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Fresh Pursuit Onto Native American Reservations: State Rights "to Pursue Savage Hostile Indian Marauders Across the Border"

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FRESH PURSUIT ONTO NATIVE AMERICAN RESERVATIONS: STATE RIGHTS "TO PURSUE SAVAGE HOSTILE INDIAN MARAUDERS ACROSS THE BORDER"*

An Analysis of the Limits of State Intrusion into Tribal Sovereignty

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* This title derives, in part, from a series of late-nineteenth century treaties between Mexico and the United States. These agreements were an attempt to halt the cross-border raiding of an Apache leader named "Kid" and his bandits, who continually eluded capture by frustrated federal troops from both countries by exploiting the international borderlands as an extra-jurisdictional haven. *See infra* note 159.

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I. INTRODUCTION

Criminal jurisdiction over Native Americans[1] is partitioned

1. The authors use the term "Native Americans," rather than "Indians," in this article. Our choice of collective identifier stems not only from our own personal preferences, but finds ample support in Professor Berkhofer's penetrating treatise exposing the underlayment of white conceptions of America's original peoples. *See* R.F. BERKHOFER, JR., WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT (1978). Beginning with the origin of the Spanish term "los Indios," derived from Columbus's profound geographic error, *id.* at 4-5, Berkhofer proceeds, throughout the remainder of his work, to expose the culturo-centric and ethnocentric biases of Europeans, and later white Americans, who perpetuated the erroneous use of the term "Indians" as an artificial construct of Euro-American prejudices, beliefs, and attitudes.

> [I]t has to be remembered that the term "Indian" is a white man's word; a concept arising out of an original error into which white men have insisted on imparting meaning. To be aboriginal of the Americas is to be Sioux, or Cree, or Mohawk, or Navajo — a tribesman. Among those who live most intimately with tradition, to talk about "Indian issues" or "Indian aspirations" is to talk a dangerous kind of nonsense. One may offend someone by seeming to speak for him.

H. FEY & D. MCNICKLE, INDIANS AND OTHER AMERICANS 239 (1970). *See also* United States v. Wheeler, 435 U.S. 313, 331 n.33 (1978)(" 'Navaho' is not their word for themselves. In their own language, they are *dine*, 'The People.' ").

No truly self-generated movement exists among America's first peoples to embrace any one collective term to the exclusion of another. Native Americans remain much less concerned about a collective designation than they are about their band, tribal, or national identities. Each Native nation or tribe considers itself a discrete unit confederated loosely with others against the dominant Euro-American culture.

We recognize accordingly that the term "Native Americans" itself is an unfortunate overgeneralization. Dean Strickland has admonished those who would perpetuate the entrenched fiction that "all Indians are alike":

> We must destroy the prevailing myth that there is a single body of transitory Native law uniformly applicable to all Indian people. Because there is no single Indian tribe, no single Indian culture, no single Indian personality, no single Indian language, and no single Indian history, there can be no single body of rules that can be applied to every Indian tribe, culture, personality, language, and history. Much of the confusion of Indian law and policy in the past has been a refusal to face what we have always known — that while there are many common interests among Indian people, there are also many divergent needs within the Indian community.

Strickland, *The Puppet Princess: The Case for a Policy Oriented Framework for Understanding and Shaping American Indian Law*, 62 OR. L. REV. 11, 17 (1983). For penetrating analyses of white con-

among three sovereigns: tribal,[2] federal, and state governments. Whether one or more of these sovereigns[3] has criminal jurisdiction in a particular case is determined by a confluence of factors: where the offense was committed, the gravity of the offense, and whether either the perpetrator or the victim was Native American. Outside the territory of Native reservations, state jurisdiction, for all intents and purposes, is exclusive for all crimes except federal crimes. Within reservation borders, however, criminal jurisdiction is split among the three sovereigns. Jurisdiction in most instances resides inherently

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ceptions of Native Americans, *see generally* BERKHOFER, *supra*; R.H. PEARCE, THE SAVAGES OF AMERICA: A STUDY OF THE INDIAN AND THE IDEA OF CIVILIZATION (1965).

Semantic arguments aside, however, the concern here is with the manner in which the topic of fresh pursuit has been understood and dealt with by traditional domestic "Indian" law. Accordingly the generic designation "Native Americans," whatever that term's shortcomings, has been used to characterize the collective ethnicity of America's indigenous peoples. It is not the authors' intent to lend any credence to the analytic homogenization of Native peoples or to reinforce the prevailing notion that "all Indians are alike."

2. Decisions of the domestic court system frequently note that "the basic unit of the federal-Indian relationship is the tribe." Attorney Gen. v. Hermes, 127 Mich. App. 777, 782, 339 N.W.2d 545, 549 (1983). *See also* United States v. Washington, 520 F.2d 676, 691 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). This characterization is reflected in the statutory definition at section 19 of the Indian Reorganization Act of 1934, 25 U.S.C. § 479 (1982), that a "tribe" is "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Yet, the term "tribe" perhaps is applied best in the ethnological sense rather than in a legal and political sense. While the utility in the law of such a general, judicially-manageable term is undenied, it is by its very generic nature problematical.

With the resurgence of Native American nationalism since the late 1960s, many Native groups have reasserted the independent nationhood status they maintained prior to the formation of the United States. *See, e.g.*, Oneida Indian Nation v. New York, 691 F.2d 1070, 1089 (2d Cir. 1982) (Oneidas "qualify as a 'nation' with whom Congress could enter into 'treaties and alliances' as used in clause 1" of the Constitution). *See also infra* note 109. Some communities of Native peoples may indeed be construed as "tribes," that is, as separate, complete, discrete political units. Yet other native communal entities, such as the numerous, politically autonomous "bands" of Ojibwa and Arapaho, are not separate "tribes," despite the fact that they legally may be designated as "tribes" as that term is defined by statute. City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 160 (D.D.C. 1980). "Band" identity is nonetheless the controlling identification for these peoples.

Because the term "tribe" has such wide recognition in the case law and the literature, the authors will use that term in its generic sense throughout this article. The authors do not intend thereby to denigrate any Native nation's assertion to national sovereignty.

3. The authors are speaking in this article solely of the recognition of sovereignty under the domestic law of the United States. The sovereign status of Native peoples under international law is much more problematical and is well beyond the scope of this article. For recent works espousing the international sovereign status of indigenous peoples, *see* Kronowitz, Lichtman, *et al.*, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507 (1987); Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986); Johnston, *The Quest of the Six Nations Confederacy for Self-Determination*, 44 U. TORONTO FAC. L. REV. 1 (1986) (noting the Haudenosaunee's "defiant assertions of independence and sovereignty" and refusal to become "a part of Canada"); Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73 (1983); Green, *Aboriginal Peoples, International Law and the Canadian Charter of Rights and Freedoms*, 61 CANADIAN B. REV. 339 (1983); Clinebell & Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFFALO L. REV. 669 (1978). *See also generally*, R.D. ORTIZ, INDIANS OF THE AMERICAS: HUMAN RIGHTS AND SELF-DETERMINATION (1984).

with the tribe. Jurisdiction over many Native-involved crimes is asserted unilaterally by the federal government as well. The states take jurisdiction over crimes involving only non-Natives, and as a function of the federal arrogation of power, may have criminal jurisdiction granted to them by the federal government over reservation lands within their borders. The result is an incongruous meld of concurrent criminal jurisdiction on Native reservations, under which the tribe and at least one additional sovereign — the United States or a state — share jurisdiction.

The impact of this patchwork of jurisdiction on tribal sovereignty is fundamental. Maintaining the peace and administering justice within a territory are inherent attributes of a sovereign power. Yet tribal authority to do either is impaired by both the intrusion of another sovereign's jurisdiction and the concomitant loss of tribal power. Employing the jurisdictional issue of fresh pursuit as a paradigm, this article will explore the implications for tribal sovereignty of the present tripartite arrangement.

The present jurisdictional apportionment by territorial compartmentalization, while adequate to cover most arrest situations, is inadequate to resolve the issue of fresh pursuit,[4] where a Native suspected of violating state law off the reservation is pursued by state law enforcement officers across reservation borders onto tribal lands. While state officers may have exclusive authority over the crime and the suspect at the off-reservation location where the crime is committed,[5] the officers, absent a specific congressional grant of jurisdiction to the state, have no jurisdiction over Native Americans within reservation borders.[6] Yet on-reservation arrests of Natives by state officers for off-reservation offenses go relatively unchecked. Many courts, even those that recognize the illegality of the state's exercise of jurisdiction on the reservation, will not invalidate such arrests.

The fundamental premise of this article is that fresh pursuit onto

4. Fresh pursuit refers generally to those pursuits of fleeing suspects that cross jurisdictional boundaries. Fennessy & Joscelyn, *A National Study of Hot Pursuit*, 48 DEN. L.J. 389, 390 (1972); Carson v. Pape, 15 Wis. 2d 300, 308, 112 N.W.2d 693, 697 (1961); 5 AM. JUR. 2D *Arrest* § 51 (1962). The phrase "close pursuit" also is used occasionally for the same concept. By contrast, the better-known term "hot pursuit" usually refers to immediate and continuous pursuit of a fleeing violator independent of the crossing of any jurisdictional barriers. *See, e.g.*, Fennessy & Joscelyn, *supra*, at 389-90; Welsh v. Wisconsin, 466 U.S. 740, 753 (1984). The substitution of the term "fresh" or "close" pursuit for "hot pursuit" may be an attempt to divorce the cross-jurisdictional doctrine from the image of the Hollywood car chase. *See, e.g.*, United States v. Getz, 381 F. Supp. 43, 46 (E.D. Pa. 1974); Charnes v. Arnold, 600 P.2d 64, 66 (Colo. 1979). In this article the authors are concerned solely with the concept of cross-jurisdictional fresh pursuit, concentrating on state-tribal reservation boundaries.

5. There are exceptions to the exclusive off-reservation authority of the state in the area of treaty-reserved hunting and fishing rights. *See infra* section II.A.

6. *See infra* section II.B.2.a. and note 48.

a Native reservation, unless specifically authorized by the tribe and carried out in full compliance with tribal law, is a violation of inherent tribal sovereignty. To protect tribal self-government and control over the reservation, courts must shift their focus in fresh pursuit cases away from the rights of the individual suspect and the police powers of the state, to the right of a sovereign to inviolate borders.

This article explores the limits of state infringement of tribal sovereignty in the context of fresh pursuit onto Native reservations.[7] It looks first at existing principles of criminal jurisdiction over Native Americans, as those principles are defined by the domestic[8] law of the United States, including the related areas of on-reservation arrest and extradition. The article next discusses the doctrine of fresh pursuit as applied in three cross-jurisdictional models: intrastate, interstate, and international law. Finally, the article outlines the current common law analysis for determining whether a state has jurisdiction on the reservation, indicating statutory actions tribes may take to increase the likelihood of a judicial determination that state authority to pursue across reservation borders is preempted. The authors ultimately conclude that tribal sovereignty, even in the absence of a tribal statutory enactment or a tribal-state agreement, should operate as an insuperable barrier to the ability of state officers to make fresh pursuit arrests on the reservation.

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7. This article does not deal expressly with the situation in which a Native commits a crime on a reservation and is pursued thereafter from the reservation to state lands. *See, e.g.*, North Dakota v. Littlewind, 417 N.W.2d 361 (N.D. 1987) (arrest by BIA police officer following pursuit from reservation into state held valid under state law as citizen's arrest). Nevertheless, the sovereignty analysis set out by the authors for tribal extradition to the state conceptually would apply also to state extradition to the tribe. One state specifically has addressed this situation by statute. In Nevada, both federal Bureau of Indian Affairs and tribal police officers are authorized to arrest without a warrant

> [o]utside the boundaries of an Indian reservation or Indian colony if he [sic] is in fresh pursuit of a person who is reasonably believed by him [sic] to have committed a felony within the boundaries of the reservation or colony or has committed, or attempted to commit, any criminal offense within those boundaries in the presence of the officer or agent.

NEV. REV. STAT. § 171.1255 (1985).

Neither do the authors address fresh pursuit between reservations. In certain jurisdictional configurations, such as the Navajo-Hopi reservations in Arizona and the Crow-Northern Cheyenne reservations in Montana, a suspect could be pursued from one reservation onto another without crossing into state jurisdiction. As with the tribal-state pursuit situation, it appears that intertribal pursuit could be resolved according to the sovereignty principles articulated for the state-tribal model. State law enforcement pursuit solely between reservations, on the other hand, may present unique jurisdictional issues. *See infra* note 9.

8. In international law, the national or internal law of a sovereign state is termed "municipal law." However, because this article discusses, in part, the doctrine of fresh pursuit in the context of intrastate law and the law of municipalities, the authors have elected to use the term "domestic law" to describe the national law of the United States.

II. CRIMINAL JURISDICTION

The issue of fresh pursuit onto Native reservations must be viewed in the context of asserted criminal jurisdiction over Natives and Native American reservations. An analysis of which sovereign — federal, state or tribal — has jurisdiction over whom, on and off the reservation, provides a critical conceptual backdrop to the issue of fresh pursuit.

A. Off-Reservation Jurisdiction

Criminal acts that give rise to fresh pursuit by state law enforcement officers necessarily occur outside the boundaries of the reservation.[9] Jurisdiction over virtually all non-federal criminal offenses committed off the reservation lies exclusively with the state.[10] The proposition that a state has criminal jurisdiction over non-Natives who commit crimes within its borders is basic to American jurisprudence. Additionally, the United States Supreme Court has declared that the state has full criminal jurisdiction over Natives who violate state laws outside reservation boundaries.[11] Consequently, off the reservation, state criminal jurisdiction over Natives is coextensive with the state's jurisdiction over non-Natives.[12]

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9. In some instances where Native reservations abut, such as the Crow and Northern Cheyenne reservations in Montana, it would be possible for state pursuit to begin on one reservation and continue across the borders of another. For the pursuit and subsequent arrest to be lawful, however, the state officer would need to have jurisdiction over the suspect and the offense at the time and place that the pursuit began. In the example of the Northern Cheyenne — Crow, state officers would have no jurisdiction to arrest a Native suspect on either reservation, since Montana exercises criminal jurisdiction only over the Flathead Reservation, *see infra* note 41, and thus should have no jurisdiction to undertake fresh pursuit. Absent a grant of criminal jurisdiction, Montana officers would have jurisdiction over a non-Native suspect if the victim of the alleged crime was also non-Native, but not if the victim was Native. *See infra* section II.B.2. Whether Montana officers would have authority to pursue and arrest a non-Native for a victimless offense such as a traffic violation is not clear. *See infra* note 55. Because of the unique jurisdictional quagmire presented by the relatively remote likelihood of pursuit by state officers between reservations, that situation is not considered here.

10. The sole exception is tribal jurisdiction over tribal members for hunting and fishing violations committed during the exercise of off-reservation treaty usufructuary rights. *See infra* notes 15 and 26 and accompanying text.

11. "It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country." Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962). *See also* DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); Ward v. Race Horse, 163 U.S. 504 (1896); Pablo v. People, 23 Colo. 134, 135-37, 46 P. 636, 637 (1896)(state law held applicable to Ute killing another Ute at off-reservation site); State v. Youpee, 103 Mont. 86, 61 P.2d 832 (1936)(state law applicable to Assiniboine accused of statutory rape of Assiniboine minor off-reservation). "Whatever sovereign power the federal government had to try Indians for crimes committed off of the reservation and on land ceded to the federal government by treaty was transferred to the state upon its admission to the Union." Sturdevant v. State, 76 Wis. 2d 247, 254-55, 251 N.W.2d 50, 54 (1977) (noting, *id.* at 250 n.1, 251 N.W.2d at 52 n.1, that this principle applies "only to state penal statutes not including fish and wildlife conservation laws").

12. "Absent express federal law to the contrary, Indians going beyond reservation boundaries

By contrast, tribal governments generally have no criminal jurisdiction off the reservation, even over their own members.[13] Tribal court jurisdiction, rather, traditionally has been limited to offenses committed within the confines of the reservation.[14] In selected instances, most notably violations of off-reservation treaty hunting and fishing rights, tribes may retain jurisdiction to prosecute their members for offenses occurring outside the tribe's territorial boundaries.[15] Absent this potential jurisdictional aberration, however, state criminal

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have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). *See also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 n.18 (1983). The Court expressly noted in *Jones* that this principle is "as relevant to a State's tax laws as it is to *state criminal laws*. . . ." 411 U.S. at 149 (citations omitted) (emphasis added).

13. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975): "If the lands in question are within a continuing 'reservation,' jurisdiction is in the tribe and the Federal Government. . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State. . . ."

14. *See* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 557 n.281 (1976) (citing 4 NAT'L AM. INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN 4, 40 (1974)); Ex parte Kenyon, 14 F. Cas. 353, 355 (C.C.W.D. Ark. 1878) (No. 7720); *Hearings on the Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt.1, at 267 (1961).

15. Settler v. Lameer, 507 F.2d 231, 237 (9th Cir. 1974):

> [R]egulatory interference by the state with treaty fishing is obnoxious to the treaty tribes. These tribes have the power to regulate their own members and to arrest violators of their regulations apprehended on their reservations or at [off-reservation] "usual and accustomed" fishing sites.

United States v. Washington, 520 F.2d 676, 686 (9th Cir.), *cert. denied*, 423 U.S. 1086 (1975), *vacated on other grounds*, 443 U.S. 658 (1979). *See also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 14 Indian L. Rep. (Am. Indian Law. Training Program) 3135, 3138 (W.D. Wis. 1987) (Chippewa "tribes possess the authority to regulate their members in the exercise of treaty usufructuary rights off the reservation. . . . [T]he power to regulate necessarily includes the power to enforce the regulations against tribal members by arrest or other enforcement mechanisms."); United States v. Michigan, 471 F. Supp. 192, 273-74 (W.D. Mich. 1979) (Bay Mills Indian Community's and Sault Ste. Marie Chippewa Tribe's treaty rights include the power to regulate their members off reservation so long as members are fishing under tribal regulation and in ceded area); United States v. Washington, 384 F. Supp. 312, 340-42 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975) (tribes meeting certain qualifications and conditions, including procedures for enforcement, identification of members, and reporting, could regulate off-reservation treaty fishing rights of members); State v. Courville, 36 Wash. App. 615, 620, 676 P.2d 1011, 1014 (1983) ("Muckleshoot Tribe has the power to regulate the treaty fishing rights of its individual members off-reservation."). *See also* Note, *Indian Law—Tribal Off-Reservation Jurisdiction*—Settler v. Lameer, *507 F.2d 231 (9th Cir. 1974)*, 1975 WIS. L. REV. 1221; Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 52 N.C.L. REV. 743, 760 (1984) (federally protected treaty rights implicate tribes' reservation of power to control exercise of the right). *Cf.* State v. Gowdy, 1 Or. App. 424, 427, 462 P.2d 461, 463 (1969)(Native fishing off-reservation in violation of both tribal regulations and state game laws is outside reserved treaty rights and in same position as non-Native who violates state fishing laws).

Notwithstanding favorable scholarly opinion and the growing volume of lower court precedent acknowledging tribal regulatory authority, including criminal enforcement powers, over members' off-reservation hunting and fishing rights, the Supreme Court has yet to consider this issue. Nonetheless, one source notes that in the Pacific Northwest, "[v]irtually all tribes in the Puget Sound region, and the Yakima and Warm Springs tribes on the Columbia, exercise *Settler*-type regulatory authority." Wilkin-

jurisdiction remains exclusive for all off-reservation violations of state law.

B. Jurisdiction Within Reservation Boundaries

Criminal jurisdiction on the reservation is controlled by a tripar-

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son & Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource*, 32 U. KAN. L. REV. 17, 48 n.174 (1983).

It is not clear whether the tribal power to regulate the off-reservation usufructuary activities of tribal members is exclusive of state regulation. The tribal power recognized in *Settler* and subsequent cases has been qualified where the treaty rights are to be shared "in common with" all citizens of the state. This express treaty provision, common to several treaties of the Pacific Northwest, accords equal rights in the fishery to the non-Natives in the treaty area. These "in common with" treaty provisions have been construed by the Supreme Court as according to a state the authority to regulate Native off-reservation treaty fishing rights for narrowly defined conservation purposes. *See* Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165, 175-77 (1977). Lower courts, even in the absence of the pivotal "in common with" treaty language, uniformly have construed reserved Native usufructuary rights to be held in common with non-Native settlers in the treaty area and to be subject thereby to limited state regulation. *See* United States v. Michigan, 623 F.2d 448 (6th Cir. 1980) (tentatively adopting the common usufruct treaty concept espoused in People v. LeBlanc, 399 Mich. 31, 248 N.W.2d 199 (1976)); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1434-35 (W.D. Wis. 1987) (court noted the lack of "in common with" language in Chippewa treaties, but held itself bound by *Puyallup* line of cases to find that state may regulate treaty-based usufructuary activities when reasonable and necessary for conservation).

The language of the decisions implicates concurrent tribal and state regulation.

> Regulation of off-reservation Indian treaty fishing by the United States, the State, or the . . . tribes does not preempt the regulation by any of the other two. Jurisdiction of each entity to regulate is unimpaired by the exercise of another entity's regulatory jurisdiction. With respect to matters over which there may be multiple jurisdiction, the extent of exercise or nonexercise of regulatory jurisdiction by the entity having primary interest in the matter may be relevant to the appropriateness of another entity's exercise of its jurisdiction.

United States v. Washington, 384 F. Supp. 312, 403 (W.D. Wash. 1974). *See also Settler*, 507 F.2d at 237 (existence of tribal self-regulation "does not mean that the State of Washington is without any authority to regulate off-reservation fishing. That power has been expressly recognized, but it has been strictly limited."). But where a tribal regulatory scheme incorporates the state's limited conservation interests, the tribal exercise of authority ousts state jurisdiction.

> Both Bay Mills' and the Sault Tribe's treaty rights include the power to regulate their members so long as they are fishing under tribal regulation and in the area ceded by the Treaty of 1836. Both tribes presently exercise that power and regulate the fishing activities of their members. This regulation preempts any state authority to regulate the fishing activity of the tribal members.

United States v. Michigan, 471 F. Supp. 192, 274 (W.D. Mich. 1979). *Accord* United States v. Washington, 384 F. Supp. 312, 403 (W.D. Wash. 1974) ("the exercise of . . . tribal regulatory control may affect the finding of 'necessity' which is required for the validity of any state exercise of its police power to preserve the resource"), *aff'd*, 520 F.2d 676, 686 (9th Cir. 1975)("[s]o long as the tribes responsibly insure [sic] that the run of each species in each stream is preserved, the legitimate conservation interests of the state are not infringed"), *cert. denied*, 423 U.S. 1086 (1976); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 14 Indian L. Rep. (Am. Indian Law. Training Program) 3135, 3138-39 (W.D. Wis. 1987) ("effective tribal self-regulation of a particular resource or activity precludes state regulation of that resource or activity as to the tribes. . . . [W]here 'the tribes responsibly insure' that conservation and public safety and health goals are met, the legitimate interests of the state are not contravened."). *See also* Reynolds, *supra*, at 770 ("if a tribe can show that it adequately is regulating its members to ensure perpetuation of the resource, state regulation will not be deemed necessary").

tite division among the tribes, the states, and the federal government.[16] Two allocations of criminal justice power generally are consistent among all reservations: tribes exercise criminal jurisdiction over Native offenders, and states take exclusive jurisdiction over non-federal crimes involving only non-Natives. In addition, if a state has been granted or has assumed criminal jurisdiction pursuant to Public Law 280 or a similar enabling statute,[17] federal jurisdiction within reservation borders continues only as to federal crimes. In the absence of a specific jurisdictional grant or an assumption of jurisdiction under Public Law 280, however, federal jurisdiction vis-a-vis the states is paramount for Native-involved criminal activity. Tribal criminal jurisdiction, restricted to Native offenders, is not affected by Public Law 280.

1. Tribal Jurisdiction

Native nations and tribes are sovereign entities, "distinct, independent political communities" possessing sovereign powers over both their members and their territory.[18] Among the attributes of sovereignty exercised by tribes are the powers to control their internal and

16. As the following section of this article demonstrates, courts and scholars have wrestled for well over a century with the complexities, anomalies, and disarray of the "jurisdictional maze" on Native reservations. Clinton, *supra* note 14, at 504. Notwithstanding the significant and apparent difficulties inherent in attempting to develop a clear picture of criminal jurisdiction within reservation borders, the United States Department of Justice recently asserted, with a stupefying lack of accuracy, that "jurisdiction over all persons and [sic: in] Indian country is clear, and no legal uncertainties exist." *Indian Reservation Special Magistrate: Hearing before the Sen. Select Comm. on Indian Affairs*, 99th Cong., 2d Sess. 13 (1986) [hereinafter cited as *Reservation Special Magistrate*] (statement of Mark M. Richard, Dep. Ass't Att'y Gen., Criminal Div., U.S. Dep't of Justice). The United States Department of the Interior termed this description "apt." *Id.* at 17 (statement of Hazel Elbert, Dep. to the Ass't Sec'y of Indian Affairs (Tribal Services), U.S. Dep't of Interior). As this article will show, and as the writings of other authors and scholars on this subject uniformly demonstrate, the determinacy that the Justice Department finds in criminal jurisdiction within Indian country can be attributed only to a pernicious disregard of fact, a significant lack of legal insight, or an intentionally self-deceptive inventiveness.

A table setting out the major parameters of on-reservation criminal jurisdiction is attached at Appendix A. The table is cross-referenced to notes in the text to facilitate explanation of jurisdictional authorities.

17. *See infra* section II.B.2.a. and note 47.

18. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978); United States v. Mazurie, 419 U.S. 544, 557 (1975); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832).

The Supreme Court has narrowed the universality of this well-patined doctrine in the civil law context. In Montana v. United States, the Court held that the Crow Tribe, as a general matter, could not regulate hunting and fishing on lands which, while within the territorial confines of the reservation, were not owned by the tribe. 450 U.S. 544, 557-67 (1981). *See also* Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165, 174-75 (1977) (dismissing Tribe's assertion of exclusive tribal regulatory authority over on-reservation fishing where fewer than 22 acres of the original 18,000 acre reservation remained in trust status).

social relations, and "to make their own laws and be ruled by them."[19] Central to tribal sovereignty is the administration of justice within the tribe's territory.[20]

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19. *Mescalero Apache Tribe*, 462 U.S. at 332; *Martinez*, 436 U.S. at 55-56; *Mazurie*, 419 U.S. at 557; Williams v. Lee, 358 U.S. 217, 220-21 (1959).

The beneficence of the Court's frequent statement is belied by myriad congressional enactments and federal administrative and judicial decisions. For example, the Major Crimes Act, codified at 18 U.S.C. § 1153(a) (1982), unilaterally extended federal criminal jurisdiction to Native reservations and displaced Native restitutionary concepts of justice with non-Native retributive and punitive values.

> It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.

Ex parte Crow Dog, 109 U.S. 556, 571 (1883).

The Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-479 (1986), was implemented to coerce about 70 percent of Native American tribes to adopt the form of government of the dominant society. Barsh, *When Will Tribes Have a Choice?* in RETHINKING INDIAN LAW 43 (Nat'l Lawyers Guild 1982). Public Law 280, *see infra* notes 39-41 and accompanying text, delegated to selected state governments jurisdiction over most crimes and civil matters throughout most Native reservations within their borders. With the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1982), Congress imposed upon Native American tribes the dominant society's vision of civil rights. The Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1986), requires Inuit and Aleut Natives to set up economic corporations in the western capitalist model to govern their Native affairs. *See* Branson, *Square Pegs in Round Holes: Alaska Native Claims Settlement Corporations Under Corporate Law*, 8 U.C.L.A.-ALASKA L. REV. 103 (1979); Lazarus & West, *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 LAW & CONTEMP. PROBS. 132 (1976).

Much political control of Native nations is vested by Congress in the Secretary of the Interior. *See generally* Title 25 of the United States Code (1982). For instance, the Secretary assumes the power to review and overrule most actions of Native governments, including constitutional amendments, 25 U.S.C. § 476 (1982), and tribal codes of law and order, 25 C.F.R. § 11.1(e) (1987). In fact, most IRA constitutions contain a boilerplate provision that all major actions of tribal governments must be reviewed and approved by the Secretary. *See, e.g.*, Constitution and Bylaws of the Wisconsin Winnebago Tribe, arts. 9 (Amendments) and 12 (Adoption of Constitution and Bylaws), *reprinted in* 2(1) J. WIS. INDIAN RESEARCH INST. 106, 110, 112 (1966); Revised Constitution and By-Laws of the Oneida Tribe of Indians of Wisconsin, art. 7, *reprinted in* 2(2) J. WIS. INDIAN RESEARCH INST. 34, 38 (1966) ("No amendment shall become effective until approved by the Secretary of the Interior.").

> The [Bureau of Indian Affairs in the Department of Interior] possesses final authority over most tribal actions as well as over many decisions made by Indians as individuals. BIA approval is required, for example, when a tribe enters into a contract, expends money, or amends its constitution. Although the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government.

Cohen & Mause, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1819-20 (1968) (citations omitted). *See, e.g.*, Moapa Band of Paiute Indians v. Department of Interior, 747 F.2d 563 (9th Cir. 1984) (upholding Secretary's decision to rescind tribal statute that would have permitted, as an economic development measure, houses of prostitution on tribal reservation).

The ultimate arrogance of political control is seen in attempts by the United States Congress to terminate the political existence of several Native nations. *See infra* note 38.

20. United States v. Wheeler, 435 U.S. 313, 322 (1978) (Native tribes, vested with sovereign powers, have "the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions."); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975) ("Intrinsic in this [tribal] sovereignty is the power of a tribe to create and administer a criminal justice system."). *See also*

Despite the fundamental sovereign nature of criminal justice administration, the United States Supreme Court ruled in 1978 that tribes have no jurisdiction to prosecute non-Natives committing offenses within reservation boundaries.[21] While that decision has been

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Powers of Indian Tribes, 55 I.D. 14 (1934), in I *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974* at 445, 471-76 [hereinafter cited as *Op. Sol.*]; Note, *Indians—Crimes by Indians out of Indian Country or Reservation—Jurisdiction of State to Arrest Indian on the Reservation*, 45 N.D. L. REV. 430, 436 (1969) [hereinafter cited as *Arrest on the Reservation*] (*quoting* Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 147 (1940)); Comment, *Tribal Control of Extradition from Reservations*, 10 NAT. RESOURCES J. 626, 628 (1970) [hereinafter cited as *Tribal Control of Extradition*].

The Supreme Court recognized early on that criminal jurisdiction is a *sine qua non* of tribal sovereignty, when it held that the district court of the Dakota Territory had no jurisdiction to try a Native for the murder of another Native on the Brule Sioux Reservation:

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.

Ex parte Crow Dog, 109 U.S. 556, 568 (1883).

21. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court fabricated and grafted onto Indian common law an ill-reasoned, invidious doctrine that tribal exercise of criminal jurisdiction over non-Natives was a power "*inconsistent with their status.*" *Id.* at 208 (emphasis in original). Justice Stewart's unanimous opinion in Wheeler v. United States, handed down fifteen days after *Oliphant*, dubbed the doctrine "implicit divestiture." 435 U.S. 313, 326 (1978).

The decision in *Oliphant* served to settle only the domestic law of "*inherent* [Indian criminal] jurisdiction to try and punish non-Indians," 435 U.S. at 212 (emphasis added), and did not abrogate any tribal criminal jurisdiction over non-Natives retained by treaty. *See, e.g.*, Treaty with the Delawares, Sept. 17, 1778, art. 4, 7 Stat. 13 (reserving tribal court jurisdiction over non-Native offenders if "a fair and impartial trial can be had by judges or juries of both parties" according to the laws and customs of both parties and natural justice). Many other early treaties, while not expressly reserving criminal jurisdiction in the tribes, waived federal protection for non-Indian trespassers onto Native lands and reserved to the tribes the power to punish the interlopers. *See, e.g.*, Treaty with the Cherokee, Nov. 28, 1785, art. 5, 7 Stat. 18, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 3, 9 (C.J. Kappler ed. 1904) [hereinafter cited as KAPPLER TREATIES] (non-Native settler trespassing on lands allotted to Choctaws "shall forfeit the protection of the United States and the Indians may punish him or not as they please"); Treaty with the Shawnee, Jan. 31, 1786, art. 7, 7 Stat. 26, *reprinted in* KAPPLER TREATIES at 17. These reservations of exclusivity and punishment largely have been mooted over time. Their application was restricted to the boundaries circumscribed by the specific treaty. The "punish . . . as they please" clause disappeared as a standard treaty provision by the mid-1790s. *See generally* KAPPLER TREATIES, *supra*.

Moreover, *Oliphant* left open the question whether the Court intended to divest tribes of their inherent criminal powers over all nonmembers or only over non-Natives. *See* Duro v. Reina, 821 F.2d 1358 (9th Cir. 1987), in which the court upheld the criminal jurisdiction of the Salt River Pima-Maricopa tribal court over a Torrez-Martinez defendant accused of discharging a firearm in the murder of a Gila River victim on the Salt River Reservation. Finding that *Oliphant* disposed only of inherent tribal jurisdiction to try and punish non-Natives, the court determined that the defendant, because of his close contacts with the Salt River Community, was an "Indian" subject to tribal court jurisdiction. *Id.* at 1363-64. This assertion of tribal court jurisdiction over nonmember Natives is not an isolated occurrence. *See, e.g., Reservation Special Magistrate, supra* note 16, at 38 (testimony of Robert Fasthorse, Chief Judge, Oglala Sioux Tribal Court) (Oglala Tribal Court asserts jurisdiction over Natives of other

widely criticized,[22] it remains United States domestic law that Native

federally recognized tribes). The complexities of nonmember versus non-Native tribal jurisdiction are discussed *infra* at note 77.

The Salt River Pima-Maricopa Community, whose criminal jurisdiction was upheld in *Duro*, previously had sought from Congress a grant of jurisdiction over misdemeanor violations of the tribal criminal code by non-members within the boundaries of the reservation. In the second session of the 99th Congress, Representative Udall introduced H.R. 4900, a bill to grant criminal misdemeanor jurisdiction to the Salt River Pima-Maricopa Indian Community. H.R. 4900 passed the House on Sept. 23, 1986 and was referred to the Senate Select Committee on Indian Affairs. Cong. Index (CCH) 35,090 (1985-86). At a Senate hearing held in July 1986 on S. 2564, a similar bill, the legislation received almost universal support—from the Salt River Community itself, the Department of Interior, the Arizona senators, the Governor and Attorney General of Arizona, and the mayors of Phoenix, Scottsdale, Tempe, and Mesa. *Administration of Justice within the Salt River Pima-Maricopa [SRPM] Indian Reservation: Hearing before the Sen. Select Subcomm. on Indian Affairs*, 99th Cong., 2d Sess. 21-55 (1986) [hereinafter cited as *Administration of Justice*]. The hearing highlighted the exceptional circumstances of the SRPM community warranting a possible return of jurisdiction over non-Natives: 80,000 travelers cross the reservation daily, and weekend traffic amounts to some 5000 to 6000 people tubing or boating on the river through the reservation. *Id.* at 8, 15. The Department of the Interior, in supporting the grant of full misdemeanor jurisdiction to the SRPM community, noted that it would consider the appropriateness of recommending similar jurisdiction for other reservations on a case-by-case basis based on five factors: an independent tribal judiciary of sufficient size to handle the misdemeanor caseload; comprehensive and equitable tribal misdemeanor statutes; a geographical location that encourages substantial tribal/non-tribal contact; the support of local and state governments; and a tribal fiscal ability to accommodate the cost of exercising misdemeanor jurisdiction over non-tribal members. *Id.* at 9 (statement of H. Elbert, Dep. Asst. Sec'y for Indian Affairs, Tribal Operations). Despite the widespread local, state, and federal support for the legislation, S. 2564 was not reported out of committee before the end of the 99th Congress. Cong. Index (CCH) 21,051 (1985-86). Some insight into the lack of success of the legislation may be gleaned from introductory remarks of Senator Melcher at later congressional hearings on related criminal jurisdiction issues. Although Sen. Melcher termed the Pima-Maricopa bill "very satisfactory and very worthwhile," he added: "[T]he precedent it would set might alarm a great number of non-Indians. . . . In the long run, it might cause Congress to overreact and place even more unworkable patterns of enforcement of justice for minor offenses, on Indian reservations." *Reservation Special Magistrate, supra* note 16, at 12 (remarks of Sen. Melcher). As of Jan. 1, 1988, no similar legislation had been introduced in the 100th Congress. Cong. Index (CCH) (1987-88).

22. The case unleashed a mammoth amount of critical academic commentary. *See, e.g.*, Barsh & Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 617 (1979) (decision characterized by "*gestalt* jurisprudence" and "exhibits an unusual propensity for the selective use of history, assuming conclusions, and even according greater weight to defeated bills than enacted law"); Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 268 (characterizing the case as "a critical anamnesis for United States' colonial legal theory"); Stetson, *Decriminalizing Tribal Codes: A Response to* Oliphant, 9 AM. INDIAN L. REV. 51, 53, 56 (1981) (Rehnquist's "reasoning was poorly founded, even irrational," and his "conclusions fly in the face of logic, precedent, and justice, apparently relying on the inevitable ensuing confusion to cover the tracks"); Note, Oliphant v. Suquamish Indian Tribe: *A Restriction of Tribal Sovereignty*, 15 WILLAMETTE L. REV. 127 (1978); Note, *Indian Law—Indian Tribes Have No Inherent Authority to Exercise Criminal Jurisdiction Over Non-Indians Violating Tribal Criminal Laws Within Reservation Boundaries*—Oliphant v. Suquamish Indian Tribe, 28 CATH. U.L. REV. 663 (1979); Note, Oliphant v. Suquamish Indian Tribe: *A Jurisdictional Quagmire*, 24 S.D. L. REV. 217 (1979); Note, *Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of* Oliphant, 7 AM. INDIAN L. REV. 291 (1979) [hereinafter cited as *Enforcement Problems*]; Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction Over Non-Indian Offenders*, 1979 WIS. L. REV. 537, 540 [hereinafter cited as *Tribal Courts Lack Jurisdiction*] (decision represents "a new interpretation of Indian law and is difficult to resolve with precedent"); Note, *The Legal Trail of Tears: Supreme Court Removal of Tribal Court*

tribes may not exercise criminal jurisdiction over non-Natives.[23] Despite this unwarranted judicial excision of tribal court jurisdiction, the authority of tribal police to detain non-Native offenders on the reservation and turn them over to the appropriate state or federal authorities remains unaffected.[24]

Jurisdiction Over Crimes By and Against Reservation Indians, 20 NEW ENG. L. REV. 247, 283 (1984-85) [hereinafter cited as *The Legal Trail of Tears*] (decision reflects an "intensive ethnocentrism" and "covertly racist attitude"). *See also* the commentary of Judge William C. Canby, Jr., Circuit Judge, United States Court of Appeals for the Ninth Circuit, *infra* note 110.

One of the more outspoken critics of the *Oliphant* decision has been Chief Judge Bowen of the Puyallup Tribal Court, who stated that arguments presented in his tribal court by the federal government, relying in large part on the reasoning of *Oliphant*,

> would be persuasive if this court accepted the legitimacy of the cited federal cases as a matter of tribal law. However, the federal cases relied on by the United States—holdings which present the potential of pernicious, cavernous effects on tribal sovereignty — are wrong from a tribal and international law perspective.

Satiacum v. Reagan, Case No. 81-1136 (Puy. Tr. Ct. Sept. 17, 1982), 10 Indian L. Rep. (Am. Indian Law. Training Program) 6009, 6010 (1983).

