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THE LIMITS OF INDIAN TRIBAL SOVEREIGNTY: THE CORNUCOPIA OF INHERENT POWERS

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> Just as settlement of the United States took place by compelling the Indians to accept European laws and practices pertaining to the land, so also domain over the tribes themselves was achieved by substituting the rule of outsiders for inherent self-rule.
>
> And just as the Indians still retain bits and parcels of their original homeland, so also they still cling to shreds of the sovereignty which once was theirs.[1]

The continual conflict between the states and Indian[2] tribes over law and order jurisdiction,[3] religious liberty,[4] domestic relations,[5] hunting and fishing rights,[6] and taxation,[7] gradually redefines the powers of Indian tribal governments. The concomitant judicial[8] and legislative efforts to extend the Bill of Rights to controversies between a tribe and its members further clarifies the powers and portends possible deterioration of the sovereign stat-

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1. H. FEY & D. MCNICKLE, INDIANS AND OTHER AMERICANS 48 (1970).

2. For various definitions of "Indian," see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2-5 (University of New Mexico ed. 1942 [hereinafter cited as COHEN, HANDBOOK]. For a discussion of "Who is an Indian?" in the legal sense, see W. WASHBURN, RED MAN'S LAND—WHITE MAN'S LAW 163-64 (1971).

3. *See, e.g.*, Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

4. *See, e.g.*, Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813 (1964).

5. *See, e.g.*, Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950); Whyte v. District Court of Montezuma County, 364 P.2d 1012, 128 *cert. denied*, 363 U.S. 829 (1960).

6. *See, e.g.*, Leech Lake Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971).

7. Mescalero Apache Tribe v. Jones, 83 N.M. 158, 489 P.2d 666 (1971); McClanahan v. State Tax Comm'n, 14 Ariz. App. 452, 484 P.2d 221 (1971); Tonasket v. State, 79 Wash. 2d 607, 488 P.2d 281 (1971(; Commissioner of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970); Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (1969); Comment, *The Power of a State to Impose an Income Tax on Reservation Indians*, 6 WILLIAMETTE L.J. 515 (1970); Comment, *State Taxation of Indian Income*, 1971 LAW AND SOCIAL ORDER 355 (1971).

8. Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970.)

9. 25 U.S.C. § 1301-1303 (1970).

us of Indian tribal governments. The turning point may be reached this year, however, when the Supreme Court decides three cases in which state taxation of Indians and Indian enterprises is challenged.[10]

This article weighs judicial developments of the past twenty years to measure the bounds of tribal sovereignty. The historic federal involvement in Indian affairs[11] is traced to outline the framework of the Native American's "separateness."[12] From that perspective this article will delimit the powers possessed by Indian tribes.

I. *Historical Background*

> The whites at first recognized and accepted the tribal and national character of the Indian collectives with which they dealt. It could hardly have been otherwise. The very future of the colonies and the security of many of the states depended upon a satisfactory accommodation to the power that could be marshalled by the Indian political units. With the decline of that power and the growth of the power of the intruders, the individual Indian became more and more subject to white codes of law and white regulation of his activities.[13]

A. *The Shaping of Federal Indian Policy*

Governmental policies both limit and enlarge tribal powers. The policies change from time to time, and there are elements that go both ways in governmental policy at a given time. Federal policy vascillates between attempted assimilaltion[14] and protection of Indian cultural identity.[15] A mammoth federal bureaucracy, the Bureau of Indian Affairs (BIA), administers services to reservation

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10. Mescalero Apache Tribe v. Jones, 83 N.M. 158, 489 P.2d 666 (1971); McClanahan Wash. 2d 607, 488 P.2d 281 (1971); Tonasket v. State, 79 Wash. 2d 607, 488 P.2d 281 (1971); ANNOUNCEMENTS, Nat'l. Ind. Law Lib., 1-3 (No. 3 Aug. 1972).

11. "Indian affairs in 1775 were under the jurisdiction of the Continental Congress. When the United States Constitution was adopted, the states ceded to the federal government the power of regulation of commerce with Indian tribes, which by statute and judicial decision was broadened to the management of Indian affairs. The agency set up for administration of Indian affairs was established in 1824 under the War Department. Later, in 1849, it was moved to the Department of the Interior, where it is today."
W. BROPHY & S. ABERLE, REPORT OF THE COMMISSION ON THE RIGHTS, LIBERTIES, AND RESPONSIBILITIES OF THE AMERICAN INDIAN, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 119 (1969) [hereinafter cited as THE INDIAN: AMERICA'S UNFINISHED BUSINESS.].

12. "As for their treatment as a separate people—Indians insist that they are just that. The laws of the nation, including the Bill of Rights, are the white man's laws, born of the white man's heritage. Indians do not quarrel with that but ask that their own heritage be respected."
F. FEY & D. MCNICKLE, *supra* note 1, at 7.

13. W. WASHBURN, *supra* note 2, at 242.

14. *See* H. FRITZ, THE MOVEMENT FOR INDIAN ASSIMILATION, 1860-1880 (1963).

15. *See* THE INDIAN: AMERICA'S UNFINISHED BUSINESS, *supra* note 11, at 179-93.

Indians.[16] Congress, the President, administrators, and the judiciary formulate the policies that regulate the economic and social interests of these Indians.

In a classic judicial statement, Chief Justice Marshall presaged the importance of respecting Indian heritage in *Worcester v. Georgia*.[17] He observed that "America was inhabited by a distinct people, divided into separate nations, independent of each other, and of the rest of the world, and governing themselves by their own laws."[18] He had earlier tried to harmonize conflicting ideas about the status of Indian tribes by depicting them as "domestic dependent nations" related to the federal government much like "a ward to his guardian."[19] Marshall's wardship view in time grew to disfavor, and those who came after him often did not share his respect for Indian heritage.

Beginning with the mid-1800's the emphasis of the national Indian policy was upon forced assimilation.[20] From the points of view of the administrators and legislators, attempts at acculturation of the reservation Indians were generally not successful.[21] The Indians, however, physically survived the ordeal; their social and political structures, though, were not as fortunate.

B. *Legislative Patterns*

By 1871 there was a growing recognition in Washington that the tribes were no longer "independent nations."[22] This was the time when Congress ended its treaty-making with the Indians.[23] Cessation of treaty-making as well as subsequent treaty violations mirrored Congressional attitudes about tribal sovereignty.[24]

In 1887 Congress responded to public demand for Indian reform[25] by passage of the General Allotment Act which provided for: (1) granting citizenship to individual Indians who would take land allotments, (2) divesting the tribe of title to these parcels and transferring title to the citizen, and (3) authorizing the sale of surplus reservation land that was not allotted.[26] The effect of the Act in the context of this discussion is that it destroyed the tribal

16. 25 C.F.R. § 1.1 *et seq.* (1970).
17. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
18. *Id.* at 560-61.
19. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).
20. H. FRITZ, *supra* note 14, at 221.
21. THE INDIAN: AMERICA'S UNFINISHED BUSINESS, *supra* note 11, at 180.
22. *Id.*
23. *See* Abbott, *Indians and the Law*, 2 HARV. L. REV. 167, 171 (1888).
24. *Id.* THE INDIAN: AMERICA'S UNFINISHED BUSINESS, *supra* note 11, at 26.
25. Note, *The American Indian—Tribal Sovereignty and Civil Rights*, 51 IOWA L. REV. 654, 663 (1966).
26. 24 Stat. 388 (1887).

