATE AND TRIBAL GOVERNMENTS 2* (2000).  
 39. *Id.* at 5.  
 40. CORNTASSEL & WITMER, *supra* note 2 at 16-24.  
 41. Gabriel S. Galanda & Anthony S. Broadman, *Deal or No Deal? Understanding Indian Country Transactions*, 18 BUS. L. TODAY 11, 11 (2008).  
 42. MODELS OF COOPERATION, *supra* note 28 at 7.





## NOTICE FOR AMERICAN JUDGES ASSOCIATION MEMBERS

The newsletter of the American Judges Association, *Benchmark*, has been moved from print to electronic publication. If we have your email address on file, we will send *Benchmark* to you each time it is published. *Benchmark* is the official newsletter of the AJA, and it contains notice of AJA activities, elections, awards, and events. This move will help us make sure that you get timely notice of AJA information, and it will also help us in keeping AJA dues as low as possible.

You will continue to receive *Court Review* in the mail.

If you haven't provided your email address to the AJA, please send it to us at [aja@ncsc.dni.us](mailto:aja@ncsc.dni.us). We will use it only for authorized correspondence from the AJA.

## Court Review Author Submission Guidelines

*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

*Court Review* is received by the 2,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general-jurisdiction, state trial judges. Another 40 percent are limited-jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative-law judges.

**Articles:** Articles should be submitted in double-spaced text with footnotes, preferably in Word format (although WordPerfect format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better-state-bar-association law journals and/or other law reviews.

**Essays:** Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

**Book Reviews:** Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

**Pre-commitment:** For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

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# Resource Page: Focus on Indian Law

*Editor's Note: Professor Nancy Carol Carter has provided an excellent review of sources for research on Indian Law (see p. 32). This Resource Page separately identifies some resources that we have surveyed that appear useful. Judges wanting a comprehensive overview of potential sources about Indian law should review the Carter article in addition to this Resource Page.*



## BOOKS

ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH KRAKOFF, *AMERICAN INDIAN LAW: CASES AND COMMENTARY*. Thomson/West, 2008 (\$141). 901 pp.

WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL*. Thomson Reuters, 2009 (\$33). 529 pp.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (NELL JESSUP NEWTON, ED.). Lexis Nexis, 2005 (with 2009 Supp.) (\$189). 1,413 pp. plus 153-pp. Supp.

STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS*. New York Univ. Press, 2004 (\$20). 380 pp.

These four books are among the best for providing coverage of American Indian law. We will briefly describe each one before comparing their potential usefulness to judges.

The first one listed—we'll call it the Anderson casebook for convenience since he's the first-listed author—is the most recent law-school casebook in the field, published in 2008. All four of the authors are law professors who also serve either as editors or authors for *Cohen's Handbook of Federal Indian Law*. (We note too that one of the authors, Philip Frickey, is a member of the *Court Review* Editorial Board.) The book is thorough and well written; it includes both source materials (excerpts of key statutes, cases, and even legislative history) as well as treatise-like coverage of

the caselaw in many areas of focus, like the Indian Child Welfare Act.

The Anderson casebook begins with three chapters explaining the scope of Indian law and reviewing the various approaches to Indian policy that have been used in United States history. Later, at least one chapter is devoted to each of these topics: criminal jurisdiction in Indian country; tribal sovereignty; jurisdictional struggles between states and tribes; tribal jurisdiction over non-members; tribal jurisdiction over natural resources, hunting, and fishing; water rights; and the religion and culture of American Indians. Other chapters look at the rights of natives in Alaska and Hawaii, as well as the rights of indigenous people in other countries, including Canada, Australia, and New Zealand.

For those who may be interested in the disputes that drive scholarly work in the area of American Indian law, there is a useful, six-page overview of those debates at the end of the book. The authors describe *foundationalist* scholars who attempt to reconnect Indian law to its precedential and constitutional roots, *critical* scholars who point to racism as a factor in the decisions made, *pragmatists* who note imperfections but also point to guiding principles even in cases that today may seem flawed by racism, and *skeptics* who question whether there are truly distinctive Indian law principles that should guide cases rather than more general principles applicable to all types of disputes. Caselaw is often shaped, subtly or directly, by the themes at play in scholarly work. This section of the book provides a good survey of the current academic literature, with citations to key articles from each group of scholars.