23. Five years after *Oliphant*, the Supreme Court unanimously upheld the right of a tribal government to regulate the on-reservation hunting and fishing activities of non-members. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). By denying tribal criminal jurisdiction over non-Natives, however, the *Oliphant* decision may seriously impair the ability of a tribe to enforce effectively its regulation of non-member hunters and fishers. As a consequence, tribes must depend on "foreign" mechanisms such as federal laws that make the unlicensed trespass for hunting or fishing on reservation trust lands and violations of tribal fish and game codes, federal criminal offenses rather than tribal criminal offenses. *See* 18 U.S.C. § 1165 (1982)(federal criminal trespass statute); 16 U.S.C. § 3372(a)(1) (1982)(Lacey Act).

> [A tribe's] recourse for violations of conditions of entry [for hunting and fishing] by non-members is limited to suspension or revocation of permits and licenses, eviction of persons violating the [tribal Conservation] Code from Indian-owned land and trust lands and referral of violators to federal authorities for prosecution under 18 U.S.C. § 1165.

White Earth Band of Chippewa Indians v. Alexander, 518 F. Supp. 527, 535 (D. Minn. 1981). The United States Commission on Civil Rights, however, has noted that federal authorities decline to prosecute the great majority of criminal offenses committed by non-Natives on the reservation. U.S. CIVIL RIGHTS COMM'N, INDIAN TRIBES — A CONTINUING QUEST FOR SURVIVAL 154-55 (1981).

The Navajo Nation has attempted to address these concerns through laws governing exclusion of non-Navajos. In 1978, the Nation amended its exclusion statute, in part as a response to the *Oliphant* decision:

> If the Navajo Nation may not try non-Indians (or possibly non-Navajos) who are alleged to have violated the criminal laws of the Navajo Nation (or who are alleged to have committed acts which would be criminal if committed by a Navajo), then it is appropriate to adopt a procedure for removal of such individuals from the Navajo Nation.

Preamble to Tribal Council Resolution CO-73-78, NAVAJO TRIB. CODE tit. 17, subch. 5 (Supp. 1984-85). One of the grounds for exclusion is when a non-member who is accused of conduct punishable under the laws of the Nation, declines to consent in writing to the criminal jurisdiction of the Navajo courts. NAVAJO TRIB. CODE tit. 17, § 1901(c)(1) (1977). The Navajo exclusion laws are separate from and in addition to the Navajo extradition statute, NAVAJO TRIB. CODE tit. 17, § 1951 (1977). *See infra* note 78. For discussion of a similar Menominee law authorizing banishment of members, *see infra* note 27.

24. Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976). Similarly, tribal police retain the power to investigate violations of state and federal law by non-Natives. Ortiz-Barraza v. United States, 512 F.2d 1176, 1181 (9th Cir. 1975).

These powers arguably were unaffected by *Oliphant*. *See* State v. Ryder, 98 N.M. 453, 649 P.2d

As an inherent attribute of self-government, tribes exercise criminal jurisdiction over their members.[25] Even this sovereign power, however, has been circumscribed in domestic law, both as to territory and as to type of crime. In the first instance, tribal criminal jurisdiction generally extends only within the confines of reservation boundaries.[26] Second, since United States law has curtailed tribal court powers to a maximum sentence for any one offense of imprisonment

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756 (N.M. Ct. App. 1981), *aff'd on other grounds*, 98 N.M. 316, 648 P.2d 774 (1982), in which a BIA police officer stopped a driver for a traffic offense, realized the driver was a non-Native, and detained him for approximately ten minutes until another BIA officer, cross-commissioned as a state peace officer, could arrive and issue the driver a state citation. The New Mexico Court of Appeals held that:

> *Oliphant* does not prohibit an arrest of non-Indians. Indeed, *Oliphant* tacitly acknowledges that such an arrest may be made, so long as the Indian authorities "promptly deliver up any non-Indian offender, rather than try and punish him themselves."
>
> . . .
>
> To hold that an Indian police officer may stop offenders but upon determining they are non-Indians must let them go, would be to subvert a substantial function of Indian police authorities and produce a ludicrous state of affairs which would permit non-Indians to act unlawfully, with impunity, on Indian lands.

Ryder, 98 N.M. at 455-56, 649 P.2d at 758-59 (quoting *Oliphant*, 435 U.S. at 208). *Accord* Op. Sol. Dep't Interior, Jurisdiction over Offenses Committed by Non-Indians in Indian Country (1978), *reprinted in* 5 Indian L. Rep. (Am. Indian Law. Training Program) H-10 (1978) (reaffirming, post-*Oliphant*, the right of tribal police to arrest non-Natives and deliver them up to federal authorities). *But see* State v. Burrola, 137 Ariz. 181, 669 P.2d 614 (Ariz. Ct. App. 1983) (leaving open the question of illegal arrest of non-Native by tribal police for offense of possession of prohibited weapon). *See also Enforcement Problems*, *supra* note 22, at 306-08; *The Legal Trail of Tears*, *supra* note 22, at 275; *Tribal Courts Lack Jurisdiction*, *supra* note 22, at 567 n.161; Comment, *Criminal Jurisdiction in Indian Country*, 6 G.M.U. L. REV. 225, 242 (1983) [hereinafter cited as *Criminal Jurisdiction*].

On appeal, *Ryder* was affirmed on other grounds. 98 N.M. 316, 648 P.2d 774 (1982). The New Mexico Supreme Court did not find it necessary to decide whether the officer was empowered under *Oliphant* to arrest a non-Native. The court held, rather, that the arresting officer was a BIA police officer authorized to enforce federal law on the reservation. Since the federal Assimilative Crimes Act, *see infra* note 53, incorporated state substantive criminal law in this case (traffic offense), the officer could have issued the defendant a federal traffic citation. 98 N.M. at 318, 648 P.2d at 776. Thus, when the officer stopped the defendant, he was acting as a federal officer enforcing federal law, and not as a tribal officer exercising criminal jurisdiction over a non-Native. Because the initial stop was valid, detaining the driver for no more than ten minutes under the mistaken impression that only a cross-commissioned officer could issue a citation was reasonable. *Id.* at 319, 648 P.2d at 777. Whether the lower court's ruling would stand in the case of a tribal officer not commissioned as a BIA police officer is not clear, although it is noteworthy that the supreme court did not dispute the lower court's reading of *Oliphant*.

25. "[A]n Indian tribe's power to punish tribal offenders is part of its own retained sovereignty. . . ." United States v. Wheeler, 435 U.S. 313, 328 (1978); United States v. Jackson, 600 F.2d 1283, 1285 (9th Cir. 1979). *See generally*, Clinton, *supra* note 14, at 557-64. *See also Criminal Jurisdiction*, *supra* note 24.

26. Clinton, *supra* note 14, at 557 n.281; DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). As noted previously, however, tribes may have off-reservation jurisdiction over treaty hunting and fishing violations committed by tribal members. *See supra* note 15. Generally this will require that the tribe provide for such jurisdiction by tribal code. *See* State v. Smith, 51 Or. App. 223, 229-230, 625 P.2d 1321, 1326 (1981) (notwithstanding established Yakima right to regulate tribal fishing at all usual and accustomed off-reservation sites, state court had jurisdiction over criminal offenses not expressly provided for by tribal regulations).

This territorial definition of tribal sovereign jurisdiction comports with international legal norms.

for one year or a fine of 5000 dollars, or both,[27] tribal criminal juris-

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A general principle of international law presumes that a state can require adherence to its laws only from persons permanently or transiently within its territory.

> It is a general rule of criminal law that the crime must be committed within the territorial jurisdiction of the sovereignty seeking to try the offense in order to give the sovereign jurisdiction. . . . "The criminal jurisdiction of the United States — that is, its jurisdiction to try parties for offenses committed against its laws — may in some instances extend to its citizens everywhere. . . . But in all such cases it will be found that the law of Congress indicates clearly the extraterritorial character of the act. . . . Except in cases like these, the criminal jurisdiction of the United States is necessarily limited to their own territory. . . ."

Yenkichi Ito v. United States, 64 F.2d 73, 75 (9th Cir. 1933) (*quoting* United States v. Smiley, 27 F. Cas. 1132, 1134 (N.D. Cal. 1864) (No. 16,317)) (court had no jurisdiction to try and convict defendant for bringing illegal aliens into United States where seizure and arrest took place outside the territorial limits of the United States "on the high seas some forty miles off the coast of Southern California," 64 F.2d at 74).

Section 38 of the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) provides: "Rules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute." Extraterritorial conduct deemed to have "an effect within the territory of the United States" is very limited and includes, generally, only such acts as threaten the security of the United States and the operation of its governmental functions, particularly "the counterfeiting of the state's seals and currency and the falsification of its official documents." *Id.* at § 33. Although not extant as a separate sectional heading in the revised RESTATEMENT presently under redraft, the concept of territorial circumscription of domestic law, with the same few exceptions, is present in the newer drafts. *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 comment f (Tent. Draft No. 6, 1985) ("Legislative intent to subject conduct outside the state's territory to its criminal law should not be found except on the basis of an express statement or a clear implication"). *See also* 18 U.S.C. §§ 1651-1659 (1982)(extending U.S. jurisdiction beyond territorial waters and onto high seas for acts of piracy and privateering against U.S. ships); 18 U.S.C. § 1203 (Supp. IV 1987) (extending U.S. jurisdiction beyond territorial borders in cases of hostage-taking where the abductors attempt to compel the United States "to do or abstain from doing any act"). This commonly is called the "protection principle" of international law. A "Reporter's Note" to § 33 of the RESTATEMENT (SECOND) states: "The preference of the common law for the territorial basis of jurisdiction has led the United States . . . to make little use of the protective principle." For a thorough treatment of international and United States extraterritorial criminal jurisdiction, *see* the extended discussion presented by C.L. Blakesley in 2 INTERNATIONAL CRIMINAL LAW 3-53 (M.C. Bassiouni ed. 1986).

27. 25 U.S.C. § 1302(7) (Supp. IV 1987) provides that:

> No Indian tribe in exercising powers of self-government shall —
>
> . . .
>
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both.

Prior to 1986, tribes were even more circumscribed: to sanctions no greater than imprisonment for six months or a fine of $500, or both, for any one offense. Tribal sentencing powers were expanded as part of the Anti-Drug Abuse Act of 1986, in order "[t]o enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics on Indian reservations." Pub. L. No. 99-570, § 4217, 100 Stat. 3207-146 (1986). Despite the narrow focus of the bill enlarging Native sentencing authority, the expanded powers are not limited to narcotics offenses.

This intrusive limitation on tribal courts' sentencing powers need not impair the meting out of harsher punishment where convictions are obtained on multiple charges. *See, e.g.*, Ramos v. Pyramid Tribal Court, 621 F. Supp. 967, 970 (D. Nev. 1985), where the defendant was sentenced by the Pyramid Lake Tribal Court to two years imprisonment following conviction on seven separate offenses. No one sentence violated the pre-1986 prohibition against sentences greater than six months. The Nevada

diction generally has been limited to charges of lesser crimes.[28] More-

district court refused to find that the imposition of consecutive sentences violated 25 U.S.C. § 1302(7) or *per se* constituted cruel and unusual punishment.

Neither does the federal statutory limitation on the tribal court sentencing power affect what is perhaps the "ultimate" inherent sanctioning power of the tribal government to control serious offenses within its homeland. The Menominee Tribal Legislature, in 1987, unanimously voted to empower that Nation's tribal court to banish from the reservation members who violate the revised tribal controlled substances statute. Menominee Nation, Menominee Tribal Legislature, Amendment to Ordinance 80-17, § 5 (April 16, 1987). The Tribal Court was given the discretion to order banishment on the first offense, but "in the case of 2nd and succeeding offenses, [a fine of $1000 and banishment from the Menominee Indian Reservation for a period not less than one year nor more than 5 years] *shall* be imposed by the Court." *Id.* at § 5(1)(e) (emphasis provided). For a discussion of the Navajo Nation's law authorizing exclusion of nonmembers under certain circumstances, *see supra* note 23.

28. Clinton, *supra* note 14, at 557 n.281. It remains unsettled, however, whether tribal court authority must be limited to lesser offenses. *See* United States v. John, 437 U.S. 634, 651 n.21 (1978) ("We do not consider here the more disputed question whether [the Major Crimes Act] also was intended to pre-empt tribal jurisdiction."); Clinton, *supra*, at 559 (describing tribal court restriction to lesser crimes as "open to substantial question," noting that whereas Congress has limited the punishment that tribal courts may impose, it has not specifically prevented tribes from prosecuting serious offenses).

The Major Crimes Act, as amended, *see infra* note 53 and accompanying text, provides that for any of the enumerated felony offenses committed within "Indian country" by a Native, the defendant "shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." On its face the Act does not deprive tribal courts of concurrent jurisdiction over the enumerated crimes. *See* United States v. Cowboy, 694 F.2d 1228, 1235 (10th Cir. 1982) (Major Crimes Act only "extend[s] federal . . . jurisdiction to cover [enumerated] offenses" and does not suggest divestiture of inherent tribal jurisdiction). Nor does the face of the Act require that federal courts exercise exclusive jurisdiction over such crimes. *See* Goodson v. United States, 7 Okla. 117, 54 P. 423 (1898)(not required that the United States exercise sole and exclusive jurisdiction over Native reservation or its inhabitants in order that United States may have jurisdiction to try punishable offenses committed on such reservations). Moreover, the Supreme Court expressly has noted the narrow scope of the Act as a "carefully limited intrusion . . . into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian Land." United States v. Antelope, 430 U.S. 641, 643 n.1 (1977); United States v. Center, 750 F.2d 724, 725 (8th Cir. 1984). *See* United States v. Torres, 733 F.2d 449, 459 n.12 (7th Cir. 1984) (noting "the tribal court may have concurrent jurisdiction if an Indian commits one of the fourteen enumerated crimes of [the Major Crimes Act] against another Indian"); United States v. Broncheau, 597 F.2d 1260, 1265 (9th Cir.), *cert. denied*, 444 U.S. 859 (1979) (noting without deciding that "[t]ribal courts may have concurrent jurisdiction" with federal courts under the Major Crimes Act). *Cf.* Duro v Reina, 821 F.2d 1358, 1364 n.5 (9th Cir. 1987) ("It is not clear whether federal jurisdiction preempts tribal jurisdiction" under the Major Crimes Act.).

Some courts of appeals have interpreted the Act as positing exclusive jurisdiction in the federal courts. *See, e.g.*, Felicia v. United States, 495 F.2d 353, 355 (8th Cir. 1974) (Native defendant convicted of assault with intent to do great bodily harm upon another Native was "within the exclusive jurisdiction of the United States"); Sam v. United States, 385 F.2d 213, 214 (10th Cir. 1967)(prosecution of Navajo for rape of a Navajo woman within Indian country was beyond jurisdiction of Navajo tribal court). *Accord* United States v. Blue, 722 F.2d 383, 384 (8th Cir. 1983). Indeed, Justice Rehnquist in *Oliphant* hinted, without deciding, that federal jurisdiction may be exclusive under the Major Crimes Act. "If tribal courts may try non-Indians, however, as respondents contend, those tribal courts are free to try non-Indians even for such major offenses as Congress may well have given the federal courts *exclusive* jurisdiction to try members of their own tribe committing the exact same offenses." 435 U.S. 191, 203 (1978) (emphasis in original). But the legislative history of the Act appears inapposite. Express provision for federal jurisdiction, "and not otherwise," in an early version of the Act was deleted from the final bill at the urging of one Congressman. "I think it is sufficient that the

over, tribal prosecution of Natives for crimes consistent with the diminished tribal sentencing powers may subject the defendants to a second state or federal prosecution for the same act, charged as a more serious crime under applicable state or federal law.[29]

The exercise of tribal criminal jurisdiction is dependent upon the existence of a tribal court or other mechanism for criminal dispute resolution.[30] In the absence of an agreement permitting law enforce-

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courts of the United States should have concurrent jurisdiction in these cases." 16 CONG. REC. 934 (1885) (remarks of Mr. Budd). *See Oliphant*, 435 U.S. at 203 n.14. The Court in *Oliphant* observed that the issue was "mooted for all practical purposes" by the congressional limitation on tribal court penalty and sentencing powers. *Id.*

29. Subjecting a defendant to both a tribal and a state or federal prosecution for the same crime does not implicate double jeopardy. United States v. Wheeler, 435 U.S. 313 (1978); United States v. Strong, 778 F.2d 1393, 1396 (9th Cir. 1985); United States v. Walking Crow, 560 F.2d 386 (8th Cir. 1977). The Navajo defendant in *Wheeler* pled guilty in the Navajo Tribal Court to two offenses reserved to tribal jurisdiction: disorderly conduct and contributing to the delinquency of a minor. One year later, he was indicted in federal court for statutory rape arising from the same incident. Wheeler argued double jeopardy; the government argued dual sovereignty. The Supreme Court held that the defendant was not subjected to double jeopardy because the prosecutions brought by the tribe and the federal government originated in separate sovereigns. 435 U.S. at 332.

In *Walking Crow*, a Rosebud Sioux pled guilty in tribal court to the misdemeanor of simple theft and one month later was indicted in federal court for felony robbery under the Major Crimes Act. On appeal the Eighth Circuit refused to set aside the subsequent federal conviction, in part because of the deleterious implications such an action could have on inherent tribal jurisdiction:

> From a practical standpoint, the result that the appellant would have us reach might mean that the felony jurisdiction conferred on the federal courts by [the Major Crimes Act] could in instances be frustrated by relatively minor prosecutions in the tribal courts. Such a situation would be undesirable and might lead to still further congressional encroachment on the jurisdiction of these courts.

560 F.2d at 389. *See also* Ramos v. Pyramid Tribal Court, 621 F. Supp. 967, 969-70 (D. Nev. 1985)(conviction of Paiute in state court was not double jeopardy bar to prosecution in tribal court for similar violations arising out of same incident); Burns, *Criminal Jurisdiction: Double Jeopardy in Indian Country*, 6 AM. INDIAN L. REV. 395 (1978); Comment, *Tribal Courts, Double Jeopardy and the Dual Sovereignty Doctrine*, 13 GONZ. L. REV. 467 (1978).

30. One prominent observer of domestic Native law has termed tribal courts "often the single most important vestige of tribal sovereignty on the reservations." Clinton, *supra* note 14, at 557. As United States courts have recognized in the context of tribal law enforcement, the power that tribes retain to administer justice is only meaningful in conjunction with the power to enforce. Ortiz-Barraza v. United States, 512 F.2d 1176, 1180 (9th Cir. 1975). *See also* Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 598 (9th Cir. 1983) ("Civil jurisdiction to enforce [tribal repossession statute] is a necessary exercise of tribal self-government and territorial management"); Settler v. Lameer, 507 F.2d 231, 239 (9th Cir. 1974) ("regulatory authority retained by the Yakima Nation with respect to the exercise of [member] off-reservation fishing rights can be truly effective only through off-reservation enforcement powers [of arrest and seizure] at the 'usual and accustomed' fishing places"); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 14 Indian L. Rep. (Am. Indian Law. Training Program) 3135, 3138 (W.D. Wis. 1987) ("the power to regulate necessarily includes the power to enforce the regulations against tribal members by arrest or other enforcement mechanisms").

In 1898, the Curtis Act abolished "all tribal courts in Indian Territory," divesting Native tribes in Oklahoma of the right to establish courts with general civil and criminal jurisdiction over their members. Act of June 28, 1898, ch. 517, 30 Stat. 495. In affirming the effect of the Curtis Act on the Creek Nation, one court recently noted:

> There is . . . no question that the abolition of their traditional courts has interfered with the

ment officers of another sovereign to arrest for violations of tribal law and cite the violator into tribal court,[31] tribal jurisdiction also is dependent as a practical matter upon the establishment of a tribal police force.[32] While Native police forces and tribal courts are moderately widespread among Native American reservations,[33] the existence of neither can be taken for granted, especially on smaller reservations."[34]

> ability of the Creeks to exercise the rights of self-government which were consistently promised to them by the federal government. . . . Furthermore, recent developments in the United States District Court of Oklahoma suggest that the Muscogees may find it difficult to enforce law in their territory unless they can establish courts with general civil and criminal jurisdiction.

Muscogee (Creek) Nation v. Hodel, 670 F. Supp. 434, 444 (D.D.C. 1987). Nonetheless, the court stated, "it is to Congress, the body that abolished the Muscogee courts, and not to the courts, that [the tribe] must look for a remedy." *Id.* at 445.

31. Cross-deputization agreements, whether unilateral or bilateral, apparently are relatively common. *See* COMMISSION ON STATE-TRIBAL RELATIONS, STATE TRIBAL AGREEMENTS: A COMPREHENSIVE STUDY 11-20 (1981), for specific examples of state-tribal arrest and detention agreements. *See also* Op. Att'y Gen. Wis. 93-79 (1979) (unpublished formal opinion) (positing that Menominee Tribe and Menominee County may engage in cross-deputization as long as tribal police meet statutory and constitutional requirements for appointment as deputy sheriffs). Traditional cross-deputization agreements have been criticized by commentators, however, as too dependent upon political good-will and as likely to lead to increasing state jurisdictional encroachments upon the reservation. Johnson, *Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of* Oliphant, 7 AM. INDIAN L. REV. 291, 308-09 (1979); Oliviero & Skibine, *The Supreme Court Decision that Jolted Tribal Jurisdiction*, 6(5) AM. INDIAN J. 2, 7-8, 10 (1980); Skibine, Oliviero & Fagan, *Potential Solutions to Jurisdictional Problems on Reservations*, 6(6) AM. INDIAN J. 9, 12 (1980). More permanent state-tribal agreements or commissions have been proposed as alternatives. Johnson, *supra*, at 309-15; Skibine, Oliviero & Fagan, *supra*, at 12. Sample cross-deputization and mutual aid agreements are found in Skibine, Oliviero & Fagan, *supra*, at 12-13.

32. The inherent power of Indian tribes to maintain a police force "to aid in the enforcement of tribal law in the exercise of tribal power" has been recognized expressly. Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975). *See also* Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976). As with establishment of a tribal court system, sovereign tribal authority to administer justice on the reservation is dependent upon enforcement powers for its effectiveness. *See supra* note 30.

33. A recent series of articles highly critical of aspects of the tribal court system states that there currently are 147 operative reservation courts serving the nation's 487 tribal reservations. Minneapolis Star and Tribune, Jan. 5, 1986, at 1A, col. 5. A footnote to Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196 n.7 (1978), noted that of the 127 reservation courts in existence in 1978, 71 were tribal courts; 30 were federal "CFR Courts," successors to the Courts of Indian Offenses; 16 were traditional courts of the New Mexico pueblos; and ten were conservation courts. A 1983 tabulation reflected 117 tribal courts and 23 Courts of Indian Offenses. *See* 9 Indian Courts Newsletter 7 (1983). For an explanation of the types of reservation court systems, *see* Clinton, *supra* note 14, at 553-57. Reservation courts of all types handle annually an estimated 160,000 criminal, civil, and juvenile cases. Minneapolis Star and Tribune, *supra*, at 12A, col.1.

34. Professor Clinton has noted that no Indian police are present on many smaller reservations. Clinton, *supra* note 14, at 575.

An example of a reservation that only recently established a court system and police force is the Lac du Flambeau Band of Lake Superior Chippewa in Wisconsin, which established a tribal court in September 1983, and hired its first police officer in October 1984. Reply Brief of State of Wisconsin, at 5 (prepared for County of Vilas v. Chapman, 122 Wis.2d 211, 361 N.W.2d 699 (1985)). The Lac du Flambeau Reservation of 44,500 acres has an estimated Native population of 1092 persons. CONFED-

Yet, even in the presence of an established tribal criminal justice system, a tribe's criminal jurisdiction over its members within reservation territory has been held not to be exclusive. Either the state or the federal government will have at least partial concurrent criminal jurisdiction. Which of these two sovereigns will exercise concurrent jurisdiction, and over which criminal offenses, depends largely upon the application of Public Law 280 to the particular state.

2. State and Federal Jurisdiction

Certain aspects of non-tribal criminal jurisdiction within reservation borders are consistent regardless whether the reservation is subject to Public Law 280. One constant is that either the state or the federal government, or both, but never the tribe, will have criminal jurisdiction over non-Natives. All criminal jurisdiction over non-Natives presently is vested in non-Native sovereigns.

As discussed previously, the Supreme Court in 1978 divested tribal governments of their inherent power "to try and punish" non-Natives for offenses committed against Native victims.[35] In addition, the

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ERATION OF AMERICAN INDIANS, INDIAN RESERVATIONS: A STATE AND FEDERAL HANDBOOK 297-98 (1986)(citing 1980 census data).

It is even more unlikely that significantly smaller tribes, such as the Paiute of Pyramid Lake (est. pop. 720 on 475,100 acres), the Papago of Ak-Chin (est. pop. 230 on 21,800 acres), the Potowatomi in Forest County, Wisconsin (est. pop. 220 on 11,700 acres), or the Seminole of Big Cypress, Florida (est. pop. 315 on 42,700 acres), can afford the fiscal encumbrances of formal tribal courts and Native police forces. The situation is far less encouraging for many of the very small tribes and mission bands of Natives in California, such as the Santa Rosa Band (est. pop. 12 on 11,100 acres), Cabazon Band (est. pop. 8 on 1700 acres), and Chemehuevi Tribe (est. pop. 32 on 28,200 acres). Nevertheless, where there is enough interest or incentive, and a sufficient economic base, there is a way. *See* references to Puyallup (est. pop. 856 on 33 acres) Tribal Court, *supra* note 22, and to the Suquamish (est. pop. 148 on 2700 acres) tribal police force and tribal court, at the heart of the controversy in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). (All population and acreage tabulations taken from INDIAN RESERVATIONS, *supra*.)

Thirty-five percent of America's 278 federally-recognized reservations and 487 Alaskan native villages have fewer than 100 inhabitants. Almost three-fourths have fewer than 500 residents. PRESIDENTIAL COMM'N ON INDIAN RESERVATION ECONOMIES, REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES 83 (1984)(citing 1980 census figures).

35. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), discussed *supra* notes 21 and 22 and accompanying text.

Popular scholarly and judicial sentiment appears to hold that Native governments were divested of their jurisdiction to try crimes between non-Natives by the *McBratney* line of cases, discussed *infra* at notes 36 and 37 and accompanying text. *See, e.g.*, United States v. Antelope, 430 U.S. 641, 643 n.2 (1977) ("Not all crimes committed within Indian country are subject to federal or tribal jurisdiction, however. Under [*McBratney*], a non-Indian charged with committing crimes against other non-Indians in Indian country is subject to prosecution under state law."). The *McBratney* line of cases addressed solely the issue of federal versus state court jurisdiction and did not implicate the issue of concurrent tribal court jurisdiction. This issue, in fact, never has been squarely before the Court. Even if tribal jurisdiction over crimes between non-Natives survived *McBratney*, however, the *Oliphant* divestiture of tribal jurisdiction over crimes by non-Natives against Natives likely is broad enough to encompass the loss of all tribal jurisdiction over non-Native defendants, regardless of the status of the victim.

McBratney rule has allotted to the states jurisdiction over all crimes committed by one non-Native against another non-Native.[36] In a series of cases, the United States Supreme Court created a judicial exception to federal jurisdiction, finding that non-federal crimes on Native lands involving only non-Natives were exclusively within a state's jurisdiction to prosecute.[37]

a. Public Law 280 Reservations

In 1953, as part of the termination era and the assimilationist policy then in vogue in federal Indian affairs,[38] Congress enacted Public

36. United States v. McBratney, 104 U.S. 621 (1881). The question in *McBratney* was whether the federal district court had jurisdiction to try a non-Native for the murder of another non-Native committed on the Ute Reservation.

> The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever. . .has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remain in force. But that treaty contains no stipulation for the punishment of offenses committed by white men against white men.

Id. at 624. The Court's reliance on the equal footing doctrine is a perplexing conclusion at odds with then-existing precedent. The original states had not been found previously to have criminal jurisdiction over non-Natives committing offenses in Indian country. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) ("The Cherokee nation, then, is a distinct community, occupying its own territory. . .in which the laws of Georgia [an original state] can have no force."). *But see* New York ex rel. Ray v. Martin, 326 U.S. 496 (1946), extending the *McBratney* rule to the original state of New York. *See infra* note 37.

Beyond this breach of its own precedent, the Court in *McBratney* found for state jurisdiction despite the existence of an earlier version of the General Crimes Act (*see infra* note 53) that provided for federal jurisdiction in Indian country with a few exceptions, all of which deferred to tribal jurisdiction. In fact, the Court first noted and then ignored the mandate of this statute, focusing instead solely upon interpretations of state enabling acts. *See* Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 977-81 (1975). The Supreme Court later attempted a gloss on this legislative-judicial schism by finding that *McBratney* and its progeny implicitly created an exception to the General Crimes Act. United States v. Antelope, 430 U.S. 641, 644 n.4 (1977).

For a more extensive explanation of the *McBratney* rule, its evolution, and its application, *see* Clinton, *supra* note 14, at 524-26; Indian Civil Rights Task Force, *Development of Tripartite Jurisdiction in Indian Country*, 22 U. KAN. L. REV. 351, 366-73 (1974).

37. *See, e.g.*, Draper v. United States, 164 U.S. 240, 247 (1896) ("in reserving to the United States jurisdiction and control over Indian lands it was not intended to deprive [Montana] of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians"); New York ex rel. Ray v. Martin, 326 U.S. 496, 500 (1946) (as "to crimes between whites and whites which do not affect Indians, the *McBratney* line of decisions stands for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes"). The holding in *McBratney* was not so explicit, but has been read to imply state jurisdiction. *McBratney* itself held only that the federal government did not have jurisdiction in cases involving crimes committed by non-Natives against non-Natives on reservation lands.

38. Termination was the primary federal Indian policy from the early 1950s until the mid-1960s. Implementation of the policy took multiple forms. Public Law 280, *see infra* note 39, enacted in 1953,

Law 280.[39] The Act conveyed initially to five, and later to six, states

ushered in the termination era by giving the states power to assume both criminal and civil jurisdiction over all reservations within their borders. Liquidation of specific tribes as federal legal entities followed in short order. Beginning in 1954, fourteen termination acts were passed over the next eight years, affecting more than 11,500 Natives and 1.5 million acres of Native lands. Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1187 (1983) [hereinafter cited as *Termination Policy*]. Many of these acts emphasized in their text only the termination of federal land supervision and federal services to the tribes. In substantive effect, however, the acts liquidated the home-rule governments of the affected tribes, made trust land taxable by states, and forced the sale, in some instances, of enormous amounts of land.

Three restoration acts subsequently were passed in the 1970s and three more in the 1980s, reestablishing some 68 of the 110 tribes and bands previously terminated. The most recent re-recognition act is the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987), which restored the federal trust relationship and reestablished the tribes' reservations "without regard to whether legal title to such lands is held in trust by the Secretary." *Id.* at §§ 103, 105, 203, 206. Another recently restored tribe did not fare as well. *See* the Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (1986) (codified at 25 U.S.C. § 566 *et seq.* (Supp. IV 1987)). While the Act restored the Klamath's lost federal tribal status, it did not restore the Klamath trust lands. Approximately 2500 Natives and almost 1,100,000 acres in five states remain unrestored to federal status. *Termination Policy, supra*, at 1187.

The effect of termination was devastating, not only for the tribes terminated but for the entire Native American community. A Wall Street Journal article, discussing the shattered self-identity of one terminated tribe, noted:

> [Termination] was disastrous because Washington did not understand that it is virtually impossible to successfully impose alien values on people with vastly different traditions and culture. . . . Congress has too often failed to take into account the very values and traditions that distinguish effective reform from ineffective intrusion. The short-lived Menominee [termination] experiment will stand as a conspicuous monument to this lack of understanding.

Wall Street Journal, Jan. 7, 1974, at 10, col. 1. *See also* O. LA FARGE, TERMINATION OF FEDERAL SUPERVISION: DISINTEGRATION AND THE AMERICAN INDIANS (1966); A. DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 349 (1970) ("termination was the most concerted drive against Indian property and Indian survival since the removals following the acts of 1830 and the liquidation of tribes and reservations following 1887"). For a chronicle of the Menominee efforts to regain their federal status, *see* Herzberg, *The Menominee Indians: Termination to Restoration: Part 1*, 6 AM. INDIAN L. REV. 143 (1978). A comprehensive survey of the termination movement is presented in Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

An excellent overview of the historical development of federal Indian policy through legislative and executive actions is presented in F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47-206 (R. Strickland & C.F. Wilkinson eds. 1982) [hereinafter HANDBOOK OF FEDERAL INDIAN LAW]; *see also* TYLER, A HISTORY OF INDIAN POLICY (1973). For detailed treatments surveying the spectrum of U.S.-Native American affairs, *see* TYLER, *supra*; W. WASHBURN THE INDIAN IN AMERICA (1975). The most comprehensive historical tract generally is acknowledged to be F. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984). The treatment most sensitive and compassionate to the Native American viewpoint is DEBO, *supra*.

39. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588. For a capsule history of Public Law 280, *see Criminal Jurisdiction, supra* note 24, at 234-38. The major tract on the subject is considered to be Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

The prevalent mood at the time of the enactment of Pub. L. 280 was in favor of a rapid termination of federal involvement in Native affairs. *See supra* note 38. On July 1, 1952, the House passed a resolution directing the House Committee on Internal and Insular Affairs to conduct a detailed investigation to determine the ability of Native tribes to manage their own affairs without federal supervision. H. R. 706, 82d Cong., 2d Sess., 98 CONG. REC. 8782 (1952). Congressional policy first was announced

both civil and criminal jurisdiction over Native reservations within the states' borders,[40] and contained enabling provisions for other states to assume the same jurisdiction.[41] Public Law 280 originally contained

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formally in H.R. Con. Res. 108, approved on July 27, 1953, the same day that Pub. L. 280 was passed by the House. 99 CONG. REC. 9968 (1953). That resolution declared it to be the policy of the U.S. government to make Natives, as rapidly as possible, "subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States and to grant them all of the rights and prerogatives pertaining to American citizenship." H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953). After 35 years of legal limbo, America's Native nations are on the verge of witnessing a long-awaited recession of H.R. 108. *See* H. Res. 425, 100th Cong., 2d Sess., 134 CONG. REC. H1707, H1792-93 (daily ed. April 19, 1988) ("Congress hereby repudiates and rejects House Concurrent Resolution 108 and any policy of unilateral termination of Federal relations with any Indian nation.").

While the language of H.R. 108 ostensibly presaged the termination policy that was to dominate Indian policy during the remainder of the decade, the Supreme Court has attempted to cast Pub.L. 280 solely as an assimilationist statute.

> In *Bryan v. Itasca County*, . . . the Court emphasized that Pub.L. 280 was not a termination measure and should not be construed as such. . . . The parties agree that Pub.L. 280 reflected an assimilationist philosophy. That Congress intended to facilitate assimilation when it authorized a transfer of jurisdiction from the Federal Government to the States does not necessarily mean, however, that it intended in Pub.L. 280 to terminate tribal self-government.

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 488-89 n.32 (1979), *reh'g denied*, 440 U.S. 940 (1979) (citation omitted). *See also* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 106 S. Ct. 2305, 2314 (1986) (Pub. L. 280 does not "represent an abandonment of the federal interest in guarding Indian self-governance"). Nevertheless, by granting jurisdiction to several states without the consent of the affected Native nations, Congress blatantly ignored fundamental concepts of Native American sovereignty and in several cases also ignored reserved treaty rights. *See Yakima*, 439 U.S. at 478 n.22 (spurning as "tendentious" the tribe's assertion that its treaty-reserved right to self-government could not be abrogated by implication and was not abrogated expressly by enactment of Pub. L. 280. "The intent to abrogate inconsistent treaty rights is clear enough from the express terms of Pub. L. 280."). Professor Goldberg has noted that Pub. L. 280 was enacted, at least in part, because "assimilation [was] cheaper for the federal government and preferred by states that dislike[d] the presence of an Indian sovereignty within their borders . . . ." Goldberg, *supra*, at 536.

40. The civil jurisdiction provision is codified at 28 U.S.C. § 1360 (1982), the criminal provision at 18 U.S.C. § 1162 (1982).

The initial mandatory states were California, Minnesota, Nebraska, Oregon, and Wisconsin; Alaska was added in 1958 by the enactment of Pub. L. No. 85-615, 72 Stat. 545 (1958). Some Native reservations, such as the Red Lake Reservation in Minnesota and the Warm Springs Reservation in Oregon, were not included in the original grant of jurisdiction in Public Law 280. 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a).

41. States without disclaimer clauses in their constitutions were authorized to enact enabling legislation to assume jurisdiction over Indian reservations. Pub. L. 280, § 7 (repealed 1968). Two states assumed criminal jurisdiction under this provision: Florida and Nevada. *See* Goldberg, *supra* note 39, at 567.

States with constitutional disclaimers of jurisdiction over Indian lands were authorized to "amend, where necessary, their State constitution or existing statutes . . . to remove any legal impediment to the assumption of civil or criminal jurisdiction" under Public Law 280. Pub. L. 280, § 6 (codified at 25 U.S.C. § 1324 (1982)). While the literature and the case law, apparently in reliance on H.R. REP. NO. 848, 83rd Cong., 1st Sess. and S. REP. NO. 699, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS 2409-14, frequently note that the constitutions of eight states contain express disclaimers of jurisdiction over Native lands, *see, e.g.*, Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 491 n.36 (1979), in actuality there originally were ten states

no provision for tribal consent to state assumption of jurisdiction, and tribal indignation and rancor with this aspect of the law prompted

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with such jurisdictional impediments in their constitutions: Arizona (art. 20, § 4); Idaho (art. 21, § 19); Montana (art. 1); New Mexico (art. 21, § 2); North Dakota (art. 13, § 1); Oklahoma (art. 1, § 3); South Dakota (art. 22, § 2); Utah (art. 3, § 2); Washington (art. 26, § 2); and Wyoming (art. 21, § 26). Alaska also has a disclaimer, albeit a slightly different one, in its constitution; but that constitutional proviso is of no moment since Congress, in 1958, mandated Pub.L. 280 jurisdiction in that state. *See supra* note 40.

The disclaimer clauses of the ten states generally declared that the states "forever disclaim all right and title" to Indian lands and that Indian lands within the state shall remain under the "absolute jurisdiction and control of the congress of the United States." *See, e.g.*, Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 480 & n.24 (1979). The "absolute" jurisdiction and control typically retained by the United States by such disclaimers, however, means only "undiminished, not exclusive" control. Organized Village of Kake v. Egan, 369 U.S. 60, 71 (1962).

Several of the original ten disclaimer states have taken steps to assume jurisdiction pursuant to Pub. L. 280. Because Pub. L. 280 does not prescribe the manner in which disclaimer states are to modify their organic legislation, the question arose whether legislative action alone would suffice to repeal a constitutional disclaimer of jurisdiction over reservations. In response to a challenge by the Yakima Nation to Washington's statutory assumption of jurisdiction, the Supreme Court held that Pub. L. 280 permits, but does not require, the amendment of the state's constitution. *Yakima*, 439 U.S. at 493. *Cf.* In re Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964) (invalidating for non-compliance with Pub. L. 280 requirements a South Dakota statute assuming criminal jurisdiction over crimes committed on reservation highways). Of the five disclaimer states now empowered to exercise Pub. L. 280 jurisdiction, *see infra*, Idaho, Montana, Utah, and Washington all have enacted statutes rather than amend their state constitutions. Only North Dakota has amended its constitution to provide that the legislature "may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress." N.D. CONST. art. 13, § 1.