entity as the intermediary through which the individual Indian dealt with the national government.[27]

Although Congress had emasculated any powers of external sovereignty, internal matters were still left to the tribes that had not been dissolved as a consequence of the loss of their land base.[28] Internal affairs generally considered within the scope of tribal self-government include: (1) exercise of limited civil jurisdiction; (2) lesser crimes; (3) determination of tribal membership; (4) regulation of Indian inheritance; (5) power to tax tribal members; (6) regulation of property within tribal jurisdiction; (7) control over Indian domestic relations; and (8) power to determine the form of tribal government.[29]

By the New Deal era of the early twentieth century, people finally realized that conformity could be legislated and thus the national Indian policy shifted.[30] A developing attitude of respect for differences between people and cultures led to significant legislative enactments.[31] The Dawes Act of 1924 had conferred citizenship upon Indians.[32] Ten years later, the Indian Reorganization Act facilitated the development of tribal government units, ended the allotment system, established more reservation land, and enabled tribes to incorporate.[33] During the next decade, the Indian Claims Commission Act[34] made justiciable the tribal claims against the federal government for the taking of Indian lands.

Before the efficacy of these major legislative works could be tested, Congress ill-advisedly withdrew federal supervision over some tribes.[35] Tribes were thereby "terminated."[36] Termination, a tenet often attributed to the Eisenhower administration,[37] meant ending the special duties of the government to Indians. The effect of termination has been to deprive Indian tribes of both their property and the public services for which the federal government has long been obligated by treaties.[38]

The policy shifted again in the early 1960's and continues to evolve today emphasizing the development of Indian tribal re-

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27. THE INDIAN: AMERICA'S UNFINISHED BUSINESS, *supra* note 11, at 19-20.
28. " . . . 27,000,000 acres or two-thirds of the land allotted to individual Indians, was also lost by sale between 1887 and 1934." W. WASHBURN, *supra* note 2, at 145.
29. F. COHEN, HANDBOOK, *supra* note 2, at 122-50.
30. Note, *supra* note 25, at 664.
31. *Id.*
32. 8 U.S.C. § 1401 (a)(2) (1970).
33. 48 Stat. 984 (1934), *as amended,* 25 U.S.C. § 461 (1970).
34. 60 Stat. 1049 (1946). THE INDIAN: AMERICA'S UNFINISHED BUSINESS, *supra* note 11, at 29.
35. Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights,* 3 COLUM. SURVEY OF HUMAN RIGHTS L. 49, 59 (1970-71).
36. *Id.*
37. Kerr, *Constitutional Rights, Tribal Justice, and the American Indian,* 18 J. PUB. L. 311, 319 (1969).
38. THE INDIAN: AMERICA'S UNFINISHED BUSINESS, *supra* note 11, at 180.

sources.[39] This cuts both ways. To grant massive long-term leases to outsiders for the exploitation of reservation natural resources produces a new source of revenue; it also depletes tribal wealth and places management of the disposal of this wealth outside the hands of the Indians.

On balance, the federal government exercises plenary control[40] over external Indian concerns and the tribes are left to manage their internal affairs. Uncertainty shrouds the extent of these tribal powers largely because of the paternalistic domination of the Bureau of Indian Affairs. Perhaps the current self-determination movement will gather momentum and tribes will then assert their rightful inherent powers.

II. Derivation of Tribal Powers

> . . . [T]*hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle.[41]

The British may have recognized the sovereignty of the Indian tribes as early as 1755 when superintendents responsible for good relations with the tribes were appointed. Similar to ambassadors, the superintendents were held accountable for international tranquillity.[42] Likewise, peace treaties are an early American manifestation of respect for tribal sovereignty.[43]

A. *First Judicial Analysis of Sovereignty—Worcester*

The United States Supreme Court, in *Worcester v. Georgia*,[44] first analyzed the basis of Indian self-government in 1832. The State of Georgia, in its attempt to exert power over the Cherokees, had imprisoned a white man living among the Cherokees with the consent of tribal authorities. The Supreme Court, in an opinion by Chief Justice Marshall, held that Indians were, in effect, subjects

39. *Id.* at 87.
40. Williams v. Lee, 358 U.S. 217, 220 (1959).
41. F. COHEN, HANDBOOK, *supra* note 2, at 122.
42. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 1-10 (1961).
43. *Id.*
44. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

of federal law, to the exclusion of state law, and entitled to exercise their own inherent rights of sovereignty so far as might be consistent with such federal law.[45]

Felix Cohen[46] summarizes subsequent judicial decisions regarding Indian tribal powers as adhering to three fundamental principles. These are as follows:

> 1. An Indian tribe possesses, in the first instance, all of the powers of any sovereign state.
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> 2. Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e. its powers of local self-government.
>
> 3. These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[47]

B. *The Talton Rule*

Affirming the principles noted by Cohen, the landmark case of *Talton v. Mayes*[48] was the first judicial consideration of *internal* tribal sovereignty. *Talton* presented the question of whether the Fifth Amendment of the United States Constitution applied to the local legislation of the Cherokee Nation so as to require all prosecutions for offenses committed against the laws of that nation to be initiated by a grand jury organized in accordance with the Fifth Amendment. The solution to this question, according to the Supreme Court, involved an inquiry as to the nature and origin of the power of local government exercised by the Cherokee Nation and recognized to exist by prior treaties and statutes.[49] Although Congress earlier had been said to have the right to regulate the manner in which the local powers of the Cherokee Nation were exercised,[50] the Court held that the prior decision did not render such local powers federal powers arising from and created by the Constitution.[51]

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45. *Id.* at 560.
46. The late Felix S. Cohen formerly served with the Department of Interior. Few have achieved his renown as an expert in Indian law.
47. F. COHEN, HANDBOOK, *supra* note 2, at 123.
48. Talton v. Mayes, 163 U.S. 376 (1896).
49. *Id.* at 382.
50. Cherokee Nation v. Kansas Ry., 135 U.S. 641 (1890).
51. Talton v. Mayes, 163 U.S. 376, 384 (1896).

Chief Justice Marshall, speaking for the Court, observed that:

> [i]t follows that as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.[52]

Another reason given why the procedural rights of the Fifth Amendment were not mandatory for tribal courts was that a tribe was not a federal instrumentality.[53] Instead, the Court held that the powers of an Indian tribe are not derived from the Constitution, treaties, or statutes, but rather are inherent powers of limited sovereignty which have never been extinguished.[54]

An Indian writer analyzes *Talton* as an attempt to weld two systems, the older Cherokee and the nascent American into one consistent pattern of jurisprudence.[55] He points out that there was no intrusion by the federal government into the workings of the Cherokee Republic. A reason for this is that the Cherokees, as one of the so-called Five Civilized Tribes of Oklahoma,[56] had a well-respected court system. Judgments of these courts were upheld in capital offenses.[57]

Talton prompts interesting questions. Few would argue that *Talton* means that Indians are not subject to the Constitution.[58] But whether the Bill of Rights applies to the relations between a tribe and its members remains an open question even after the passage of the 1968 Civil Rights Act.[59] Just what the 1968 Civil Rights Act means is another question.[60] Furthermore, is it justifiable to impose these federal notions of "rights" on tribal courts when these rights are not seen as fundamental by Indians, and when countervailing factors unique to Indians militate against such an imposition?[61]

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52. *Id.*
53. *Id.*
54. *Id.*
55. V. DELORIA, JR., OF UTMOST GOOD FAITH 170 (1972).
56. These five tribes are the Cherokee, Chickasaw, Creek, Choctaw, and Seminole.
57. V. DELORIA, JR., *supra* note 55, at 169.
58. *But see* V. DELORIA, JR., *supra* note 55, at 170. He sees the decision as having contemporary relevance for every Indian tribe that operates its own tribal courts in that "the Supreme Court found that the Bill of Rights did not apply to the relationship between the Cherokee Nation and its citizens. . . ." *See also* Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968).
59. *See* Kerr, *supra* note 37; Coulter, *supra* note 35; Lazarus, *Title II of the* 1968 *Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337 (1969); and Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Government*, 82 HARV. L. REV. 1343 (1969).
60. *See* 25 U.S.C. §§ 1301-1303 (1970).
61. Coulter, *supra* note 35, at 51.