Canby's book is part of West's Nutshell series, which consists of about 150 books summarizing key concepts related to various law-school courses. But Canby's book is famous within Nutshell circles as the first—and probably only—Nutshell to have received published book review. Now in its fifth edition, Canby's book still provides a good introduction to all of the key concepts of American Indian law. His first two chapters cover what is an

Indian tribe, who is an Indian, and the historical development of federal Indian law. He then reviews tribal governance and sovereignty, the relationship between tribes and the United States government, civil and criminal jurisdiction in Indian country, Indian gaming, taxation and regulation in Indian country, water rights, individual rights of Indians, and rights related to water, hunting, and fishing. Canby includes one chapter related just to Alaska natives.

As would be expected from a Nutshell, Canby provides an overview in each of these areas, not an exhaustive survey of cases. You can be confident, though, that any United States Supreme Court cases relevant in an area will be covered, and Canby notes key cases from federal and state caselaw as well.

Canby is a senior judge on the United States Court of Appeals for the Ninth Circuit. He formerly was a law professor at Arizona State University.

*Cohen's Handbook of Federal Indian Law* is the only true treatise in this area. It has an interesting history, and the present edition is a first-rate scholarly work. It also has regular updates (including one published this year), and you should be able to find it in most law-school or state law libraries.

The book was first published by Felix Cohen in 1941, and it brought together what had been seen as a relatively unconnected set of materials. *Cohen's Handbook* is credited with creating federal Indian law as a separate area of study and specialty. Cohen died in 1953, and the treatise was later revised by the U.S. Department of the Interior. While Cohen had stressed tribal self-government, the federal government's revision stressed the plenary power of the federal government. The Indian Civil Rights Act of 1968 mandated another update of *Cohen's Handbook*, and a board of editors and authors produced a new edition in 1982 that was more faithful to Cohen's views. The present edition is the work of more than three dozen Indian law scholars, led by a team of scholar-editors and a chief editor, Nell Jessup Newton, now the dean at the Notre Dame Law School.

*Cohen's Handbook* provides fairly thorough treatment of all areas of Indian law. The book includes coverage related to natives of Alaska and Hawaii, as well as specific discussion regarding tribes in Oklahoma and the Pueblo Indians. A particularly useful feature early in the book is a chapter detailing a number of principles of interpretation that are specific to Indian law, including a number of canons of statutory construction that have been laid down, mainly by the United States Supreme Court, for Indian law matters. The Anderson casebook also provides a detailed discussion of these canons, but the discussion in *Cohen's Handbook* is especially good, including as it does a supplement that keeps the material up-to-date. *Cohen's Handbook* also includes coverage of federal laws of general applicability that may affect Indian law cases as well.

Pevar's book is intended for a lay audience, and it's written in a question-and-answer format. All of these books answer the question, who is an Indian? Pevar methodically sets out all of his book in questions like that, and he then provides straightforward answers. The book is not updated as often as the others we've listed here; its first edition was in 1983 and this third edition was published in 2004. But it too provides a very good overview of all of the major areas of Indian law: historical development; civil and criminal jurisdiction in Indian country; hunting, fishing, and water rights; taxation; civil rights; gaming; and the Indian Child Welfare Act.

Pevar is an attorney for the American Civil Liberties Union. He has taught at the University of Denver School of Law.