Only three of these five disclaimer states presently exercise Pub. L. 280 criminal jurisdiction over reservations within their borders. In 1963, Montana assumed criminal jurisdiction over the Flathead Reservation, MONT. CODE ANN. § 2-1-301 (1987), but maintains no criminal jurisdiction over other reservations within that state. State ex rel. Flammond v. Flammond, 621 P.2d 471, 472 (Mont. 1980). In that same year, Idaho and Washington each assumed partial civil and criminal jurisdiction over reservation lands within the states. Washington took jurisdiction over Native trust lands with respect to selected, enumerated subject matter areas, but assumed full jurisdiction over the nontrust lands in Indian country. WASH. REV. CODE § 37.12.010 (Supp. 1987). Idaho, on the other hand, also assumed jurisdiction over enumerated subject areas, but extended that selective jurisdiction to all lands within "Indian country. . .[as] defined by title 18, United States Code § 1151." IDAHO CODE § 67-5101 (1980 & Supp. 1987). The Supreme Court has held that such an assumption of partial jurisdiction is permissible under Pub. L. 280. *Yakima*, 439 U.S. at 495-99. For discussions of the peculiarities of Washington's Pub. L. 280 jurisdiction, and the litigation it engendered, *see* Note, *Washington's Public Law 280 Jurisdiction on Indian Reservations*, 53 WASH. L. REV. 701 (1978); Comment, *Public Law 280: The Status of State Legal Jurisdiction over Indians After* Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 15 GONZ. L. REV. 133 (1979).

In addition to these three states, Utah has enacted legislation that would permit it to acquire Public Law 280 jurisdiction, UTAH CODE ANN. § 63-36-9 (1986), but to date no tribe has accepted the offer of state jurisdiction. *See* United States v. Felter, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985). North Dakota, on the other hand, has amended its constitution and enacted legislation permitting it to take civil jurisdiction with the consent of the tribes. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 467 U.S. 138, 144 (1984); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 106 S. Ct. 2305, 2308 (1986). As in Utah, however, no tribe has yet accepted the state's offer of jurisdiction. *See* Malaterre v. Malaterre, 293 N.W.2d 139, 143 (N.D. 1980) ("North Dakota does not have jurisdiction over Indians residing within the exterior boundaries of an Indian reserva-

Congress later to enact certain reforms as part of the Indian Civil Rights Act of 1968.[42] After 1968 state jurisdiction could be assumed only with the consent of the affected tribes,[43] and states

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tion."). For a discussion of North Dakota's "residuary jurisdiction" over certain civil actions, *see infra* note 50.

None of the five remaining states with disclaimers presently exercise any criminal cognizance over Indian country within their borders. *See, e.g.*, Nenna v. Moreno, 132 Ariz. 565, 566, 647 P.2d 1163, 1164 (Ariz. Ct. App. 1982) (Arizona has not sought "to extend Arizona's civil and criminal jurisdiction to Indian reservations via the mechanism provided in" Pub. L. 280); Blatchford v. Gonzales, 100 N.M. 333, 338, 670 P.2d 944, 949 (1983), *cert. denied sub nom.* Blatchford v. Winans, 464 U.S. 1033 (1984) ("New Mexico has not accepted jurisdiction of [Indian country] under Public Law 280 or any other federal statute"); State v. Brooks, 14 Indian L. Rep. (Am. Indian Law. Training Program) 5015 (1987) (Okla. Crim. App. 1986) ("Oklahoma has never acted pursuant to [Pub. L. 280] to assume jurisdiction over the 'Indian Country' within its borders . . . [and] does not have jurisdiction over crimes committed by or against an Indian in Indian Country."); State ex rel. May v. Seneca-Cayuga Tribe, 711 P.2d 77, 88 (Okla. 1985) (court "unable to identify and isolate any [Oklahoma] governmental action which amounts to an assumption of cognizance over Indian Country"); State v. Hero, 282 N.W.2d 70, 72 (S.D. 1979) ("South Dakota is not a Public Law 280 state"); State ex rel. Peterson v. District Court, 617 P.2d 1056, 1062-63 (Wyo. 1980)(reviewing court "aware of no Wyoming legislation to accept . . . [Pub. L. 280] delegation").

The disclaimer state of New Mexico has claimed from time to time that it has criminal jurisdiction in Indian country pursuant to an 1889 statute which provides that:

> All Indians, committing against the person or property of another Indian, or other person, any of the following crimes . . . within the state of New Mexico and either within or without an Indian reservation, shall be subject therefor to the laws of this state relating to such crimes. . .and the courts are hereby given jurisdiction in all such cases.

N.M. STAT. ANN. § 31-10-3 (1978 & Supp. 1984). New Mexico courts have held in no uncertain terms, however, that the 1889 law, enacted decades prior to Pub. L. 280, does not constitute an assumption of jurisdiction pursuant to that act. *Blatchford*, 100 N.M. at 338-39, 670 P.2d at 949-50; State v. Ortiz, 105 N.M. 308, 731 P.2d 1352 (N.M. Ct. App. 1986). Nonetheless, as of 1987, the statute remains on the books in New Mexico.

In addition, Arizona purports to enforce on Native lands the criminal provisions of its air pollution statutes. This assertion of state jurisdiction is undoubtedly invalid.

> Arizona's attempted assumption of jurisdiction over Indian country for pollution control purposes is illegal. Arizona has no legal power to enforce her pollution control laws on Indians in Indian country nor has she the power to try Indians for causes of actions arising from pollution in Indian country. Apparently, until rebuked by the U.S. Supreme Court, Arizona will continue to claim jurisdiction to which she is not entitled.

U.S. ENVIRONMENTAL PROTECTION AGENCY (REGION IX), APPLICABILITY OF STATE POLLUTION CONTROL LAWS TO INDIAN RESERVATIONS 1 (quoted in Note, *Environmental Law: Protecting Clean Air: The Authority of Indian Governments to Regulate Reservation Airsheds*, 9 AM. INDIAN L. REV. 83, 99-100 (1981)). *See also* Will, *Indian Lands Environment — Who Should Protect It*, 18 NAT. RESOURCES J. 465, 471 n.34 (1978); Note, *The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government*, 48 U. COLO. L. REV. 63, 80 n.92 (1976).

42. Act of Apr. 11, 1968, Pub. L. No. 90-284, Title IV, §§ 401-406, 82 Stat. 73, 78-80 (codified at 25 U.S.C. §§ 1321-1326 (1982)) [hereinafter Pub. L. 284]. *See Criminal Jurisdiction, supra* note 24, at 238.

43. Malaterre v. Malaterre, 293 N.W.2d 139, 143 (N.D. 1980). A majority vote of the adult members of the tribe is required. Pub. L. No. 284, § 402 (codified at 25 U.S.C. § 1322 (1982)). The new provision was prospective only and left intact prior state assumptions of jurisdiction, notwithstanding that these had not been consented to by the affected tribes. 25 U.S.C. § 1323(b) (1982).

On at least one occasion, Native consent has been legislated by the federal government. The act restoring to federal recognition two Native tribes in Texas contained the following provision:

were permitted, upon their sole prerogative and with approval by the Secretary of the Interior, to retrocede jurisdiction to the federal government in full or in part.[44] Native tribes, however, could neither initi-

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> The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the [Indian Civil Rights Act, 25 U.S.C. §§ 1321-1322]. . . .

Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, § 105(f) (Ysleta del Sur Pueblo) and § 206(f) (Alabama and Coushatta Tribes), 101 Stat. 666, at 667, 671-72 (1987). This general designation of state civil and criminal jurisdiction, however, does not preclude the tribes from exercising concurrent jurisdiction in these areas. *See infra* note 47.

This restoration act may represent the most recent event giving rise to Native American cynicism with the dominant society's frequently imposed requirement of consent by "majority rule." *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 557 (1903) (upholding congressional plan for disposition of 2.5 million acres of Kiowa and Comanche lands despite fact that plan fell short by 87 votes of three-fourths of adult males consent required to convey tribal lands); Berkey, *Implementation of the Indian Reorganization Act*, 2(8) AM. INDIAN J. 2 (1976) (discussing, in part, the Bureau of Indian Affairs interpretation of abstaining voters as affirmative votes during tribal elections to reject the implementation of the IRA); Tullberg, *The Creation and Decline of the Hopi Tribal Council*, in RETHINKING INDIAN LAW 29, 35 (Nat'l Law. Guild ed. 1982) ("Despite the preponderant sentiment against the constitution . . . acceptance by less than 15 per cent of the Hopis was enough to warrant adoption of the constitution . . . ."); Barsh, *supra* note 19, at 45 (detailing the IRA election mockery on the Santa Ysabel Reservation in California). *See also generally* Holm, *The Crisis in Tribal Government*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 135-54 (V. Deloria ed. 1985) (detailing the present-day conflict between IRA tribal governments premised on simple majority rule, and traditional Native social concepts of community consensus).

Since the 1968 revision mandating tribal consent, only one state has taken steps to acquire jurisdiction through its own legislative process. In 1971 the Utah State Legislature adopted a statute "obligat[ing] and bind[ing] itself to assume civil and criminal jurisdiction over Indians and Indian territory, country and lands . . .," pending tribal acceptance of state jurisdiction. Brough v. Appawora, 553 P.2d 934, 937 (Utah 1976); UTAH CODE ANN. § 63-36-9 (1986). To date, no tribe in that state has accepted. *See supra* note 41.

Several states on their own cognizance, prior to the 1968 federal requirement of tribal consent to state assumption of jurisdiction, enacted option statutes whereby individual tribes within their borders, upon tribal resolution or election by tribal members, could subject themselves to full state authority. *See, e.g.*, MONT. CODE ANN. § 2-1-302 (1980) (tribe must file a resolution by governing body with the state governor); IDAHO CODE § 67-5102 (1980 & Supp. 1986) ("additional state jurisdiction in criminal and civil causes . . . may be extended . . . with the consent of the governing body of the tribe"); WASH. REV. CODE § 37.12.021 (Supp. 1987) (permits "extension of full state authority" upon receipt of tribal resolution). No tribe in any state has so consented. The continuing effectiveness of these state legislative provisions is uncertain in light of the present federal procedural requirement for tribal consent by referendum. 25 U.S.C. § 1322 (1982). *See also* 25 U.S.C. § 1361 (1982); Kennerly v. District Court, 400 U.S. 423, 428-30 (1971).

44. Pub. L. 284, § 403 (codified at 25 U.S.C. § 1323(a) (1982)). *See* Goldberg, *supra* note 39, at 506.

Federal criminal jurisdiction was restored in 1970 over the Metlakatla Native Community of Alaska. Act of Nov. 25, 1970, Pub. L. No. 91-523, 84 Stat. 1358. Additionally, several states have since retroceded partial jurisdiction to the federal government, as for example Nebraska's retrocession of jurisdiction over the Omaha Reservation, 35 Fed. Reg. 16598 (1970), and later retrocession of criminal jurisdiction over the Winnebago Reservation, 51 Fed. Reg. 24234 (1986); Wisconsin's retrocession of jurisdiction over the Menominee Reservation, 41 Fed. Reg. 8516 (1976); Oregon's retrocession of criminal jurisdiction over the Umatilla Reservation, 46 Fed. Reg. 2195 (1981), and most recently Washington's retrocession of criminal jurisdiction over the Colville Reservation, 52 Fed. Reg. 8372 (1987).

Wisconsin's retrocession of jurisdiction over the Menominee Reservation in 1976 was the result of jurisdictional confusion in Wisconsin after the Menominee Tribe was restored to federal status. As a

ate nor force retrocession.[45] In all, eleven states presently assert either full or limited criminal jurisdiction pursuant to Public Law 280.[46]

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mandatory state under Pub. L. 280, Wisconsin had been granted civil and criminal jurisdiction over all Indian country in the state. *See supra* note 40. In 1954, the Menominee Tribe was terminated from federal status, the former reservation became Menominee County, Wisconsin, and the tribe, its members, and its land were subjected to state jurisdiction. Indians—Menominee Reservation—Extension of Civil and Criminal Laws of Wisconsin, Pub. L. No. 83-661 (1954). *See infra* note 203 and accompanying text. When the tribe was restored in 1973, Menominee Restoration Act of 1973, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. §§ 903 *et seq.* (1982)), its status under Pub. L. 280 was unclear. The state ended the jurisdictional uncertainty by formally retroceding all jurisdiction to the federal government. *See* State v. Webster, 114 Wis. 2d 418, 421-24, 338 N.W.2d 474, 477 (1983). Subsequently, Congress has avoided this dilemma by specifying jurisdiction in the restoration legislation. *See* Klamath Indian Tribe Restoration Act of 1986, 25 U.S.C. § 566e (Supp. IV 1987) (specifying that the state of Oregon, an initial mandatory state, shall exercise Pub. L. 280 jurisdiction over the restored Klamath Tribe).

The retrocession process itself also could be fraught with difficulties. In 1969, the Nebraska Legislature passed Legislative Resolution 37, which retroceded all criminal jurisdiction, except for traffic offenses, over the Omaha and Winnebago Indian reservations. The Secretary of the Interior accepted jurisdiction only over the Omaha Reservation, and subsequently the Nebraska Legislature in 1971 attempted to rescind its offer of retrocession. The federal court in Nebraska held that the Secretary's action in accepting jurisdiction only over the Omaha Reservation was valid, stating that Public Law 280 was not intended "to make the Indian a political ping-pong ball between the state and federal governments." United States v. Brown, 334 F. Supp. 536, 542 (D. Neb. 1971). *See also* United States v. Lawrence, 595 F.2d 1149 (9th Cir.), *cert. denied*, 444 U.S. 853 (1979) (alleged invalidity of Washington retrocession of jurisdiction over Suquamish Port Madison Reservation under state law immaterial where retrocession valid under preemptive federal law).

A curious aspect of the retrocession statute is that, by its express terms, it is available only to states that assumed jurisdiction pursuant to Public Law 280. 25 U.S.C. § 1323(a) (1982). As the Supreme Court recently noted:

> [T]he fact that Congress did not provide for retrocession of jurisdiction lawfully assumed prior to the enactment of Pub.L. 280 or of jurisdiction assumed after 1968 cannot be attributed to mere oversight or inadvertence. Since Congress was motivated by a desire to shield the Indians from unwanted extensions of jurisdiction over them, there was no need to provide for retrocession in those circumstances because the previously assumed jurisdiction over Indian country was only lawful to the extent that it was consistent with Indian tribal sovereignty and self-government, *see, e.g., Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), and the jurisdiction assumed after 1968 could be secured only upon the receipt of tribal consent.

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 106 S. Ct. 2305, 2311 (1986). While the Court's statement that state jurisdiction assumed prior to Pub. L. 280 invariably was consistent with tribal sovereignty appears more than a little disingenuous, no mechanism does seem to exist for retrocession of state jurisdiction assumed other than pursuant to Public Law 280. *See infra* note 50.

45. *Criminal Jurisdiction*, *supra* note 24, at 238; Goldberg, *supra* note 39, at 559. Despite the arguably discriminatory effect of federal law in failing to provide a mechanism for tribal initiation of retrocession, some states do provide for such a procedure by state law. *See, e.g.*, MONT. CODE ANN. § 2-1-306 (1987)(tribe that previously consented to state jurisdiction may withdraw consent by appropriate tribal resolution within two years of state assumption of jurisdiction); N.D. CENT. CODE § 27-19-12 (Supp. V 1987) (provision for withdrawal of state civil jurisdiction); WASH. REV. CODE § 37.12.100 (Supp. 1987) (authorizing a procedure for the retrocession of selected criminal jurisdiction over the Colville Confederated Tribes). In the case of Washington, criminal jurisdiction over the Colville Reservation was retroceded to the federal government in 1987. *See supra* note 44.

46. The states are Alaska, California, Florida, Idaho, Minnesota, Montana, Nebraska, Nevada, Oregon, Washington, and Wisconsin. *See supra* notes 40-41. In addition, Texas now exercises jurisdic-

The criminal jurisdiction granted to the states by Public Law 280 is coextensive with the criminal jurisdiction the state exercises elsewhere within its borders.[47] Thus, the exercise of state jurisdiction in a

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tion over two Native reservations pursuant to a hybrid of a tribal restoration act and Pub. L. 280 as amended by the Indian Civil Rights Act. *See supra* note 43. Four additional states, pursuant to special congressional grants of jurisdiction prior to the enactment of Pub. L. 280, maintain at least partial criminal jurisdiction over reservations within their borders. *See infra* note 50.

For a relatively recent listing of the states and the extent of their Public Law 280 jurisdiction, *see Jurisdiction on Indian Reservations: Hearings before the Select Comm. on Indian Affairs on S. 1181, S. 1722, and S. 2832*, 96th Cong., 2d Sess. 29-35 (1980). A more dated compilation of criminal jurisdiction asserted by states, under Public Law 280 or other authority, can be found in Clinton, *supra* note 14, at 577-83.

47. Public Law 280 provides, with regard to criminal jurisdiction:

> Each of the States or Territories shall . . . have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

18 U.S.C. § 1162(a) (1982). While the statute expressly accords criminal jurisdiction to the state, the statutory language does not grant to the state exclusive criminal jurisdiction over Natives. Confederated Tribes of the Colville Indian Reservation v. Beck, 6 Indian L. Rep. (Am. Indian Law. Training Program) F-8 (E.D. Wash. 1978) (concurrent criminal jurisdiction); State v. Michael, 111 Idaho 930, 933 n.1, 729 P.2d 405, 408 n.1 (1986) (tribal court may have concurrent jurisdiction with state on Pub. L. 280 reservation). Public Law 280 granted to the states only so much jurisdiction as the federal government previously asserted over Natives.

State criminal and civil jurisdiction pursuant to Public Law 280 is limited expressly with regard to treaty hunting and fishing rights. The statute provides that:

> Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

18 U.S.C. § 1162(b) (1982) (criminal); 28 U.S.C. § 1360(b) (1982) (civil). Outside reservation boundaries, states have the authority to regulate treaty usufructuary rights, but only for the narrowly defined purposes of conservation, and perhaps safety. *See supra* note 15. Within reservation borders, however, a Native nation exercises exclusive jurisdiction over usufructuary activities by its members, subject only to state regulation in "exceptional circumstances." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983). The only exceptional circumstance recognized thus far by the Supreme Court occurred in Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165, 173-77 (1977), which held that the state had jurisdiction to regulate treaty fishing within reservation borders for the purpose of conservation. As the Court noted in *Mescalero*, however, the treaty in *Puyallup* granted "in common" rights to non-Natives, the reservation lands in question no longer belonged to the tribe, and the resource was both scarce and migratory, thus conferring a particularly strong regulatory interest in the state. 462 U.S. at 332 n.15 and 342. *See also* State v. Billie, 497 So.2d 889, 895 (Fla. Dist. Ct. App. 1986), *review denied*, 506 So.2d 1040 (Fla. 1987) (state may prosecute Seminole for on-reservation hunting of animal protected by state endangered species law, in part because purpose of the state law was preservation of the species). It is likely, then, that under Pub. L. 280, a state would be permitted at a maximum to enforce against on-reservation treaty hunters and fishers only those provisions of its criminal laws that comported with the narrow purposes for which the state may regulate treaty usufructuary rights.

Another area of uncertainty in Pub. L. 280 jurisdiction is whether county or municipal criminal ordinances fall within the Pub. L. 280 delegation of jurisdiction over "the criminal laws of the State." It is likely that they do not. *See, e.g.*, California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1089-90 n.11 (1987) ("We note initially that it is doubtful that Pub. L. 280 authorizes the application of

Public Law 280 state extends to all persons, Native and non-Native alike, and is exclusive of federal criminal authority for all non-federal crimes. As a result of this parity with off-reservation jurisdiction, it has been argued that not only state courts, but state police as well, have jurisdiction within reservation boundaries.[48] Furthermore, law enforcement officers with jurisdiction in the county in which a reservation is located may have full criminal authority on reservation lands within that county.[49] Absent a grant of jurisdiction under Public Law 280 or other enabling legislation,[50] however, neither state courts nor

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any local laws to Indian reservations."); Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1390 (9th Cir. 1987) ("P.L. 280 subjected Indian Country to only the civil laws of the state, and not to local regulation."); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 661 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) (local land use regulations do not constitute "civil laws of [the] state" because such local ordinances are not of "statewide application"). *Accord* Bryan v. Itasca County, 426 U.S. 373, 377 (1976) (no "authority in . . . county to levy a personal property tax" upon reservation Native's property); United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980). *But cf.* County of Vilas v. Chapman, 122 Wis. 2d 211, 361 N.W.2d 699 (1985). The authors are unaware of any court decision fully determinative of this issue in the criminal context.

48. State law enforcement agencies "have complete authority over any . . . reservation to which complete or substantial criminal jurisdiction has been transferred to the state by congressional act." Clinton, *supra* note 14, at 574.

49. *See, e.g.*, State v. Folstrom, 331 N.W.2d 231, 232 (Minn. 1983) (upheld arrest of Ojibwa by deputy county sheriff for possession of weapon without a state permit on tribal trust land in a Pub. L. 280 state); County of Vilas v. Chapman, 122 Wis. 2d 211, 213, 361 N.W.2d 699, 701 (1985) (county had "jurisdiction to enforce a noncriminal traffic ordinance against an enrolled [Ojibwa] member . . . for an offense which occurred on a public highway within the boundaries of [a Pub. L. 280] reservation").

50. While Pub. L. 280 was the first federal statute to attempt an omnibus transfer of criminal jurisdiction to states, Congress previously had enacted special jurisdictional statutes granting criminal jurisdiction over selected Native reservations to five states: Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1982)) (granting criminal jurisdiction over all reservations in New York to the state); Act of October 5, 1949, ch. 604, 63 Stat. 705 (granting jurisdiction over the Agua Caliente Reservation to California); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (granting criminal jurisdiction over Sac & Fox Reservation to Iowa); Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified as amended at 18 U.S.C. § 3243 (1982)) (granting criminal jurisdiction to Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (granting criminal jurisdiction over Devil's Lake Reservation to North Dakota). For a discussion of these statutes, *see* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 38, at 373-76. *See also* the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987), *supra* note 43, which grants to Texas full criminal jurisdiction within the boundaries of the federal reservations reestablished by the Act.

At least one state, North Carolina, purports to exercise criminal jurisdiction over a Native tribe pursuant to treaty. In re McCoy, 233 F. Supp. 409, 412 (E.D.N.C. 1964) ("Since the treaty of New Echota of 1835, 7 Stat. 478, the State of North Carolina has exercised jurisdiction over criminal offenses committed by Indiana [sic] on the Cherokee Indian reservation" in that state.). *See also* Wildcatt v. Smith, 69 N.C. App. 1, 7, 10 n.16, 316 S.E.2d 870, 875, 877 n.16, *appeal denied*, 312 N.C. 90, 321 S.E.2d 909 (1984) (state jurisdiction obtained pursuant to Treaty of New Echota was not divested by passage of Pub. L. 280, Pub. L. 284, or any other action of Congress).

Traditionally the Supreme Court has held that Pub. L. 280 and Pub. L. 284 constitute the sole and exclusive means by which a state could obtain jurisdiction over Native reservations within the state's borders. Fisher v. District Court, 424 U.S. 382, 390 (1976); Kennerly v. District Court, 400 U.S. 423, 427 (1971). *See also* United States v. John, 437 U.S. 634, 653-54 (1978). More recently, however, Pub. L. 280 has been relegated by the Court to representing merely "the primary expression of federal policy governing the assumption by States of civil and criminal jurisdiction over the Indian Nations." Three

state law enforcement officers have jurisdiction within the reservation over crimes involving Native Americans.[51]

Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 106 S. Ct. 2305, 2310 (1986) (*Three Affiliated Tribes II*). In an earlier incarnation of the same case, the Court noted that prior lawfully assumed state jurisdiction over civil cases brought by Native plaintiffs against non-Native defendants survived the passage of Pub. L. 280. "Nothing in the language or legislative history of Pub. L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction." Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 467 U.S. 138, 150 (1984) (*Three Affiliated Tribes I*).

This "residuary jurisdiction" appears to have its roots in State ex rel. Iron Bear v. District Court, 162 Mont. 335, 342-43, 512 P.2d 1292, 1297 (1973), which found that the Assiniboine-Sioux Tribes of the Fort Peck Reservation, in 1938, had ceded to the Montana state courts jurisdiction over the marriages and divorces of its members, and that the continued exercise of that jurisdiction by the state courts did not interfere with tribal self-government. The residuary jurisdiction doctrine seems to indicate then that the passage of Pub. L. 280 was not meant to eliminate all state jurisdiction acquired outside the provisions of that Act. As the Court noted in *Three Affiliated Tribes II*: "Pub. L. 280 neither required nor authorized North Dakota to disclaim the jurisdiction it had lawfully exercised over the claims of Indian plaintiffs against non-Indian defendants prior to the enactment of Pub. L. 280." 106 S. Ct. at 2308-09. The 1984 Court cautioned, however, that the exercise of such jurisdiction prior to and apart from Pub. L. 280 would be improper where it "cannot be squared with principles of tribal autonomy." *Three Affiliated Tribes I*, 467 U.S. at 148 (citations omitted). For example, the Court stated, jurisdiction "over claims by non-Indians against Indians or over claims between Indians. . .[would] intrude impermissibly on tribal self governance." *Id.* Nonetheless, the Court held that:

> As a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country. The exercise of state jurisdiction is particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted.

Id. at 148-49.

51. This is true even for patented fee lands within a Native reservation. In Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962), the Supreme Court reviewed the denial of a writ of habeas corpus sought by a Native resident of a reservation following his conviction for burglary. In holding that the Washington courts had no jurisdiction, the Court disposed of the state's argument that jurisdiction existed because the crime was committed on land within the reservation held under a patent in fee by a non-Native:

> This contention is not entirely implausible on its face and, indeed, at one time had the support of distinguished commentators on Indian law. But the issue has since been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in [18 U.S.C.] § 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the [U.S.] Government, notwithstanding the issuance of any patent. . . ."

Id. at 357-58 (footnote omitted). The Court noted further the deleterious effects of "checkerboarding" — a euphemism for geographic jurisdiction according to ownership of parcels of land within the reservation — upon law enforcement on the reservation:

> [L]aw enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and . . . [would only serve] to recreate confusion Congress specifically sought to avoid.

Id. at 358 (footnote omitted). Thus, once a block of land is withdrawn as a Native reservation, the entire block, including individual plots patented in fee to non-Natives, retains its status as "Indian country" until Congress explicitly indicates otherwise. *See also* Solem v. Bartlett, 465 U.S. 463 (1984); United States v. Celestine, 215 U.S. 278 (1909). *Cf.* Washington v. Confederated Bands and Tribes of

b. Non-Public Law 280 Reservations

Where the federal government has not granted criminal jurisdiction to the state pursuant to Public Law 280 or similar enabling legislation, state jurisdiction within reservation boundaries is extremely limited. On non-Public Law 280 reservations, the state has no jurisdiction over crimes committed by Natives or against Natives.[52] Offenses committed by Natives are punishable by the tribe, or by the

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the Yakima Indian Nation, 439 U.S. 463 (1979) (upholding Washington's assumption of checkerboard Pub. L. 280 jurisdiction over fee lands within the reservation as not antithetical to law enforcement); DeCoteau v. District County Court, 420 U.S. 425 (1975)(upholding extension of state criminal jurisdiction to non-Native lands within a reservation where tribe expressly had ceded and relinquished "all claim, right, title and interest" in unallotted lands). *See generally* Comment, *Criminal Jurisdiction over Non-Trust Lands within the Limits of Indian Reservations*, 9 WILLAMETTE L. REV. 288 (1973); *The Legal Trail of Tears, supra* note 22, at 253.

Checkerboarding poses interesting problems in the context of fresh pursuit. Where checkerboard criminal jurisdiction has been upheld, precise geographical data may take precedence in determining the legality of an on-reservation fresh pursuit arrest. Whether state jurisdiction was present at the point where the pursuit crossed the tribal-state border, during the entire course of the pursuit, or at the point where the arrest occurred — and which of these factors would implicate the legality of the arrest — could complicate the fresh pursuit analysis unnecessarily and obscure the central issue of sovereign territorial integrity. Notwithstanding the Court's acceptance of Washington's Pub. L. 280 checkerboard jurisdiction, the earlier caution of the Court in *Seymour* that checkerboard jurisdiction is not only impractical but contrary to principles of Native law appears particularly apt in the area of fresh pursuit.

52. United States v. John, 437 U.S. 634 (1978) (Major Crimes Act precludes concurrent state criminal jurisdiction over Native defendant); DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975) (in a non-Public Law 280 state, jurisdiction within reservation borders "is in the tribe and the Federal Government"); Williams v. United States, 327 U.S. 711, 714 (1946) ("the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there [on the reservation], as in this case, by one who is not an Indian against one who is an Indian"); Donnelly v. United States, 228 U.S. 243, 271-72 (1913) ("offenses committed by or against Indians are not within the principle of the McBratney and Draper Cases" [*see* discussion *supra* notes 36 and 37 and accompanying text] which extended state jurisdiction to on-reservation crimes by non-Natives against other non-Natives).

Notwithstanding the jurisdictional strictures of *Donnelly* and *Williams*, the U.S. Department of Justice recently has taken the position that for crimes by a non-Native against a Native within reservation borders, state criminal jurisdiction is concurrent with that of the federal government. *See Reservation Special Magistrate, supra* note 16, at 19-20 (exchange of views between Mark M. Richard, Dep. Ass't Att'y Gen., Criminal Div., U.S. Dep't of Justice, and Sen. Melcher). The Department based its view on "our analysis of 18 U.S.C. 1152 [the General Crimes Act] and 1153 [the Major Crimes Act] and the Assimilative Crimes Act [18 U.S.C. § 13]." *Id.* at 19. While the Department's "analysis" of these statutes is not provided, it is necessarily false. The Major Crimes Act does not reach non-Native defendants, but is applicable only to Native defendants, and operates to the exclusion of state court jurisdiction. United States v. Kagama, 118 U.S. 375 (1886). The General Crimes Act extends federal jurisdiction over crimes between Natives and non-Natives, and has been held also to extend the Assimilative Crimes Act to Indian country. *See infra* note 53. The Assimilative Crimes Act essentially incorporates definitions of lesser state crimes into the federal code. Air Terminal Serv. v. Rentzel, 81 F. Supp. 611, 612 (E.D. Va. 1949) (Assimilative Crimes Act was intended "to fill in gaps in the Federal Criminal Code"). Neither the General nor the Assimilative Crimes Act confers upon the states express or implied jurisdiction over Native reservations. These acts, rather, empower only the *federal* courts to prosecute non-Natives who commit crimes against Natives within reservation borders. *See Williams*, 327 U.S. at 714 n.10. *Accord* Clinton, *supra* note 14, at 523 n.94 ("The prevailing rule today is that the

federal government acting under specific statutory authority, or both.[53] Criminal acts committed by non-Natives against Natives are

federal jurisdiction conferred by [the General and Major Crimes Acts] is exclusive; where one of these sections applies, the state has no jurisdiction.") (citations omitted).

53. United States v. John, 437 U.S. 634, 654 (1978); DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). As to crimes committed by Natives, the Major Crimes Act, 18 U.S.C. § 1153(a) (Supp. IV 1986), provides in part that: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." *See supra* note 28 for a brief discussion of possible tribal-federal concurrent criminal jurisdiction under the Major Crimes Act.

While federal grand juries can indict under the Act only for the crimes specified, juries can be instructed on lesser-included offenses not enumerated in the Act. Keeble v. United States, 412 U.S. 205, 212 (1973) (concluding that Congress hardly "intended to disqualify Indians from the benefits of a lesser offense instruction, when those benefits are made available to any non-Indian charged with the same offense"); United States v. Bowman, 679 F.2d 798 (9th Cir. 1982) (discussing at length the apparent conflict between thus extending the scope of the Act and simultaneously retaining its "limited intrusion" into inherent tribal sovereignty). At least four federal circuit courts have construed the *Keeble* holding on jury instructions to extend to the power to convict and sentence for the lesser-included offense. *Bowman*, 679 F.2d at 799; United States v. Pino, 606 F.2d 908 (10th Cir. 1979); United States v. John, 587 F.2d 683 (5th Cir. 1979), *cert. denied*, 441 U.S. 925 (1980); Felicia v. United States, 495 F.2d 353 (8th Cir. 1974). *Cf.* United States v. Welch, 822 F.2d 460, 464 (4th Cir. 1987) ("When there is a crime by an Indian against another Indian within Indian country only those offenses enumerated in the Major Crimes Act may be tried in the federal courts."). For suggested analyses of the reach of *Keeble*, see Vollman, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 400-02 (1974); McGoldrick, *Criminal Jurisdiction: Jurisdiction to Sentence and Convict for Lesser Included Offenses under the Major Crimes Act: A Critical Assessment of the* Keeble *Legacy*, 12 AM. INDIAN L. REV. 219 (1984).

A companion statute to the Major Crimes Act, the General Crimes Act, 18 U.S.C. § 1152 (1982), confers federal jurisdiction also over "lesser" crimes occurring within reservation boundaries. The "general federal laws" which the statute "extends to the Indian Country" are those laws, commonly known as federal enclave laws, governing federal properties such as national parks and forests. *See* United States v. White, 508 F.2d 453, 454-55 (8th Cir. 1974). The statute operates to extend a body of federal laws, including the Assimilative Crimes Act, to Indian country. Williams v. United States, 327 U.S. 711 (1946). The Assimilative Crimes Act, 18 U.S.C. § 13 (1982), incorporates state law for the definition of some offenses in the General Crimes Act. For criticism of the Court's application of the Assimilative Crimes Act to Native reservations, *see* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 38, at 290-91, 293 n.95; Clinton, *supra* note 14, at 532. *See also* Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300, 1310 n.14 (D.D.C. 1987) (hinting that a future and more incisive Supreme Court review could find the Act inapplicable to Indian country).

The application of both the General Crimes Act and the Assimilative Crimes Act within Indian country, however, is significantly limited. Neither act reaches crimes committed by one Native against another Native in Indian country. 18 U.S.C. § 1152 (1982) (General Crimes Act "shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe . . ."); *Welch*, 822 F.2d at 463 (inapplicability of Assimilative Crimes Act). Nor do the acts reach offenses by a non-Native against another non-Native that are controlled by the *McBratney* rule. *See supra* note 37 and accompanying text.

Despite the apparent clarity of the statutory limitations, there is disagreement among the federal courts concerning the exclusivity of tribal court jurisdiction under the General Crimes Act. The controversy stems from an initial dictum in United States v. Quiver, 241 U.S. 602 (1916), suggesting that tribal court jurisdiction might be exclusive over "lesser" crimes not expressly set out in the Major Crimes Act. The Court noted that the enumeration of certain offenses in the Major Crimes Act as

within the exclusive jurisdiction of the federal courts. As discussed previously, however, states have been granted authority over all crimes committed by one non-Native against another non-Native, even on reservations not otherwise subject to state jurisdiction.[54] There is some indication also that states may have jurisdiction on the reservation over victimless crimes, such as state traffic or fish and game violations, committed by non-Natives.[55]

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applicable to Natives on reservations "carries with it some implication of a purpose to exclude others." *Id.* at 606.

More recently, a unanimous Supreme Court observed that "[e]xcept for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts." United States v. Antelope, 430 U.S. 641, 643 n.2 (1977). *See also Keeble*, 412 U.S. at 209-10 (reaffirming the *Crow Dog* reasoning that in the absence of express congressional enactment, Native tribes retained exclusive jurisdiction to punish a crime of murder between Natives).

The Ninth Circuit Court of Appeals apparently has interpreted the *Antelope* footnote as positing exclusive "lesser" crime jurisdiction in the tribe. *See* United States v. Johnson, 637 F.2d 1224, 1231 (9th Cir. 1980). The Seventh, Eighth, and Tenth Circuits, on the other hand, have rejected the view that the tribal jurisdiction referred to is exclusive. *See* United States v. Smith, 562 F.2d 453, 457-58 (7th Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); United States v. Blue, 722 F.2d 383, 386 (8th Cir. 1983); United States v. Cowboy, 694 F.2d 1228, 1235 (10th Cir. 1982).

For a discussion of the parameters of asserted federal criminal jurisdiction within reservation boundaries, as well as the historical and statutory underpinnings, *see* Clinton, *supra* note 14, at 505-52; *Criminal Jurisdiction*, *supra* note 24, at 226-34.

54. *See supra* notes 36-37 and accompanying text.

55. *See, e.g.*, State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963), in which a non-Native was charged with driving under the influence, a criminal offense, within the boundaries of the Navajo Reservation. The court concluded that state jurisdiction over a crime committed by a non-Native where no Native person or property was involved—in other words, a victimless crime—would not infringe upon tribal sovereignty. Essentially, the court merely extended the *McBratney* rule, *see supra* notes 36-37, that crimes on Native lands involving only non-Natives are exclusively within the state's jurisdiction to prosecute. "[W]e conclude that the New Mexico State Courts have jurisdiction over criminal offenses committed on an Indian reservation within this state, by non-Indians, which are not against an Indian nor involving Indian property." *Id.* at 422, 379 P.2d at 68-69. The Supreme Court has concurred in dicta. Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984) (absent a grant of jurisdiction, "state jurisdiction is limited to crimes by non-Indians against non-Indians, . . . and victimless crimes by non-Indians.") (citations omitted). *See also Enforcement Problems*, *supra* note 22, at 303-06; Memorandum for Benjamin R. Civiletti, Dep. Att'y Gen., "Jurisdiction over 'Victimless' Crimes Committed by Non-Indians on Indian Reservations," *reprinted in* 6 Indian L. Rep. (Am. Indian Law. Training Program) K-15 (1979)(contending that states have exclusive jurisdiction over victimless crimes, including most traffic offenses, committed by non-Natives in Indian country); *Reservation Special Magistrate*, *supra* note 16, at 14-15 (statement of Mark M. Richard, Dep. Ass't Att'y Gen., Criminal Div., U.S. Dep't of Justice) (positing that state jurisdiction is exclusive over victimless crimes committed by non-Natives "unless the crime poses a direct threat to individual Indian or tribal interests").

The Wisconsin Supreme Court also has implied as much in a case concerning jurisdiction over traffic offenses on public roads within reservation borders: "It was noted at oral argument that Menominee tribal police patrol the roads on the Menominee Reservation but regulate only Indians." State v. Webster, 114 Wis. 2d 418, 434-35, 338 N.W.2d 474, 482 (1983). *See also* State v. Burrola, 137 Ariz. 181, 183, 669 P.2d 614, 616 (Ariz. Ct. App. 1983) (state had jurisdiction to try non-Native arrested on reservation by tribal police officer for victimless offense of possession of deadly weapon); Ryder v. State, 98 N.M. 316, 318, 648 P.2d 774, 776 (1982) (state had jurisdiction to try non-Native arrested on reservation for possession of marijuana). *See also* State v. Herber, 123 Ariz. 214, 216, 598 P.2d 1033, 1035

3. Summary

Native tribes have jurisdiction, including jurisdiction to prosecute crimes, over their members within reservation boundaries; the sentencing power of tribal courts, however, is limited by federal statute. This tribal jurisdiction, based on inherent sovereign powers, is unaffected by any arrogation of criminal jurisdiction by other sovereigns. Tribes also may possess a degree of criminal jurisdiction over their members off the reservation, at least in the area of treaty-based fishing and hunting regulation. Under domestic law, however, there remains no inherent tribal criminal jurisdiction over non-Natives even for crimes committed on the reservation against the tribe or its members.

States exercise criminal jurisdiction on Native reservations within the state borders only where such jurisdiction has been assumed under Public Law 280 or other jurisdictional statute. In the absence of such a specific grant of jurisdiction, states have criminal authority within reservation boundaries only as to crimes exclusively between non-Natives. Where the states have not been granted criminal jurisdiction, the federal courts retain jurisdiction over all offenses between Natives and non-Natives, and over those Native-committed crimes enumerated under federal law.