How the Constitution applies to Indian tribes that were self-sufficient prior to its adoption is still another open question. Cohen said that the Constitution applies in the same sense that it does to the City of New Orleans.[62] The popular equation of a tribe to a municipality is overly facile. At the very least, cities are distinguishable in that "state action" limitations under the Fourteenth Amendment apply to cities and not to Indian tribes.[63]

A reversion to the nation classification[64] may be appropriate since some of the tribes operated with stable governments long before American conquest. In 1939 tribes were regarded as "separate political communities."[65] And in 1959 it was held that the tribes were not states but had a "status higher than that of States. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have been expressly required to surrender them by a superior sovereign, the United States."[66] At a minimum, however, and Indian tribe is a "distinct political society"[67] within the federal system.

C. *An Extreme, But Necessary Case—Ex Parte Crow Dog*

Predating *Talton v. Mayes*[68] by 13 years, the case of *Ex Parte Crow Dog*[69] represents an extreme application of the doctrine of tribal sovereignty. In *Crow Dog* the Supreme Court held that the murder of one Sioux Indian by another upon an Indian reservation was not within the criminal jurisdiction of any court of the United States, and that only the Indian tribe could punish for the offense. The argument for extension of federal jurisdiction was rejected, the Supreme Court stating:

> . . . [I]t is a case where, against express exception in the law itself, that law, by argument and inference only, is sought to be extended to aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they have no previous warning; which judges them by a standard made by others and not for them,

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62. F. COHEN, HANDBOOK, *supra* note 2, at 124.
63. Dodge v. Nakai, 298 F. Supp. 17, 21 (1968).
64. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
65. United States v. City of Salamanca, 27 F. Supp. 541, 544 (D.N.Y. 1939).
66. Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959).
67. Kane, *Jurisdiction Over Indians and Indian Reservations*, 6 ARIZ. L. REV. 237, 238 (1965).
68. Talton v. Mayes, 163 U.S. 376 (1896).
69. *Ex Parte* Crow Dog, 109 U.S. 556 (1883).

> which takes no account of the conditions which should except them from its extractions, and makes no allowance for their inability to understand it.[70]

The thrust of the *Crow Dog* opinion intimates the vast content of criminal jurisdiction inherent in tribal sovereignty.[71] It also illustrates how far the Supreme Court was once willing to go in opposing efforts of other courts to infringe upon tribal sovereignty. Nevertheless, without such protection from infringement, tribal sovereignty is an illusion indeed.

D. *Decision Respects Differing Heritage—Ex Parte Tiger*

Tribal sovereignty was buttressed in the case of *Ex Parte Tiger*.[72] It signaled the judicial recognition that Indian courts need not be guided by the Anglo-Saxon common law, but may properly consider traditions and circumstances of Indian people. The Court acknowledged that "[t]hey derive their jurisprudence from an entirely different source, and they are as unfamiliar with common law terms and definitions as they are with Sanskrit or Hebrew."[73]

In brief, tribal government is derived from the original sovereign power to govern their affairs and is qualified by the subsequent judicial, legislative, and administrative restrictions. Hence, the tribes retain a sovereign authority. The contemporary meaning of tribal sovereignty is defined in *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*,[74] as follows:

> . . . It would seem clear that the Constitution, as construed by the Supreme Court acknowledges the paramount authority of the United States with regard to Indian tribes but recognizes the existence of Indian tribes as quasi-sovereign entities possessing all the inherent rights of sovereignty except where restrictions have been placed thereon by the United States, itself.[75]

The dimensions of this quasi-sovereignty can best be examined in the context of specific cases, e.g., in the areas of law and order jurisdiction, religious liberty, domestic relations, and hunting and fishing rights. An attempt is next made to consider the major cases of the past twenty years to illuminate the present limits of tribal sovereignty.

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70. *Id.* at 571.
71. *See* Kane, *supra* note 67, at 239-44.
72. *Ex Parte* Tiger, 2 Ind. T. 41, 47 S.W. 304 (1898).
73. *Id.* at 305.
74. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).
75. *Id.* at 92.

III. Indians and Courts in a Jurisdictional Maze

Much has been written about the unique problems of Indian courts,[76] but what should be changed, if anything, remains an open question principally because of historic and cultural differences between tribal justice and that of the dominant Anglo society. Congress responded in 1968, however, with what has been heralded as an "Indian Bill of Rights"[77] for Indian courts. Initial Indian opposition to the Act was strong.[78] The legislation appears to have been a misguided attempt to help. A frankensteinian nature emerges when Indian judicial procedures have welded onto them the Anglo-American constitutional guarantees.

A. *Tripartite Jurisdiction*

Indians may be subjected simultaneously to three legal codes—federal, state, and tribal.[79] All three can conceivably be involved in various phases of the same case.[80] Consequently, great confusion as to which government should exercise jurisdiction exists.[81] Doubtless a complete jurisdictional vacuum sometimes results, thereby denying due process and equal protection of the laws.[82]

B. *Bounds of Tribal Jurisdiction*

Indian courts vary like flowers in a field of diverse cultures known as tribes. One Senate inventory lists 12 courts of Indian offenses (established by the BIA); 53 "tribal" courts (organized by tribal members under BIA guidelines); and 19 traditional courts (in a form that existed prior to the founding of America.)[83] Little has been recorded about the operation of Indian courts.[84] This is not too surprising since some Indian courts bar non-Indian lawyers from appearing before them.[85]

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76. *See, e.g.*, Kane, *supra* note 67; Kerr, *supra* note 37, at 318-19.
77. 25 U.S.C. §§ 1301-1303 (1970).
78. *Hearings on Rights of Members of Indian Tribes Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 37 (1968). Indicative of the objections is the statement of the Pueblos:

> Section [1303], habeas corpus, opens an avenue through which Federal Courts, lacking knowledge of our traditional values, customs and laws, could review and offset the decisions of our councils sitting as courts and acting on the basis of our own laws and customs as tribal courts.