For a quick check of the comparative usefulness of these four books for state-court judges, we looked at their treatment of the Indian Child Welfare Act (ICWA), which is of concern to any judge handling a matter related to custody or adoption of a child who might be eligible for membership in a recognized Indian tribe. Between Pevar and Canby, Pevar provides more thorough coverage of this topic, with a straightforward, 30-page chapter. But Canby has a good overview too. We looked at coverage of a subtopic—the “existing Indian family doctrine,” under which some state courts have held that ICWA doesn't apply when the Indian parents haven't maintained a

significant relationship with the tribe. Both Pevar and Canby covered this issue. Once again Pevar had a bit more detail on it, but Canby's discussion, though brief, was a good summary of the caselaw development. And he cited to a leading and recent case in which the Oklahoma Supreme Court had reversed its initial acceptance of the doctrine. See *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004). Reviewing that one case and checking for later cases citing it would quickly give any judge or reader a good overview of the issue and a way to find the most relevant cases on this topic.

The Anderson casebook and *Cohen's Handbook* had even more extensive treatment of ICWA. Judges will generally find *Cohen's Handbook* of more help since it's a treatise with regular updates, while the casebook format leaves some questions unanswered—questions designed for class discussion, though often of significance. But both books provided an excellent discussion of the existing Indian family doctrine, with ample case citations. Both books had a complete presentation of cases on that doctrine, identifying seven states that followed the doctrine and 13 that had rejected it as of the books' publication dates. One of the seven states both books identify as following the doctrine has recently reversed course. See *In re A.J.S.*, 204 P.3d 543 (Kan. 2009). Presumably the *Cohen Handbook*, which is the most regularly updated, will be the first to note that.

If you have an interest in this area of law, any of these books can provide you with a good overview of the key cases, statutes, and issues. You might be able to find the Pevar book in a local public library; *Cohen's Handbook* can be found in most law-school libraries.



### LAW-SCHOOL LIBRARY RESEARCH SUGGESTIONS

**Berkeley Law (Univ. of Cal. – Berkeley)**  
<http://www.law.berkeley.edu/library/dynamic/guide.php?id=49>

Law-school libraries have reference librarians whose mission is to make it easier for all of us to find what we need. Reference librarian Dean C. Rowan at

Berkeley Law has prepared an excellent guide to source materials on American Indian law. He includes a much longer list of books than we have, and he includes a description of each book. He also provides a review of web-based sources, even including blogs. We could have included a of several other research guides prepared by librarians—there are useful ones from the Cornell University libraries, the University of Connecticut School of Law Library, and others. But Rowan's guide is a good one.



### WEBSITES OF INTEREST

**University of Oklahoma College of Law**  
<http://www.law.ou.edu/native/index.shtml>

The University of Oklahoma College of Law publishes the *American Indian Law Review*, now in its 33rd year, and the law school's website has an excellent collection of American Indian law materials. This includes the Native American Constitution and Law Digitization Project, where you can find codes and constitutions of many tribes. The website also provides links to home pages of many tribes, and a comprehensive set of links to legal resources.

**Native American Rights Fund**  
[www.narf.org/icwa/index.htm](http://www.narf.org/icwa/index.htm)

The link we've provided takes you to the Native American Rights Fund's online publication, *A Practical Guide to the Indian Child Welfare Act*. The online guide works through a series of frequently asked questions (with answers, of course) and a series of flow charts about when and how ICWA may apply to a given case. The full, 367-page written guidebook (including appendices) may be downloaded free from the website.

**National Tribal Justice  
Resource Center**  
<http://www.ntjrc.org/triballaw/>

This resource center put together by the National American Indian Court Judges Association provides links to codes and constitutions of tribes, a directory of tribal courts, and searchable opinions from participating tribal courts.





# The Resource Page



## JOURNALS OF NOTE

### Chapman Journal of Criminal Justice Symposium on Evidence-Based Sentencing

[http://www.chapman.edu/images/userImages/dfinley/Page\\_12412/CCJ\\_Spring\\_2009\\_a.pdf](http://www.chapman.edu/images/userImages/dfinley/Page_12412/CCJ_Spring_2009_a.pdf)

Thirty years ago, published research concluded that an expert's chance of predicting recidivism was no more accurate than flipping a coin would be, and there was little in the way of valuable research on risk factors generally for criminal behavior or effective means of rehabilitation. Much has changed, and the *Chapman Journal of Criminal Justice* has devoted its inaugural issue to an excellent discussion of the research now available and its implications for more effective criminal sentencing.