C. On-Reservation Arrest for Off-Reservation Crime

The foregoing discussion of general criminal jurisdiction, although important to an understanding of the fresh pursuit issue, concerns solely the power of each sovereign to exercise its authority in the jurisdiction where the offense occurs. By contrast, fresh pursuit involves the exercise of authority by law enforcement officers in a for-

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(Ariz. Ct. App. 1979), which affirmed the conviction of a non-Native, who was pursued onto the reservation by state officers and arrested for possession of marijuana for sale, apparently on the ground that Arizona had jurisdiction to prosecute non-Natives for on-reservation crimes against non-Natives. The import of the reasoning, as in *Warner*, is apparently that victimless crimes committed by non-Natives will be treated by the state as the equivalent of crimes committed against non-Natives.

Criminal violations of state fish and game codes by non-Natives in Indian country fall within the definition of victimless crimes, but jurisdiction over such crimes may be dependent upon the unwieldy system of jurisdiction based on land tenure developed primarily in the context of civil regulatory authority. *Compare* Montana v. United States, 450 U.S. 544, 566 (1981) (Crow Tribe may not regulate hunting and fishing by non-Natives on non-Native fee land within the reservation) *with* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 343-44 (1983) (tribal regulations preempt application of state game laws to non-Native hunting and fishing on tribal and trust lands within the reservation). The Court in *Mescalero* noted that any enforcement vacuum created by *Oliphant* (*see* discussion *supra* note 21 and accompanying text), to the effect that the tribe cannot employ criminal penalties against non-Natives, would be filled by federal enforcement of the federal trespass statute, 18 U.S.C. § 1165 (1982), and the Lacey Act of 1981, 16 U.S.C. §§ 3371 *et seq.* (1982). *Mescalero*, 462 U.S. at 342 n.27. To date, it does not appear that this checkerboard jurisdiction over hunting and fishing offenses has been applied to other types of victimless crimes committed by non-Natives within reservation borders.

eign jurisdiction. The next step, therefore, is to examine, against the backdrop of general criminal jurisdiction, judicial reaction to attempts by state officers to make arrests within reservation boundaries where fresh pursuit is not involved.

1. General Arrest Authority

On reservations subject to Public Law 280 or other grants of state jurisdiction, state officers effecting arrests within reservation boundaries are not operating in a *de jure* foreign jurisdiction. Because these law enforcement officers have been accorded full criminal authority over persons on the reservation,[56] an on-reservation arrest for an off-reservation crime is valid whether the suspect is a Native American or not. The criminal jurisdiction granted by Public Law 280 and other enabling statutes renders such an arrest no different from an arrest by a county sheriff in one part of the county for an offense committed in another part of the same county. Hence, reservation boundaries in a Public Law 280 state, in essence, are non-existent for criminal jurisdiction purposes. In this limited sense, Public Law 280 operates as an abrogation of a tribe's sovereign power to control criminal justice administration within its territory. Because arrests by state law enforcement officers on Public Law 280 reservations do not implicate cross-jurisdictional concerns, the remainder of this discussion is addressed solely to reservations on which the state exercises only the limited criminal jurisdiction permitted under the *McBratney* rule.[57]

Even on reservations not subject to Public Law 280, state police arrests for off-reservation offenses have been held to be valid. As one commentator has observed, the identity of the suspect as Native or non-Native has not been decisive.[58] The smattering of authority, to date, has focused rather upon whether state law enforcement officers have "the authority to enter a reservation over which the state has no criminal jurisdiction to arrest an Indian for a misdeed done off the reservation without first securing the permission of tribal officials to arrest the offender or otherwise recognizing any interest of the tribal

56. *See supra* notes 47-50 and accompanying text.

57. *See supra* notes 36-37.

58. *Arrest on the Reservation*, *supra* note 20, at 431-32. With one exception, the few cases addressing this issue concern on-reservation arrests of Native suspects. *See infra* note 60. The exception was the pursuit by state officers across reservation borders and the capture and arrest of a non-Native suspect on the charge of possession of marijuana for sale. State v. Herber, 123 Ariz. 214, 598 P.2d 1033 (Ariz. Ct. App. 1979). The Arizona court, in affirming the conviction, apparently premised state jurisdiction to make the arrest on the doctrine that even on the reservation, state jurisdiction extends over crimes between non-Natives. *Id.* at 216, 598 P.2d at 1035. It is clear, in any case, that where an on-reservation arrest of a tribal member for an off-reservation crime would be valid, so also would a similar arrest of a non-Native.

government in the matter."[59] The answer uniformly has been yes.

There appear to be only four relevant authorities, none of them definitive: three state court decisions and an opinion of the Solicitor of the Department of the Interior.[60] In the earliest of these authorities, the Interior Solicitor advised that a county sheriff's arrest of a grand larceny suspect on the reservation was authorized despite the lack of state criminal jurisdiction within the reservation boundaries.[61] One year later, the North Dakota Supreme Court, although apparently unaware of the Solicitor's opinion, reached the same conclusion regarding an on-reservation felony arrest.[62] Both analyses were grounded in the concept that Native reservations are not extraterritorial to the states in which they are located.[63]

The North Dakota court termed the power to arrest for off-reservation offenses "fundamental to the preservation of the state," asking rhetorically whether the state's failure to assume Public Law 280 jurisdiction should deprive it of its sovereign power to enforce its laws outside reservation boundaries.[64] The court framed the issue before it as: "whether the state courts will be able to be effective in performing their function, or whether they will become helpless when an offense is committed off the reservation by an Indian who escapes to the reservation before he is apprehended."[65] Having stated the question in these terms, the court readily concluded that the arrest did not infringe upon tribal sovereignty, nor impair a right granted or reserved to Native Americans by federal law.[66]

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59. *Arrest on the Reservation, supra* note 20, at 432. The discussion in this section concerns the validity of on-reservation arrests where no extradition procedures exist. The validity of arrests not in compliance with tribal extradition laws is addressed in the next section.

60. In re Little Light, 183 Mont. 52, 598 P.2d 572 (1979); State ex rel. Old Elk v. District Court, 170 Mont. 208, 552 P.2d 1394, *appeal dismissed*, 429 U.S. 1030 (1976); Fournier v. Roed, 161 N.W.2d 458 (N.D. 1968); Op. Sol. Dep't of Interior M-36717 (1967).

In a fifth case, the court denied habeas corpus relief to a Montana parole violator who was arrested for an unrelated offense on a South Dakota reservation, surrendered to Montana authorities by the tribal police, and returned to Montana. High Pine v. Montana, 439 F.2d 1093 (9th Cir. 1971). The case is not discussed in this section because the court's decision was premised solely on the *Ker-Frisbie* rule (*see infra* section II.C.3.), and contained no Native law analysis.

61. Op. Sol. Dep't of Interior M-36717 (1967).

62. Fournier v. Roed, 161 N.W.2d 458 (N.D. 1968). Both *Fournier* and the Solicitor's Opinion are criticized in *Arrest on the Reservation, supra* note 20.

63. *Arrest on the Reservation, supra* note 20, at 432.

64. *Fournier*, 161 N.W.2d at 465.

65. *Id.* The tone of the court's presentation of its analysis has been called "emotional." *Arrest on the Reservation, supra* note 20, at 432.

66. *Fournier*, 161 N.W.2d at 467. The court's analysis was based on a test articulated in Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962): "even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." This two-tiered analysis forms the basis of the current test for state jurisdiction within reservation boundaries, discussed *infra* in section IV. The *Kake* test, which appears

More recently, the issue has been twice addressed by the Supreme Court of Montana in cases relating to arrests on the Crow Reservation for felonies committed outside reservation borders.[67] In finding that the arrests did not interfere with tribal sovereignty,[68] the Montana court stressed the absence of any extradition procedures.[69] In the ear-

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to begin with a presumption in favor of the legitimacy of state jurisdiction, itself reformulated somewhat the now-classic test from Williams v. Lee, 358 U.S. 217, 220 (1959): "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."

67. In re Little Light, 183 Mont. 52, 598 P.2d 572 (1979); State ex rel. Old Elk v. District Court, 170 Mont. 208, 552 P.2d 1394, *appeal dismissed*, 429 U.S. 1030 (1976).

68. *Little Light*, 183 Mont. at 55, 598 P.2d at 573; *Old Elk*, 170 Mont. at 216-17, 552 P.2d at 1398.

69. *Little Light*, 183 Mont. at 55, 598 P.2d at 573; *Old Elk*, 170 Mont. at 211, 213-16, 552 P.2d at 1395, 1397-98. The concurring opinion in *Fournier* also noted the absence of an extradition statute in the Devils Lake Sioux Tribal Code. 161 N.W.2d at 476 (Knudson, J., concurring).

Extradition has been defined as the formal surrender, based upon a reciprocal arrangement, such as an extradition agreement, "by one nation to another of an individual accused or convicted of an offense outside its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." Terlinden v. Ames, 184 U.S. 270, 289 (1902). *See also* Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893). With the exception of civil law states, the contemporary world view, and that adopted by the United States, is that in the absence of an agreement or treaty creating an obligation upon a state to extradite, no such obligation exists in international law.

> But the principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so. . ., the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.

Factor v. Laubenheimer, 290 U.S. 276, 287 (1933). *Accord* Argento v. Horn, 241 F.2d 258, 259 (6th Cir. 1957)("While Congress might conceivably have authorized extradition in the absence of a treaty, it has not done so. The law is clear . . . ."); 1 MOORE ON EXTRADITION 21 (1891); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 476 (Tent. Draft No. 7, April 10, 1986). The United States codified its practice in 1948. *See* 18 U.S.C. § 3181 (1982) (United States extradition provisions "shall continue in force only during the existence of any treaty of extradition with [a] foreign government").

Extradition is solely an international law concept. The domestic equivalent — the right of one state of the United States to demand, and the duty of another state to surrender, fugitives from justice is called "rendition." Lascelles v. Georgia, 148 U.S. 537 (1893) ("rendition" and not "extradition" was the proper term to be used in referring to the arrest and surrender of interstate criminals). *See also* S.A. SCOTT, LAW OF INTERSTATE RENDITION: TREATISE ON THE ARREST AND SURRENDER OF FUGITIVES FROM THE JUSTICE OF ONE STATE TO ANOTHER 1-5 (1917) (setting out seven "Fundamental Points of Difference" between international extradition and interstate rendition).

In keeping with the inherent and separate sovereignty retained by America's Native nations, and because neither the constitutional nor statutory provisions for interstate rendition apply to Native tribes, see *infra* note 79, the term "extradition" will be used in the remainder of this article to refer to the tribal-state surrender of fugitives. State-to-state surrenders will be referred to properly as "rendition."

The obligation of arrest and interstate rendition imposed upon the states of the United States is not limited to certain criminal offenses, as is so frequently the case in international law. Most extradition treaties enumerate selected offenses for which the countries will grant extradition. *See, e.g.*, Treaty on Extradition, Jan. 21, 1972, United States-Argentina, art. 2, 23 U.S.T. 3501, T.I.A.S. No. 7510. Other

lier of the two cases, the court specifically noted that the county sheriff had requested the tribal judge to issue a court order or arrest warrant, but that the tribal judge had refused, and in fact had no authority to apprehend or extradite the suspect on behalf of the state.[70] Interestingly, the court then observed in dictum that, had the Crow Tribe enacted and enforced an extradition law, the arrest may well have infringed on the tribe's right of self-government.[71]

The uniform conclusion of these authorities, that an on-reservation arrest for an off-reservation crime does not infringe upon tribal sovereignty, seems premised primarily on the absence of tribal extradition procedures. While this procedural shortcoming obviously does not alter a tribe's sovereignty, it does leave a state that is intent upon

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treaties require simply that the extraditable offense be punishable in both the releasing and accepting countries. *See, e.g.*, Extradition Treaty, May 4, 1978, United States-Mexico, art. 2(3), 31 U.S.T. 5059, T.I.A.S. No. 9656. Such a proviso is called an "eliminative" provision, because it eliminates from extradition consideration all offenses not meeting the terms of the stipulation. The more recently renegotiated extradition treaties utilize a combination of enumerative and eliminative provisions. For example, the Japanese-American extradition treaty, entered into force in 1980, enumerates 47 offenses and, in a catch-all provision, includes also any crime punishable by "death, imprisonment, or deprivation of liberty for more than one year" under the laws of either country. *See* Note, *Recent Developments — Extradition Treaty — United States-Japan Extradition Treaty — Ratified on Dec. 13, 1979, S. Doc. No. P, 96th Cong., 1st Sess. (1979)*, 21 HARV. INT'L L.J. 540, 542 (1980). Nearly all treaties have a bar against extradition for "political offenses." Many agreements additionally exempt the asylum state's nationals from extradition and may subject them instead to domestic prosecution. *See, e.g.*, Extradition Treaty, June 9, 1977, United States-Norway, art. 4, 31 U.S.T. 5619, T.I.A.S. No. 9679.

70. *Old Elk*, 170 Mont. at 210-11, 216, 552 P.2d at 1395, 1398. It is not clear from the court's opinion whether the tribal judge was unable or unwilling, or both, to assist the sheriff. *Id.* at 210-11, 216, 552 P.2d at 1395, 1398.

71. *Id.* at 214, 552 P.2d at 1397. The court referred to the case of Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), discussed *infra* at text accompanying notes 75-78 and 80-82, which held that an arrest on the reservation in violation of the Navajo extradition code infringed on the right of the tribe to make its own laws and be ruled by them. *Id.* at 685-86. The Montana court stated that "the tribe must first have codified and exercised its own extradition laws before the rule in *Turtle* would apply." *Old Elk*, 170 Mont. at 214, 552 P.2d at 1397.

Aside from the perceived necessity for tribal codification, *see infra* note 73, the concept that arrest in violation of tribal extradition laws interferes with tribal self-governance parallels the analysis in many decisions on the scope of state-court jurisdiction. Courts have held that state court jurisdiction over Natives or activities on Native land infringes on the right of tribal governments, through their court systems, to make their own laws and be ruled by them. *See, e.g.*, Iowa Mutual Ins. Co. v. LaPlante, 107 S. Ct. 971, 976 (1987); Fisher v. District Court, 424 U.S. 382 (1976) (tribal court jurisdiction exclusive over adoption proceedings involving only reservation Natives); Williams v. Lee, 358 U.S. 217 (1959) (state court jurisdiction over collection action by non-Native against Native arising out of on-reservation transaction would infringe on right of self-government); R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985) (state court determination of dispute that is within the province of tribal court impinges upon tribal self-government); Milbank Mutual Ins. Co. v. Eagleman, 705 P.2d 1117 (Mont. 1985) (state court jurisdiction over action by non-Native against Native arising out of on-reservation incident would infringe on the tribe's right to establish forum for suit). *Cf.* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 467 U.S. 138 (1984) (state court jurisdiction over action by Native plaintiff against non-Native defendant does not interfere with tribal sovereignty).

prosecuting the off-reservation offender with little self-perceived alternative but to seek subsequent arrest on the reservation. Yet there remains in such action the abridgement of fundamental territorial sovereignty. As one commentator points out, the issue is not the state's ability to prosecute a particular Native American offender, but rather the state's authority to interfere with the tribe's control over the territory and inhabitants of its reservation.[72] Nonetheless, the lack of tribal extradition laws has allowed the courts to focus solely on the state prosecution issue, rather than on the tribal sovereignty interest, with uniformly adverse consequences for tribal autonomy and self-government.[73]

2. Extradition

Native nations and tribes possess sovereign authority to control extradition from the reservation, at least as to their members, as a corollary of the governmental powers to administer justice on and control entry onto the reservation.[74] While the existence of the tribal

72. *Arrest on the Reservation, supra* note 20, at 440: "What is at stake here is not the avoidance by an Indian from state prosecution for his offenses committed off the reservation, but rather whether the state must recognize some degree of sovereignty and control of the tribal government over the reservation's inhabitants."

73. "[F]ailure of the tribes to enact extradition measures might be viewed by some courts as a sign that tribes are not exercising their internal sovereignty. Once a court makes this determination it logically can follow that state extradition procedures would, therefore, not infringe on tribal self-government." NAT'L AM. INDIAN CT. JUDGES ASS'N, 3 JUSTICE AND THE AMERICAN INDIAN: THE EFFECT OF HAVING NO EXTRADITION PROCEDURES FOR INDIAN RESERVATIONS 28 (1974) [hereinafter cited as 3 JUSTICE AND THE AMERICAN INDIAN]. It can as easily follow that state arrest powers also do not infringe on tribal sovereignty. The National American Indian Court Judges Association recommends for this very reason that tribes adopt extradition laws. "From a practical aspect it is easier for a non-Indian court or legislator to accept adaptations of their own system codified in other cultural settings than to acknowledge arguments based on cultural distinctions and sovereignty." *Id.* at 23.

Not all commentary, however, is in agreement on the expediency or necessity of such tribal action. The Chief Justice of the Wisconsin Supreme Court articulated the counterpoise in dissent: "The power to regulate, the right to self-government, must include not only the power to decide to enact laws, but also the power to decide not to enact laws on that subject." County of Vilas v. Chapman, 122 Wis. 2d 211, 221, 361 N.W.2d 699, 704 (1985) (Heffernan, C.J., dissenting).

74. Davis v. O'Keefe, 283 N.W.2d 73, 75 (N.D. 1979) (tribe has "governmental authority to prescribe procedures for the orderly extradition to state authorities of tribal members suspected of violating state law"); "Extradition of Indian Fugitives to Reservations Where Offense Was Committed," M-31194 (1941), I *Op. Sol.*, *supra* note 20, at 1066, 1068 ("Indian tribes have complete legal authority to seek and grant extradition").

Powers of extradition routinely were incorporated into Native treaties. Professors Barsh and Henderson, discussing the *Oliphant* debacle, counted "[t]wenty-two Indian treaties [that] provide for tribal extradition of non-Indians accused of crimes under federal law, state law, or both. Two treaties provide for mutual extradition." *See* Barsh & Henderson, *supra* note 22, at 623. Tribal extradition authority over non-member Natives also has been implied by at least one court. *See infra* note 77; *see also* the inclusive language of the Navajo extradition code, *infra* note 78. Tribes probably possess the authority to extradite non-Natives, premised on the inherent tribal power to exclude non-Natives from tribal lands. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983) ("A tribe's power to exclude

power to extradite has never been contested, attempts to exercise it have met with mixed results.

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nonmembers entirely or to condition their presence on the reservation is equally well established"); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982) (non-members lawfully entering tribal lands nonetheless remain "subject to the tribe's power to exclude them"); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (non-Natives allowed to enter Cherokee lands only "with assent of the Cherokees themselves"); Hardin v. White Mountain Apache Tribe, 761 F.2d 1285, *amended*, 779 F.2d 476 (9th Cir. 1985) (upholding decision of tribal court to permanently exclude from reservation a nonmember convicted of violations of tribal code). One method of excluding such persons is by delivering them to the appropriate off-reservation authorities. Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975). *See generally*, Dillsaver, *Land Use: Exclusion of Non-Indians from Tribal Lands — an Established Right*, 4 AM. INDIAN L. REV. 135 (1976).

While the exclusionary power is an acknowledged inherent attribute of Native sovereignty, that power also is affirmed in treaties, which may provide express methods for exclusion. *See, e.g.*, Treaty with the Chickasaw, Sept. 20, 1816, art. 7, 7 Stat. 15 (no more peddlers to be licensed to traffic in the Chickasaw nation); Treaty with the Cherokee, July 2, 1791, arts. 8-9, 7 Stat. 39 ("nor shall any citizen or inhabitant [of the United States] go into the Cherokee country, without a passport first obtained"). KAPPLER TREATIES, *supra* note 21, at 30, 161. *See also* the preamble to the Navajo Nation resolution amending subchapter five of chapter five of the law and order code, "Exclusion of Persons from Tribal Land," which states in part that "[t]his right to exclude non-Navajos is both part of the inherent sovereignty of the Navajo Nation as well as recognized in the Treaty of 1868. . . ." NAVAJO TRIB. CODE tit. 17, ch. 5, subch. 5 (Supp. 1984-85). Moreover, congressional concern with trespassers on Native lands was, in part, the impetus for the Trade and Intercourse Act of 1793, as well as its successive enactments. *See* Act of Mar. 1, 1793, ch. 19, § 5, 1 Stat. 329, 330 (repealed by Act of May 19, 1796); Act of June 30, 1834, ch. 161, §§ 6, 9, 10, 11, 4 Stat. 730 (repealed in part, 1934) (codified at 25 U.S.C. §§ 179, 180 (1982)).

But the tribal exclusionary power is not plenary. Native reservations have been held subject to several arrogated federal powers that require reservation lands to remain "open" for general public usufructuary easements. For example:

> [T]he United States retains a navigational easement in the navigable waters lying within the described [Crow Reservation] boundaries for the benefit of the public, *regardless of who owns the riverbed*. Therefore such phrases in the 1868 treaty as 'absolute and undisturbed use and occupation' and 'no persons, except those herein designated . . . shall ever be permitted,' whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries.

Montana v. United States, 450 U.S. 544, 555 (1981). *See also* Choctaw Nation v. Oklahoma, 397 U.S. 620, 636-37 (1970) (Douglas, J., concurring); Cherokee Nation v. United States, 782 F.2d 871, 879 (10th Cir. 1986), *rev'd*, 107 S. Ct. 1487 (1987). *But see* Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918) (ordering removal of a non-Native fish trap located in navigable waters where exclusiveness of the fishery for Metlakatla Natives was part of reservation's purpose). *Cf.* Metlakatla Indian Community v. Egan, 369 U.S. 45, 56-57 (1962).

Numerous provisions also are provided in federal law for roadway easements across "Indian country." Reservation roads constructed or maintained with federal monies must be kept open to the public. 25 C.F.R. § 170.8 (1987). Further, pursuant to 25 U.S.C. § 311 (1982), the Secretary of the Interior may "grant permission . . . to the proper State or local authorities for the opening and establishing of public highways . . . through any Indian reservation . . . ." *See also* 25 U.S.C. §§ 323-328 (1982) (Indian Right-of-Way Act of 1948 authorized Secretary of Interior, with tribal consent, to grant rights of way for all purposes across trust lands). Moreover, states are authorized to condemn for any public purpose, including roadways, and without the approval of the Secretary, patented or fee lands within the reservation in a manner analogous to the condemnation of non-reservation lands in the state. 25 U.S.C. § 357 (1982).

The Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (1971)(codified as amended at 43 U.S.C. §§ 1601-1628 (1982)), contains a special provision requiring

The Ninth Circuit, in the key case of *Arizona ex rel. Merrill v. Turtle*,[75] held that an attempted extradition from the Navajo Reservation in violation of tribal extradition procedures was an impermissible interference "with rights essential to the Navajo's self-government."[76] In that case, the State of Oklahoma applied for an extradition order to the Navajo Nation, which refused to surrender the suspect[77] because Navajo law provided for extradition only to the states of Arizona,

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the reservation of public easements over Native-selected lands "which are reasonably necessary to guarantee . . . a full right of public use and access for recreation, hunting, transportation, utilities, docks," and other public purposes. ANCSA § 17, 43 U.S.C. § 1616(b) (1982). *See* Alaska Pub. Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977)(vacating Interior's proposed 25-foot continuous shoreline and streamside easements).

Finally, a tribe may not exclude non-members from fee lands within its reservation absent a predominant tribal sovereign interest. *Montana*, 450 U.S. at 565-66. The mere presence of non-Native hunters and fishers within the reservation was held insufficient in the *Montana* instance to meet the tribal interest test. *Id.* Tribes nevertheless may refuse entry for hunting and fishing on non-fee reservation lands. 18 U.S.C. § 1165 (1982). Violation of the federal statute constitutes criminal trespass. *Id.*; *see also Montana*, 450 U.S. at 561-62, 565 n.14.

75. 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970).

76. *Id.* at 685-86. While *Turtle* is the leading case, it is not the earliest authority. Almost two decades before *Turtle*, the Solicitor of the Department of the Interior addressed a situation where Arizona authorities, pursuant to a rendition request from Colorado, arrested a Navajo named Harding on the Navajo Reservation. The Solicitor commented:

> "without specific authority State officers have no power to enter restricted Indian lands for the enforcement of State laws against Indians. . . ." 56 I.D. 38, 39 (1936). In the Harding case, the Arizona sheriff did not request or obtain proper permission to apprehend the fugitive. Moreover, we are aware of no Federal law or Navajo tribal ordinance authorizing the apprehension by a State officer of an Indian fugitive where the latter is charged with the commission of a criminal violation of State law off the Navajo Reservation. Accordingly, this Department takes the view that the arrest of Mr. Harding was illegal.

Arrest by Sheriff of Navajo Fugitive from Justice on Navajo Reservation for Extradition to Colorado (1952), II *Op. Sol.*, *supra* note 20, at 1602, 1603. The Solicitor's opinion appears to presume that either a tribal enabling statute or a state-tribal agreement is a necessary predicate to a lawful arrest of a Native on the reservation for a violation of state law committed off the reservation.

77. The suspect sought by Oklahoma was a Cheyenne who resided on the Navajo Reservation with his Navajo wife. *Turtle*, 413 F.2d at 683. Beyond mentioning this fact, the court in *Turtle* shied away from any potential difficulty arising from the fact that the suspect was not a member of the Navajo Nation, but framed the issue before it instead as one of "extradition jurisdiction over Indian residents of the Navajo Reservation." *Id.* at 685. Throughout the opinion the Court spoke in terms of "Indian residents of reservations" and "non-Indians" rather than of members and non-members.

While the criminal jurisdictional differences in treatment of Natives and non-Natives are readily ascertainable, few statutes or cases have addressed directly the criminal jurisdictional status of non-member Natives residing on reservations of other tribes. *See* 18 U.S.C. § 1152 (1982) (providing for general criminal jurisdiction on reservations except for certain "offenses committed by one Indian against the person or property of another Indian"); United States v. Kagama, 118 U.S. 375, 383 (1886)(Major Crimes Act requires only that "the offense under the statute is committed by an Indian . . . and the fair inference is that the offending Indian shall belong to that or some other tribe"); United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846) (statutory antecedent of § 1152 exception "does not speak of members of a tribe, but of the race generally, — of the family of Indians"). *See also* Treaty with the Shawnees, Jan. 31, 1786, art. III, 7 Stat. 26 (providing for federal prosecution of any non-Native "who shall do an injury to any Indian of the [tribal] nation, or to *any other Indian* or Indians residing in their towns, and under their protection") (emphasis added). In at least one instance, a state court has held that the state does not have jurisdiction to try an enrolled member of one tribe for a

New Mexico, and Utah[78] Oklahoma then sought rendition from the

felony (bribery of a county officer) committed on the reservation of another tribe. State v. Allan, 100 Idaho 918, 920-21, 607 P.2d 426, 428-29 (1980).

These cases and statutes fail to distinguish between tribal member and non-member Natives principally because of the indiscriminate use by the judiciary and Congress of the term "Indian," *see supra* note 1, rather than a term limited to tribal members. *See* Duro v. Reina, 821 F.2d 1358, 1361 & n.1 (9th Cir. 1987) (noting that neither the Supreme Court nor the Ninth Circuit has "used the terms non-Indian and nonmember Indian precisely" and adding that even "individual opinions are internally inconsistent on this point"); Fox v. Bureau of Revenue, 87 N.M. 261, 262, 531 P.2d 1234, 1235 (N.M. Ct. App. 1975), *cert. denied*, 424 U.S. 933 (1976) (the court had "neither found nor been directed to a single case where it was regarded crucial that the Indian in question, although located on a reservation, was not a member of the tribe to which the reservation belonged").

In United States v. Wheeler, 435 U.S. 313 (1978), however, the Supreme Court first drew a criminal jurisdictional line between members and non-members rather than between Natives and non-Natives. While there were no non-member Native defendants in that prosecution, the Court fastidiously spoke of "members" and "non-members" in discussing the powers of Native governments, noting that tribal governments "have a significant interest in maintaining orderly relations among their members." *Id.* at 331. *See also* Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 410 n.3 (9th Cir. 1976) ("This opinion is limited in all respects to the relationships between the Quechan Tribe and non-members of the Tribe."); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975) (" 'An Indian tribe may exercise a complete [criminal] jurisdiction over its members and within the limits of the reservation.' ") (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 148 (1942 ed.)); Davis v. O'Keefe, 283 N.W.2d 73, 75 (N.D. 1979) ("tribal governments have always had the authority to control the conduct of their members within the exterior boundaries of a reservation" and "a tribe generally possesses the authority. . . to deliver to state authorities tribal members who are suspected of committing a state offense").

The *Wheeler* Court stated further that Native nations "cannot try non-members in tribal courts." 435 U.S. at 326 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)). The holding in *Wheeler*, that the double jeopardy clause did not bar federal prosecution of a *tribal member* previously convicted of a lesser-included offense in tribal court, was tailored to reflect expressly this member / non-member bifurcation. The *Wheeler* statement that tribes "cannot try non-members," however, is not an accurate rendition of the holding in *Oliphant*, since the latter case drew no distinction between tribal members and non-members, but was presented solely in terms of "Indians" and "non-Indians." *See supra* note 21. Subsequent federal and tribal court rulings have distinguished *Oliphant* in the context of criminal prosecutions of nonmembers. *See* Duro v. Reina, an unpublished *habeas* decision, discussed in *Administration of Justice*, *supra* note 21, at 8-9, in which a federal district court ordered the release of a Torrez-Martinez Mission Native convicted in the Pima-Maricopa tribal court of the murder of a Gila River tribal member. The federal district court ruled that the assertion of criminal jurisdiction by the tribal court over non-members, whether Native or non-Native, was a denial of equal protection under the Indian Civil Rights Act, 25 U.S.C. § 1302 (1986). The Ninth Circuit Court of Appeals, acknowledging the "uncharted reaches" of this "troubling" jurisdictional question, vacated the lower court judgment, holding instead that the non-member Native defendant was subject to the criminal jurisdiction of another tribe's court where the non-member had significant contacts with the foreign reservation. Duro v. Reina, 821 F.2d 1358, 1360, 1364 (9th Cir. 1987). In reaching its decision, the court noted that previous opinions in which the terms non-Native and non-member were used without differentiation, if not synonymously, "are not helpful in resolving this case, in which the distinction between nonmember Indian and non-Indian is crucial." *Id.* at 1361 n.1. *Accord* Miller v. Crow Creek Sioux Tribe, 12 Indian L. Rep. (Am. Indian Law. Training Program) 6008, 6009 (Intertribal Ct. App. 1984) (close cultural and social ties among modern Sioux tribes, coupled with modern law enforcement problems, require tribe to continue to assert its historic exercise of criminal jurisdiction over non-member Natives). On the member/non-member distinction in treaties, statutes, and case law, *see* Comment, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 ARIZ. ST. L.J. 727.

78. *Turtle*, 413 F.2d at 686 n.3. The Navajo extradition statute originally was enacted in 1956. The year following the *Turtle* decision, that section was amended to delete the language limiting extra-

State of Arizona,[79] whose officials had arrested the suspect and held

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dition expressly to the states of Arizona, New Mexico, and Utah because the limitation "has allowed Indians who have committed crimes in other states to use the Navajo Nation as an asylum, and serves to prevent other states from entering into agreements with the Navajo Tribe on the subject of extradition." Preamble to Amendment CMY-38-70 (1970), noted at NAVAJO TRIB. CODE tit. 17, § 1951 (1977). The amended and present Navajo extradition statute recites:

> Whenever the Chairman of the Navajo Tribal Council is informed and believes that an Indian has committed a crime outside of Indian Country and is present in Navajo "Indian Country" and is using it as an asylum from prosecution by the state, the Chairman may order any Navajo policeman to apprehend such Indian and deliver him to proper state authorities at the Reservation boundary.

NAVAJO TRIB. CODE tit. 17, § 1951 (1977).

79. The difference between interstate rendition and international extradition is explained *supra* at note 69. Interstate rendition is provided for in the Constitution:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2, cl. 2. The constitutional mandate is implemented by 18 U.S.C. § 3182 (1982):

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

Extradition to a reservation, however, cannot be premised on either the constitutional or the statutory provision. Ex parte Morgan, 20 F. 298 (W.D. Ark. 1883). In *Morgan*, the governor of Arkansas had honored a requisition issued by the chief of the Cherokee Nation and issued an arrest warrant for Morgan, who was wanted by the Cherokee Nation for the crime of murder. After Morgan was arrested by Arkansas authorities, but before he was delivered into the custody of the Cherokee Nation, he brought an action for habeas corpus relief. The court noted that the status of the Cherokee Nation was "not as a state or territory, but as the home of the Indian," *id.* at 305, and held that:

> the Cherokee Nation is neither a state nor territory, in the sense to be attached to the words when used in the clause of the Constitution and in the act of Congress relating to interstate extradition, and. . . therefore, the Governor of Arkansas could not, under the Constitution and laws of the United States, issue a warrant for the arrest of Morgan upon the demand of the chief of the Cherokee Nation.

Id. at 307. *See also* Extradition of Indian Fugitives to Reservations Where Offense Was Committed, M-31194 (1941), I *Op. Sol.*, *supra* note 20, at 1066, 1067 ("until legislation is obtained authorizing action by the States in this situation there can be no extradition of Indians from the jurisdiction of a State"); Navajo Tribal Council Resolution CJ-1-56, § 1, noted at NAVAJO TRIB. CODE tit. 17, § 1001 (1977) (urging the Secretary of Interior to request congressional legislation that would authorize the Navajo Nation to enter into extradition agreements with states).

Most states have implemented the constitutional provision through enactment of the Uniform Criminal Extradition Act, which provides state statutory authority for rendition of suspects to other states. *See, e.g.*, WIS. STAT. ANN. § 976.03 (West 1987), which lists 47 states as well as Puerto Rico and the Virgin Islands that have adopted the uniform law. As with the constitutional and federal statutory rendition provisions, however, it is unlikely that state extradition to Native governments is authorized by the Act. 70 Op. Att'y Gen. Wis. 36, 38 (1981) (finding "no authority [in the Uniform

him at the Navajo jail.[80] The governor of Arizona issued a writ of rendition, but before Oklahoma authorities could arrive, the suspect successfully petitioned for a writ of habeas corpus.[81] The Ninth Circuit concluded that because the Navajo Nation had codified and was exercising its sovereign extradition powers, the State of Arizona could not exercise concurrently its own domestic rendition power without infringing on the Navajo Nation's right of self-government.[82] Arizona

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Criminal Extradition Act] to allow state law enforcement officers to arrest Menominee Tribe members who are fugitives from tribal court jurisdiction").

Despite the apparent barriers raised by both federal and state law, states may be empowered, without federal enabling legislation, to enact separate laws permitting extradition of Native fugitives to reservations. In 1976, South Dakota enacted a statute that provides in part that "any Indian charged with an offense by an Indian tribe" may be extradited to the tribe. S.D. CODIFIED LAWS ANN. § 23-24B-1 (1979). Extradition is only available, however, if the state and the tribe "have mutually and formally entered into an extradition compact whereby either party may exercise the power of extradition." *Id.* at § 23-24B-2. At least one tribe has entered into a reciprocal agreement with the state. State v. Lufkins, 381 N.W.2d 263, 266 (S.D. 1986) (referencing the Reciprocal Extradition Agreement between the Sisseton-Wahpeton Sioux Tribe and the State of South Dakota).

Extradition between Native governments also is not governed by constitutional or federal statutory law. No federal authority is empowered to extradite Natives from one reservation to another. I *Op. Sol.*, *supra* note 20, at 1067. Native governments, however, can extradite not only to other Native tribes, but also to state or federal authorities. *Id.* As stated by Interior Department Acting Solicitor Felix S. Cohen:

> I have no doubt that part of the unabridged sovereignty and authority of Indian tribes is to request of other tribes the return of fugitive members and to act upon such requests to the extent of removing the fugitive from the reservation or of turning over the fugitive to the proper authorities of the tribe requesting extradition.

Id. Cohen noted, however, that problems may arise where the reservations are not contiguous, because Native police outside the reservation probably have no authority to hold a Native fugitive in custody. *Id. See also supra* note 7. This jurisdictional problem could be addressed either by legislation authorizing such custody, I *Op. Sol*, *supra* note 20, at 1068, or by intergovernmental agreement.

80. The arrest was illegal. The district court concluded "that the Arizona authorities had exceeded their jurisdiction in arresting appellee on the Navajo Reservation." *Turtle*, 413 F.2d at 684. The Ninth Circuit did not reach this issue on appeal.

81. *Id.* at 683-84.

82. *Id.* at 686. *See also* Comment, *Tribal Control of Extradition from Reservations*, 10 NAT. RESOURCES J. 626 (1970).

This concept that an overlay of state jurisdiction onto existing tribal jurisdiction impinges upon tribal sovereignty is echoed in both civil court and civil regulatory cases. In the civil court context, courts have held that where the tribal court exercises civil jurisdiction over Natives and activities on the reservation, state court adjudication would interfere impermissibly with the tribal self-governing right to establish forums for dispute resolution. *See supra* note 71.

In addition, to allow concurrent application of dual regulatory schemes, particularly where the state scheme is equivalent to or more restrictive than the tribal scheme, essentially would supplant or eviscerate tribal regulation. The Tenth Circuit has articulated this "mutual dislocation" doctrine as follows:

> [H]ere a definite conflict exists between the tribal regulatory structure and that of the State. In *Colville* [Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)] the tribal and state taxing schemes were purely revenue-raising in nature, and dual systems of pure taxation are not inherently conflicting. In contrast, dual *regulatory* schemes, as the Court implied, necessarily create mutual dislocations. It is because of this characteristic of regulation that we presume, when Indian tribes under federal

thus was without authority to exercise rendition jurisdiction over Native American residents of the Navajo Reservation.

Seven years later the New Mexico Supreme Court agreed with the *Turtle* analysis of tribal extradition powers. In *Benally v. Marcum*,[83] a city police officer pursued a Navajo suspect onto the Navajo reservation, arrested him for violation of a city ordinance, and returned him to the jurisdiction of the municipality.[84] Relying on the holding in *Turtle*, the court ruled that the arrest was illegal as violating the sovereignty of the Navajo Nation "because it circumvented and was contrary to the orderly procedure for extradition from the Navajo Reservation" provided for by the Navajo Code.[85]

The cases concerning extradition from the reservation that have arisen since *Benally*, however, have not concurred in the *Benally-Turtle* analysis. The Supreme Court of North Dakota, in *Davis v. O'Keefe*, refused to issue a writ of prohibition to a Native suspect arrested by a county sheriff on the Turtle Mountain Reservation and removed from it in violation of tribal extradition procedures, on the ground that no irreparable injury arises merely by being required to defend against a

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protection seek to regulate their traditional interests, that federal law has preempted state jurisdiction.

Mescalero Apache Tribe v. New Mexico, 630 F.2d 724, 730 (10th Cir. 1980) (citations omitted) (emphasis in original), *vacated and remanded*, 450 U.S. 1036 (1981). The case was remanded to the circuit court for reconsideration in light of the Supreme Court's holding in Montana v. United States, 450 U.S. 544 (1981), regarding state regulation of non-member fishing on the Crow Reservation. *See supra* note 74. On remand, the Tenth Circuit reaffirmed its prior holding, relying on Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), rather than *Montana*, and again invalidated the state regulations. Mescalero Apache Tribe v. New Mexico, 677 F.2d 55 (10th Cir. 1982), *aff'd*, 462 U.S. 324 (1983). *Accord*, United States v. Sohappy, 770 F.2d 816, 819 n.4 (9th Cir. 1985); *see also* Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75, 77 (4th Cir. 1978), *cert. dismissed*, 446 U.S. 960 (1980) (prohibiting application of the state license requirements to on-reservation, non-member fishers because, *inter alia*, imposition of a $5.50 state fishing license fee on non-members who also paid a tribal license fee of $2.00 per diem was a "substantial deterrent" to prospective visitors and prevented the tribe from increasing its own fee). *But see* Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165, 175 (1977) (dismissing assertion of exclusive tribal regulatory authority over on-reservation fishing where such control could defeat nontreaty fishers' express right under the treaty to share of scarce migratory resource). For a discussion of the conflicts of concurrent tribal and state on-reservation regulation, *see* Note, New Mexico v. Mescalero Apache Tribe: *Dueling Sovereigns — When State and Tribe Clash*, 11 OHIO N.U.L. REV. 439 (1984); Woodbury, New Mexico v. Mescalero Apache Tribe: *When Can a State Concurrently Regulate Hunting and Fishing by Non-Members on Reservation Lands?* 14 N.M.L. REV. 349 (1984).