But see 113 CONG. REC. § 18157 *et seq.* (Dec. 7, 1967) for endorsements of the legislation.
79. THE INDIAN: AMERICA'S UNFINISHED BUSINESS, *supra* note 11, at 45.
80. *Id.*
81. SENATE COMMITTEE ON THE JUDICIARY, CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN S. REP. No. 265 88th Cong., 2d Sess. 6 (1964) [hereinafter CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN].
82. *Id.*
83. *Id.* at 15.
84. *See generally* Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1832-38 (1968); *Hearings on the Constitutional Rights of the American Indian Before Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. (1961).
85. *Id.* at 1835.

The criminal jurisdiction of Indian courts is extensive; it encompasses all tribally defined offenses except those crimes preempted by the so-called Major Crimes Act.[86] Their power is bolstered because few decisions are appealed[87] and appeal may be impractical.[88]

Similarly, Indian courts are not courts of record. As the judges do not write opinions there is no developed body of precedents. Penalties, when imposed, usually do not exceed six months in jail.[89] The emphasis is upon restitution and rehabilitation.[90] For instance, a tradition among the Omaha tribe is for the offender to have to put on a dinner dance to benefit the injured party.[91] Lastly, since the tribal council often appoints the tribal judges, these judges serve at the will of the tribal council and cannot be expected to render detached judgments.[92]

Indian courts apparently wage a close race with city and county courts that serve the communities adjacent to the reservations in terms of their caseloads.[93] All three courts generally handle the lesser behavioral crimes. The 13 "major" crimes[94] were taken away from the jurisdiction of the Indian courts and placed under the jurisdiction of the federal district courts. In practice, though, state courts often assume this jurisdiction over major crimes by default[95] at a time when most state courts have little actual jurisdiction over offenses committed on Indian reservations.[96] Indian courts also may be hearing major crimes because United States Attorneys often refuse to prosecute Indian cases.[97] Delineation of the interrelationships of the judicial authority and operation of the three governmental units elucidates some of the unanswered questions regarding the jurisdiction and sovereignty of Indian courts.

C. *The Any Man's Land of Checkerboard Jurisdiction*

The curtain continues to rise and fall on an old drama in

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86. 23 Stat. 362, 385 (1885). *See* Comment, *Indictment Under the "Major Crimes Act"—An Exercise in Unfairness and Unconstitutionality*, 10 ARIZ. L. REV. 691 (1968).
87. Kerr, *supra* note 37, at 322.
88. For example, the Ute Mountain Tribal Law and Order Code provides for appeal to the federal district court in Denver which is hundreds of miles from Towaoc.
89. CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN, *supra* note 81.
90. Kerr, *supra* note 37, at 320.
91. Interview with Elmer Blackbird, Mar. 10, 1972, in Lawrence, Kansas.
92. Kerr, *supra* note 37, at 322.
93. W. HAGAN, INDIAN POLICE AND JUDGES (1966).
94. 18 U.S.C. § 1153 (1970).
95. Letter from Robert B. Long, Assistant U.S. Attorney, Denver, Colo., to James D. Childress, Assistant Attorney, Sixth Judicial District, Durango, Colo., April 26, 1966, stating in part:

> As far as the prospect of our assuming jurisdiction for prosecution purposes, we must decline in this instance. I am sure that you appreciate what an epic a Federal prosecution can be and the volume in our office necessitates that we screen all cases carefully.

96. COHEN, HANDBOOK, *supra* note 2, at 116-17.
97. CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN, *supra* note 81, at 7.

Indian Country[98] in spite of the Supreme Court's implicit ban of repeat performances. The scene is any state in which an Indian reservation is located. A portion of the original area of the reservation has been diminished by sale or other disposition. Action begins with the commission of a so-called major crime[99] by an Indian at a locus which formerly was within Indian Country and has never been disestablished. The tension increases as the alleged offender is incarcerated in a tribal or county jail. A climax is reached when there is an awareness that even though this is an offense within the exclusive jurisdiction of the United States, the United States attorney's office will refuse to exercise jurisdiction.[100] The tribal or state court then exercises jurisdiction by default.[101] While the statutes do not provide for such action, crowded dockets have rewritten the script.

The law is well settled that a major crime committed on a particular parcel of land within the original boundaries of an Indian reservation which has never been disestablished is an offense within the exclusive federal jurisdiction.[102] In *Seymour v. Superintendent of Washington State Penitentiary*,[103] the Supreme Court unanimously held that a state court had no jurisdiction over a burglary committed within the limits of the south half of the Colville reservation, even though the parcel of land was held under a patent in fee by a non-Indian, and was located within a town. Seymour, a member of the Colville tribe, entered a guilty plea to attempted burglary in a Superior Court. After conviction he filed a petition for a writ of habeas corpus in the Supreme Court of Washington, urging that the state court had lacked jurisdiction since the crime was committed in Indian Country. The petition was denied on the ground that the land on which the burglary was committed was no longer an Indian reservation.[104]

The Supreme Court, in an opinion by Justice Black, reversed, holding that the land had not lost its status as an Indian reservation, and that it was immaterial that the piece of land was located in a town.[105] The Court relied, in part, upon an earlier decision stating:

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98. 18 U.S.C. § 1151 (1970) defines Indian Country as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent . . ."

99. These include: murder; manslaughter; rape; carnal knowledge of any female, not his wife, who has not attained the age of 16 years; assault with intent to commit rape; incest; assault with intent to kill; assault with a dangerous weapon; assault resulting in serious bodily injury; arson; burglary; robbery, and larceny.

100. *See* note 95 *supra*.

101. *See* CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN, *supra* note 81, at 7-8.

102. Kane, *supra* note 67, at 239 n. 19.

103. Seymour v. Superintendent, 368 U.S. 351 (1962).

104. Seymour v. Schneckloth, 55 Wash. 2d 109, 346 P.2d 669 (1959).

105. Seymour v. Superintendent, 368 U.S. 351, 359 (1962).

"when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."[106]

Subsequent decisions reinforce the *Seymour* holding.[107] Nevertheless, as a practical matter the decision does not guarantee a United States attorneys' offices.[108] It does, however, give defense federal court trial because of the volume of cases handled by the attorneys a plea-bargaining lever.[109]

D. *Indian Courts and the Bill of Rights*

The leading case of *Talton v. Mayes*[110] stands for the proposition that a tribal government, absent any federal action, is not required to grant Indians a procedural right—a right concerning the form and manner in which the power of government is exercised—conferred by the United States Constitution.[111] Whether a tribe may deny its members a substantive right, such as the freedom of religion, is an open question.[112]

The lower federal district courts have uniformly withheld basic protections of the Bill of Rights in situations involving a tribe and its membership;[113] neither the due process clause nor the equal protection clause prevented a tribe from imposing a tax only on non-members for use of trust lands;[114] the First Amendment was no barrier to tribal punishment for the ritual use of peyote;[115] the Fifth Amendment was not applicable to a tribal taking of property;[116] and the Sixth Amendment right to counsel was held inapplicable.[117]

Although the lower courts seem to be following *Talton*, a decision of the Ninth Circuit Court of Appeals flies in the face of the long standing rule.[118] *Colliflower v. Garland* enunciated a newly-