The full, 282-page journal is available online, and we think that any criminal judge interested in more effective sentencing practices would find this issue of real interest. Indeed, in an introductory essay, Chapman law professor Richard Redding argues that a judge's "failure to apply known best practices constitutes sentencing malpractice and professional incompetence." We will leave that debate to another time, but we encourage judges to read this issue.

Here's a quick rundown of the symposium articles:

- Professor Redding provides an overview of the issue with a comprehensive overview of the existing literature on evidence-based sentencing. In nine quick pages, he gives you a thorough introduction to the use of risk and needs assessments in sentencing. He also provides reference to key articles and studies.

- A prosecutor, San Diego district attorney (and former judge) Bonnie Dumanis, and a former defense attorney, University of Illinois law professor Margareth Etienne, provide the perspective of advocates. Dumanis

argues for an individualized approach to sentencing to more effectively reduce recidivism. She also provides an overview of San Diego's prisoner reentry program for non-violent felony offenders. Etienne raises due process and fairness issues, asking whether evidence-based sentencing actually "amounts to a form of statistical profiling." She concludes that evidence-based sentencing will benefit many defendants.

- Villanova University law professor Steven Chanenson, a former federal prosecutor and current member of the Pennsylvania Sentencing Commission, describes the evidence-based program used for substance-abusing offenders in Pennsylvania. He lays out the risks and benefits that prosecutors may face in using evidence-based sentencing practices.

- Oregon state judge Michael Marcus, who has previously written about sentencing issues in *Court Review* [Winter 2004 at 16], has long been an advocate of evidence-based sentencing. See [www.smartsentencing.com](http://www.smartsentencing.com) (Judge Marcus's website on the subject). In this article, he pulls together his key arguments and the supporting evidence, emphasizing that evidence-based sentencing promotes accountability for all of those involved in the sentencing process to assess the impact of sentencing decisions on public safety. He also provides a discussion of the interrelationship of evidence-based sentencing with the traditionally recognized objectives of sentencing: deterrence, incapacitation, rehabilitation, and retribution.

- Drexel University psychology professor Kirk Heilbrun, a leading scholar in best practices in forensic mental-health assessment, provides an in-depth overview of risk assessment in the criminal-justice system. He describes advances made in the research over the past two decades, focusing on actuarial assessments and structured professional judgments, which he suggests based on research can each provide fairly accurate

results as risk-assessment tools. He then discusses how these tools may be used in sentencing, with special emphasis on drug courts and mental-health courts.

- Simon Fraser University psychology professor Stephen Hart, one of the developers of the Risk for Sexual Violence Protocol, provides a detailed look at evidence-based risk assessments for sexual violence. He concludes that appropriate sentences cannot be given without good, evidence-based risk assessments. But, like Professor Etienne, he also cautions that although a given risk-assessment tool may be generally characterized as evidence-based, "the risk assessment of a given offender is not." He urges judges, attorneys, and probation officers to become knowledgeable about risk and needs assessments.

- Dr. Douglas Marlowe, a lawyer and clinical psychologist, reviews the use of evidence-based sentencing practices in drug courts. He serves as the science and policy chief for the National Association of Drug Court Professionals. Dr. Marlowe suggests different treatment of offenders based on an assessment of each offender's needs and risks; he gives specific recommendations for high-risk, high-needs; high-risk, low-needs; low-risk, high-needs; and low-risk, low-needs offenders.

- Mark Bergstrom, executive director of the Pennsylvania Commission on Sentencing, outlines what state sentencing commissions can do to implement evidence-based sentencing practices. His discussion includes very practical questions like how to obtain good statewide data that can be used to support evidence-based sentencing.



## FOCUS ON INDIAN LAW

*Court Review* surveys resources on Indian law at page 54.