83. 89 N.M. 463, 553 P.2d 1270 (1976).

84. While ostensibly this was a fresh pursuit situation, technically it was not. Fresh pursuit arrests under New Mexico law are permitted only for felonies; Benally was being pursued for violation of a city ordinance. *Id.* at 466, 553 P.2d at 1273. Because the pursuit clearly was not authorized under state law, the *Benally* court did not address the issue of whether the arrest would have been valid if the pursuit had been for a felony violation.

85. *Id.* at 464, 553 P.2d at 1271. The court concluded that if the suspect were to be tried for violating the city ordinance, "he must be legally arrested through the established extradition process of the Navajo Tribe, or by other legal means." *Id.* at 468, 553 P.2d at 1274.

criminal charge.[86] The court noted, however, that by refusing to grant the writ, it was not attempting to resolve the issue of the lawfulness of either the arrest or the extradition.[87] Subsequently, the federal court refused to grant a writ of habeas corpus to the same suspect.[88] The Eighth Circuit distinguished its case from the situation in *Turtle* by stating: "if we were presented with a claim filed to protect the extradition process prior to surrender of the individual petitioner to the demanding state, considerations of comity and concern for tribal sovereignty might well dictate exercise of federal jurisdiction."[89] Here, by contrast, the suspect was already in state custody and subject to a pending state prosecution in which his rights "may be" recognized.[90] Moreover, the Eighth Circuit concluded, the state court maintained personal jurisdiction over the suspect even though he was brought before it by illegal means.[91]

The dissent, in accord with the reasoning of *Turtle*, termed the state's refusal to comply with tribal extradition procedures "a classic

86. Davis v. O'Keefe, 283 N.W.2d 73, 76 (N.D. 1979). The court specifically noted that: "We have not been told exactly why an extradition hearing was not held." *Id.* at 74.

87. *Id.* at 76. "It would be an undesirable precedent for this court to attempt to resolve a question as difficult as state jurisdiction over Indians within Indian lands, without any transcript of factual evidence or sworn affidavits of facts adequate to support any conclusions the court might reach." *Id.* at 75. In this context, the court expressly recognized tribal "governmental authority to prescribe procedures for the orderly extradition to state authorities of tribal members suspected of violating state law." *Id.*

88. Davis v. Muellar, 643 F.2d 521 (8th Cir.), *cert. denied*, 454 U.S. 892 (1981).

Both *Davis* cases concerned state violations of tribal extradition procedures, and both *Davis* courts denied habeas corpus relief to the defendant. There is some indication, however, that courts may be willing to enforce the substantive provisions of tribal extradition law. In State v. Lufkins, 381 N.W.2d 263 (S.D. 1986), the South Dakota Supreme Court rejected the defendant's contention that a state-tribal extradition agreement could be used to compel the presence at trial of witnesses resident on a reservation. "[T]he Reciprocal Extradition Agreement between the Sisseton-Wahpeton Sioux Tribe and the State of South Dakota . . . only concerns the extradition of 'fugitives from justice.' " *Id.* at 266-67. A similar dichotomy between enforcement of substantive statutory provisions and leniency toward violations of procedures is seen in the courts' treatment of fresh pursuit cases. *See infra* notes 143-49 and accompanying text.

89. Davis v. Muellar, 643 F.2d at 526. The court's distinction appears to have little practical application. As the Second Circuit noted in an international context: "The existence of an extradition treaty provides an individual with certain procedural protections only when he is extradited." United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981). Most violations of extradition laws involve merely ignoring them: simply arresting and removing the suspect as though no extradition procedures existed. *See infra* note 99 and accompanying text. Seldom will an on-reservation suspect have the luxury of time between the arrest and the removal to protest violations of tribal law. The effect of the *Muellar* court's distinction is that state officers may violate tribal extradition laws with impunity if only they act quickly enough.

90. Davis v. Muellar, 643 F.2d at 526.

91. *Id.*, relying on the *Ker-Frisbie* rule discussed *infra* at notes 95-97 and accompanying text. "[W]e are unable to find that the United States has by policy, by treaty, by statute or by court decision decreed North Dakota's loss of personal jurisdiction over appellant as a penalty for having arrested appellant in violation of the tribal extradition ordinance here involved." *Id.* at 527.

example of state interference with tribal sovereignty."[92] The dissenting judge agreed with the majority that the suspect's rights were not the primary issue; the focus, rather, should be on the tribe's sovereign powers over the reservation's inhabitants.[93] Extradition, the dissent asserted, creates rights only in the sovereign and does not confer asylum upon the individual.[94] Hence, once the court's attention is centered on the injury to the sovereign, in this instance a Native tribe, it should become irrelevant whether the extradition proceeding is initiated before or after the suspect is removed. But as in the cases where no tribal extradition laws exist, the focus on the individual's rights permits courts to disregard the issue of tribal sovereignty.

3. The Effect of Illegal Arrest or Extradition

As a further consequence of the improper concentration by courts on the suspect rather than the sovereign, state court jurisdiction over the suspect invariably is upheld, even when the illegality of the state arrest or extradition is recognized. The judicially-created *Ker-Frisbie* rule, developed in the context of non-Native criminal law, provides that a court's personal jurisdiction over a defendant is not impaired by the fact that the defendant has been brought before the court illegally.[95] The doctrine has been applied in cases involving both illegal interstate arrest and the violation of international extradition procedures.[96] The United States Supreme Court has justified its rule on the

92. *Id.* (McMillian, J., dissenting).

93. "The issue is not whether an Indian can avoid state prosecution for crimes committed off the reservation, but whether the state must recognize some degree of sovereignty and control of the tribal government over the reservation's inhabitants." *Id.*

94. *Id.* at 529. The dissent's argument, in this sense, premises its notion of tribal sovereignty on an international law analogue. It is a tenet of international law that failure to observe extradition procedures is a violation of that law only when the offended nation objects. United States ex rel. Lujan v. Gengler, 510 F.2d 62, 66-68 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). *See also* United States v. Rosenthal, 793 F.2d 1214, 1232 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1377 (1987) ("Under international law it is the contracting foreign government that has the right to complain about a violation" of an extradition treaty); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) ("absent protest or objection by the offended sovereign, [a defendant] has no standing to raise violation of international law as an issue").

95. The name of the doctrine is taken from the cases of Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952). *See also* United States v. Crews, 445 U.S. 463 (1980); Rose v. Mitchell, 443 U.S. 545 (1979). Professor LaFave presents a succinct discussion of the origin, formulation, and due process implications of the *Ker-Frisbie* rule in W. LAFAVE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.9 (2d ed. 1987).

96. For example, *Frisbie* concerned allegations that the suspect was in Illinois when "Michigan officers forcibly seized, handcuffed, blackjacked and took him to Michigan." 342 U.S. at 520. *Ker* involved a defendant who was abducted illegally from Peru and brought to the United States. 119 U.S. at 438.

The Wisconsin Attorney General recently released an opinion on the subject of fresh pursuit across reservation boundaries, which concluded that fresh pursuit arrests were not federally preempted and

ground that "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."[97] The only exception to the *Ker-Frisbie* rule was created by the Second Circuit in *United States v. Toscanino*, which held that the facts of that particular case "shocked the conscience" of the court.[98]

With one exception, the *Ker-Frisbie* rule has been applied wholesale to Natives arrested on the reservation. Courts have held that neither arrests in violation of tribal extradition laws nor on-reservation arrests for off-reservation offenses, even if illegal when made, divest the state courts of jurisdiction over the Native suspects.[99] The sole

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would not impair tribal sovereignty. 74 Op. Att'y Gen. Wis. 245, 257-58 (1985). The opinion continued, however, by stating:

> Even if one assumes that some aspect of Menominee tribal sovereignty is at least minimally impaired by a state officer's on-reservation arrest following a fresh pursuit, it is doubtful that the state is thereby deprived of personal jurisdiction over a defendant thus arrested. The general rule, cited above, is that failure to observe established extradition procedures does not deprive a state of personal jurisdiction over a defendant.
>
> If the failure to comply with constitutional and statutory extradition requirements does not deprive a demanding state of jurisdiction, it is difficult to conclude that a state's failure to follow tribal extradition procedures would do so.

Id. at 258 (citations omitted). The Wisconsin Attorney General, in essence, gives state law enforcement officers carte blanche to violate tribal territorial sovereignty at will, on the theory that whether state officers obey the law or not, no penalty will attach to their conduct.

97. *Frisbie*, 342 U.S. at 522. *See also Crews*, 445 U.S. at 478-79 (White, J., concurring). This formulation of the rule, as not invalidating a subsequent conviction, helps explain the different results reached in the *Turtle* and Davis v. Muellar Native extradition cases. *See supra* text accompanying notes 75-82 and 88-94. The suspect in *Turtle* was not yet in state custody, and so not yet subject to state court jurisdiction, when he petitioned for relief. Consequently, the *Ker-Frisbie* rule was not before the court. *See* Davis v. Muellar, 643 F.2d 521, 526 (8th Cir.), *cert. denied*, 454 U.S. 892 (1981), discussed *supra* at notes 88-94. The *Ker-Frisbie* rule was invoked also to deny habeas corpus relief to a Native parole violator who was arrested on a South Dakota reservation and surrendered to Montana authorities by tribal police. *See supra* note 60.

98. 500 F.2d 267, 274-79 (2d Cir. 1974) (defendant allegedly was abducted forcibly at gunpoint and subsequently was subjected incessantly for 17 days to intensive interrogation and brutal torture, including denial of sleep, minimal intravenous nourishment, kickings and beatings, alcohol flushes of the eyes and nose, and electric shock treatments to his ears, toes, and genitalia; all by or at the direction of United States agents). *See*, Comment, United States v. Toscanino: *An Assault on the* Ker-Frisbie *Rule*, 12 SAN DIEGO L. REV. 865 (1975).

The *Toscanino* exception expressly was limited only to similarly egregious situations by the same circuit in United States ex rel. Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975) (*Toscanino* did not extend to defendant's non-violent kidnapping and subsequent placement on plane for United States by foreign police as paid agents of U.S. agents). *See also* United States v. Herrera, 504 F.2d 859, 860 (5th Cir. 1974) (distinguishing *Toscanino*, in part, on grounds of torture). Other circuits have stated that they would apply the *Toscanino* exception, if at all, only in its limited form. *See, e.g.*, United States v. Rosenthal, 793 F.2d 1214, 1232 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1377 (1987); United States v. Wilson, 732 F.2d 404, 411 (5th Cir.), *cert. denied*, 469 U.S. 1009 (1984); United States v. Marzano, 537 F.2d 257, 272 (7th Cir.), *cert. denied*, 429 U.S. 1038 (1976); and cases cited in *Lujan*, 510 F.2d at 65 n.4.

99. Davis v. Muellar, 643 F.2d 521, 526-27 (8th Cir.), *cert. denied*, 454 U.S. 892 (1981) (upheld arrest in violation of tribal extradition law); Weddell v. Meierhenry, 636 F.2d 211, 214-15 (8th Cir.

exception was the *Benally* decision of the New Mexico Supreme Court, which ruled that an arrest in violation of the Navajo extradition law fell within the *Toscanino* exception, "particularly when the actions of the law enforcement officers come into conflict with the well-established right to self-government conferred upon Indians by treaty, laws and U.S. Supreme Court decisions."[100] These cases demonstrate that once the courts focus upon the suspect, the *Ker-Frisbie* rule provides an additional basis for validating on-reservation arrests by state officers for off-reservation crimes. A proper inquiry into the infringement of tribal sovereign rights, on the other hand, would render the *Ker-Frisbie* rule irrelevant.

4. Summary

Arrests by state law enforcement officers of Native suspects on the reservation for offenses committed off the reservation generally have been upheld by the courts. In the absence of tribal extradition procedures, lower courts uniformly have legitimated the authority of state officers to arrest within reservation boundaries for off-reservation crimes. Even where tribes have enacted extradition laws, arrests in violation of those codes usually have been held to be valid. In either case, judicial recognition that the arrests are illegal does not affect the result: the suspect remains subject to state court jurisdiction. The sole exceptions are the *Turtle* case, where the suspect brought a habeas corpus action prior to the state's assumption of jurisdiction, and *Benally*, where the arrest was invalidated as an infringement on the tribal right of self-government.

These two cases are unique also in their focus on tribal sovereignty, rather than on the rights of the suspect.[101] If courts formulate the issue as one of tribal sovereignty, many of the arguments for validating the arrests become irrelevant. In effecting an illegal arrest within reservation boundaries, the state clearly has injured the individual suspect; yet the greater injury is to the tribe, whose sovereign powers to administer justice and control extradition within its territorial boundaries are trenched upon by every illegal state arrest.

1980), *cert. denied*, 451 U.S. 941 (1981) (denied suspect's claim that arrest was invalid because he was not extradited); High Pine v. Montana, 439 F.2d 1093, 1094 (9th Cir. 1971) (denied habeas corpus relief, even assuming petitioner was illegally arrested by tribal police and extradited from reservation); Fournier v. Roed, 161 N.W.2d 458, 476-77 (N.D. 1968) (Knudson, J., concurring) (even if tribe had an extradition law, suspect's arrest would still be valid).

100. Benally v. Marcum, 89 N.M. 463, 467, 553 P.2d 1270, 1274 (1976).

101. This also is the argument advanced by the dissenting judge in Davis v. Muellar, 643 F.2d at 527 (McMillian, J., dissenting), who would have granted a writ of habeas corpus for failure to comply with tribal extradition laws.

Which of these injuries the courts focus on has affected not only the outcomes of the arrest and extradition cases, but will affect as well the determination of fresh pursuit issues. Judicial concentration on the rights of the individual defendant forces courts to decide the cases based on principles of personal jurisdiction and the post-hoc importance of procedural irregularities. Focus on the rights of the sovereign, conversely, would require the courts to address the issues, common to all sovereigns, of territorial integrity and criminal justice administration. Using various cross-jurisdictional models, section III will discuss these common concerns of sovereigns. Section IV then will demonstrate that the only judicial approach to the fresh pursuit issue consistent with tribal sovereignty is recognition of the injury to and the rights of the sovereign, and consequent invalidation of fresh pursuit arrests made on the reservation without the authorization of the governing tribe.

III. THE DOCTRINE OF FRESH PURSUIT

Fresh pursuit is the common law right of law enforcement officers to cross jurisdictional boundaries to arrest fleeing felons.[102] The right at common law is an extension of the power of police officers to arrest without a warrant for felonies committed in their presence or when they have reasonable grounds to believe that the suspect committed a felony.[103] What constitutes fresh pursuit is determined from all the circumstances,[104] but the elements of immediacy and continuousness are universal.[105] This section, which examines the common patterns of transjurisdictional fresh pursuit, will explore the issues of sovereignty that arise when law enforcement officers cross jurisdictional boundaries in pursuit of a fleeing suspect.

A. Three Models of Cross-Jurisdictional Pursuit

The doctrine of fresh pursuit traditionally has arisen in three cross-jurisdictional situations: pursuit across municipal boundaries,

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102. Carson v. Pape, 15 Wis. 2d 300, 308, 112 N.W.2d 693, 697 (1961); 5 AM. JUR. 2D *Arrest* § 51 (2d ed. 1962). For an explanation of the difference between "fresh pursuit," which crosses jurisdictional boundaries, and the better-known term "hot pursuit," *see supra* note 4.

103. 5 AM. JUR. 2D *Arrest* § 25 (2d ed. 1962). At common law fresh pursuit was sanctioned only in cases of felonies. Gattus v. State, 204 Md. 589, 600, 105 A.2d 661, 666 (1954); 5 AM JUR. 2D *Arrest* § 51 (2d ed. 1962).

104. White v. State, 70 Miss. 253, 258, 11 So. 632, 632 (1892).

105. *See infra* text accompanying notes 116-19 (intrastate), 139-42 (interstate), and 152 (international). *See also* 5 AM. JUR. 2D *Arrest* § 51 (2d ed. 1962) ("Where arrest in another jurisdiction on hot pursuit is permissible, the pursuit must be immediate and continuous, but the continuity is not broken by the mere fact that the officer may temporarily lose sight of the fugitive."); *Fresh Pursuit*, in LEGAL POINTS 1-2 (1976) (Int'l Ass'n of Chiefs of Police).

across state borders, and across national frontiers. While none of these models is directly analogous to fresh pursuit onto a Native reservation, an examination of the legal principles of each may inform the Native law analysis.

First, a tribe cannot be equated with a municipality. Unlike a local government, a Native nation is not a creature of the state, exercising only those powers that the state grants to it, nor is it subject to the authority of the state except as Congress expressly has provided.[106] A tribe, rather, is a separate sovereign, subject to state jurisdiction only in narrowly defined, congressionally-authorized circumstances. Neither, however, is Native sovereignty commensurate with that of a state.[107] On the one hand, Native nations sometimes are held subject

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106. The status of municipal governments is directly subordinate to the state:

> A municipal corporation is generally regarded by the courts as a subordinate branch of the government of the state, and therefore municipal administration is an instrumentality of state administration. It exercises delegated powers of government, and charters are granted for the better government of the particular areas or districts. It is a political division of the state and generally a creature of the [state] legislature . . . . While it has been variously stated . . . that a municipal corporation is, for the purpose of its creation, a government possessing to a limited extent sovereign power, it has also been declared that a municipal corporation is not itself sovereign.

E. MCQUILLIN, 1 THE LAW OF MUNICIPAL CORPORATIONS § 2.08a, at 160-61 (3d ed. 1987) (citations omitted). *See also* United States v. Wheeler, 435 U.S. 313, 320 (1978) ("cities are not sovereign entities").

In contrast to the subordinate governmental status of municipal communities:

> tribes are wholly distinct from, and not subject to, the authority of any state, unless Congress expressly curtails traditional tribal sovereignty in favor of state jurisdiction. As governing bodies, tribes are complete unto themselves. Indeed, in issues of self government, a tribe is not even subordinate to the federal government because, so long as it retains its sovereignty, it governs independently. . . . Accordingly, an Indian tribe cannot fit within the definition of a "local" governmental agency because a tribe is not a "subdivision" of any entity.
>
> . . . .
>
> It is not a "subordinate" self-government; it is a sovereign.

United States v. Barquin, 799 F.2d 619, 621 (10th Cir. 1986) (citations omitted). *See also* Washington Dep't of Ecology v. E.P.A., 752 F.2d 1465, 1469 (9th Cir. 1985)(noting that despite federal statute's definition of "municipality" as including "an Indian tribe or authorized tribal organization," such reference indicates only that tribes are regulated federal entities, since "municipality" is included in the statutory definition of "person"); 72 Op. Att'y Gen. Wis. 132 (1983)(state statute did not authorize joint sewerage commissions to include tribal governments because "a tribal government is not a 'governmental unit' [of the state] within the meaning of the statute").

107. The unique legal status of tribes is reflected in the congressional power to regulate commerce with "foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Chief Justice John Marshall called America's indigenous peoples "domestic dependent nations." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). A later Supreme Court formulation described tribal status as:

> semi-independent position . . . not as States, not as nations . . . but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

United States v. Kagama, 118 U.S. 375, 381-82 (1886). *Accord* Chischilly v. General Motors Acceptance Corp., 96 N.M. 264, 266, 629 P.2d 340, 342 (N.M. Ct. App. 1980), *rev'd*, 96 N.M. 113, 628 P.2d

to the jurisdiction of the state in which they are situated. On the other, tribes are accounted sovereign entities, exercising greater powers of self-government than states, whose sovereignty is subject to the concerns of federalism.[108] Finally, under the current domestic law of the United States, Native American tribes are not considered to be separate nations.[109] While tribes are deemed to retain many of the attrib-

683 (1981). Courts have been unequivocal in their assertions that Native tribes are not to be equated with states. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) ("Tribal reservations are not States . . . ."); Confederated Tribes of Warm Springs Reservation v. Kurtz, 691 F.2d 878, 880 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (a "Tribe is not a political subdivision of the State . . . ; it derives no authority from the state . . . . The state and Tribe each functions within its proper sphere. Neither is a creature of the other.") (citations omitted); Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959) ("Indian tribes are not states. They have a status higher than that of states."); Ex parte Morgan, 20 F. 298, 305 (W.D. Ark. 1883) ("the Cherokee Nation maintains the same *status* to-day in its relations to the federal government as it did when first set apart by such government,—not as a state or territory, but as the home of the Indian.")(emphasis in original); Lohnes v. Cloud, 254 N.W.2d 430, 433 (N.D. 1977) ("Indian tribes are not States, but rather hold a unique legal status . . . ."). *See also* Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1081 (8th Cir. 1975); Barta v. Oglala Sioux Tribe, 259 F.2d 553, 556 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956). As noted in a recent *en banc* decision of the usually hostile state Supreme Court of Washington:

> While Indian Tribes do possess some powers and characteristics akin to those of states, territories, and possessions, they are truly *sui generis*. As we noted in *Anderson v. O'Brien*, "Indian tribes are unique entities which do not fit into neat pigeonholes of the law."

Queets Band of Indians v. State, 102 Wash. 2d 1, 4, 682 P.2d 909, 911 (1984) (citation omitted).

108. Unlike states, Native governments are not circumscribed by constitutional provisions such as the Free Exercise, Commerce, or Privileges and Immunities Clauses. U.S. CONST. amend. I; art. I, § 8, cl. 3; and art. IV, § 2, cl. 2. For example, while the Free Exercise Clause is made applicable to the states through the Fourteenth Amendment, the clause does not apply to Native tribes in the same manner. Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131, 134-35 (10th Cir. 1959). Further, a tribe may prohibit non-members from hunting and fishing on tribal land. Montana v. United States, 450 U.S. 544, 557 (1981). A state's power in this regard is more limited. While a state arguably may prohibit non-resident recreational hunting and fishing, it may not control its wildlife and resources in a way that interferes with a non-resident's right to pursue a livelihood, Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371, 385-88 (1978), nor may it accord its residents a preferred right of access to its natural resources. City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978). Moreover, a Native nation may expel its own citizens and exclude non-members from tribal territory. *See supra* notes 23, 27, and 74. A state, however, may not close its borders to residents of other states. Edwards v. California, 314 U.S. 160, 173 (1941).

109. Chief Justice John Marshall recognized early-on that America's indigenous peoples were self-governing nations with full attributes of sovereignty:

> The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832). Nearly a score of years later the Cherokee were still held to be in many respects a "foreign and independent nation," being governed by their own laws and leaders, chosen by themselves. Parks v. Ross, 52 U.S. (11 How.) 362, 374 (1850). Within

utes and inherent powers of a sovereign nation, they arguably have

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another two decades, however, this acknowledgement of Native sovereignty and independent status was reversed abruptly when a rider was tacked onto a congressional appropriations bill: "[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ." Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1982)). Proponents of the 1871 legislation argued that:

> The relation of the Indian tribes to the United States . . . is continuously changing, and nations of Indians that might have been so recognized years ago may now be well regarded as having deteriorated to such an extent as to justify the adoption of this declaration . . . .

CONG. GLOBE, 41st Cong., 3d Sess. 1824 (1871)(remarks of Sen. Harlan). Justice Stewart, writing for the Court in DeCoteau v. District County Court, 420 U.S. 425, 432 (1975), observed of this appropriations rider that "[a]fter 1871, the tribes were no longer regarded as sovereign nations," thus implying that before 1871 they were so accounted. The United States Congress and Supreme Court continue to this day to give a nodding acquiescence to Native American sovereignty. *See supra* notes 19-20. *See also* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979), *modified sub. nom* Washington v. United States, 444 U.S. 816 (1979) ("[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (Indian tribes are "separate sovereigns pre-existing the Constitution"); C. BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES §§ 110-16, 160 (1902).

Evidence of Native American belief in their own independence is exemplified by a letter of July 26, 1976 from the Lakota (Sioux) Treaty Council to the United Nations Subcommittee on Prevention of Discrimination and Protection of Minorities of the U.N. Commission on Human Rights, which at that time was investigating alleged human rights violations in the United States towards the indigenous peoples:

> We the Native peoples of this continent, individually and collectively reject the patently false assertions that we are citizens of the United States of America. We are citizens of our respective Native Nations . . . we are sovereign people who have received our mandates from the Creator and we have not deviated nor have we forgotten the original instructions.

Coulter, *United Nations Representatives Study Discrimination Against Indigenous People*, 2(9) AM. INDIAN J. 2, 8 (1976). *See also Oglala Sovereignty Reaffirmed*, 5(1) AKWESASNE NOTES 32 (1973). A similar letter from representatives of the Haudenosaunee (Six Nations Iroquois) Confederacy to the same U.N. Subcommittee states: "The [Haudenosaunee] rejected this [unilateral imposition of U.S. citizenship as an] incursion into our sovereignty. To this day we do not see ourselves as subjects of another government." Coulter, *supra*, at 6.

The Haudenosaunee persistently have asserted their independent sovereign status. In 1923, the Six Nations petitioned the League of Nations for international recognition. A BASIC CALL TO CONSCIOUSNESS 13-18 (Akwesasne Notes ed. 1981). For a thorough and historic overview of the Haudenosaunee pursuit of international recognition, *see generally id.*

In his last speech on behalf of his Native people, in 1925, Deskaheh, then Speaker of the Six Nations Council, attacked as "tyranny" the enforced, attempted dominance of both the Canadian and United States cultures:

> If this must go on to the bitter end, we would rather that you come with your guns and poison gases and get rid of us that way. Do it openly and above board. Do away with the pretense that you have the right to subjugate us to your will.
>
> Your governments do that by enforcing your alien laws upon us. That is an underhanded way. . . . We want none of your laws and customs that we have not willingly adopted for ourselves.

Id. at 19. *See also* the 1967 speech of Clyde Warrior, speaking on behalf of the National Indian Youth Council, in which he descried the "elitist" and paternalistic bureaucracies and policies of both federal and tribal IRA governments, *reprinted in* A. JOSEPHY, RED POWER 83-89 (1971), and the 1970 resolution of the Pitt River Tribal Council demanding a return of all of their confiscated lands and reaffirming their separate sovereignty to determine "their own affairs," *id.* at 243-46. For a similar but Canadian

been divested by the federal courts and Congress of certain fundamental aspects of national sovereignty[110] and their powers have been held consigned to complete defeasance by the federal government.[111]

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indigenist view of separate sovereignty, *see* the Declaration of First Nations, *reprinted in* AS LONG AS THE SUN SHINES AND WATER FLOWS 337-39 (A.L. Getty & A.S. Lussier eds. 1985).

There are several Native American movements organized to assert independent indigenous sovereignty. One such organization, the International Indian Treaty Council (IITC) was formed to encourage other nations of the world to recognize the sovereignty of Native American nations. The IITC was formed in 1974 when chiefs, spiritual leaders, and other tribal leaders from 98 Native American nations met and adopted a founding Declaration of Continuing Independence. At the June 1976 IITC conference, the membership of 103 Native nations resolved that the IITC seek admission to the Organization of Petroleum Exporting Countries (OPEC), the United Nations Educational, Scientific, and Cultural Organization (UNESCO), and the World Health Organization (WHO). Further, with the awareness that the United States Supreme Court and the Indian Claims Commission disregard their sovereignty, admission also is being sought to the International Court of Justice. 8(4) AKWESASNE NOTES 17 (1976). *See also* D. SANDERS, THE FORMATION OF THE WORLD COUNCIL OF INDIGENOUS PEOPLES (1977). On the growing Native movement over the last two decades to reestablish tribal nationalism, *see generally* R. ORTIZ, INDIANS OF THE AMERICAS: HUMAN RIGHTS AND SELF-DETERMINATION 127-89 (1984); S. STEINER, THE NEW INDIANS (1968).

Vine Deloria, a leading advocate of Native American independence, notes the current attitude toward tribal self-determination:

> The modern Indian movement for national recognition thus has its roots in the tireless resistance of generations of unknown Indians who have refused to melt into the homogeneity of American life and accept American citizenship. The idea that Indian problems are some exotic form of domestic disturbance will simply not hold water in view of the persistent attitude of Indians that they have superior rights to national existence which the United States must respect.

V. DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES 20 (1974).

110. Specifically, Native tribes have been stripped under domestic law of the sovereign powers to freely alienate land, engage in foreign relations, and try non-members in tribal courts. United States v. Wheeler, 435 U.S. 313, 326 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-12 (1978). A noted jurist and authority on Native law recently has observed that:

> *Oliphant* poses an enormous potential threat to the [sovereign] power of tribes, because it permits the fashioning of new limitations on tribal power by the Court itself. Congress has always had power to limit tribal sovereignty, but *Oliphant* invites the Court to discover additional limitations that are inherent in the status of the tribes.

Canby, *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 9 (1987). As Judge Canby notes, his horror for the future of tribal sovereignty, while derived from the canvas of *Oliphant*, was confirmed in Rice v. Rehner, 463 U.S. 713 (1983). Canby, *supra*, at 16. Justice O'Connor in *Rice* added a fourth particular, that of liquor regulation, to the expanding list of inherent tribal powers divested by judicial contrivance: "the tribes have long ago been divested of any inherent self-government over liquor regulation by both the explicit command of Congress and as a 'necessary implication of their dependent status.' " 463 U.S. at 726. Justice O'Connor's statement concerning tribal divestiture by "explicit command" of Congress is central to her preemption analysis. Her use of implicit divestiture to buttress the preemption argument, however, is a mere and unfortunate appendage. Unlike Justice Rehnquist, the author of *Oliphant*, who went to some length in an attempt to fashion and justify his dependency theory, Justice O'Connor merely asserts it in *Rice* as a casual fiat. She provides no *ratio decidendi* for her conclusion.

111. United States v. Wheeler, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); Stephens v. Cherokee Nation, 174 U.S. 445, 484-86 (1899) (since federal government controls the "Indian" tribes, they cannot be considered sovereign independent states). *See also* Muscogee

Consequently, the settled law governing fresh pursuit across any particular boundary — whether municipal, state, or national — may not be wholly applicable to Native tribes. Elements common to the law of fresh pursuit in each of these cross-jurisdictional situations, rather, must be extracted and the differences among the various applications of the doctrine examined for their pertinence to an analysis of the sovereignty possessed by Native tribes.

1. Intrastate Fresh Pursuit

In general, a municipality may not exercise police power outside its boundaries unless specifically authorized to do so by state statute.[112] The common law doctrine of fresh pursuit, however, has been held to extend local police authority elsewhere within the municipality's state,[113] although not beyond the state borders.[114] The fresh pur-

(Creek) Nation v. Hodel, 670 F. Supp. 434, 440 (D.D.C. 1987) (under its plenary power, Congress was authorized to abolish the Creek Nation tribal court and "to alter or suspend the provisions of earlier treaties [guaranteeing self-government] by duly enacted legislation").

Domestic judicial decisions routinely deprecate indigenous sovereignty, relegating it subject to utter defeasance by congressional action. For example, the Supreme Court repeatedly has held that Congress can abrogate treaties unilaterally without the consent of or even consultation with the tribe. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977); Lone Wolf v. Hitchcock, 187 U.S. 553, 556 (1903). For criticism, *see* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1227-29 (1975); Note, *Indian Land Claims — A Question of Congress' Right to Unilaterally Abrogate Indian Treaty Provisions*: Rosebud Sioux Tribe v. Kneip, 21 HOW. L.J. 625 (1978). Congress also may terminate unilaterally its federal relationship with a tribe, and liquidate and distribute the tribal property. *See supra* note 38; United States v. Seminole Nation, 299 U.S. 417 (1937); United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) (Native tribes "hold and occupy [reservations] with the assent of the United States, and under their authority."). Moreover, Native lands may be taken by Congress without compensation. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278, 288-89 (1955). "No case in this Court has ever held that taking of Indian title or use by Congress required compensation. . . . Generous provision has been willingly made to allow tribes to recover for wrongs, as a *matter of grace*, not because of legal liability." *Id.* at 281-82 (emphasis added). For an extensive discussion and criticism of the *Tee-Hit-Ton* rule, see Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980).

112. Love v. State, 687 S.W.2d 469, 471 (Tex. Ct. App. 1985); State v. Cochran, 372 A.2d 193, 195 (Del. 1977); Curtiss, *Extraterritorial Law Enforcement in New York*, 50 CORNELL L. REV. 34, 35 (1964).

A number of states, for example, statutorily extend municipal police authority to one mile beyond the boundaries of the municipality. *See, e.g.*, State v. Melvin, 53 N.C. App. 421, 428, 281 S.E.2d 97, 102 (1981); Francis v. State, 498 S.W.2d 107, 114 (Tenn. Crim. App. 1973); Callands v. Commonwealth, 208 Va. 340, 342, 157 S.E.2d 198, 200 (1967). Montana permits its municipalities to extend their arrest authority within five miles of the city limits. State v. McDole, 734 P.2d 683, 684 (Mont. 1987).

113. Poss v. State, 167 Ga. App. 86, 87, 305 S.E.2d 884, 886 (1983) (fresh pursuit is a "recognized" common law exception to state statute limiting municipal police power to corporate limits of the municipality); Morris v. Combs' Adm'r, 304 Ky. 187, 191, 200 S.W.2d 281, 283 (1947) (police officer "had the right to pursue [the suspect] beyond the city limits" to make a fresh pursuit arrest); State v. Foster, 60 Ohio Misc. 46, 396 N.E.2d 246, 254 (1979) (fact that police officer's pursuit was fresh "extended his authority to act beyond his original jurisdiction").

114. Minor v. State, 153 Tex. Crim. 242, 249-51, 219 S.W.2d 467, 472 (1949) (on motion for

suit exception to municipal limitations is based on judicial reluctance to permit suspects to escape by crossing jurisdictional lines, and the perceived absurdity of requiring pursuing officers to cede their arrest authority in the midst of exercising it.[115]

Intrastate fresh pursuit is defined as "pursuit instituted immediately and with intent to recapture or reclaim, as where a thief is fleeing with stolen goods. It is a relative term and has reference to time or distance, or both, depending on the facts of the case."[116] The concept of a "fresh" pursuit is characterized by certain essential elements. First, the police must act without unnecessary delay.[117] Further, the pursuit must be both continuous and uninterrupted, although the sus-

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rehearing). It follows that if a state may not unilaterally authorize pursuit across state borders, *see infra* notes 134-35, a municipality certainly could not do so.

115. State v. Bickham, 404 So.2d 929, 932-33 (La. 1981); State v. Foster, 60 Ohio Misc. 46, 396 N.E.2d 246, 254 (1979); Francis v. State, 498 S.W.2d 107, 114 (Tenn. Crim. App. 1973); Minor v. State, 153 Tex. Crim. 242, 247, 219 S.W.2d 467, 470 (1949).

Judicial statements extending arrest authority beyond municipal boundaries tend to assume the same tone of overweening reasonableness. For example: "Surely it cannot be said with reason that the authority of city policemen to arrest one committing public offenses in their sight and presence is terminated and they become helpless and barred from arresting such an offender if he succeeds in outrunning them to the city limits. . . ." *Francis*, 498 S.W.2d at 114.

The apparent rationality of such a justification for extending the arrest authority of local police is undermined markedly by the fact that, although the same rationale could be applied as easily to interstate or international fresh pursuit, neither is permitted absent specific legal authorization. *See infra* notes 135 and 157-59 and accompanying text. No judicial explanation has been forthcoming as to why municipal authority cannot be terminated at the jurisdictional boundary, but state and national authority can.

116. Reyes v. Slayton, 331 F. Supp. 325, 327 (W.D. Va. 1971) (citations omitted). *See also* Callands v. Commonwealth, 208 Va. 340, 342-43, 157 S.E.2d 198, 201 (1967).

For example, the doctrine of fresh pursuit is not applicable if the suspect is not fleeing and does not know he is being pursued. "While pursuit does not imply a fender-smashing Hollywood style chase scene, it does connote something more than mere casual following." City of Wenatchee v. Durham, 43 Wash. App. 547, 551-52, 718 P.2d 819, 822 (1986).

117. Charnes v. Arnold, 198 Colo. 362, 365, 600 P.2d 64, 66 (1979); State v. Carey, 412 A.2d 1218, 1222 (Me. 1980); State v. Boardman, 264 N.W.2d 503, 507 (S.D. 1978).

For example, police act without unnecessary delay when they pursue a fleeing automobile. *See, e.g.*, McLarty v. State, 176 Ga. App. 433, 433, 336 S.E.2d 273, 274 (1985); Windschitl v. Commissioner of Pub. Safety, 355 N.W.2d 146, 147-48 (Minn. 1984); Minor v. State, 153 Tex. Crim. 242, 243-44, 219 S.W.2d 467, 468 (1949); Banks v. Bradley, 191 Va. 598, 600-01, 66 S.E.2d 526, 527 (1951).

For other examples, see United States v. Bishop, 530 F.2d 1156, 1157 (5th Cir.), *cert. denied*, 429 U.S. 848 (1976) (police began tracking signal from "bait money" taken in bank robbery "very shortly" after the robbery); Molan v. State, 614 P.2d 79, 80 (Okla. Crim. App. 1980) (police went in search of robbers after "a few questions" at scene of crime); Commonwealth v. Brown, 298 Pa. Super. 11, 19, 444 A.2d 149, 153 (1982) (police began search for identified suspect immediately upon hearing broadcast of robbery).

Maine has an apparently unique statutory system of determining unnecessary delay. In cases of felonies, there must be "pursuit without unreasonable delay," while in cases of misdemeanors and traffic offenses, law enforcement officers must engage in "instant pursuit." State v. Harding, 508 A.2d 471, 472 n.1, 473 (Me. 1986).

pect need not be under actual surveillance the entire time.[118] Moreover, the relationship in time between the crime, the commencement of the pursuit, and the arrest is considered. There are no absolutes here, but the greater the length of time, the less likely the courts are to find that the pursuit is "fresh."[119]

The common law doctrine in the majority of states was applicable only to felony arrests,[120] although a few state courts have noted that the felony limitation was not universal.[121] Most states, however, have superseded the common law doctrine by enacting statutory authority for intrastate fresh pursuit.[122] Some of these state laws adhere to the majority common law rule limiting the right of intrastate fresh pursuit

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118. Charnes v. Arnold, 198 Colo. 362, 365, 600 P.2d 64, 66 (1979); Commonwealth v. Brown, 298 Pa. Super. 11, 19, 444 A.2d 149, 153 (1982).

See, e.g., United States v. Getz, 381 F. Supp. 43, 46 (E.D. Pa. 1974) (police "proceeded diligently. . .and there was no hiatus or interruption in their efforts"); Reyes v. Slayton, 331 F. Supp. 325, 327 (W.D. Va. 1971) ("not fatal" to fresh pursuit that police did not see suspect until outside jurisdiction where search was unbroken and clues indicated direction of suspect's flight); Commonwealth v. Reddix, 355 Pa. Super. 514, 521, 513 A.2d 1041, 1044 (1986) (fresh pursuit doctrine is applicable "even though the [arresting] officers were not originally at the scene of the crime but initiated their pursuit in response to a radio broadcast to aid a fellow officer"); Commonwealth v. Phillips, 338 Pa. Super. 274, 277, 487 A.2d 962, 964 (1985) (no fresh pursuit where officer comes across suspects' vehicle by accident after resuming routine patrol); Minor v. State, 153 Tex. Crim. 242, 245, 219 S.W.2d 467, 469 (1949) (suspects were never out of pursuing officers' sight).