106. United States v. Celestine, 215 U.S. 278 (1909).
107. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).
108. *Set* note 95 *supra.*
109. For example, a deputy Colorado Public Defender used this jurisdictional question to secure a reduction of a felonious battery charge to a simple misdemeanor battery on egregious facts. This result was achieved despite a substantial question as to whether that portion of the Southern Ute reservation had been disestablished. Interview with Grace Merlo in Cortez, Colorado, June 30, 1971.
110. Talton v. Mays, 163 U.S. 376 (1896).
111. The right to a grand jury constituted pursuant to the constitution was at issue. *See* Lazarus, *supra* note 59, at 341.
112. *But see* Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).
113. Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), *cert. denied,* 356 U.S. 960 (1958).
114. Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied,* 358 U.S. 932 (1959).
115. Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).
116. United States v. Seneca Nation of New York Indians, 274 F. 946 (W.D.N.Y. 1921).
117. Glover v. United States, 219 F. Supp. 19 (D. Mont. 1963).
118. Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

divined premise that tribal courts "function in part as a federal agency," and thereby licensed the district court to inquire into the legality of detention of an Indian pursuant to an order of the Indian court.[119] The impact of threats to the *Talton* rule[120] including the 1968 Civil Rights Act[121] have not been measured. The Ninth Circuit's decision in *Colliflower v. Garland*[122] seems wrong; it is judicial meddling into internal tribal affairs. At most, the decision should only apply to courts established by the BIA as was that court. A well-written opinion, notwithstanding, the court failed to adequately distinguish prior well-reasoned cases[123] reaching a contrary conclusion on similar facts, and therefore should *not* be followed. Does one dose of federal interference by the Bureau of Indian Affairs call for another by the judiciary?

Colliflower has been criticized by one commentator as an example of hard facts making bad law.[124] The court expressly narrowed its decision to the facts before it but its holding might be applied more broadly by another court in a later case.

E. *Extension of the Tribal Sovereignty Doctrine, The Right to Refuse to Extradite*

Although the holding of the Ninth Circuit Court of Appeals in *Colliflower*[125] dealt a blow to tribal sovereignty, the court recanted and bolstered the doctrine in 1969. In fact, it broadened sovereignty regarding extradition beyond that enjoyed by 49 states.[126] In *Arizona ex. rel. Merrill v. Turtle*,[127] Turtle had been arrested by a county sheriff and detained in tribal jail pursuant to the request of Oklahoma authorities who sought him for alleged second degree forgery in Oklahoma. He was a Cheyenne residing on the Navajo Reservation and was protected by the Navajo Tribal Council who refused the extradition request on the ground that the Navajo Tribal Code allowed extradition only to Arizona, Utah, or New Mexico.[128] Oklahoma next contacted Arizona's governor who agreed to the extradition. The jurisdictional question was raised in a habeas corpus proceeding. The Ninth Circuit held that Arizona's attempted extradition "would clearly interfere with rights essential to the Navajos'

119. *Id.* at 379.
120. Lazarus, *supra* note 59.
121. 25 U.S.C. §§ 1301-1303 (1970).
122. Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1969).
123. *See, e.g.,* Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 94-98 (1956); Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 908 (1963).
124. Lazarus, *supra* note 59, at 344. *But see* 79 HARV. L. REV. 436, 437 (1965).
125. Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).
126. *See* 79 HARV. L. REV. 436 (1965).
127. Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), *cert. denied,* 396 U.S. 1003 (1970).
128. NAVAJO TRIBAL CODE tit. 17, § 1841 (1962).

self-government,"[129] and affirmed a federal district court's determination that the state had neither jurisdiction to arrest the appellee nor the power to extradite him.[130]

The decision is remarkable in light of facts on which the Ninth Circuit might have gone the other way. The presence of a Cheyenne on a Navajo reservation, for instance, suggests the possibility of a political-asylum. The decision may herald a re-elevating of tribes to positions of sovereignty like those of independent nations. Nonetheless, the holding should *not* be regarded as a misconception of sovereignty *nor* a misapplication of the tribal self-government concept.[131] Extradition is an aspect of the self-government possessed by states.[132] Tribes have been analogized to states, and, in some ways are regarded as more sovereign than states.[133] Thus tribal self-government should include the right to determine whether extradition shall be allowed.[134]

F. *Guidelines for Courts in Construing the Indian Civil Rights Act*

Title II of the 1968 Civil Rights Act[135] popularly referred to as an "Indian Bill of Rights" has been judicially construed about

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129. Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683, 685 (9th Cir. 1969).
130. *Id.*
131. *Contra,* Comment, *The "Right of Tribal Self-Government" and Jurisdiction of Indian Affairs,* 1970 UTAH L. REV. 291, 295 (1970).
132. Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861).
133. Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).
134. This was one of two conclusions grounding the Ninth Circuit's decision. The other was that a state may not infringe upon rights essential to the Navajo's self-government.
135. Act of April 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77 [codified at 25 U.S.C. §§ 1302-1303 (Supp. 1971)], the text of which is as follows:

> § 1302. Constitutional Rights
> No Indian tribe in exercising powers of self-government shall—
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
> (3) subject any person for the same offense to be twice put in jeopardy;
> (4) compel any person in any criminal case to be a witness against himself;
> (5) take any private property for a public use without just compentation;
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
> (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 six months or a fine of $500, or both;
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
> (9) pass any bill or attainder or ex post facto law; or

thirty times in the past four years. Departmental rulings from the Solicitor's office concerning application of the statute number at least eight. It is likely that the Indian Bill of Rights offers a limitless potential for litigation.

Judicial consideration of any issue arising under the 1968 statute must be analyzed in the context of the extent to which the federal government ought to intervene and impose restrictions upon the tribal governments. Hence in each case the court must balance the erosion of Indian tribal autonomy that will be caused against the benefits that will be acquired by the individual from the new rights. Since the statute is aimed at limitations on the tribal government, each lawsuit is a potential threat to tribal sovereignty. This threat branches out in two directions. One aspect is the imposition of Anglo-Saxon judicial standards and requirements upon the tribes, which they may or may not be financially or otherwise able to meet and which may be inappropriate in light of tribal customs and traditions. Another aspect is that the statute allows non-Indian intervention in Indian affairs.

Illustrative of the threat to tribal sovereignty posed by the imposition of Anglo-Saxon judicial standards is the possible conflict in literal application of the "equal protection" and "due process of law" language.[136] Assuming a hypothetical fact situation in which a tribal law and order code prescribed a fine and no imprisonment for a certain offense which had been violated by an impecunious Indian defendant. To read "equal protection" as interpreted by the United States Supreme Court in *Tate v. Short*[137] requires that the impecunious defendant not be jailed if he is unable to pay his fine when a person who could pay the fine is not jailed. *Tate* might be read in tandem with *Argersinger v. Hamlin*[138]. Since criminal cases heard in Indian courts are misdemeanors, the application of *Argersinger* would require appointment of counsel for indigents when there was a possibility of a jail sentence. If a tribe tries to get around *Argersinger* by amending its law and order code to only prescribe fines, the *Tate* question still is present. The conflict is put in focus by a provision of the Indian Bill of Rights that guarantees the right of counsel at the individual's expense.[139] After *Argersinger* this provision may have no vitality. Tribes may be

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.
§ 1303. Habeas corpus
The privilege of the write of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order on an Indian tribe.