119. Charnes v. Arnold, 198 Colo. 362, 365, 600 P.2d 64, 66 (1979).

120. Op. Att'y Gen. Idaho 4 (1980); Banks v. Bradley, 192 Va. 598, 602-03, 66 S.E.2d 526, 528-29 (1951).

121. State v. Baldwin, 140 Vt. 501, 508, 438 A.2d 1135, 1138-39 (1981); People v. Sandoval, 65 Cal. 2d 303, 312, 419 P.2d 187, 192, 54 Cal. Rptr. 123, 128 (1966). *See also* Op. Att'y Gen. Idaho 4 (1980).

The California Supreme Court noted: "We can find no reason, either in the historical origins of the doctrine or in its contemporary rationale, to impose these limitations." *Sandoval*, 65 Cal. 2d at 312, 419 P.2d at 192, 54 Cal. Rptr. at 128 (footnotes omitted). The court went on to state, however, that despite the felony limitation, fresh pursuit authority should not be denied "[s]o long as officers reasonably believe, as did the officers in this case, that a felony has recently been committed within their jurisdiction and that the felon might escape unless promptly apprehended. . . ." *Id.* at 313, 419 P.2d at 193, 54 Cal. Rptr. at 129.

122. A somewhat dated listing of intrastate fresh pursuit statutes is found in Wagner, *Patterns of State Laws Relating to "Fresh Pursuit": Preliminary Draft* (Workshop in Political Theory and Policy Analysis, Indiana University, 1975)(at tables 1 & 3).

In some states, fresh pursuit statutes have been interpreted to authorize not only pursuit in order to arrest, but also pursuit for the purpose of conducting a *Terry* stop [Terry v. Ohio, 392 U.S. 1 (1968)]. State v. Merchant, 490 So.2d 336, 339 (La. Ct. App. 1986); State v. Dahlheimer, 413 N.W.2d 255, 257 (Minn. Ct. App. 1987); Commonwealth v. Montgomery, 513 Pa. 138, 144, 518 A.2d 1197, 1201 (1986), *cert. denied*, 107 S. Ct. 1579 (1987). The justification generally given is that police need not have probable cause to arrest at the time they cross their jurisdictional limits, but only at the time they make the arrest. *Montgomery*, 513 Pa. at 144-46, 518 A.2d at 1200-01. One court has noted also its belief that a close pursuit stop is within the "spirit" of the state fresh pursuit statute. State v. Bickham, 404 So.2d 929, 932 (La. 1981). In dissent, one justice has argued that investigation should not justify fresh pursuit because the purpose of a *Terry* stop is to prevent presently occurring criminal activity, whereas the purpose of fresh pursuit is the apprehension of a suspect where a crime has already been committed. *Montgomery*, 513 Pa. at 147-49, 518 A.2d at 1202 (Zappala, J., dissenting).

to felonies,[123] while others authorize the right in cases of "criminal offenses,"[124] crimes and misdemeanors,[125] or the full range of felonies, misdemeanors, and traffic offenses.[126] In addition, it generally is recognized that law enforcement officers in fresh pursuit may arrest the suspect not only for the original offense, but also for violations committed during the course of the pursuit, even if those violations occur outside the arresting officer's jurisdiction.[127]

The intrastate fresh pursuit doctrine contains within it major stumbling blocks to its application on Native reservations. First, the doctrine is governed largely by state statute, and, absent Public Law 280 jurisdiction,[128] state criminal laws have no force or effect within reservation boundaries.[129] Second, the extent of the right as defined by

123. Op. Att'y Gen. Ark. No. 87-347 (1987); Reyes v. Slayton, 331 F. Supp. 325, 327 (W.D. Va. 1971); State v. Foster, 60 Ohio Misc. 46, 396 N.E.2d 246, 254 (1979); State v. Boardman, 264 N.W.2d 503, 507 (S.D. 1978).

124. People v. Hamilton, 666 P.2d 152, 154-55 (Colo. 1983); State v. Melvin, 53 N.C. App. 421, 428, 281 S.E.2d 97, 102 (1981).

125. State v. McCarthy, 123 N.J. Super. 513, 520, 303 A.2d 626, 630 (1973) (high misdemeanors and criminal offenses); State v. Baldwin, 140 Vt. 501, 508-12, 438 A.2d 1135, 1139-41 (1981) (criminal or "other laws" held to include misdemeanors).

126. State v. Cochran, 372 A.2d 193, 195 (Del. 1977); Edwards v. State, 462 So.2d 581, 582 (Fla. Dist. Ct. App. 1985); State v. Carey, 412 A.2d 1218, 1219 (Me. 1980).

As noted earlier, while Maine permits fresh pursuit for all violations, the standard for determining whether the pursuit is "fresh" differs between felonies ("pursuit without unreasonable delay") and misdemeanors and traffic offenses ("instant pursuit"). *See supra* note 117.

127. State v. Cochran, 372 A.2d 193, 196 (Del. 1977) (upon immediate and continuous fresh pursuit, a "pursuing officer may arrest for any violation which occurs during the pursuit regardless of the place of the offense"); McLarty v. State, 176 Ga. App. 433, 435, 336 S.E.2d 273, 276 (1985) ("any other offense observed at the time of the stop, when the officer was lawfully in a place he was authorized to be, would be permissible to be added to the original offense which authorized" the pursuit); Delude v. Raasakka, 391 Mich. 296, 302-03, 215 N.W.2d 685, 689 (1974) (if fresh pursuit is justified, police officers assaulted during arrest for initial offense also have the right to arrest without warrant for the assault); Windschitl v. Commissioner of Pub. Safety, 355 N.W.2d 146, 148 (Minn. 1984) ("when the conduct of the offender during the course of the pursuit and arrest furnishes separate and distinct grounds for arrest, the police officer may arrest the offender for the additional offense").

128. Public Law 280 (*see supra* section II.B.2.a.) renders the question moot by extending state criminal jurisdiction over reservations. On Public Law 280 reservations, municipal law enforcement officers apparently would have the same right to cross into the reservation as to cross any other jurisdictional boundaries. And county sheriffs going onto the reservation may not be crossing any judicially-recognized criminal jurisdiction boundary at all.

129. An opinion on fresh pursuit authority by the Wisconsin Attorney General set up the following syllogism: (1) Wisconsin statutorily has extended municipal fresh pursuit authority to the entire state; (2) there is "no persuasive evidence" of congressional intent to exempt from the intrastate fresh pursuit doctrine Natives who flee onto reservations; and therefore (3) local officers may make fresh pursuit arrests within reservation borders. 74 Op. Att'y Gen. Wis. 245, 247-48, 257 (1985). This reasoning, however, does not survive the fact that, outside of Public Law 280, Wisconsin has no power unilaterally to extend its municipal officers' jurisdiction over the territory of Native reservations. *See supra* notes 39-41, 48, and 50-53. Neither should it survive the oft-cited rule that state laws apply only where Congress expressly has so provided. This aspect of the Wisconsin opinion is discussed *infra* at note 198.

statute generally extends throughout the county or state;[130] in the absence of more restrictive statutory territorial limits, the right has been restricted expressly to the confines of the state.[131] This limitation represents a recognition that the laws of the state can have no force where the state has no jurisdiction. Just as a state may not authorize its municipal law enforcement officers to engage in fresh pursuit into another state, because the authorizing state has no criminal jurisdiction in the bordering state, so a state cannot authorize its officers to cross the jurisdictional boundaries of the reservation.[132] Moreover, the intrastate doctrine of fresh pursuit authorizes officers to arrest not only for the original violation, but also for offenses that occur during the pursuit, even if the later offenses take place outside the officer's territorial jurisdiction.[133] Application of this doctrine to Native reservations would lead to the exercise of unauthorized state criminal jurisdiction within reservation boundaries. A municipal police officer pursuing a suspect onto the reservation would be empowered to arrest for a crime occurring on the reservation during the pursuit, even though under other circumstances the officer would have no jurisdiction to arrest for on-reservation crimes.

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130. For example, Wisconsin's intrastate fresh pursuit statute is set out at WIS. STAT. § 175.40 (1985):

> Any peace officer, as defined in s. 939.22(22) may, when in fresh pursuit, follow anywhere in the state and arrest any person or persons for violation of any law or ordinance the officer is authorized to enforce.

The term "state," for purposes of Wisconsin criminal jurisdiction, is defined at WIS. STAT. § 939.03(2) (1987), as "includ[ing] [all] area within the boundaries of the state, and area over which the state exercises concurrent jurisdiction under art. IX, section 1, of the [Wisconsin] constitution."

Other jurisdictional limits on the right of intrastate fresh pursuit are listed in Wagner, *supra* note 122, at table 1.

131. Minor v. State, 153 Tex. Crim. 242, 249-51, 219 S.W.2d 467, 472 (1949) (on motion for rehearing).

132. The Kansas Supreme Court held recently that a state statute authorizing police to arrest within city limits or "in any other place . . . when in fresh pursuit" validated an arrest following pursuit onto a federal military reservation. City of Junction City v. Riley, 240 Kan. 614, 731 P.2d 310, *cert. denied*, 107 S. Ct. 3191 (1987). The court found that although Kansas had ceded to the United States exclusive jurisdiction over the reservation, there was "no controlling federal statute or regulation with regard to criminal jurisdiction on the Fort Riley military reservation" and no federal common law. *Id.* at —, 731 P.2d at 313. In the absence of federal law, the court stated, the applicable law within the military reservation was Kansas law, which in this case permitted the fresh pursuit arrest. *Id.* at —, 731 P.2d at 312-13.

The exact rationale of the Kansas court is difficult to cull from its opinion. Nevertheless, the *Riley* decision should have no bearing on the validity of similar fresh pursuit arrests on Native reservations. There is within Native reservations controlling tribal as well as federal law with regard to criminal jurisdiction. Absent an affirmative grant of criminal jurisdiction to the state, jurisdiction within Indian country "is in the tribe and the Federal Government." DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). The law applicable to a fresh pursuit arrest on a Native reservation, therefore, is tribal and federal law, not the law of the pursuing state.

133. State v. Cochran, 372 A.2d 193, 196 (Del. 1977); COUNCIL OF STATE GOV'TS, THE HANDBOOK ON INTERSTATE CRIME CONTROL 151 (1978 ed.).

Use of the intrastate doctrine to justify fresh pursuit arrests on the reservation, therefore, raises the initial pungent aroma of the state camel under the sovereign tribal tipi. Reliance on this model of fresh pursuit would permit the state to exercise an unwarranted degree of criminal jurisdiction within reservation boundaries, thereby increasing the likelihood of further domestic encroachments on tribal sovereignty.

2. Interstate Fresh Pursuit

A state has no inherent authority to extend its police powers or its criminal jurisdiction into another state.[134] Officers of one state are permitted to arrest a suspect following fresh pursuit into another state only if that authority exists at common law or has been granted to them by enactment by the host state of the Uniform Act on Fresh Pursuit.[135] The validity of an arrest following interstate fresh pursuit is determined by the law of the state where the arrest occurs, rather than that of the state where the crime is committed.[136]

The Uniform Act on Fresh Pursuit is designed to protect the citizens of the state of arrest by ensuring more rapid apprehension of po-

134. McLean v. Mississippi ex. rel. Roy, 96 F.2d 741, 745 (5th Cir.), *cert. denied*, 305 U.S. 623 (1938) ("The State of Mississippi has no power to extend the authority of its sheriffs into another State."); United States v. Trunko, 189 F. Supp. 559, 563 (E.D. Ark. 1960)(county deputy sheriff "had no right to [arrest and] seize [defendant] in Arkansas and remove him to Ohio"); Kirkes v. Askew, 32 F. Supp. 802, 804 (E.D. Okla. 1940)(warrant of arrest cannot be executed in a state other than that in which issued); Six Feathers v. State, 611 P.2d 857, 861 (Wyo. 1980)(at common law, law enforcement officer cannot effect arrest in another jurisdiction unless in fresh pursuit of suspected felon). *See also* COUNCIL OF STATE GOV'TS, *supra* note 133, at 97 ("Each state border. . .marks the territorial limitation on the execution of the state's policy on criminal justice expressed in its criminal and penal statutes.").

135. United States v. Holmes, 380 A.2d 598, 600 (D.C. App. 1977); District of Columbia v. Perry, 215 A.2d 845, 847 (D.C. App. 1966); People v. Fenton, 154 Ill. App. 3d 152, 506 N.E.2d 979, 980 (1987); People v. Jacobs, 67 Ill. App. 3d 447, 449, 385 N.E.2d 137, 139 (1979).

The text of the Uniform Act on Fresh Pursuit is reprinted in COUNCIL OF STATE GOV'TS, *supra* note 133, at 147-48. Forty-two states and the District of Columbia have adopted some variation of the Act. *See, e.g.*, listing at WIS. STAT. § 976.04 (Supp. 1987). The now somewhat dated information in Wagner, *supra* note 122, at table 6, indicates that of the 41 states that had then enacted the uniform law, eight had amended it to require reciprocity and two to permit pursuit for any offense.

136. Crawford v. State, 479 So.2d 1349, 1353 (Ala. Crim. App. 1985); People v. Jacobs, 67 Ill. App. 3d 447, 449, 385 N.E.2d 137, 139 (1979); People v. Clark, 46 Ill. App. 3d 240, 243, 360 N.E.2d 1160, 1163 (1977); Hutchinson v. State, 38 Md. App. 160, 166, 380 A.2d 232, 235 (1977); Boddie v. State, 6 Md. App. 523, 531, 252 A.2d 290, 294 (1969).

The result can be confusing for law enforcement officers. For example, Kansas borders on Colorado, Oklahoma, Nebraska, and Missouri. The "uniform" laws of Kansas and Colorado permit a fresh pursuit arrest of a person suspected of committing "a crime" in the originating jurisdiction, while the statutes of the other three states permit a fresh pursuit arrest only of a person suspected of committing a felony. As a result, Kansas law enforcement officers may pursue some suspects into Colorado, but not into Oklahoma, Nebraska, or Missouri. Op. Att'y Gen. Kan. 87-80 (1987).

tentially dangerous suspects.[137] In virtually all states, the Uniform Act authorizes a law enforcement officer to enter another state "in fresh pursuit of a person in order to arrest him on the ground that he is believed to have committed a felony in such State."[138] The Act defines fresh pursuit both statutorily and by incorporating the common law definition, and seeks to avoid the Hollywood car chase syndrome by stating that fresh pursuit does not necessarily mean instant pursuit but rather pursuit without unreasonable delay.[139]

The substantive requirements that the Uniform Act imposes on foreign police are reasonable grounds to believe the suspect committed a felony, pursuit within a reasonable period of time, and continuous and uninterrupted pursuit.[140] Other factors concerning the exigencies of the particular situation also are important in determining whether the pursuit is "fresh."[141] In addition, the suspect must be fleeing for

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137. Swain v. State, 50 Md. App. 29, 38, 435 A.2d 805, 810 (1981):

> The D.C. city limit is an artificial political border which criminals do not respect and use to their own advantage when committing crimes. In many cases the effect of the statute will be a much quicker apprehension of the suspect, who is potentially dangerous to D.C. citizens, than would occur if the foreign police were required to stop at the D.C. border and notify the D.C. police. . . .

138. District of Columbia Fresh Pursuit Act, D.C. CODE ANN. § 23-901 (1973) (quoted in *Swain*, 50 Md. App. at 36, 435 A.2d at 809) (current codification at D.C. CODE ANN. § 23-901 (1981)).

The felony giving rise to the pursuit must be a felony in the originating jurisdiction. *See* State v. Malone, 106 Wash. 2d 607, 608-10, 724 P.2d 364, 365-66 (1986), where the court held that an Idaho officer who pursued a suspect into Washington for an offense that was a felony in Washington, but not in Idaho, lacked fresh pursuit jurisdiction to arrest.

In some states the Uniform Act applies also to misdemeanors. *See, e.g.*, ILL. ANN. STAT. ch. 38, para. 107-4(b) (Smith-Hurd 1980) ("an offense in [an]other State"); KAN. STAT. ANN. § 22-2404(2) (1981) ("crime in [an]other state"); MONT. CODE ANN. § 46-6-411 (1987) ("a crime"). The practical difficulties that can arise, particularly where the originating jurisdiction is surrounded by states with differing requirements, have been addressed by the Kansas attorney general. *See supra* note 136.

139. A typical example is the South Dakota statute, S.D. CODIFIED LAWS ANN. § 23A-3-14 (1979 and Supp. 1986), which provides:

> The term "fresh pursuit" as used in secs. 23A-3-10 to 23A-3-14, inclusive, shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used in this title shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

140. Swain v. State, 50 Md. App. 29, 38-40, 435 A.2d 805, 810-11 (1981). *See also* State v. Tillman, 208 Kan. 954, 957-58, 494 P.2d 1178, 1182 (1972).

141. A number of these factors were enumerated in Six Feathers v. State, 611 P.2d 857, 861 (Wyo. 1980):

> Immediate or fresh pursuit does not require the pursuer to keep the pursued in sight. It does not require recognition by the pursued that he is being pursued. But it does require (as recited in the South Dakota statute) the pursuit to be undertaken without unreasonable delay. The nature of the crime, the activities and location of the pursuer after receiving a report of the commission of the crime, the activities and location of the pursued after commission of the crime, whether or not the pursued had been identified or would escape, the extent and nature of the evidence connecting the pursued with the crime, and the potential

the purpose of avoiding arrest, although the suspect need not be aware of the pursuit.[142]

These substantive provisions of the Uniform Act generally are enforced on behalf of suspects. Where interstate fresh pursuit arrests for misdemeanors or traffic offenses are not authorized by the Act, for example, the arrests have been deemed invalid or evidence has been suppressed.[143] On the other hand, where the pursuit is triggered by a misdemeanor, but the pursuing officer learns of a felony during the chase, the felony will validate the subsequent arrest, at least where the felony was committed in the pursuing officer's jurisdiction.[144]

By contrast, the procedural aspects of the Uniform Act seldom are enforced on behalf of the suspect. The basic procedure mandated by the Act is that the suspect is entitled to a hearing in the state of arrest, prior to being returned to the state where the violation occurred, to determine the lawfulness of the arrest.[145] Almost without exception, state courts have denied relief for the arresting state's fail-

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for the pursued to cause immediate and additional injury or damage to others are examples of the circumstances to be considered in the determination as to whether or not the pursuit was without unreasonable delay.

142. People v. Wolfbrandt, 127 Ill. App. 3d 836, 841, 469 N.E.2d 305, 310 (1984); State v. Ferrell, 218 Neb. 463, 466, 356 N.W.2d 868, 870 (1984); State v. Goff, 174 Neb. 548, 555, 118 N.W.2d 625, 630 (1962); Six Feathers v. State, 611 P.2d 857, 861 (Wyo. 1980).

143. District of Columbia v. Perry, 215 A.2d 845, 847 (D.C. 1966); People v. Fenton, 154 Ill. App. 3d 152, 506 N.E.2d 979, 981 (1987); Op. Att'y Gen. Ill. No. 82-057 (1982). *But see supra* note 138.

The courts also have deemed invalid, as outside an officer's fresh pursuit authority, an arrest for an offense that was a felony in the host jurisdiction, but not in the originating jurisdiction. State v. Malone, 106 Wash. 2d 607, 608-10, 724 P.2d 364, 365-66 (1986).

144. Crawford v. State, 479 So.2d 1349, 1353 (Ala. Crim. App. 1985). An Alabama officer in fresh pursuit of a suspect for the misdemeanor of reckless driving learned during the chase that the tag number of the suspect's car belonged to a stolen truck. The court noted:

> Since the appellant was stopped only one-quarter of a mile into Florida, it is most likely that this information was obtained during the chase while still in Alabama. Thus, when [the officer] stopped the appellant, he did have reason to suspect the appellant had committed a felony in the State of Alabama and was empowered to arrest the appellant according to [the Florida Uniform Act].

145. The Wisconsin law is typical. WIS. STAT. § 976.04(2) (1986), provides that an officer effecting an arrest following interstate fresh pursuit:

> . . . shall without unnecessary delay take the person arrested before a judge of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the judge determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state or admit him to bail for such purpose. If the judge determines that the arrest was unlawful he shall discharge the person arrested.

In other states, the presiding judicial officer is authorized, pending a determination of lawful arrest, to commit the suspect, not to custody to await the issuance of a warrant of extradition, but "to the custody of the officer making the arrest, who shall without unnecessary delay take him to the state from which he fled." *See, e.g.*, MONT. CODE ANN. § 46-6-411(2) (1987). Although Montana has enacted the Uniform Criminal Extradition Act, MONT. CODE ANN. §§ 46-30-201 *et seq.* (1987), that Act apparently is limited to situations not involving the exigencies of fresh pursuit.

ure to comply with the procedure, generally relying upon the *Ker-Frisbie* rule[146] that the illegality of the defendant's arrest does not divest the court of personal jurisdiction over the suspect.[147] A few courts have indicated discomfort with the notion of unchecked procedural violations,[148] but apparently only one court has reversed a conviction because of failure to comply with the Uniform Act's procedures.[149]

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146. *See supra* section II.C.3.

147. Soles v. State, 16 Md. App. 656, 670, 299 A.2d 502, 511 (1973); Boddie v. State, 6 Md. App. 523, 534-35, 252 A.2d 290, 296 (1969); People v. Bacon, 84 Misc. 2d 679, 682, 376 N.Y.S.2d 839, 841 (1975); People v. Walls, 35 N.Y.2d 419, 424, 321 N.E.2d 875, 876, 363 N.Y.S.2d 82, 83-84 (1974), *cert. denied*, 421 U.S. 951 (1975); State v. Ferrell, 218 Neb. 463, 468-69, 356 N.W.2d 868, 871-72 (1984).

The Maryland court noted that the hearing requirement "is essentially procedural in nature," explaining:

> [W]e do not mean to imply that Maryland officers making arrests in the District of Columbia under that jurisdiction's Uniform Act on Fresh Pursuit may with impunity ignore the provisions of Section 502. We hold, however, under the circumstances of this case, that the arrest of appellants and the search of their vehicle were lawful when made and that they are not voided by failure of the Maryland officers to comply with the procedural provisions of Section 502.

Boddie, 6 Md. App. at 534-35, 252 A.2d at 296. The court appears to imply, despite its caveat, that officers making an otherwise lawful arrest may in fact ignore with impunity the act's procedural requirements.

The state's failure to comply with the correct procedures also has been deemed not to void the arrest when the defendant either returned voluntarily to the pursuing jurisdiction or waived extradition. Crawford v. State, 479 So.2d 1349, 1353-54 (Ala. Crim. App. 1985) ("since the appellant *returned voluntarily* to Alabama with Officer Hutcheson, the fact that he was not taken before a judge in Florida does not render his arrest illegal") (emphasis in original); United States v. Holmes, 380 A.2d 598, 601-02 (D.C. App. 1977) (evidence suppressed in criminal trial where suspect's "consent to accompany the Maryland officers without an extradition hearing was *not* voluntary," in part because police did not explain to suspect his right to a hearing to determine the lawfulness of his arrest) (emphasis in original); Six Feathers v. State, 611 P.2d 857, 862 (Wyo. 1980) (although suspect was not taken before a South Dakota magistrate for a hearing, "[i]n this instance appellant waived extradition, and the purpose of the hearing was nullified"). *Cf.* State v. Tillman, 208 Kan. 954, 958, 494 P.2d 1178, 1182 (1972) (suspects were taken before a Missouri magistrate, where "[b]oth appellants voluntarily waived extradition and they were returned to the State of Kansas. The record establishes a full compliance with the requirements of the Missouri Uniform Law on Fresh Pursuit.").

148. State v. Goff, 174 Neb. 548, 555, 118 N.W.2d 625, 631 (1962) (noting with disapproval the state's failure to comply with procedures); People v. Walls, 35 N.Y.2d 419, 424, 321 N.E.2d 875, 876, 363 N.Y.S.2d 82, 83 (1974), *cert. denied*, 421 U.S. 951 (1975) (noting that "[i]n a proper case" relief may be granted); State v. Bonds, 98 Wash. 2d 1, 653 P.2d 1024 (1982). In *Bonds*, the Washington Supreme Court noted that:

> Unauthorized police excursions into neighboring states would certainly be deterred by a refusal to admit evidence obtained as a result of such activities. However, we feel that in this case alternative deterrents are available. The police officers concede that they were acting as private citizens in Oregon and therefore may well be exposed to civilian criminal or civil liability for unlawful arrest under Oregon law. . . . If such potential liability does not constitute sufficient deterrence of police officers' making unauthorized excursions into another jurisdiction, let it be understood that we will not hesitate in the future to use our supervisory power to exclude the fruits of such unauthorized excursions.

Id. at 13, 653 P.2d at 1031 (citations omitted).

149. People v. Jacobs, 67 Ill. App. 3d 447, 450-51, 385 N.E.2d 137, 140 (1979). The *Jacobs* court reversed the defendant's convictions for murder and robbery, and remanded for a new trial in which the defendant's confessions were to be suppressed as the fruits of an illegal arrest. The court noted: "None

At first blush, the doctrine of interstate fresh pursuit has features attractive to the development of principles governing fresh pursuit onto Native reservations.[150] Principally, the Interstate Act recognizes

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of the mandates set forth in the Uniform Fresh Pursuit Law of Iowa were complied with by the arresting officer from Illinois. They were both blithely and summarily ignored. . . ." *Id.*

Despite the courts' reluctance to invalidate arrests, suspects whose procedural rights are violated may have a cause of action for damages under 42 U.S.C. § 1983 (1982), which addresses violations of civil rights under color of state law. *Compare* Draper v. Coombs, 792 F.2d 915, 921-22 (9th Cir. 1986) (technical violations of Oregon fresh pursuit statute may state a claim under § 1983; nominal damages are available even if defendant suffers no actual damages), *with* Cole v. Williams, 798 F.2d 280, 283 (8th Cir. 1986) (affirmed grant of judgment n.o.v. from jury award of $5000 for procedural violations of Arkansas fresh pursuit statute, on ground that suspects "suffered no damages").

150. The National American Indian Court Judges Association has recommended that the Uniform Act on Fresh Pursuit be amended to include tribal police, and that laws consistent with the Act be enacted by tribes. NAT'L AM. INDIAN CT. JUDGES ASS'N, 4 JUSTICE AND THE AMERICAN INDIAN: EXAMINATION OF THE BASIS OF TRIBAL LAW AND ORDER AUTHORITY 68-71 (1974) [hereinafter cited as 4 JUSTICE AND THE AMERICAN INDIAN]. *See also infra* note 183.

A second, albeit potentially more cumbersome, solution to the unchecked border incursions of state officers onto reservations may lie in tribal-state compacts or agreements. These may be akin to the existing cross-deputization agreements presently in effect between Native-state sovereigns in several areas of the country. *See supra* note 31. While such a criminal pursuit agreement doubtlessly could be negotiated successfully to the mutual advantage of the contiguous sovereigns, it may be that existing domestic law would not permit such an agreement to be implemented simply on the accession of the tribe and state *inter se*.

Under federal law, any jurisdictional change in the tribal-state relationship can be accomplished solely through the formal process prescribed by Congress in the Indian Civil Rights Act of 1968. *See* discussion and text *supra* notes 42-43. *See also* Kennerly v. District Court, 400 U.S. 423, 427 (1971) (unilateral action by Blackfoot tribal council attempting to grant state concurrent jurisdiction over civil suits failed because state jurisdiction was not assumed in a manner consistent with Pub. L. 280, which required affirmative legislative act); White v. Califano, 437 F. Supp. 543, 551 (D.S.D. 1977) (state could not act on tribal court involuntary commitment order for reservation resident because "there would be a point where the state [impermissibly] would be vested with jurisdiction with tribal consent"); Blackwolf v. District Court, 158 Mont. 523, 493 P.2d 1293 (1972) (tribal court transfer, in conformity with Cheyenne tribal law, of jurisdiction over nonconsenting reservation juvenile to state court for placement in off-reservation detention/treatment facility was void because state court lacked jurisdiction to accept tribal court order).

It is not clear, however, that a grant by a tribe to the state of authority to engage in fresh pursuit across reservation boundaries alters the jurisdictional relationship between the two sovereigns. Hence, it is equally uncertain that federal approval of such an arrangement would need be sought. States are encumbered by the compact clause of the Constitution to obtain congressional approval for any interstate or state-foreign power agreement, regardless of form or formality, that would tend to increase the political power of the state at the expense of federal supremacy. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 470-71 (1978); U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress. . .enter into any Agreement or Compact with another State, or with a foreign Power."). While the "foreign Power" language of the clause may limit a state's ability to treat with a Native nation, the applicability of the Compact Clause to state-tribal agreements has not been addressed directly by the courts. *Compare* United States v. Rauscher, 119 U.S. 407, 414 (1886) (extradition agreement between a state and a foreign nation violates the Compact Clause), *with* the Reciprocal Extradition Agreement between the Sisseton-Wahpeton Sioux Tribe and the State of South Dakota, discussed *supra* note 79, which apparently was concluded without congressional involvement.

Conceptually, even if the constitutional constraint on state cooperation does apply to state-tribal compacts, the tribes themselves are not bound by the Compact Clause. In the Cherokee cases, Chief Justice Marshall held that tribes had lost their sovereign power to treat with foreign governments other

the sovereignty of state borders: crossing a state line in fresh pursuit is permissible only if and as authorized by the law of the asylum state. Application of the interstate doctrine to Native reservations necessarily would represent state acknowledgement of tribal sovereignty over both the territory of the reservation and the subject matter of criminal justice. Significantly too, defendants arrested in violation of the Act's substantive provisions generally have been granted relief, ensuring that Native suspects pursued across reservation boundaries could not be validly arrested for misdemeanors or traffic offenses unless the tribe's law expressly permitted such fresh pursuit arrests. On the negative side, however, the interstate fresh pursuit doctrine generally disregards procedural violations, and thus effectively would permit state officers to violate tribal sovereignty with virtual impunity by simply conveying the suspect off the reservation and into the personal jurisdiction of the state courts. As a consequence of judicial tolerance of procedural neglect, the recognition of tribal sovereignty promised by the interstate doctrine is ultimately a mirage.

3. International Hot Pursuit

The basic elements of the doctrine of hot pursuit in international law[151] are identical to the components of intra- and interstate fresh pursuit: the pursuit must be immediate, continuous, and uninterrupted.[152] Recognition of the right of hot pursuit is grounded in the juridical fiction that the arrest occurs in the country where the offense is committed, although in fact the arrest takes place in another jurisdiction.[153]

Most writings on international hot pursuit have concentrated on the right of pursuit from the pursuing nation's territorial waters onto

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than the fledgling United States, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), but Native nations never have been divested expressly of their inherent sovereign power to enter into agreements with the lesser sovereigns within the federal system. Thus, while consent of the Congress arguably is necessary for a state legitimately to enter into a tribal-state compact, no similar procedural impediment constrains the inherent powers of Native nations.

151. In international law, at least as reflected in the literature, the doctrine generally is referred to as "hot" pursuit. Consequently, that term will be used in this section.

152. Note, *The Right of Hot Pursuit from Exclusive Fishery Zones:* United States v. "F/V Taiyo Maru, No. 28," 15 COLUM. J. TRANSNAT'L L. 336, 346 (1976) [hereinafter cited as *Right of Hot Pursuit*]; N. POULANTZAS, THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW 1-2 (1969).

153. Williams, *The Juridical Basis of Hot Pursuit*, 20 BRIT. Y.B. INT'L L. 83, 84 (1939):

> Where an arrest or seizure is effected upon fresh pursuit, it is, in general, deemed to have been effected both at the time at which, and at the place from which, the pursuit began.
>
> . . . .
>
> [T]he general rule is that the culprit is not allowed to derive any legal advantage from his vain attempts at escape. He is in the same position as if he had been arrested at the beginning.

the high seas. This customary right,[154] as an exception to the historical maritime doctrine of freedom of the high seas,[155] is premised on the fact that pursuit on the high seas does not infringe on the territorial sovereignty of any state.[156] There is, however, no customary right of hot pursuit on land as there is at sea.[157] Hot pursuit on land,

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154. Article 38(1) of the Statute of the International Court of Justice outlines four sources from which international "rules" may be derived: treaties, international custom, general principles of law, and juridical writings and those of highly qualified academic authorities. "Custom" then is a primary source of international law. A norm rises to the level of international custom when there is "evidence of a general practice accepted as law." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1)(b); 1 L. OPPENHEIM, INTERNATIONAL LAW 26 (H. Lauterpacht ed. 8th ed. 1955) (defining custom as "a clear and continuous habit of doing certain actions [which] has grown up under the aegis of the conviction that these actions are . . . obligatory or right"); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 102(2) (Tent. Draft No. 6, 1985).

> The requirement that a rule command the "general assent of civilized nations" to become binding upon them is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.

Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980). The formation of customary international law thus is comprised of two essential elements: "a general practice of States, and the acceptance by States of this general practice as the law." H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 46 (1972) (quoting G. SCHWARTZENBERGER, MANUAL OF INTERNATIONAL LAW 32 (1967)). A brief but excellent precis of international customary law is presented by Sohn, *"Generally Accepted" International Rules*, 61 WASH. L. REV. 1073 (1986).

155. "Hot pursuit" of unauthorized foreign vessels from territorial coastal waters onto the high seas is an ancient doctrine of the law of nations. *See* M. WHITEMAN, 4 DIGEST OF INTERNATIONAL LAW 677-87 (1965) [hereinafter cited as DIGEST OF INTERNATIONAL LAW], and the discussion of early Canadian and American cases presented in P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 106-11 (1927). For reference, see "Freedom of the High Seas," RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 521 (Tent. Draft No. 6, 1985).

156. The S.S. Lotus Case, 1927 P.C.I.J. (Ser. A) No. 10, at 25 (*reprinted in part in* J.-G. CASTEL, INTERNATIONAL LAW 621 (3d ed. 1976)):

> It is certainly true that — apart from certain special cases which are defined by international law — vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.

See also Maidment, *Historical Aspects of the Doctrine of Hot Pursuit*, 46 BRIT. Y.B. INT'L L. 365, 380-81 (1972-73); POULANTZAS, *supra* note 152, at 39.

The right of hot pursuit at sea was codified in 1958 in the Convention on the High Seas:

> The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only by continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.

Geneva Convention on the High Seas, April 29, 1958, art. 23, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, *reprinted in part in* CASTEL, *supra*, at 604. *See generally* Maidment, *supra*; *Right of Hot Pursuit*, *supra* note 152; POULANTZAS, *supra* note 152, at 39-238. Of the three possible international hot pursuit situations—land, sea, and air—only the right at sea has been codified. POULANTZAS, *supra* note 152, at 1.

157. Williams, *supra* note 153, at 89 (". . .Bynkershoek [writing in the year 1737] conceded the same right of hot pursuit on land as he did on sea; no one would do so to-day."); POULANTZAS, *supra*

rather, is permitted across international borders only with the express consent of the countries involved.[158]

As an "exceptional prerogative," the right of hot pursuit across national boundaries is sanctioned by international law only where an agreement exists between the nations concerned.[159] The necessity of an agreement arises because of the violation of national sovereignty represented by the unauthorized crossing of a frontier.[160] In the ab-

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note 152, at 11-12, 14-15. Poulantzas states that "hot pursuit on land did not succeed in crystallizing into a definite and independent right in international law relying on custom." *Id.* at 15. He cites a number of sources in support, but notes: "We cannot see therefore, why J. Verplaetse [citation omitted], in his otherwise excellent article takes for granted the existence of a right of hot pursuit on land." *Id.* at 15 n.24. *Accord* 5 DIGEST OF INTERNATIONAL LAW, *supra* note 155, at 216 (police in "hot pursuit" may not cross an international border and arrest a fugitive in the territory of another state); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 432(2) (Tent. Draft No. 6, 1985) ("A state's law enforcement officers may exercise their functions within the territory of another state only with the consent of the other state.")

In a Native context, the absolute bar of national frontiers to the continued pursuit of fleeing "hostiles" is reflected in the following anecdote:

> Again and again Blackfeet warriors fleeing northward after a raiding attack watched with growing amazement as the pursuing troops of the United States Army came to a sudden, almost magical stop. Again and again, fleeing southward, they saw the same thing happen as the Canadian Mounties reined to an abrupt halt. The tribes of the Blackfeet Confederacy living along what is now the United States-Canadian border came to refer to that potent but invisible demarcation as the "Medicine Line." It seemed to them almost a supernatural manifestation. The Confederacy members had hunted, roamed, prayed and allied with tribes from northern Alberta and Saskatchewan all the way down to Yellowstone. For these Indian Nations, the "Medicine Line" was nearly impossible to comprehend: Man did not divide a land; rather rivers and mountains interrupted the land's unity.

O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 315 (1984).

158. POULANTZAS, *supra* note 152, at 15-16. One commentator, however, has suggested that hot pursuit across a land frontier might be justified, "if at all," by necessity. Williams, *supra* note 153, at 91. Another has indicated that the international principle of self-defense, "superior in the particular circumstances to the right of territorial inviolability," may justify hot pursuit across national borders. 12 DIGEST OF INTERNATIONAL LAW, *supra* note 155, at 75 (citing D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 38-41 (1958)). Bowett specifically referred to an incident in 1836 in which U.S. troops pursued "marauding Indians" into Mexico, and which American diplomats justified based on the principle of self-defense.

159. POULANTZAS, *supra* note 152, at 2. "[F]or the crossing of the boundaries of a State in pursuit of wrongdoers the express consent of that State is necessary." *Id.* at 3 n.18.

For example, in 1882 the United States and Mexico concluded the Treaty on Reciprocal Consent to Pursue Savage Hostile Indian Marauders Across the Border. *See id.* at 13; Williams, *supra* note 153, at 91 n.3. This bilateral convention was renegotiated several times over the next 11 years to provide "for the reciprocal crossing, in the unpopulated or desert parts of the international boundary line, by the regular federal troops of the respective Governments, in pursuit of savage hostile Indians. . . ." 9 TREATIES AND OTHER AGREEMENTS OF THE UNITED STATES OF AMERICA: 1776-1949, at 847, 854, 881, 884, 889 (C.I. Bevans ed. 1972). These "Indians" were led by an Apache named "Kid" who had been leading raids along the Arizona and New Mexico border and "evad[ing] pursuit made by troops of the United States, by crossing the frontier of Mexico." *Id.* at 884. After repeated extensions of the agreements, each for fixed periods of several years, the final treaty was to remain in effect "until Kid's band of hostile Indians shall be wholly exterminated or rendered obedient to one of the two Governments." *Id.* at 890.

160. POULANTZAS, *supra* note 152, at 11-12:

sence of a treaty or other agreement, the movement of a country's

> States are very sensitive to incidents involving violations of their sovereignty by the unauthorized crossing of their frontiers. A serious breach of international law arises when a State sends its agents into the territory of another State to apprehend offenders. . . . Therefore, pursuit on land has not succeeded in acquiring the character of a right in customary international law, as is the case with hot pursuit in the international law of the sea. This is the reason why a network of treaties between various States was necessary permitting and expressly providing for hot pursuit on land on a basis of reciprocity and only under special conditions.

See also 12 DIGEST OF INTERNATIONAL LAW, *supra* note 155, at 75 (referring to hot pursuit on land as a "derogation from the state's territorial sovereignty").

The principle of inviolability of territorial frontiers is central to international sovereignty. "It is a fundamental principle of the law of nations that a sovereign state is supreme within its territorial domain and that it and its nationals are entitled to use and enjoy their territory and property without interference from an outside source." Trail Smelter Arbitration (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1941), *reprinted in* 35 AM. J. INT'L L. 684 (1941). *See also* The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812); 2 J.B. MOORE, A DIGEST OF INTERNATIONAL LAW 4-16 (1970). All persons within a state's boundaries, except those foreign emissaries receiving diplomatic immunity, are subject to the exclusive power of that state. As a general rule, no state may exert jurisdiction over questions arising within another's boundaries. G. DAVIS, ELEMENTS OF INTERNATIONAL LAW 35 (1916). Moreover, a person within the territory of a state generally is subject only to the *in personam* jurisdiction of that state. T. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 199 (7th ed. 1923). Sovereignty in the international law context thus signifies a state's independence and right to be free from external interference. DAVIS, *supra*, at 36. *See also* Isle of Palmas Case (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 838 (1928), *reprinted in* 22 AM. J. INT'L L. 867, 875 (1928) ("Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a State."). *Cf.* United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625, 25 U.N. GAOR Supp. (No.28) at 121, U.N. Doc. A/8028 (1970) ("Every state has the duty to refrain from threat or use of force to violate the existing international boundaries of another State . . . .")