136. 25 U.S.C. § 1302(8) (Supp. 1971).
137. Tate v. Short, 401 U.S. 395 (1971). *See* Memo. Asso. Sol. (July 21, 1971).
138. Argersinger v. Hamlin, 407 U.S. 25 (1972).
139. 25 U.S.C. § 1302 (6) (Supp. 1971).

forced to provide counsel or experienced lay advocates. Moreover, if tribes are forced to provide attorneys to defend indigent tribal members the operation of the Indian courts could be upset since most tribal judges are laymen. Additionally, if the tribal budget is low, the expense of attorneys presents another problem. Court operation might be hampered if there is a defense attorney, since most Indian courts lack prosecutors; a tribe may be obliged to hire another attorney to prosecute.

An answer may lie in applying the spirit of equal protection and not the strict doctrine as it is reflected in federal caselaw. The spirit of equal protection could be tempered with tribal customs, traditions, and to some extent the fiscal resources of the tribe. Judicial deference to a culture different than that of the dominant society is not without precedent. The Supreme Court in dictum has noted that:

> the relations of the federal courts to Puerto Rico have often raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with Spanish tradition. Federal courts, reversing Puerto Rican courts, were inclined to construe Puerto Rican laws in the Anglo-Saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this Court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be "inescapably wrong."[140]

A comparable deference to Indian courts' construction of tribal law should be extended. Similarly, the principle should be extended to cases based upon the 1968 Indian Civil Rights Act; courts should follow local tradition and customs unless these could be said to be "inescapably wrong."

The other aspect of the threat to tribal sovereignty is the availability of direct access to federal courts for non-Indians who are at odds with the tribe. Two cases brought by legal services attorneys reflect the ease of non-Indian intervention and the manner in which some courts might be expected to greet such lawsuits. In *Dodge v. Nakai*[141] a non-Indian lawyer filed an action after he had been excluded from the Navajo reservation for allegedly disruptive behavior in the Navajo council chambers. The federal court found that the Navajo Advisory Committee's actions violated the free speech, due process, and bill of attainder clauses of the statute.[142]

140. Fornaus v. Ridge Tool Co., 400 U.S. 41 (1970).
141. Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969).
142. *Id.* at 31, 32, 33.

The Zuni legal services office brought *Wasson v. Gray.*[143] The federal court granted a preliminary injunction prohibiting interference by defendants with plaintiff's right of access to the on-reservation tribal administration building.

The threat is compounded by the fact that although the 1968 Indian Civil Rights Act provides for the remedy of habeas corpus alone, injunctive relief, and monetary damages also have been awarded based on supplemental statutory bases.[144] The availability of additional remedies increases the vulnerability of tribes before the non-Indian tribunals. Extreme caution must be exercised lest the statute becomes the shibboleth of the non-Indian in conflict with tribal interests. If an interest-balancing test had been applied in the cases brought by the legal service attorneys, the cases might have gone the other way. Courts must consider *legitimate* tribal interests. Greater weight must be given the interests of tribes in maintaining cultural autonomy and political sovereignty.

IV. Recent Decisions Bolster Eroded Foundation

Recent decisions strongly point to the re-establishment of tribal sovereignty in the areas of religion, contract, divorce, hunting and fishing rights, and immunity from taxation.

A. *Restriction on Religion, an End-Run Around the First Amendment*

In the leading case, *Native American Church of North America v. Navajo Tribal Council,*[145] the federal court refused to review the Navajo anti-Peyote ordinance on the ground that the first amendment did not apply to tribal restrictions on religious practice. A class action had been brought by the Native American Church of North America seeking to enjoin the enforcement of a tribal ordinance making it an offense to introduce into Navajo country, sell, use, or have in possession within Navajo country, the bean known as peyote. It was alleged that the ordinance was void because it violated the church's rights and the rights of its members under the First Amendment. The district court dismissed the action.

The Tenth Circuit Court of Appeals affirmed, holding that:

> . . . No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Consti-

143. Wasson v. Gray, Civil No. 9223, (D.N.M. 1971).
144. *See, e.g.,* Longsassion v. Leekity, 334 F. Supp. 370 (D.N.M. 1971); Spotted Eagle v. Blackfoot Tribe, 301 F. Supp. 85 (D. Mont. 1969).
145. Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).

> tution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious worship.[146]

One writer criticizes the Tenth Circuit's decision as a blind adherence to an old rule.[147] Granted that the opinion gave scant attention to the civil libertarian ramifications of such a holding, the court reached the only practical result. To have held otherwise would have impaired the sovereignty of the Navajo Tribal Council, particularly since the church subsequently prevailed by political means in getting the council to change the ordinance.[148]

Earlier in *Toledo v. Pueblo De Jemez*[149] the New Mexico federal district court had held that a deprivation of religious liberties by a tribal government that did not derive its powers from a state or from the United States could not be redressed by action under a federal civil rights act.[150] Six Jemez Pueblo Indians, all of whom were members of various protestant denominations, filed a complaint for declaratory judgment against the Pueblo of Jemez. They charged that the Pueblo refused them the right to bury their dead in the community cemetery; denied them the right to build a church of their own on Pueblo land; prohibited them from using their homes for church purposes; refused to permit Protestant missionaries freely to enter the Pueblo at reasonable times, and deprived some of them of the right to use a communal threshing machine which threatened the loss of their wheat crop.[151] The court properly found that there was no basis for holding that the conduct of the defendants of which the plaintiffs complained was done under color of state law; otherwise, the quasi-sovereignty of the theocratic community would have been debilitated.

Religious freedom raises complex questions. When a tribe takes action that would be unconstitutional for the federal or state government, the aggrieved party is without a forum in which he can appeal for redress. The dilemma intensifies because an extension of a federal or state appeal would enfeeble tribal sovereignty. An answer is to establish Indian Courts of Appeal independent from the federal courts and the BIA.[152] The courts could be located geographically across the country in areas of Indian population concentration.

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146. *Id.* at 135.
147. Note, *supra* note 25, at 666.
148. Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1828 (1968). Based on his interviews the writer states that "[o]nly after several years of inconsistent enforcement in the tribal courts and active church support for candidates pledged to legalize peyote did the council comply with the church's demand."
149. Toledo v. Pueblo De Jemez, 119 F. Supp. 429, 432 (D.N.M. 1954).
150. 42 U.S.C. § 1983 (1970).
151. Toledo v. Pueblo De Jemez, 119 F. Supp. 429, 430 (D.N.M. 1954).
152. Kerr, *supra* note 37, at 329.

Thus in cases where the individual was oppressed by a tribal judge or official, one could appeal without the harm of further federal interposition.

Kerr has suggested that a series of circuit courts of appeal be established and that these be composed of Indian tribal judges and laymen acquainted with Indian traditions.[153] He aptly notes that such an appeal system ignores what he terms a salient characteristic of most tribal law—that it is unwritten and not found in Indian constitutions. Nevertheless, since some Navajo tribal court decisions have been reported since 1969, this objection may be overcome.[154] It remains to be seen whether other tribal courts will report their decisions.

A more vital point concerning Indian appellate courts is what law they would apply. Would it be higher than tribal law? If not, what function could they serve except to police procedures? The diverse backgrounds and characteristics of the numerous tribes argues for application of local tribal law. Where a tribe's law is unknown a problem would exist. Additionally, intertribal disputes could raise serious choice of law questions. This might necessitate a body of law superior to tribal law. The source of this superior law might be inter-tribal pacts or treaties.

B. *Supreme Court Affirms Tribal Jurisdiction over Contracts—Williams v. Lee*

The United States Supreme Court replenished tribal authority in *Williams v. Lee*[155] holding that the exercise of state jurisdiction would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves, which was recognized by Congress in the Treaty of 1868 with the Navajos and has never been taken away.[156] The action was brought by a non-Indian who operated a general store in Arizona on the Navajo Indian Reservation. In the Superior Court of Arizona he sought to collect for goods sold on credit to a Navajo Indian and his wife. In spite of the defendant's motion to

153. *See, e.g., In re* Chischilly, Sr., Civil No. 8813 (Feb. 29, 1972); Navajo Tribe v. Bahe, Civil No. 91542 (Jan. 11, 1972); and Navajo Tribe v. Littleman, Civil No. 41950 (Dec. 7, 1971).

154. Note, 46 WASH. L. REV. 541, 552 (1971). The danger of BIA affiliation is expressed in the following statement made before a Congressional subcommittee by Roy Waite, Morongo Band of Mission Indians:

> You mentioned a while ago about the sovereign power of the tribe, but we do not have sovereign power and, in fact, we have no power at all because everything we do goes through and must be approved by the Bureau.

Hearings on constitutional rights of the American Indian before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, pt. II, 87th Cong., 1st Sess., p. 328.

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

156. *Id.* at 223.

dismiss on the ground that jurisdiction lay in the tribal court rather than in the state court, judgment was entered in favor of the plaintiff. The Supreme Court of Arizona affirmed.[157]

The United States Supreme Court granted certiorari because it felt that there had been a doubtful determination of the important question of state power over Indian affairs.[158] The court took note that the tribe had "in recent years greatly improved its legal system through increased expenditures and better-trained personnel. Today the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants."[159] It was immaterial that the plaintiff was not an Indian.[160]

The decision did not reach some crucial questions that might be raised. Was the reason the Indian court had exclusive jurisdiction the fact that no federal act has given state courts jurisdiction over such controversies? Under traditional conflict of laws analysis one might expect the court to have zeroed in on the point that the contract was entered into upon the reservation. Could the Indian court have jurisdiction over an off-reservation contract? Finally, does at least one party have to be an Indian or a member of that tribe?

Williams is a particularly significant decision because of the dearth of Supreme Court opinions regarding the status of Indian tribes since *Worcester v. Georgia*.[161] In short, it is the last word on the question of tribal sovereignty. Hopefully, *Williams* will serve as a beacon to both federal and state courts steering through the jurisdictional waters surrounding Indian cases, both civil and criminal.[162]

C. *Recognition of Tribal Regulation of Domestic Relations, a Nameless Rule Akin to Comity*

Indian tribal custom marriage and divorce have traditionally been recognized by both federal and state governments.[163] An early judicial recognition of tribal jurisdiction in the field of domestic relations was registered in the form of dictum in the case of *United States v. Quiver*.[164] A Sioux allegedly committed adultery with another Sioux on a reservation in South Dakota. Prosecution for adultery was held to be outside the jurisdiction of the federal dis-

157. Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (1958).
158. Williams v. Lee, 356 U.S. 930 (1958).
159. Williams v. Lee, 358 U.S. 217, 222 (1959).
160. Williams v. Lee, 358 U.S. 217, 223 (1959).
161. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
162. *See* Whyte v. District Court of Montezuma County, 346 P.2d 1012, 1014-15, *cert. denied*, 363 U.S. 829 (1960).
163. COHEN, HANDBOOK, *supra* note 2, at 137-39.
164. United States v. Quirer, 241 U.S. 602 (1916).

trict court because no statute which in terms referred to Indians had conferred jurisdiction on the court. The court observed:

> At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with according to their tribal customs and laws.[165]

In *Begay v. Miller*,[166] a case of first impression, the Arizona Supreme Court considered the jurisdiction of an Indian court in the field of domestic relations. The question arose in a petition for a writ of habeas corpus to secure release from incarceration in the county jail by a husband who had been committed after having been found guilty of contempt of Superior Court for failure to pay alimony. The state court held that where husband and wife were properly before the Navajo Indian Court and the Indian Court entered a decree of divorce, the Superior Court of Apache County was without jurisdiction to enter a subsequent decree of divorce, and therefore an order holding husband in contempt of the Superior Court was a nullity.[167]

Since *Begay* antedates *Williams* by nearly two decades, the underpinnings of *Begay* may have been eroded, particularly since there is an unarticulated assumption in *Begay* of concurrent state and tribal jurisdiction over domestic relations. This is hard to reconcile with the contract situation in *Williams* where it was held that the tribal court had exclusive jurisdiction. If concurrent jurisdiction does exist in domestic relations, a state judgment prior in time would be valid. Would the tribal court be bound to recognize and enforce the state judgment? *Williams* must be read as meaning that Arizona state courts lack jurisdiction over *all* civil and criminal matters. *Begay* is still instructive, however, in the reasoning followed by the court in concluding that it must recognize the validity of Indian court decrees.

The Arizona Supreme Court rejected an argument asserting that the Court of Indian Offenses was a federal court under Art. 3, Sec. 1, of the federal Constitution. Its answer was that the Indian court was "simply a tribal court exercising jurisdiction retained by the Indians over their own domestic problems."[168] The court reasoned that since the federal government concedes the validity of

165. *Id.* at 603-04.
166. Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950).
167. *Id.* at 629-30.
168. *Id.* at 628.

such divorces, it could see no constitutional basis for the courts of Arizona to refuse to recognize the validity of such decrees. The court was unable to find a rubric for the recognition; it stated:

> . . . Such recognition obviously is not made under the "full Faith and Credit" clause of Art. 4, Sec. 1, of the Constitution of the United States, for clearly this clause applies only between states of the Union. Neither is it done under the commonly accepted meaning of the term "comity," which presupposes two independent sovereign nations, because the Navajo tribe is not now classed as such, but we recognize it because of the general rule, call it by whatever name you will, that a divorce valid by the law where it is granted is recognized as valid everywhere. The fact that a formal decree is now entered by a tribal court does not vary in any way the recognition theretofore accorded in this anomalous situation.[169]

The terse analysis of "full faith and credit" and "comity" may indicate a hesitancy to blaze a new trail. Implicit in the analysis seems to be that regardless of the status of the Navajo tribe a unique form of comity calls for recognition of its divorce judgments. Recognition of the divorce decrees of Indian courts is a significant step in re-establishing tribal sovereignty. The decision, while not overly lucid, should not be confined to its facts. Valid judgments of Indian courts in all areas deserve similar support, notwithstanding the absence of case support.