Nonetheless, while territoriality is the predominant empirical basis of the current international system, and the legal orders of sovereign states are anchored to defined territories, modern developments have rendered sovereignty a more relative concept. A myriad of elements, once the concern only of the domestic nation-state, now demonstrate substantial transterritorial effects: international economies and multinational corporations, communications, terrorism, human rights, and pollution of the global environment. To be sure, political sovereignty within a state's territorial frontiers is considered still to be a requisite absolute and unfettered element of a state's self-determination; yet, a state's legal sovereignty may be bound to international norms of conduct and in that sense is merely relative. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980)("U.N. Charter . . . makes it clear that in this modern age, a state's treatment of its own citizens is a matter of international concern")(citation omitted). For exemplary discussions of the restricted sovereignty doctrine, *see* Singer, *Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe*, 26 HARV. INT'L L.J. 1 (1985); Fleiner-Gerster & Meyer, *New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty*, 34 INT'L & COMP. L.Q. 267 (1985); Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982).

Sovereignty also creates a corollary duty upon every state to refrain from attempting to exercise its sovereign powers within the territory of another state. 5 DIGEST OF INTERNATIONAL LAW, *supra* note 155, at 7. This duty, as it relates to the apprehension of fugitives, forbids one state from dispatching its agents into the territory of another state to effect capture. *Id.* at 184 (citing 1 L. OPPENHEIM, INTERNATIONAL LAW 251 (4th ed 1928)). Under the United Nations Charter, all states must "refrain . . . from the threat or use of threat against the territorial integrity" of another state. U.N. CHARTER art. 2, para. 4. This article has been interpreted broadly to mean that signatories are obligated not to violate the territorial sovereignty of other states. United States v. Toscanino, 500 F.2d 267, 275-78 (2d Cir. 1974). Similarly, article 17 of the Charter of the Organization of American States (OAS) provides that "the

officers across a national frontier to apprehend a suspect entails a "serious breach" of international law.[161] Virtually every treaty providing for a transnational right of hot pursuit has mandated that suspects be delivered to authorities of the nation where they are arrested, to await extradition hearings."[162] Violations of either national frontiers or treaty provisions presumably confer on the injured state the right of complaint to and redress by an international forum.[163]

The doctrine of hot pursuit in international law is the most auspi-

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territory of a state is inviolable" and may not be subject to any measure of force by another state. Charter of the OAS, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3. This multilateral agreement also is violated when a criminal defendant is abducted by foreign agents. *Toscanino*, 500 F.2d at 276.

Because of national sensitivities to unauthorized border intrusions, international agreements sanctioning hot pursuit on land generally condition the right on reciprocity and adherence to strict and specific conditions. POULANTZAS, *supra* note 152, at 347.

161. POULANTZAS, *supra* note 152, at 11. In a case presaging World War II, a German refugee journalist living and working in Switzerland was abducted by Nazi agents and returned to Germany for trial for treason. The Swiss government vehemently protested the gross violation of its territorial sovereignty and demanded a return of the dissident journalist. The matter was scheduled to be presented to an international arbitral tribunal, but before the issue could be adjudicated, the public rancor of the Swiss proved sufficient to force Germany to accede to its neighbor's demand. 5 DIGEST OF INTERNATIONAL LAW, *supra* note 155, at 7 (Berthold Jacob Case (1935)). For an accounting of the incident, *see* Preuss, *Settlement of the Jacob Kidnapping Case*, 30 AM. J. INT'L L. 123 (1936).

More recently, in June 1960 Argentina lodged a vigorous protest with the United Nations Security Council that the abduction of Adolf Eichmann by Israeli agents in Argentina constituted an outrageous violation of its sovereignty. The Security Council, careful not to condone the criminal acts allegedly perpetrated by Eichmann and indicating that he should be brought to trial, resolved that such abductions, even of the most heinous of criminals, were incompatible with the U.N. Charter and could not be tolerated as a precedent that would create an international atmosphere of insecurity and distrust detrimental to world peace. *See* 15 U.N. SCOR (868th mtg.) at 1, U.N. Doc. S/p.v. 868 (1960). Israel and Argentina subsequently reached an agreement in which Israel apologized for its violation of Argentina's territorial integrity, but was not requested to return Eichmann to his state of asylum. *See generally* Silving, In re Eichmann: *A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961).

162. POULANTZAS, *supra* note 152, at 13:

> All these cases of pursuit on land, permitted by special treaties, had the specific characteristic that the arrested offenders had to be delivered to the authorities of the State on whose territory they were apprehended. The recovery of the fugitive offenders by the State where the commission of the offence occurred might follow through the process of extradition.

163. A comment to the draft Restatement of Foreign Relations section dealing with "External Measures in Aid of Enforcement of Criminal Law" notes:

> If a state's law enforcement officers exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes seizure or abduction of a person, the state from which the person was abducted may demand return of the person. If that state does not object to the continued detention of the person, the prevailing view is that the state to which the person was taken may hold him for prosecution according to its laws. If the state from whose territory the person was abducted objects to the abduction and insists on his return, international law requires that he be returned.

RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 432 comment c (Tent. Draft No. 6, 1985). *See also* Williams, *supra* note 153, at 91. This corresponds to the international law of extradition, which recognizes a right of the asylum state to object to violations of its extradition laws. *See supra* note 94.

cious of the cross-jurisdictional models for the development of fresh pursuit principles for Native reservations. First, international law recognizes an absolute sovereignty on the part of the state to which the suspect has fled; frontiers can be crossed only in the event of an express agreement, and then only under the conditions imposed by the agreement. Second, where either sovereign borders or the provisions of the agreement are violated, the injured sovereign has a cause of action against the offending state. The significance of these factors for Native law lies in their focus on the injury to, and right of redress by, the sovereign. The international law focus on the violation of territorial integrity, rather than on the injury to the suspect, increases the likelihood that domestic courts will recognize and vindicate tribal sovereignty in a fresh pursuit situation. As one commentator noted, in the international arena "expediency should not be permitted to let politics prevail over law."[164]

B. Summary

The three cross-jurisdictional models of fresh pursuit have varied implications for Native reservations. The doctrine of intrastate fresh pursuit is derivative of state organic powers and thus involves principles inimical to Native sovereignty. Application of this model would result in an unwarranted extension of state criminal jurisdiction across reservation frontiers. Some acknowledgement of tribal territorial sovereignty would inhere in the application of interstate fresh pursuit principles, if only to the extent of recognizing the substantive limitations placed on fresh pursuit arrests by tribal law. The failure of domestic courts to redress procedural violations, however, ultimately negates any promise of the interstate doctrine for Native law. Only the principles of international hot pursuit fully address sovereign concerns. International law recognizes both an absolute sovereign right to inviolate borders and a right of redress on the part of the sovereign for injury to its territorial integrity. As such, the international law doctrine of hot pursuit offers greater protection for tribal sovereign interests than either of the domestic cross-jurisdictional models.

IV. STATE AUTHORITY TO PURSUE ONTO THE RESERVATION

The authority of a state law enforcement officer to follow a suspect across reservation boundaries in fresh pursuit and effect a valid arrest depends upon a synthesis of the principles discussed in the previous sections, considered against the background of federal Indian

164. POULANTZAS, *supra* note 152, at 349.

law. A number of competing doctrines are involved. First, although arrest following fresh pursuit is a precept of criminal law, existing principles of Native criminal jurisdiction seemingly are incapable of resolving the question. The state may have complete jurisdiction over the suspect at the time and place of the crime, but no jurisdiction over the suspect within the territorial bounds of the reservation. The general lack of state criminal jurisdiction over Native Americans within reservation boundaries, however, is premised on the reservation as the situs of the crime. Whether the prohibition against state jurisdiction on the reservation will be extended by the courts to fresh pursuit and arrest within Native territory is speculative.

Second, the few cases addressing the issues of on-reservation arrest for off-reservation crimes and extradition from the reservation where no fresh pursuit is involved are generally unhelpful. In the absence of tribal extradition procedures, lower domestic courts uniformly have held that on-reservation arrests for crimes committed outside the reservation do not violate tribal sovereignty. Even where tribal extradition laws would appear to protect a suspect's rights, the courts generally have validated arrests made in violation of the extradition procedures. With rare exceptions, the superordinate sovereign injury to the tribe, as opposed to the injury to the individual suspect, has not been considered. These cases, then, can serve only as tenuous judicial benchmarks in the area of on-reservation arrest following transborder pursuit, since on the whole they do not address in substance the issue of tribal sovereignty.

Finally, the several jurisdictional configurations of the fresh pursuit doctrine offer various possibilities. Principles of intrastate fresh pursuit, attractive to states that do not view reservations as extraterritorial to the states in which they are located, would permit the omnifarious exercise of state criminal jurisdiction within reservation boundaries in ways now prohibited. Interstate fresh pursuit offers some recognition of sovereign status, but procedural violations seldom are enforced, and illegal arrests often are validated by the subsequent fact of the state court's personal jurisdiction over the suspect. International hot pursuit provides the most protective model for tribal sovereignty, including a right of redress on behalf of the injured sovereign, but at the present time the application of international law to tribal-state issues is uncertain.[165]

165. That international law has been and continues to be assimilated into domestic United States law is undisputed. "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796). The participation of United States courts in applying and clarifying international law, however, is incidental to the usual court business of applying domestic law to domestic parties. Use of

Principles of Native law criminal jurisdiction offer little guidance,

international law in domestic courts traditionally has been limited largely to the application and enforcement of treaties to which the United States is a party. By article VI of the Constitution, treaties made under the authority of the United States, together with the Constitution and laws of the United States, are declared the supreme law of the land. But general or "customary" international law, *see supra* note 154, carries no such explicit constitutional seal of approval.

Because international law currently is considered "positivist" in nature, most substantive international law is codified in international instruments drafted by governments acting in their capacity as member states of international organizations. Many of these instruments purport to codify or clarify customary international law by reducing to written rules the norms derived from custom; the instruments then may become authoritative evidence of international law. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 103 (Tent. Draft No. 6, 1985).

These customary rules of international law can be incorporated into domestic law. The classic exposition on the American incorporation of international law is Justice Gray's opinion in The Paquete Habana, 175 U.S. 677, 700 (1900):

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .

The *Paquete Habana* remains still the authoritative statement on the subject. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 880-81 (2d Cir. 1980); RESTATEMENT, *supra*, at § 131. It is apparent, however, that where there exists a treaty or "controlling executive or legislative act or judicial decision," the political and judicial organs of the United States reserve the power to disregard customary international law. *See, e.g.*, Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814) (President can disregard customary international law); Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960)("it has long been settled in the United States that the federal courts are bound to recognize any one of these three sources of law [treaties, statutes, and the Constitution] as superior to canons of international law . . . . There is no power in this Court to declare null and void a statute adopted by Congress . . . merely on the ground that such provision violates a principle of international law."). Courts generally will apply domestic law instead of international law in any situation in which a controlling domestic law exists. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("the public law of nations can hardly dictate to a country . . . how to treat [a] wrong within its domestic borders"); Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 441 U.S. 931 (1973) (later congressional legislation specifically authorizing importation of Rhodesian chrome held to override United States international obligations under United Nations Security Council embargo on that material from Rhodesia).

Nonetheless, the courts early-on began to assume that Congress did not intend to violate international law and construed domestic statutes accordingly. *See, e.g.*, Missouri v. Holland, 252 U.S. 416 (1920); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117-18 (1804). *See also* RESTATEMENT, *supra*, at § 134. More recently, the 1985 draft of the Restatement of the Foreign Relations Law of the United States elevates customary international law to the same status as treaty law: established international custom supercedes inconsistent state and local laws and prior, inconsistent federal laws. RESTATEMENT, *supra*, at §§ 102, 131(1), 135(1) reporter's note 1. *See also* discussion *supra* note 155. For an excellent historical overview of the United States domestic enforcement or incorporation of international customary human rights norms, *see* Morgan, *Internalization of Customary International Law: An Historical Perspective*, 12 YALE J. INT'L L. 63 (1987). For recent conflicting interpretations of the incorporation doctrine of international law into domestic United States law, *compare* Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984)(positing that later customary law, as federal law equivalent in constitutional status to international treaties, overrides preexisting and inconsistent domestic law), *with* Goldklang, *Back on Board the* Paquete Habana: *Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1984).

As customary international law issues arise more frequently in domestic tribunals, the question of

and the courts appear never to have developed a specific test for determining when the intrusion of state criminal jurisdiction into Native territory may be warranted. Most courts that have addressed the issues of on-reservation arrest or extradition from Native reservations have adopted as an analytical tool the standard for the exercise of state authority within reservation borders articulated in *Williams v. Lee*, a civil case.[166] While the *Williams* test focuses on the tribal right of self-government, in recent years the Supreme Court's emphasis in civil jurisdictional analysis has shifted away from tribal sovereignty and toward the issue of federal preemption.[167] Assuming that the courts will

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what role international law should play in the absence of controlling domestic law increasingly will be scrutinized. The issue recently has generated much controversy in the field of human rights litigation. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)(torture of Paraguayan conducted under color of Paraguayan law in Paraguay was a violation of international law and gave rise to a cause of action in United States courts); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 795 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981) ("machinery of domestic law utterly fail[ed] to operate to assure protection" of illegal alien against arbitrary, indeterminate detention; but such was contrary to customary international human rights which provided basis for prisoner's release); Lareau v. Manson, 507 F. Supp. 1177, 1187-89 (D. Conn. 1980), and Sterling v. Cupp, 290 Or. 611, 622, 625 P.2d 123, 131 (1981)(both stressing that in adjudication of domestic law cases, courts legitimately and properly may be aware of and conform to international law standards). For a discussion of recent human rights cases in general, and the applicability of international law to their resolution, *see* Bilder, *Integrating International Human Rights Law Into Domestic Law — U.S. Experience*, 4 HOUSTON J. INT'L L. 1 (1981); Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, 1980 AM. SOC'Y INT'L L. PROC. 20.

166. 358 U.S. 217 (1959). In *Williams*, the Court reversed a holding of the Arizona Supreme Court that Arizona courts had jurisdiction over civil suits against Navajos for goods sold to them by a non-Native who operated a store on the Navajo Reservation. The Court articulated the test for state jurisdiction within reservation borders as follows: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. While the opinion in *Williams* dealt only with the absence of state jurisdiction, the Supreme Court, in a subsequent decision, interpreted the case as "holding that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians. . . ." *See* United States v. Mazurie, 419 U.S. 544, 558 (1975).

167. Rice v. Rehner, 463 U.S. 713, 718 (1983) (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973)); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 884 (1986) (citing *Rice*). Like *Williams*, none of these was a criminal case. *Rice* concerned state control of private on-reservation liquor transactions, *McClanahan* involved the imposition of the state income tax on reservation Natives, and *Wold* dealt with the ability of Native plaintiffs to bring suit against non-Natives in state court.

One apparent exception to this trend is found in determinations of state court jurisdiction, where the infringement test still is applied to bar state action. As the Supreme Court has recently stated: "If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law." Iowa Mutual Ins. Co. v. LaPlante, 107 S. Ct. 971, 976 (1987). *See also supra* note 71. *But cf. Wold*, which examined state court jurisdiction under both the preemption and infringement tests.

The prevalence of the *Williams* infringement test in the lower court cases addressing on-reservation arrest and extradition from the reservation may be a reflection of two factors. First, most of the cases discussed *supra* in section II.C. were decided either prior to *McClanahan* or during the transition years between that case and *Rice*, when the primacy of the preemption analysis was being fully established. Second, the emphasis on the *Williams* test in these cases, as in the state-court jurisdiction cases,

continue to use available tools rather than develop an analysis specific to criminal law, the following subsections will examine the question of fresh pursuit onto Native reservations in light of this current jurisdictional analysis.

A. Overview of the Current Analytical Framework

The current Supreme Court analysis begins with the proposition that even on reservations, state law may be applied unless its imposition would interfere with tribal self-government or impair a right granted or reserved by federal law.[168] From this base arises the domestic juridical doctrine that there are "two independent but related barriers" to state jurisdiction within Indian reservations: federal preemption of state authority, and infringement of the tribal right to self-

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may be a function of judicial recognition of the central role of tribal sovereignty in determining issues of state criminal jurisdiction within reservation borders.

168. *Rice*, 463 U.S. at 718 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)). In *Rice*, the Court adopted but retuned slightly the Rehnquistian paradigm that state jurisdiction must be preempted expressly, whereas tribal sovereign powers may be lost by implication. A foremost observer and authority of Native law in the United States has observed that: "In the extreme, so much tribal jurisdiction is lost by the general implication of 'dependent status' that assertions of tribal law must be supported by express delegations from Congress." Barsh, Merrion: *False Hopes for Clear Thinking*, 8(1) AM. INDIAN J. 6, 7 (1982).

The jurisdictional test in *Rice* propounds a new and ahistoric concept in federal Indian law: the doctrine is unfounded, its reasoning is fallacious, and its precedent is pernicious to tribal self-government. The Wisconsin Supreme Court has noted in passing, and in understatement: "The *Rice* Court appears to have significantly modified the established rule that '[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.' " State v. Webster, 114 Wis. 2d 418, 433, 338 N.W.2d 474, 481 (1983)(citation omitted).

Fortunately, the Court itself appears in later decisions to be somewhat disconcerted by the *Rice* articulation. In Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 885 (1986), the Court reasserted that its decisions have "rejected the proposition that pre-emption requires 'an express congressional statement to that effect.' " Similarly, in Iowa Mut. Ins. Co. v. LaPlante, 107 S. Ct. 971, 978 (1987), the Court reaffirmed its language from Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982): " 'Because the [Navajo] Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from [congressional] silence. . . is that the sovereign power. . . remains intact.' " Most recently, in California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083 (1987), the Court disavowed the *Rice* eisegesis even more plainly. The Court noted that state jurisdiction over tribes and their members, while not *per se* precluded in the absence of express congressional consent, could be asserted only in " 'exceptional circumstances.' " *Id.* at 1091 (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983)). In a footnote, the Court then contrasted the position of the dissent:

> Justice Stevens appears to embrace the opposite presumption—that state laws apply on Indian reservations absent an express congressional statement to the contrary. But, as we stated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151. . . (1980), in the context of an assertion of state authority over the activities of non-Indians within a reservation, "[t]hat is simply not the law." It is even less correct when applied to the activities of tribes and tribal members within reservations.

Id. at 1092 n.18. The Court further appears to restrict *Rice* to its facts—that is, to the specific subject matter of liquor transactions within Native territory. *Id.* at 1094. It is noteworthy that Justice O'Connor, who wrote for the majority in *Rice*, joined the dissent in *Cabazon*.

government.[169] Of these two barriers, the courts presently place almost total reliance on that of federal preemption,[170] demonstrating an ever-increasing reluctance to apprehend the central and historic role of tribal sovereignty as a bar to state jurisdiction.

The judicial test for federal preemption is a dual one. The first step is an assessment of the "backdrop" of tribal sovereignty through a two-part analysis: a determination whether the tribe has a tradition of self-government in the particular area in question, and a balancing of the tribal, state, and federal interests involved. Against this "backdrop," the courts determine whether the federal government has preempted the state's exercise of jurisdiction.[171]

Preemption in domestic Indian law differs in several material respects from the standard preemption analysis based on the Supremacy Clause of the Constitution.[172] For example, unlike the usual preemption analysis, Native preemption takes account of the sovereign inter-

169. *See, e.g., Rice*, 463 U.S. at 718-19. The initial formulation of this analytical doctrine appeared in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980), where the entire jurisdictional test articulated in Williams v. Lee, *see* discussion *supra* note 166, was reduced to mere support for the second of the two judicial barriers.

170. *Rice*, 463 U.S. at 718 ("our recent cases have established a 'trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption.' ")(quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973)). The apparent exception to this "total reliance" is judicial determination of state court jurisdiction over Natives and activities within reservation borders. *See supra* notes 71 and 167.

171. *Rice*, 463 U.S. at 718-20.

172. The use of the term "federal preemption" in Native law has a meaning separate and distinct from the use of that term in the familiar context of federal-state relations. "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). *See also Rice*, 463 U.S. at 718; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983); HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 38, at 270-79. At the federal-state interface, excepting those enumerated powers wholly invested in the federal government by the Constitution, the states retain full powers of regulatory control over their jurisdictions. Thus, only when Congress acts pursuant to an enumerated power can it withdraw or "preempt" state legislation in a given field. Federal preemption is the exception and not the rule.

> [F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). Federal preemption in domestic Indian law, on the other hand, classically has been attended by the converse presumption: that absent a clear congressional delegation of jurisdiction to the states, federal control is plenary.

James Madison, the principal architect of the Indian Commerce Clause, reported that the framers fully intended the clause "to commit the exclusive power over Indian affairs to the federal government." Clinton, *supra* note 14, at 435 (citing J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 190, 549, 585, 654-56 (E. Scott ed. 1898)). The Supreme Court, at least prior to *Rice*, gave effect to the framers' intent: "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973) (quoting U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958)). "Thus, if the federal government was silent on an issue of state jurisdiction,

ests of three separate governments in determining whether the exercise of jurisdiction by one of them, the state, has been preempted. In addition, Native preemption carries no requirement that Congress affirmatively preempt the assertion of state authority.[173] On the contrary, in most areas of domestic law as applied to Native Americans, the fact that Congress has not acted affirmatively to grant jurisdiction to the states denotes that state authority has been preempted.[174]

The second barrier to the exercise of state jurisdiction is tribal sovereignty itself: infringement on the tribal right to self-government. In the last few years, tribal sovereignty as a separate barrier in domestic law has declined drastically in significance, although the courts have failed to explain their reluctance to rely on the infringement doctrine. While a number of recent cases that found state jurisdiction preempted also indicated that the state action infringed on tribal sovereignty,[175] no major recent case has premised a denial of state regula-

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it was presumed that the federal government retained jurisdiction either in itself or in the tribal government." State v. Webster, 114 Wis. 2d 418, 433, 338 N.W.2d 474, 481 (1983).

173. The articulation of this point in *Rice* was couched in somewhat tentative terms: "We do not necessarily require that Congress explicitly pre-empt assertion of state authority insofar as Indians on reservations are concerned. . . ." 463 U.S. at 719. More recently, however, the Court has reverted in some measure to its previous, stronger position. California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1091 (1987) (while there is no "inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent," such state jurisdiction may be asserted only in "exceptional circumstances"); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 885 (1986) (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983) (citation omitted)) (Supreme Court case law has "rejected the proposition that preemption requires 'an express congressional statement to that effect.' ").

174. An obvious example is state criminal jurisdiction for crimes involving Natives committed within reservation boundaries. As a rule states have no authority over such crimes absent a grant of jurisdiction pursuant to Public Law 280 or other jurisdictional statute. *See supra* section II.B.2.a. *But see* North Carolina's assertion of criminal jurisdiction pursuant to treaty, discussed *supra* note 50. Another example is state taxation of Native interests on the reservation, which is preempted in the absence of a specific grant of authority by Congress. *See, e.g.*, California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1091 n. 17 (1987) (declaring a "*per se* rule" precluding state taxation on the reservation absent express congressional consent); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 768 (1985)("In the absence of clear congressional consent to taxation, we hold that the State may not tax Indian royalty income from leases issued pursuant to the 1938 [Indian Mineral Leasing] Act."); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973)("by imposing [a personal income] tax . . . the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves").

175. *See, e.g.*, Crow Tribe of Indians v. Montana [*Crow I*], 650 F.2d 1104, 1107 (9th Cir. 1981), *cert. denied*, 459 U.S. 916 (1982), which held that the Tribe's allegations concerning state taxation of coal mining stated a cause of action under both the preemption and the sovereign infringement barriers. In reversing the district court's dismissal of the tribe's complaint, the court of appeals stated in part:

> We find that the Tribe's complaint adequately states a claim that the Montana taxes infringe on its right to govern itself. To support the claim at trial, the Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable.

tory jurisdiction exclusively on the sovereignty argument.[176] Nonetheless, sovereign status remains a valuable and essential, if dormant, tenet of domestic Native law.

Of the two independent barriers to state jurisdiction within reservation borders, that of tribal sovereignty is the more compelling in the area of fresh pursuit. Nevertheless, given the Court's present bias toward dependence on federal preemption at the expense of the self-government doctrine, the following subsection will discuss fresh pursuit in the context of preemption, noting actions tribes could take to increase the likelihood of a judicial finding of preemption. Following the preemption discussion, the article will address Native American tribal

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Id. at 1117.

On remand, the district court upheld the application of the state taxes, but the Ninth Circuit reversed. Crow Tribe of Indians v. Montana [*Crow II*], 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 108 S. Ct. 685 (1988). After holding that the state severance taxes were preempted by federal law, the appeals court found also that "the Montana tax is invalid because it erodes the Tribe's sovereign authority." *Id.* at 903. The court's reasoning rests not on inherent tribal sovereignty, however, but on prevailing federal policy promoting tribal sovereignty.

> By taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threatens Congress' overriding objective of encouraging tribal self-government and economic development.

Id. at 902-03. The value of *Crow II* as buttressing the infringement barrier to state incursions thus is questionable.

176. A prime example of judicial reluctance to address the infringement barrier is *Rice* itself, the decision responsible for the current tenuous articulation of the jurisdictional analysis. The question in *Rice* was whether a federally-licensed Native owner of a store on the reservation was required to obtain a state liquor license in order to sell alcohol for off-premises consumption. Justice O'Connor, writing for the majority, produced a lengthy and detailed preemption analysis, concluding that there was no federal preemption of state jurisdiction over liquor transactions on Indian reservations. But there the analysis stopped. The second supposedly "independent" barrier to state jurisdiction—tribal sovereignty—was dismissed summarily in a footnote. 463 U.S. at 720 n.7. And yet the decisions of where, when, and under what conditions to permit liquor transactions within reservation boundaries seem peculiarly governmental functions.

A further example is a recent opinion of the Wisconsin Attorney General addressing the legality of fresh pursuit arrests by state law enforcement officers on the Menominee Indian Reservation. 74 Op. Att'y Gen. Wis. 245 (1985). In the manner of the *Rice* opinion, the attorney general's opinion delivered an extended preemption analysis, and then summarily concluded that fresh pursuit arrests were not only not preempted, but also did not "impair Menominee tribal sovereignty." *Id.* at 257. The only sovereignty analysis contained in the opinion was addressed to the "backdrop" component of preemption; the attorney general's conclusion that self-government did not present an independent barrier to fresh pursuit arrests was based on absolutely no consideration of sovereignty as an independent barrier.

Nevertheless, even as the preemption analysis flourishes, courts occasionally still will deny state *court* jurisdiction solely on the grounds that it infringes on tribal sovereignty. *See, e.g.*, R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979, 983 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985) (holding that state court jurisdiction over a dispute within the province of tribal courts "would impinge upon the tribe's right to adjudicate controversies arising within it"); Milbank Mutual Ins. Co. v. Eagleman, 705 P.2d 1117, 1119 (Mont. 1985) (denying state court jurisdiction over a suit by a non-Native against a tribal member because it would infringe on tribal sovereignty, and expressly refusing to apply the preemption analysis "[b]ecause recent federal cases are not clear.").

sovereignty as an independent barrier to state fresh pursuit jurisdiction within reservation borders.

B. Federal Preemption

Preemption, the barrier to state jurisdiction currently more credited by domestic courts, involves a two-pronged analysis. Initially, the court ascertains the "backdrop" of tribal sovereignty by assessing both the tribal tradition of self-government and the balance of federal, state, and Native interests in the area in question. Against this "backdrop" of Native sovereignty, the courts then determine whether state jurisdiction has been preempted by the federal government.

1. Backdrop of Tribal Sovereignty

a. Tradition of Self-Government

The first component in the preemption analysis is the "backdrop" of tribal sovereignty, and the first issue in determining that "backdrop" is whether the tribe has a tradition of self-government in the area over which the state is attempting to assert jurisdiction.[177] In the

177. Justice O'Connor, writing for the Court in *Rice*, noted within the particularized inquiry of that case that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians." 463 U.S. at 722. While the Pala Tribe had authorized by tribal resolution the sale and possession of liquor on their reservation as early as 1960, the tribe had no licensure requirements in place as of 1978. May, *Alcohol Beverage Control: A Survey of Tribal Alcohol Statutes*, 5 AM. INDIAN L. REV. 217, 225 (1978). Accordingly, the Court's assessment in *Rice* that tribes "cannot be said to 'possess the usual accouterments of tribal self-government' " in the area of liquor regulation, 463 U.S. at 724 (citation omitted), arguably is correct in the limited context of the Pala Tribe. For over 30 years, however, since the repeal of federal prohibition in 1953, several other tribal governments have imposed tribal licensure requirements for the on-reservation sale of liquor: the Cheyenne River Sioux since 1953; the Blackfoot Nation, Red Cliff Band of Chippewa, and Lower Brule Sioux, since 1954; and the Minnesota Chippewa since 1955. May, *supra*, at 224-27.

The decision in *Rice* appears to be the first time that the Court employed such a narrow definition of what tribal sovereign interests it would consider. Rather than look at the possible interference with tribal sovereignty as a general concept, the Court chose to focus on the specific tribal sovereign interest in liquor regulation. Prior to *Rice*, the courts had not insisted that Native governments be able to establish a tradition of tribal sovereignty in the particular subject matter at issue in order to demonstrate an existing backdrop of tribal sovereignty. The very particularity of the holding in *Rice*, however, may permit the Court, now uncomfortable with the ramifications of the analysis as articulated in that case, to limit *Rice* to its facts. *See* California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083 (1987), which held that state and county gambling regulations could not be applied to bar bingo operations on the Cabazon Reservation. In reaching this decision, the Court rejected California's reliance on *Rice* by noting that the holding in that case was predicated on an historic congressional view that states would exercise concurrent regulatory authority over liquor transactions in Indian country. *Id.* at 1094. The measure of the *Cabazon* Court's dissociation from *Rice* is highlighted further by the dissent, in which Justice O'Connor, author of the majority opinion in *Rice*, joined. The dissent, in an obvious effort to broaden the holding of *Rice* far beyond the strictures of the *Rice* facts, surmised that in that case "we recognized the State's authority over transactions, whether they be liquor sales or gambling, between Indians and non-Indians." *Id.* at 1096 (Stevens, J., dissenting). The *Cabazon* majority, how-

area of fresh pursuit onto the reservation, a number of factors appear to be consequential to the concept of a self-governing tradition.

The fundamental parameter is the general sovereign power to administer criminal justice within reservation boundaries.[178] This tradition of criminal authority over tribal members within tribal territory is central to the sovereign right of Native governments to make their own laws and be ruled by them.[179] The greater the outward, visible manifestations of this sovereign power, and the more these manifestations conform to the preconceptions of the dominant United States legal system, the more likely domestic courts are to recognize the tribal exercise of sovereignty.[180] In the area of fresh pursuit, for example, a tribal court or alternative tribal criminal justice system is essential to preserving the tribe's interests in a post-arrest hearing pro-

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ever, refused to accede to this unsupported attempt to reify the holding in *Rice* as having universal application to all interactions between Natives and non-Natives within reservation borders.

178. *See supra* note 20.

179. *See supra* notes 19 and 25-28 and accompanying text.

180. Native American self-government, however, is not, and should not be, dependent upon outward evidence of its existence.

> [W]hat is required is not that the tribe have a history of regulation and enforcement in a particular area, but that it have a historical *right* of autonomy or self-regulation in that area. According to the majority—and I agree—the [Lac du Flambeau] Band has the power to regulate civil traffic matters. I disagree with the majority's test of self-government. Its test is whether the Band has enacted laws on a particular subject matter. The power to regulate, the right of self-government, must include not only the power to decide to enact laws, but also the power to decide not to enact laws on that subject. Consequently, I believe that the majority's conclusion, that the Lac du Flambeau Band has no historical tradition of sovereignty in traffic regulation simply because it had no traffic regulations or motor vehicle code at the time of Chapman's offense, is irrelevant to the self-governing prerogatives of the Band to not regulate a particular activity.

County of Vilas v. Chapman, 122 Wis. 2d 211, 221, 361 N.W.2d 699, 704 (1985) (Heffernan, C.J., dissenting) (emphasis in original). In *Chapman*, the Wisconsin Supreme Court found that the absence of tribal traffic regulations for reservation highways evinced a lack of tribal interest and permitted application of the state's enforcement mechanisms.

Similarly, Justice Marshall, writing for a six to three majority in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982), previously had stated that:

> Without regard to its source, sovereign power, even when unexercised, is an enduring presence that . . . will remain intact unless surrendered in unmistakable terms.
>
> . . . .
>
> To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power . . . turns the concept of sovereignty on its head . . . .

See also Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1393 (9th Cir. 1987) ("Although tribal rent control ordinances have not been enacted, failure of the Tribe to legislate does not constitute a relinquishment of its authority to do so."); United States v. Jackson, 600 F.2d 1283, 1288 (9th Cir. 1979) (argument that federal government had authority to prosecute tribal member for violating tribal hunting regulations because tribe had no mechanism in place to deal with such violations "confuses jurisdiction with enforcement procedures. The fact that the Tribe had not set up a system to punish certain of its members does not mean that it lacked the power to do so. It merely failed to exercise its jurisdiction.").

cedure.[181] Of substantial importance also are tribal police and a tribal or shared off-reservation jail facility that can hold suspects within tribal jurisdiction while awaiting post-arrest hearings.

A judicial finding of traditional control, however, may require indicia of self-government more closely tailored to the particular area in question.[182] A major factor, therefore, presumably would be the existence of a tribal statute governing fresh pursuit arrests, although it is doubtful whether any tribes have enacted such laws.[183] A tribal extradition law would constitute another specific indication of tribal self-government in this area, in part because extradition generally is the legally-acknowledged post-arrest procedure[184] and in part because extradition laws indicate an assertion of tribal control over persons present on the reservation and suspected of off-reservation crimes.[185]

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181. The sovereign tribal power to administer criminal justice on the reservation is only meaningful if tribes retain the power to enforce tribal law. Enforcement in turn is dependent upon such mechanisms as a tribal court system, police force, and jail facility. *See supra* notes 30 and 32-34 and accompanying text.

182. *See Rice*, 463 U.S. at 719, 724-25. "The role of tribal sovereignty in pre-emption analysis varies in accordance with the particular 'notions of sovereignty that have developed from historical traditions of tribal independence.' " *Id.* at 719. And again: "The court below erred in thinking that there was some *single* notion of tribal sovereignty that served to direct *any* pre-emption analysis involving Indians." *Id.* at 725 (emphasis in original).

For example, *see* State v. Webster, 114 Wis. 2d 418, 338 N.W.2d 474 (1983), which found that the Menominee Tribe had a tradition of self-government in the area of traffic regulation because it had a tribal traffic code, police department, court system, and jail. *Id.* at 434-35, 338 N.W.2d at 482.

While there is some recent indication that *Rice* may be confined to its facts, see *supra* note 177, there is no reason to believe that the Court has retreated fully from its position in that case that the appropriate inquiry is to scrutinize the sovereign interest in the specific area at question, not sovereign interests in general.

183. "A limited search of tribal codes has failed to turn up an ordinance authorizing fresh pursuit arrests. It is doubtful that any tribe has enacted such an ordinance." 4 JUSTICE AND THE AMERICAN INDIAN, *supra* note 150, at 82 n.8. The National American Indian Court Judges Association (NAICJA) has suggested sample tribal legislation, as well as enabling federal legislation and a proposed revision of the state Uniform Act on Fresh Pursuit. *Id.* at 67-71. The NAICJA proposals are included as Appendix B to this article.

184. *See supra* notes 145 and 162 and accompanying text.

185. Tribal extradition codes, unlike the laws governing interstate rendition, may be limited expressly to suspected felons. Interstate rendition may be requested for any crime, felony or misdemeanor. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 99 (1860):

> The words 'treason, felony, or other crime,' [in the second clause of the second section of the fourth article of the Constitution] in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the State [where the offense is committed]. The word 'crime' of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called 'misdemeanors' as well as treason and felony.

By contrast, tribal extradition is not tied to the constitutional or federal statutory provisions. *See supra* note 79. Hence tribal extradition laws may be limited, as befits a Native sovereign's prerogative, to more serious crimes or even to selected enumerated offenses as is frequently the case in international extradition treaties. *But see supra* note 78 (Navajo extradition code apparently effective for any "crime" committed outside Navajo country). Since this same restriction is asserted in many bilateral international extradition treaties, it should not affect domestic courts' perception of the self-governing power

The greater the number of these elements that are present in any particular case, the more likely domestic courts are to find a tradition of Native self-government in the area of fresh pursuit regulation. Where the courts determine that such a tradition of sovereignty exists, they generally are reluctant to authorize the exercise of state authority unless Congress expressly has provided for it.[186] An implied repeal of established tribal self-governance is particularly disfavored.[187]

b. Balance of Interests

The second component of the tribal sovereignty "backdrop" is the balance of state, federal and tribal interests involved in the particular area over which the state is asserting jurisdiction. As a rule, courts approach this component as a balance of the federal and tribal interests on the one hand, and the state interests on the other.[188]

The state's interests in fresh pursuit jurisdiction within reservation borders are relatively easy to identify. The primary interest of the state is the apprehension of persons suspected of off-reservation crimes. Unquestionably the state has a strong interest in bringing to justice violators of state law, and, as a corollary of that interest, a concern that reservation boundaries not represent a safe haven for suspects in off-reservation offenses.[189] In a fresh pursuit situation, where

inherent in the tribal law. Neither should any limitation on the states to which the tribe will extradite. For example, extradition from the Menominee Reservation is limited to Wisconsin, the state in which the reservation is situated. Menominee Nation, Menominee Tribal Legislature, Ordinance No. 81-22, §§ 1(a) & 2(a). *See also* the discussion of the Navajo extradition code, *supra* note 78. These statutory restrictions simply represent the individual tribe's exercise of its sovereign powers to determine the extent of its own laws, and should not be viewed as a limitation of the tribe's sovereign power to extradite.

As in the area of fresh pursuit, *see supra* note 183, the National American Indian Court Judges Association has developed and proffered sample state and tribal legislative proposals for extradition and for the transportation and confinement of prisoners being extradited. *See* 3 JUSTICE AND THE AMERICAN INDIAN, *supra* note 73, at 23, 35-54 (Appendix B)(advocating that "tribes might want to act promptly to adopt such provisions"). While the NAICJA proposals provide the essential minimums to vest some powers of extradition in a tribal government, the authors encourage tribes considering the adoption of an extradition code to review and consider the more flexible and comprehensive provisions and framework provided for in international bilateral extradition treaties. *See supra* note 69. Selective provisions of these treaties may be modified and adopted unilaterally as tribal law.

186. Rice v. Rehner, 463 U.S. 713, 719-20 (1983) (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973)).

187. *Rice*, 463 U.S. at 720 (citing Bryan v. Itasca County, 426 U.S. 373, 392 (1976)).

188. *Rice*, 463 U.S. at 719 (citing Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1980)).

189. The U.S. Supreme Court has noted that the state's interests generally are substantial where there is "spillover" from the on-reservation conduct and consequent off-reservation effects. *Rice*, 463 U.S. at 724 (upholding state licensure requirement for on-reservation general store where "distribution of liquor [for off-premises consumption] has a significant impact beyond the limits of the . . . [r]eservation"); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983) ("State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate

the suspect's identity may be unknown or unascertainable and alternate methods of apprehension such as extradition therefore inapplicable, the state's interests, at least from its own perspective, may take on a compelling character.

It is difficult, however, to argue that the state's interest in apprehending suspects who flee across reservation boundaries is greater than the interest in apprehending suspects who flee across state or national borders. The same concerns are present: unidentified suspects, unless apprehended immediately, may escape arrest altogether. Yet the state is not empowered to pursue suspects across state or national boundaries without the express consent of the host sovereign as embodied in legislation or agreement. Consequently, the state's interest in pursuing unidentified fleeing suspects across reservation boundaries, while strong, is at most no more compelling than the interest of the pursuing government in any intersovereign situation.

The basic federal interest in fresh pursuit across reservation borders derives from general federal Indian policy. For the past decade or two, federal policy has articulated a firm commitment to encouraging tribal self-government and promoting reservation self-sufficiency.[190] Tribal independence, central to the federal interest in

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state intervention."); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980) ("principles of federal Indian law . . . [do not] authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business [off-reservation]"). *See also* Comment, *The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determinations*, 1986 WIS. L. REV. 989, 1032 (Supreme Court's balancing of competing tribal and state interests in spillover situations is specious as the Court "has not shown a capacity to consider . . . [and] is not sensitive to tribal interests"). As Professor Barsh has noted, an equally valid argument can be advanced by a tribe to regulate the off-reservation sale of selected commodities to Natives: "[s]pillovers spill over both ways." Barsh, *Is There Any Indian "Law" Left? A Review of the Supreme Court's 1982 Term*, 59 WASH. L. REV. 863, 875 (1984).

In the area of fresh pursuit, of course, the spillover effect is the potential for non-apprehension of persons suspected of off-reservation crimes. As noted in the text, however, this spillover effect is no different than the effect of suspects fleeing into another state or country. In the context of interstate and international law, the spillover effect is addressed through legislation or treaties on the subject of fresh pursuit. No jurisdiction has the power unilaterally to extend its authority into another jurisdiction merely because of a spillover effect.

190. California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1092-93 and nn.19 & 20 (1987) (emphasizing "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development"); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890 (1986) (noting "Congress' jealous regard for Indian self-governance"); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 n.10 (1980)(quoting the congressional policy statements from the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.* (1982), the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* (1982), and the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (1982)).

President Reagan's federal policy statement of January 24, 1983 supported the primary role of Native governments in matters affecting reservations. Reagan's policy emphasized two interrelated themes: (1) that the federal government would pursue the principle of Indian "self-government," and (2) that the federal government would work directly with Native governments on a government-to-

Native affairs, would be undermined by the unauthorized intrusion of state criminal jurisdiction onto reservations where tribe members are subject only to tribal and federal law.

The federal government also has an interest in maintaining uniform access across internal boundaries, so that no territory within national borders becomes a haven for fugitives. This interest is reflected in constitutional and statutory interstate extradition provisions,[191] intended to prevent any state from becoming a sanctuary and thus "balkanizing" criminal justice among the states.[192] The federal interest appears confined to extradition, however, since no federal law, constitutional or statutory, governs interstate fresh pursuit. Each state, rather, is free to control fresh pursuit intrusions across its borders, to permit them or not, and under such conditions as the state sees fit. In the fresh pursuit situation, apparently, the sovereignty of internal territorial borders outweighs the federal interest in forestalling the development of sanctuaries. Particularly in light of the federal policy of promoting tribal self-government, the federal interest in ensuring fresh pursuit access across reservation boundaries is no more compelling than its interest in ensuring such pursuit across state lines. Hence, the federal interest in furthering Native self-government eclipses any latent federal interest in deterring territorial balkanization.

The third element in the balance of interests is the interest of the tribes themselves in fresh pursuit jurisdiction. Native sovereign interests include the desire to keep reservations from becoming havens for fugitives from state law, and a concern to provide mechanisms for the mutual return of suspects who have fled across state-reservation frontiers.[193] To those ends, a number of Native governments have enacted

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government basis. Statement of the President on Indian Policy, 1 PUBLIC PAPERS OF RONALD REAGAN 96, 99 (Jan. 24, 1983). Notwithstanding expressions of such good intent, implementation of the administration's much touted "government-to-government" policy has been subject to considerable criticism by leaders of the nation's Native community. *See, e.g., Fiscal Year 1988 Budget, Hearing before the Senate Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. 182-83, 188-91 (1987) (resolution and press release of the National Congress of American Indians demanding the resignation of Ross O. Swimmer, Interior Assistant Secretary for Indian Affairs, the principal architect of the President's Native policy); *id.* at 27 (statement of Alaska Federation of Natives expressing fear that Swimmer's fiscal year 1988 budget proposal would undermine the federal-Alaskan Native trust relationship and is tantamount to "a further step toward termination of Alaska Native tribes in regard to Bureau of Indian Affairs and Indian Health Service").

191. *See supra* note 79.

192. Michigan v. Doran, 439 U.S. 282, 287 (1978). *See also* Puerto Rico v. Branstad, 107 S. Ct. 2802 (1987) (commands of Extradition Clause are mandatory and can be enforced against states by federal courts); California v. Superior Court, 107 S. Ct. 2433, 2437 (1987) ("The obvious objective of the Extradition Clause is that no State should become a safe haven for the fugitives from a sister State's criminal justice system.").

193. *See* Menominee Nation, Menominee Tribal Legislature, Ordinance No. 81-22 (cited in 74 Op. Att'y Gen. Wis. 245, 251 (1985)); Benally v. Marcum, 89 N.M. 463, 464-65, 553 P.2d 1270, 1271-

extradition laws, detailing when and under what conditions suspects present on the reservation may be returned to state jurisdiction.[194] A more fundamental tribal interest, however, lies in maintaining the traditional sovereign power over criminal matters involving Natives within reservation boundaries. To the extent that state law enforcement officers may cross reservation borders against the wishes of the tribes, arrest tribal members, and remove them from the tribe's jurisdiction, the inherent power of Native governments "to make their own laws and be ruled by them"[195] correspondingly is diminished.

In balancing these several sovereign interests in fresh pursuit jurisdiction, the tribal interests, bolstered by federal policy fostering Native self-government, must prevail. The state's interest in apprehending suspects doubtlessly is a strong one, but it is addressed adequately in many instances by tribal extradition laws. Furthermore, where fresh pursuit is necessary to apprehend a suspect, the state's interest cannot be said to be greater than it is in any other cross-jurisdictional situation, where a fresh pursuit arrest is lawful only if and as expressly authorized by the sovereign in whose territory the arrest occurs. The concomitant federal interest in avoiding territorial balkanization of criminal justice, evident in federal extradition laws, apparently is subordinate to the internal sovereigns' interest in controlling fresh pursuit intrusions across their borders. Consequently, the state's interest in pursuing suspects across reservation boundaries should not outweigh the Native government's interests in the integrity of its borders and its sovereign authority over its territory and people.

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72 (1976)(quoting NAVAJO TRIB. CODE tit. 17, § 1001 (1970), currently codified at NAVAJO TRIB. CODE tit. 17, § 1951 (1977)).

At least one mutual extradition agreement has been entered into between a tribe and a state. *See* State v. Lufkins, 381 N.W.2d 263, 266 (S.D. 1986) (referencing the Reciprocal Extradition Agreement between the Sisseton-Wahpeton Sioux Tribe and the State of South Dakota).

194. *See supra* notes 78 and 183. Navajo extradition practice requires that a Native American apprehended at the request of a foreign jurisdiction be taken to the nearest Court of the Navajo Nation to determine whether there is probable cause to believe the suspect guilty of the crime alleged and whether it appears the detainee will receive "a fair trial in the state court." NAVAJO TRIB. CODE tit. 17, § 1952 (1977). "IN NO EVENT shall any Navajo Policeman turn over or deliver any Navajo to state, county or city authorities except under order of a court of the Navajo Tribe following an appropriate extradition hearing." Chairman's Order of October 10, 1967, Navajo Tribal Council (*reprinted at* NAVAJO TRIB. CODE tit. 17, § 1952 (1977)). *See also* 3 JUSTICE AND THE AMERICAN INDIAN, *supra* note 73, at 23-25, referencing extradition laws of the Turtle Mountain Tribe (providing for extradition from the reservation to the state for violations of state law committed outside the jurisdiction of the Turtle Mountain Tribal Court) and Pueblo of Laguna (providing for extradition, pending notification of an intent to exercise jurisdiction by a court of the requesting sovereign, to federal, state, and other *tribal governments* for offenses over which they may have lawful jurisdiction).

195. Williams v. Lee, 358 U.S. 217, 220 (1959).

c. Summary

These, then, are the factors that comprise the "backdrop" of tribal sovereignty which informs the judicial preemption analysis. The position of tribes, in relation to both the tradition of self-government and the balance of interests, manifestly would be improved by the enactment of tribal extradition and fresh pursuit laws, or by concluding agreements in those areas with bordering states. The existence of tribal laws and intergovernmental agreements could only strengthen both the perceived tradition of tribal self-government, by providing concrete manifestations for the propitiation of domestic courts, and the argument that tribal interests in territorial integrity and the administration of criminal justice on the reservation outweigh the interests of the state in the fresh pursuit situation.

2. Preemption

Since the earliest days of the republic, state criminal jurisdiction within Native reservations has been extremely limited.[196] Tribes traditionally have enjoyed a sovereign immunity concerning the exercise of state criminal jurisdiction over Native Americans on the reservation.[197] Where such a tradition of sovereign immunity is present, domestic courts usually are reluctant to infer state jurisdiction "'except where Congress has expressly provided that State laws shall

196. *See supra* section II.B.2. Even state criminal jurisdiction over non-Natives present on the reservation was prohibited initially. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Chief Justice Marshall stated:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress.

Id. at 561.

As the Supreme Court subsequently has noted, however: "The conceptual clarity of Mr. Chief Justice Marshall's view in Worcester v. Georgia [citation omitted] has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). *See also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980).

197. Once land is determined to be "Indian country" under 18 U.S.C. § 1151(a) (1982), state criminal jurisdiction is preempted by both federal protection of tribal self-government and federal statutes on subjects relating to Natives, tribes, their property, and federal programs. *See supra* note 51. *See also* United States v. Mazurie, 419 U.S. 544, 555 (1975) (noting "Congress' authority to define 'Indian country' so broadly, and to supersede state jurisdiction within the defined area"). Federal protection of tribal self-government precludes criminal jurisdiction of state courts over Native Americans or their property absent consent of Congress. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)(Georgia could not punish non-Native, licensed by federal government to practice as a missionary among the Cherokee, for his refusal to leave Cherokee lands). *Cf.* Fisher v. District Court, 424 U.S. 382, 387-89 (1976) (state civil court jurisdiction over tribal adoption proceeding would interfere with Native self-government).

apply.' "[198]

Congress, on occasion, has provided expressly that state criminal laws shall apply on Native reservations. Public Law 280,[199] enacted in 1953, conferred mandatory criminal jurisdiction on six states, and served as enabling legislation for other states that wished to assume criminal jurisdiction over the reservations within their borders. Notwithstanding a subsequent amendment requiring tribal consent before a state could assume such jurisdiction,[200] Congress has provided a clear and unequivocal roadmap for state assumption of criminal jurisdiction within reservation territory.[201]

Congress also unmistakably provided for state criminal jurisdiction in the iniquitous termination legislation of the 1950s.[202] When a Native government was "terminated" by Congress, it lost its federally-recognized status as a tribe; a consequential corollary was the extension of state jurisdiction over the territory that formerly had been the tribe's reservation.[203]

Both Public Law 280 and the termination enactments establish that where Congress has intended to permit the state to exercise crimi-

198. Rice v. Rehner, 463 U.S. 713, 719-20 (1983) (quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973)).

The only analysis that has considered the issue of fresh pursuit within the preemption framework concluded that fresh pursuit by state law enforcement officers onto the Menominee Reservation is not preempted by federal law. 74 Op. Att'y Gen. Wis. 245 (1985). That conclusion was grounded in the statement that "there is no persuasive evidence of congressional intent to make individual Indians who flee to the reservation to escape imminent arrest exceptions to the [intrastate] fresh pursuit doctrine or immune from ordinary state arrest authority." *Id.* at 257. Leaving aside the fundamental issue whether intrastate fresh pursuit principles could ever apply to Native governments, *see supra* notes 106 and 128-33 and accompanying text, this formulation of the preemption doctrine wholly reverses the historic preemption analysis. It has never been a part of the "Indian" preemption doctrine that Congress must indicate what aspects of state jurisdiction it does *not* want applied on reservations. The result would be absurd: Congress would be reduced to legislating a laundry list of negatives. It has always been the rule, rather, that states have no criminal jurisdiction over Natives on the reservation absent express congressional consent. *See supra* notes 50-53 and accompanying text.

199. *See supra* section II.B.2.a.

200. *See supra* notes 42-43 and accompanying text.

201. The details of the roadmap were not always so clear however. *See supra* note 41.

202. *See, e.g.*, Menominee Termination Act, Pub. L. No. 83-399, 68 Stat. 250 (1954); Klamath Termination Act, Pub. L. No. 83-587, 68 Stat. 718 (1954) (codified at 25 U.S.C. §§ 564 *et seq.* (1982)); Alabama & Coushatta Termination Act, Pub. L. No. 83-627, 68 Stat. 768 (1954) (codified at 25 U.S.C. §§ 721 *et seq.* (1982)); Paiute Indian Tribe of Utah Termination Act, Pub. L. No. 83-762, 68 Stat. 1099 (1954) (codified at 25 U.S.C. §§ 741 *et seq.* (1982)).

203. The statutory language terminating the federal trust responsibility and announcing the imposition of state laws generally read:

> [A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

Paiute Indian Tribe of Utah Termination Act, 68 Stat. at 1103 (codified at 25 U.S.C. § 757(a) (1982)). *See also supra* notes 38 and 44.

nal jurisdiction on the reservation, it has expressly so provided. With the "backdrop" of tribal sovereignty relative to fresh pursuit demonstrating a strong tribal immunity to state authority in on-reservation criminal jurisdiction and territorial integrity, Congress' failure to provide expressly that states may intrude onto the reservation in fresh pursuit situations demonstrates a federal intent to preempt state authority to effect fresh pursuit arrests within reservation boundaries.

C. Tribal Sovereignty

The second independent barrier to the exercise of state jurisdiction within reservation boundaries, often articulated but seldom relied upon, is infringement on tribal sovereignty.[204] If state jurisdiction interferes with the tribe's right to govern itself, to make its own laws and be ruled by them, then the assertion of state authority is unlawful.[205]

Many of the relevant sovereign powers of the tribes already have been addressed.[206] Native American tribes are sovereign entities, retaining rights of self-government over both their territory and their members.[207] Among the rights of self-government are the specific powers to make their own laws[208] and to administer criminal justice

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204. Despite the recent judicial favoring of preemption, tribal self-government is still posited by domestic courts as an independent barrier to state intrusions. *See, e.g.*, Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1390 (9th Cir. 1987) ("either can be a sufficient basis for holding state law inapplicable"). In the case that first espoused the "two independent but related barriers" language, the Supreme Court explained: "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). On increasingly rare occasions, and generally in determinations of state court jurisdiction, self-government still operates as an independent bar to state court jurisdiction. *See supra* note 176.

In the context of regulatory jurisdiction, the Ninth Circuit had reasserted the concept that sovereignty serves as far more than a mere "backdrop" to the preemption analysis. "Although self-government is related to federal preemption in the sense that both depend on congressional action and in the sense that preemption is considered in the context of the deeply ingrained traditional notions of self-government, the self-government doctrine is an independent barrier to state regulation." Crow Tribe of Indians v. Montana [*Crow I*], 650 F.2d 1104, 1110 (9th Cir. 1981), *cert. denied*, 459 U.S. 916 (1982). On appeal from the remand of the case, however, the circuit court based its "sovereignty" argument on the federal policy of promoting tribal self-government, and not on inherent tribal sovereignty itself. Crow Tribe of Indians v. Montana [*Crow II*], 819 F.2d 895, 902-03 (9th Cir. 1987), *aff'd mem.*, 108 S. Ct. 685 (1988).

205. "The self-government doctrine differs from the preemption analysis in that it specifically prohibits state action that impairs the ability of a tribe to exercise traditional governmental functions. . . ." *Crow I*, 650 F.2d at 1110. *See also Crow II*, 819 F.2d at 902-03. Thus, in the context of civil court jurisdiction, state jurisdiction has been barred by tribal sovereignty where state action would interfere with the laws and forums established by tribes for the resolution of civil disputes. *See, e.g.*, Fisher v. District County Court, 424 U.S. 382, 387-88 (1976); R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979, 983 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985).

206. *See supra* section II.B.1.

207. *See supra* notes 18 and 74.

208. *See supra* note 19 and accompanying text.

within reservation boundaries.[209] Tribes are empowered to enact laws, hire police, establish courts, maintain jail facilities, and prosecute their members for violations of tribal law.[210]

More particularly, Native governments have the power, as do all sovereigns, to control extradition from their territory.[211] The sovereign rights of tribes to exclude persons from the reservation and to administer criminal justice as to their members authorize tribal determination of the circumstances and procedures of extradition to the states.[212] Moreover, the self-governing rights to control the territory of the reservation and to say when and how Natives may be removed from that territory are sufficiently broad to curtail ad hoc fresh pursuit across reservation borders by state officers.[213] There is no doubt that tribes have the power to enact legislation on the subject, and thereby

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209. *See supra* note 20.

210. *See supra* notes 13-15, 25, 30, 32-34, and 181.

211. *See* Arizona ex rel. Merrill v. Turtle, 413 F.2d 683, 685-86 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970):

> . . .Arizona's exercise of the claimed jurisdiction would clearly interfere with rights essential to the Navajo's self-government. The essential and intimate relationship of control of the extradition process to the right of self-government was recognized long ago in Kentucky v. Dennison, [65 U.S.] 24 How. 66, 16 L. Ed. 717 (1861), holding that there is no power, state or federal, to compel a state to perform its constitutional duty of extradition.

The Supreme Court found in *Dennison* that the language of the statute implementing the constitutional extradition clause, see *supra* note 79, was "not used as mandatory and compulsory, but as declaratory of the moral duty" of the states. 65 U.S. (24 How.) at 107. Recently, however, the Court overruled this aspect of *Dennison*. In Puerto Rico v. Branstad, 107 S. Ct. 2802 (1987), the Court reaffirmed what it viewed as *Dennison*'s "conclusion that the commands of the Extradition Clause are mandatory, and afford no discretion to the executive officers or courts of the asylum State." *Id.* at 2808. *See also* California v. Superior Court, 107 S. Ct. 2433, 2438 (1987) ("By the express terms of federal law, therefore, the asylum State is bound to deliver up to the demanding State's agent a fugitive. . . ."). The *Branstad* Court then overruled *Dennison* to the extent of holding that federal courts are empowered to compel state performance of the duty to deliver fugitives to the demanding state. 107 S. Ct. at 2808-09. "*Kentucky v. Dennison*," the Court found, "is the product of another time. . . . We conclude that it may stand no longer." *Id.* at 2809-10. The partial overruling of *Dennison* is in accord with the enactment by forty-seven states, Puerto Rico, and the Virgin Islands of the Uniform Criminal Extradition Act, which makes it "the duty" of the governor to deliver to agents of any other state a fugitive from justice. *See, e.g.*, WIS. STAT. ANN. § 976.03 (1986).

Puerto Rico v. Branstad should have no effect on the proposition stated by the Ninth Circuit in *Turtle* that extradition is closely tied to self-government. In *Branstad*, the Court rejected the notion that states are coequal sovereigns with the federal government, therefore enabling the Court to find that the federal government has the power to compel states to perform their constitutional duties, such as the duties mandated by the Extradition Clause. 107 S. Ct. at 2808. Since neither the constitutional nor the federal statutory extradition provisions apply to Native governments, *see supra* note 79, the Court's restructuring of the federal-state relationship in regard to rendition powers likewise has no applicability to sovereign tribal power to control extradition from Native territory.

212. *See supra* notes 20, 23, 27, and 73-74 and accompanying text.

213. The delimitation of unauthorized border crossings into another sovereign's territory has been discussed previously. *See supra* notes 114, 131, 134 (noting the border limitation imposed on intrastate and interstate pursuits), 157-59 (noting the border limitations imposed on international fresh pursuit) and accompanying text. *See also* the relevant earlier discussion *supra* notes 74 (discussing tribe's inher-

to control the circumstances of fresh pursuit onto the reservation.[214]

For tribes considering the enactment of laws or agreements governing fresh pursuit,[215] those tribal laws should serve to confer rights in domestic courts on both the suspect and the tribe. As with statutes governing interstate fresh pursuit, violations of the substantive provisions of tribal fresh pursuit laws, at a minimum, should create enforceable rights on behalf of the suspect.[216] Violations of procedural protections built into the fresh pursuit statutes and agreements of various sovereigns are treated in state and federal courts similarly to violations of extradition laws: once the suspect is within the personal jurisdiction of the court, illegal conduct by the arresting sovereign within the territory of the asylum state typically is ignored.[217] Domestic courts generally have proved unwilling to overturn criminal convictions merely because the defendant's procedural protections were not observed. This narrow judicial focus on the injury to the individual enables the courts to circumvent the issue of sovereign injury resulting from disregard of the sovereign's rights, as embodied in its criminal laws, to control its territory and its criminal justice system.

The inherent power of a Native government to administer justice is meaningful only if tribal laws are enforced.[218] Where tribal fresh pursuit laws are enacted, violations by the arresting sovereign of either substantive or procedural provisions should create in the asylum sovereign—the tribe—the right to a remedy in the domestic courts. If the

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ent power to exclude) and 160 (discussing territorial integrity and inviolability as central components of sovereignty under international law).

There is some indication that the sovereign right of border control of Native governments may not extend fully to non-Natives. In State v. Herber, 123 Ariz. 214, 598 P.2d 1033 (Ariz. Ct. App. 1979), state law enforcement officers pursued Herber by air and on the ground onto the Papago Reservation, where Herber stopped and was arrested. The court refused to follow an earlier Arizona case, Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976), which held that a county sheriff had no authority to make valid service of process on the Papago Reservation because the state had no authority to apply its laws within the boundaries of that reservation.

> Francisco, however, was an Indian; Herber is not. The infringement on tribal sovereignty presented by the facts in *Francisco* thus is absent from this case. Jurisdiction of Arizona to prosecute and punish non-Indians for crimes against non-Indians committed on an Indian reservation is beyond dispute. Conversely, Indian tribal courts lack criminal jurisdiction over non-Indians. In the absence of any potential conflict of jurisdiction, we see no reason to extend the rule of *Francisco* to preclude the arrest of a non-Indian by state law enforcement officers who have pursued him onto an Indian reservation.

Herber, 123 Ariz. at 216, 598 P.2d at 1035 (citations omitted).

214. *See* 4 JUSTICE AND THE AMERICAN INDIAN, *supra* note 150, at 47-49 and 67-73 (providing proposed legislation on the subject of fresh pursuit, involving amendments or additions to tribal, state, and federal law). The proposed legislation is reprinted as Appendix B to this article.

215. No tribe appears to have done so thus far. *See supra* note 183.

216. *See supra* notes 143-44 and accompanying text.

217. *See supra* notes 95-98 and 145-47 and accompanying text.

218. *See supra* notes 30 and 32.

arresting jurisdiction is free to ignore the laws of the asylum jurisdiction, without penalty or consequence, then the sovereignty of the asylum jurisdiction necessarily has been impaired. Tribal sovereignty, accordingly, must serve as a barrier to violations, whether substantive or procedural, of tribal fresh pursuit and extradition laws by state law enforcement officers. The impairment of tribal sovereignty, manifested by the arresting jurisdiction's astigmatic disregard of tribal law, should entitle the Native government to take remedial action modelled on the right of sovereigns in international law to seek redress for violations of their hot pursuit and extradition laws and treaties.[219]

Tribal legislation specifically governing either fresh pursuit or extradition, however, is relatively rare.[220] In the absence of controlling tribal statutes, Native governments should be accorded the same common-law recognition as other sovereigns: that fresh pursuit across their borders is valid only if and as the sovereign authorizes.

In international law, hot pursuit on land is not a customary right, but an exceptional prerogative permitted only with the express consent of the asylum sovereign as embodied in an agreement or treaty.[221] The unauthorized crossing of a frontier, as in hot pursuit, violates the national sovereignty of the asylum state and represents a grave breach of international law.[222] Similarly, within the United States, fresh pursuit across state lines is justified only under the authority of the Uniform Act on Fresh Pursuit.[223] Since the legality of a fresh pursuit arrest is determined by the law of the asylum state,[224] the law of a state that had not authorized fresh pursuit across its borders presumably would mandate that any arrest attendant upon fresh pursuit would be invalid.

No reason exists to accord Native governments a lesser degree of sovereignty over either their territory or their people. Like nations and states, tribes exercise inherent sovereign powers of control over both the territory of the reservation and their citizens resident within that territory. Like those sovereigns, tribes retain the right to keep their borders free from wrongful intrusions and from the attempted extension of jurisdiction over their territory by foreign sovereigns. The unauthorized crossing of a national frontier or state line in fresh pursuit constitutes a serious infringement of the sovereign integrity of the asylum nation or state. Fresh pursuit onto a Native reservation, in

219. *See supra* notes 94 and 160.

220. *See supra* notes 150 and 183.

221. *See supra* notes 157-59 and accompanying text.

222. *See supra* notes 160-61 and accompanying text.

223. *See supra* notes 134-36 and accompanying text.

224. *See supra* note 136 and accompanying text.

the absence of tribal law or an intergovernmental agreement authorizing the pursuit, is correspondingly an impairment of the tribal right of self-government. In accord with universal principles of intersovereign relations, tribal sovereignty itself should serve as an unassailable bar to the exercise of unauthorized state fresh pursuit intrusions within the confines of the Native reservation.

V. CONCLUSION

State jurisdiction within Native reservations remains a continuing source of state-tribal tension and litigation. Preventing further encroachments through the United States courts presently depends to a great degree upon the doctrine of federal preemption. The more visible and familiar the manifestations of tribal control—tribal police, court systems, jails, extradition procedures, and fresh pursuit laws—the stronger the analytical "backdrop" of tribal sovereignty is apt to appear to domestic courts.[225] Each of these factors increases the likeli-

225. The tragic irony here, of course, is that the courts have lapsed into a new form of cultural imperialism by insisting that tribal governments reflect the dominant government's non-Native political structures. It is unconscionable that such a culturo-centric bias should become so manifest among the courts when the equivalent legislative policy repeatedly has been eschewed by the Congress for nearly 30 years. *See supra* notes 39 and 190. The outrage is that in purporting to preserve Native autonomy and self-determination, the courts, by pursuing this policy of "judicial assimilation," are attempting to shoehorn tribal governments and institutions into political analogues wholly inconsistent with their heritage. *See supra* notes 19 (referencing, *inter alia*, the congressional imposition of alien IRA governments on Native societies, and foreign corporate status upon Alaska Natives) and 180 (referencing courts' insistence that tribes demonstrate self-government by enacting laws).

The historical development and continued relativistic intolerance of the United States' political, legal, and social institutions toward Native tribal cultures and institutions has been assailed in innumerable articles, treatises, and texts. For recent articles, *see, e.g.*, Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986); Williams, *supra* note 22; Bryan, *Cultural Relativism — Power in Service of Interests: The Particular Case of Native American Education*, 32 BUFFALO L. REV. 643 (1983); Lobsenz, *"Dependent Indian Communities": A Search for a Twentieth Century Definition*, 24 ARIZ. L. REV. 1 (1982). In remarks prefatory to and conclusory of his discussion of western understanding of and dealings with Native American cultures, Bryan notes:

> The story of relativism — here, cultural relativism — is a story of power; power disguised as tolerance, disguised as neutrality, disguised as respect for other perspectives. . . . In a "relative world," individuals and groups impose their desires, their sense of the proper order of the world, on others. They do so not because they are right, good, or true. . . . Rather, they do so simply because they want to: power stripped of all pretense.
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> . . . .
>
> Relativistic tolerance is practiced when cultural differences are not threatening. Tolerance can and does disappear as quickly as it appears; Indian ways are fine when those ways do not present too great an obstacle to the white man's desires, but they are wrong and intolerable when they do.

Bryan, *supra*, at 645, 693. *See also supra* notes 110-11. Chief Justice Marshall, even in the lodestar of Native American jurisprudence, acknowledged this arrogance of power: "Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with *the single exception of that imposed by irresistable power* . . . ." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (emphasis added).

hood of a judicial determination that state fresh pursuit arrest authority on the reservation is federally preempted.

A finding of federal preemption, however, is inadequate to protect either the suspect or the tribe. As a general rule, state and federal courts will validate arrests made in violation of an asylum sovereign's fresh pursuit or extradition laws. The effect of this doctrine with respect to Native tribes is that no penalty attaches for the illegal exercise of state fresh pursuit jurisdiction within the territory of the reservation.

The remedy is a change of judicial focus, from the injury incurred by the individual suspect to the rights of the sovereign tribe. Fresh pursuit arrests on the reservation, either in the absence of authorizing legislation or in violation of tribal laws and procedures, impair the Native government's sovereign right to self-government. Domestic courts, in concentrating myopically on their personal jurisdiction over the suspect or on the state's interest in immediate apprehension of suspects, historically and uniformly have diverted judicial attention away from the serious breach of tribal sovereignty that unauthorized fresh pursuit arrests represent.

Focusing the domestic courts' attention on the injury to Native sovereignty may require that the affected tribe itself initiate or join in legal action protesting fresh pursuit intrusions onto the reservation. It also may necessitate persuading the courts to accept and apply in a Native context established principles of international law, which offer the greatest recognition and protection of the sovereign's rights. Finally, it surely will require a court that is willing to bring the doctrine of tribal sovereignty out of the legal limbo of preemption's "backdrop" and employ it as the independent barrier to state authority that it was meant to be.

And as Professor Williams caustically points out, in order to sway the "conqueror's" courts, tribes must emphasize their acceptance and adoption of the white man's legal and political ethos:

> Tribes must exercise their "rights" to self-determination so as not to conflict with the interests of the dominant sovereign. In effect, this form of discourse enforces a highly efficient process of legal auto-genocide, the ultimate hegemonic effect of which is to instruct the savage to self-extinguish all troublesome expressions of difference that diverge from the white man's own hierachic [sic], universalized worldview.

Williams, *supra* note 22, at 274.

APPENDIX A

JURISDICTION OVER CRIMINAL OFFENSES* COMMITTED IN "INDIAN COUNTRY"** IN STATE WITHOUT PUBLIC LAW 280 JURISDICTION***

Offender	Victim	Crime	Jurisdiction	Authority	Explanation
Native	Native	Major	Federal & Tribal	Major Crimes Act, 18 USC § 1153; *Wheeler*, 435 US 313	*See* notes 25, 28, 52-53
		Minor	Tribal	*Wheeler*, 435 US 313	*See* notes 25, 53
Native	Non-Native	Major	Federal & Tribal	Major Crimes Act, 18 USC § 1153; *Wheeler*, 435 US 313	*See* notes 25, 28, 52-53
		Minor	Tribal & Federal	General Crimes Act, 18 USC § 1152	*See* notes 36, 53
Non-Native	Native	All	Federal	*Oliphant*, 435 US 191	*See* notes 21-23, 52, 77
Non-Native	Non-Native	All	State	*McBratney*, 104 US 621; *Draper*, 164 US 240; *Oliphant*, 435 US 191	*See* notes 35-37

* Tables do not address all aspects of criminal jurisdiction over Native Americans. For example, not addressed are jurisdiction over off-reservation crimes, *see* notes 5, 11; crimes committed during the exercise of on- or off-reservation usufructuary activities, *see* notes 15, 26, 43, 47; victimless crimes, *see* notes 23, 47, 55; tribal criminal jurisdiction over non-member Natives, *see* notes 21, 77; transfer of criminal jurisdiction by treaty, *see* notes 21, 50, 74; application of county and municipal criminal ordinances, *see* note 47, special criminal jurisdictional statutes, *see* notes 43, 50; the sale or introduction of liquor into Indian country, *see* 18 USC §§ 1154, 1156, notes 110, 177; or crimes peculiarly federal in nature, *e.g.*, assault on a federal officer, to which federal jurisdiction attaches regardless of the locus of the crime or the genetics of the offender.

** 18 USC § 1151 provides: "Except as otherwise provided . . . the term 'Indian country,' as used in this chapter, means (a) all land within the limits of an Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including any rights-of-way running through the reservation."

*** The jurisdictional tables are intended to address solely the PL280/non-PL280 differences in jurisdiction. The exercise of criminal jurisdiction conferred upon a state by a special jurisdictional act, or the assumption of residuary jurisdiction by a state is not addressed here. *See* note 50.

JURISDICTION OVER CRIMINAL OFFENSES* COMMITTED IN "INDIAN COUNTRY"** IN STATE THAT HAS ASSUMED PUBLIC LAW 280 JURISDICTION***

Offender	Victim	Crime	Jurisdiction	Authority	Explanation
Native	Native	All	State & Tribal	18 USC § 1162; 25 USC § 1321	Neither the General Crimes Act nor the Major Crimes Act is applicable in PL280 jurisdictions. *See* notes 39-43; 47
Native	Non-Native	All	State & Tribal	18 USC § 1162; 25 USC § 1321; *Beck*, 6 ILR F8; *Michael*, 729 P2d 405	*See* note 47
Non-Native	Native	All	State	18 USC § 1162; 25 USC § 1321; *Oliphant*, 435 US 191	*See* notes 21-23
Non-Native	Non-Native	All	State	*McBratney*, 104 US 621; *Draper*, 164 US 240; *Oliphant*, 435 US 191	*See* text and notes 35-37

* Tables do not address all aspects of criminal jurisdiction over Native Americans. For example, not addressed are jurisdiction over off-reservation crimes, *see* notes 5, 11; crimes committed during the exercise of on- or off-reservation usufructuary activities, *see* notes 15, 26, 43, 47; victimless crimes, *see* notes 23, 47, 55; tribal criminal jurisdiction over non-member Natives, *see* notes 21, 77; transfer of criminal jurisdiction by treaty, *see* notes 21, 50, 74; application of county and municipal criminal ordinances, *see* note 47, special criminal jurisdictional statutes, *see* notes 43, 50; the sale or introduction of liquor into Indian country, *see* 18 USC §§ 1154, 1156, notes 110, 177; or crimes peculiarly federal in nature, *e.g.*, assault on a federal officer, to which federal jurisdiction attaches regardless of the locus of the crime or the genetics of the offender.

** 18 USC § 1151 provides: "Except as otherwise provided . . . the term 'Indian country,' as used in this chapter, means (a) all land within the limits of an Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including any rights-of-way running through the reservation."

*** The jurisdictional tables are intended to address solely the PL280/non-PL280 differences in jurisdiction. The exercise of criminal jurisdiction conferred upon a state by a special jurisdictional act, or the assumption of residuary jurisdiction by a state is not addressed here. *See* note 50.

APPENDIX B*

Proposed Tribal Fresh Pursuit Ordinance

Any member of a duly organized state, county or municipal peace unit of a state of the United States or of any other Indian reservation, or any federal police officer, who enters this reservation in fresh pursuit, and continues in such fresh pursuit within this reservation, of any person, whether or not that person is an Indian, in order to arrest him on the ground that he is believed to have committed a felony in such other state or Indian reservation, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized peace unit of this reservation, to arrest and hold in custody a person on the ground that he is believed to have committed a felony on this reservation.

EXPLANATORY NOTES

1. This act is necessary because fresh pursuit arrests can be sustained legally only if the jurisdiction which the arresting officer enters has consented to his making a fresh pursuit arrest. The consent is needed no less when the jurisdiction which the officer enters on fresh pursuit is an Indian reservation than when it is another state.
2. This act is restricted to felonies in an attempt to make it consistent with Uniform Fresh Pursuit Acts adopted by many states; however, this act is not to be construed as limiting fresh pursuit arrest powers strictly to felonies in situations involving offenders who flee onto Indian reservations. Any tribe at its discretion may statutorily authorize fresh pursuit arrests to be made on the reservation for misdemeanors committed outside the reservation.
3. Federal Indian police officers and tribal police officers are intended to come under the provisions of this act, regardless of the particular tribe or federal agency with which they are affiliated.

*Appendix B is reprinted from NAT'L AM. INDIAN CT. JUDGES ASS'N, 4 JUSTICE AND THE AMERICAN INDIAN: EXAMINATION OF THE BASIS OF TRIBAL LAW AND ORDER AUTHORITY 67-71 (1974), and does not represent the recommendation of the authors. The NAICJA proposals, although somewhat dated, are reprinted here for the reader's convenience because of the relative unavailability of the source document.

Proposed Companion Ordinance to Tribal Fresh Pursuit Acts

If an arrest is made on this reservation by a peace officer of a state or of any other Indian reservation, or by any federal police officer, within the provisions of section 1 of this ordinance, said officer shall without unnecessary delay take the person arrested before a tribal judge of this reservation, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the tribal judge determines that the arrest was lawful, he shall place the person arrested in the custody of the arresting officer to be returned to the jurisdiction in which the alleged crime is believed to have been committed. If the tribal judge determines that the arrest was unlawful he shall discharge the person arrested.

EXPLANATORY NOTES

1. This ordinance is offered for the consideration of those Indian tribes that *do not* have any extradition procedures in force and that do not pass any laws to set up such procedures prior to adopting a fresh pursuit ordinance.
2. This act is intended to confer jurisdiction over non-Indians upon Indian tribal courts. Tribal judges, under the provisions of this act, will be authorized to conduct hearings in the fresh pursuit arrests of non-Indians as well as Indians.
3. Federal Indian police officers and tribal police officers are intended to come under the provisions of this act, regardless of the particular tribe or federal agency with which they are affiliated.

Proposed Revision of the Uniform Fresh Pursuit Act

Officer of another state or of an Indian reservation entering this state in fresh pursuit — Power to arrest and hold fugitive. — Any member of a duly organized state, county or municipal peace unit of another state of the United States, or any member of any unit which is empowered to enforce any law on an Indian reservation, who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state or Indian reservation, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

EXPLANATORY NOTES

1. This act is necessary because fresh pursuit arrests can be sustained legally only if the jurisdiction which the arresting officer enters has consented to such action by foreign officers.

2. This act is restricted to felonies in an attempt to make it consistent with Uniform Fresh Pursuit Acts of other states; however, this act is not to be construed as limiting fresh pursuit arrest powers strictly to felonies in situations involving Indian reservations. Any state at its discretion may statutorily authorize fresh pursuit arrests for misdemeanors committed on an Indian reservation.

3. Federal and Indian tribal police officers are not mentioned specifically in this act. However, they are authorized to come under the broad purview of the provisions of the act.

Proposed Revision to Statutes Regulating Hearings Concerning Fresh Pursuit Arrests

Arrested person taken before magistrate — Hearing — Commitment or discharge. — If an arrest is made in this state by an officer of another state or by any member of any peace unit which is empowered to enforce any law on an Indian reservation, in accordance with the provisions of section 1 of this act, that officer shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, or, if such arrest was made by a federal officer, then the person arrested shall be taken to the nearest federal magistrate in the state. Said magistrate shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the accepted procedure of this state. If the magistrate determines that the arrest was unlawful he shall discharge the person arrested.

EXPLANATORY NOTES

1. For further discussion of the need for this revision see the research paper entitled "The Effect of Having No Extradition Procedures on Indian Reservations", Volume 3 of this project [Nat'l Am. Indian Ct. Judges Ass'n, Justice and the American Indian (1974)], wherein specific procedures are set forth for extradition which include Indian tribes.