The Colorado Supreme Court reached a similar conclusion when it considered whether a state district court had jurisdiction to proceed to judgment in a divorce action. In *Whyte v. District Court of Montezuma County*,[170] the court agreed with the plaintiff's argument that:

> . . . Surely, if a non-Indian's rights under a contract made with an Indian on an Indian reservation are subject to the exclusive jurisdiction of the tribal court, it must follow that a contract of marriage entered into on an Indian reservation between two enrolled members of the tribe must be governed by tribal law.[171]

The court thought *Williams v. Lee*[172] controlled the case and gave no other basis for its decision.[173] Nevertheless, by holding that the state court was without jurisdiction the court added to the

169. *Id.*
170. Whyte v. District Court of Montezuma County, 346 P.2d 1012, *cert. denied*, 363 U.S. 829 (1960).
171. *Id.* at 1014.
172. Williams v. Lee, 358 U.S. 217 (1959).
173. Whyte v. District Court of Montezuma County, 346 P.2d 1012, 1014-15 (1959).

mounting weight of authority against interference with tribal affairs. The decision also affirmed that "[a]s a corollary to federal sovereignty it is clear that state laws have no force within the territory of an Indian tribe in matters affecting Indians."[174]

In summary, the diversity of Indian cultures is a cogent reason for tribal sovereignty in domestic relations. Judicial clarification is needed to refine the source of the general rule calling for enforcement of valid tribal marriages and divorces. Is it comity? At present it may be possible to forum shop. Tribal law sometimes recognizes the validity of marriage by custom,[175] whereas the state courts in Utah would likely invalidate them.[176] One writer argues that "since we recognize the validity of tribal laws, it would seem both logical and practical that we recognize the validity of Indian Court judgments and decrees based thereon, at least insofar as Indian personal and domestic relations are concerned."[177] Comity is arguably due Indian court judgments to protect cultural diversity and manifest respect for persons of different backgrounds, particularly when some of these courts pre-date the American Constitution.

D. *Fishing Rights, Tribes, Treaties, and States—A Continual Hassle*

Rights of hunting, fishing, and trapping are guaranteed to Indian tribes by treaties[178] and statutes.[179] Controversies involving these rights are generally clashes between states and tribes. It is clear, though, that when treaties with Indian tribes have secured to them certain rights such as hunting and fishing, the state laws cannot override a tribe's treaty rights.[180] Concomitantly, tribal rights to hunt and fish are subject to federal regulations.[181]

Methods and direction of regulation of Indian fishing rights vary even within a state. For instance, the Secretary of Interior determines the regulation of fishing on Alaskan reservations.[182] Regulation by the State of Alaska of Indian off-reservation fishing rights, even where such rights are preserved by federal treaty, has been approved by the Supreme Court when it did not impinge on treaty-protected reservation self-government.[183]

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174. *Id.* at 1014.
175. *See* 25 C.F.R. § 11.28 (1971).
176. *In re* Vetas' Estate, 110 Utah 187, 170 P.2d 183 (1946).
177. Kane, *Jurisdiction Over Indians and Indian Reservations*, 6 ARIZ. L. REV. 237, 255 (1965).
178. COHEN, HANDBOOK, *supra* note 2, at 285.
179. *Id.*
180. *Id.* at 286. *But see* Kake Village v. Egan, 369 U.S. 60 (1962); Tulee v. Washington, 315 U.S 681 (1942).
181. COHEN, HANDBOOK, *supra* note 2, at 286.
182. Metlakatla Indian Community v. Egan, 369 U.S. 45, 59 (1962).
183. Kake Village v. Egan, 369 U.S. 60 (1962).

A recent case, *Leech Lake Indians v. Herbst*,[184] may foretell increased sovereignty with regard to aboriginal hunting and fishing rights. Declaratory judgment actions were brought by the Leech Lake band of Chippewa Indians and the United States against the Minnesota Commissioner of Natural Resources and the State of Minnesota to determine whether Indians might fish, hunt, and harvest wild rice on the public lands and waters of the Leech Lake Reservation without complying with Minnesota fish and game laws. The district court declared:

> . . . [T]hat Plaintiff Indians have the right to hunt and fish and gather wild rice on public lands and public waters of the Leech Lake reservation free of Minnesota game and fish laws. Defendants are enjoined from enforcing such laws.[185]

The Leech Lake Band also sought the exclusive right to regulate hunting and fishing of Indian and non-Indian alike on the reservation the same as the Minnesota Red Lake Indians do.[186] The court refused to grant this right distinguishing the instant case as an "open" reservation of the Leech Lake Indians as contrasted to the "closed" reservation off the Red Lake Indians.[187] Granted that different tribes have enjoyed different relationships with the government and have been subject to different expressions of Congressional policy, this looms as too important a question for such treatment. Instead, courts must look beyond labels such as "open" or "closed" reservations and devote more attention to Indian wishes of protecting their land and culture.

This decision has spawned controversy among the whites and Indians of Cass Lake, Minnesota.[188] The local whites fear that the decision is just the first step in a process which could ultimately establish the Indians right to license resorts and to be in charge of licensing hunting and fishing for non-Indians.[189] They also fear that the Chippewas will commence large scale commercial fishing and that this would ruin sport fishing.[190]

The implications of *Leech Lake Indians* for tribal sovereignty are uncertain. The decision has been appealed. On the one hand, the Chippewas ask that their treaty rights be protected. And on the other, local whites urge that the Indians gave up these rights when they became citizens; they see the decision as forcing segregation

184. Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971).
185. *Id.* at 1006.
186. *Id.*
187. *Id.*
188. Brainerd Daily Dispatch, Jan. 21, 1972, at 1, col. 1.
189. *Id.*
190. *Id.*

and two sets of rules. Clearly, Indian tribes and bands such as the Chippewas are entitled to those rights not extinguished by subsequent treaties nor abrogated by the United States. Those Indians who have left the reservations, or whose reservations were abolished may be in a different posture. It is certainly arguable that they should retain their tribal rights, especially when they may have had no alternative other than leaving. Furthermore, by enforcing their treaty rights, Indians may be able to reclaim a measure of sovereignty.

E. *Taxation - The Power to Tax is the Power to Destroy*

In 1819 when then Chief Justice Marshall declared in *McCulloch v. Maryland*[191] that "the power to tax involves the power to destroy," he referred to state taxation of the national bank. Today the Mescalero Apache Tribe has made a similar argument against state taxation; this time it is state taxation of an Indian ski-resort business on non-reservation land.[192] Attempts by states to tax tribal lands and operations is not new. The landmark case is *The Kansas Indians*.[193] The Supreme Court held that tribal lands and lands owned by individual tribal members were not subject to state tax laws. Cohen states that the original reason for tribal immunity from state taxation was the fact that the tribes were regarded as distinct political communities exercising some of the attributes of a sovereign body.[194] Courts have relied upon sovereignty as well as what has been called the "instrumentality" theory in immunizing tribal lands from state taxation. Illustrative of the instrumentality theory is the decision of the United States Court of Appeals in *United States v. Thurston County*.[195] The court held that proceeds from the sales of allotted trust lands were exempt from state taxation because the proceeds like the lands from which they were derived constituted an instrumentality lawfully employed by the government in the exercise of its powers to protect, support, and instruct the Indians.

In recent years as states have been pinched for revenue, there have been increasing attempts to tax Indians. In 1970 the Minnesota Supreme Court denied the state the power to tax reservation Indians.[196] The decision is the opposite of the result reached by the New Mexico Appellate Court in *Ghahate v. Bureau of Revenue* only

191. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 431 (1819).
192. Mescalero Apache Tribe v. Jones, 83 N.M. 158, _____, 489 P.2d 666, 670 (1971).
193. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866).
194. F. COHEN, FEDERAL INDIAN LAW 850 (G.P.O. 1958).
195. United States v. Thurston County, 143 F. 287 (8th Cir. 1906).
196. Commission of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970).

one year previously. *Ghahate* is unique in that for some reason not readily apparent, the parties had stipulated that the tax would not interfere with the tribal right of self government.[197]

Three cases arising in 1971 with appeals currently pending before the United States Supreme Court may provide the answer as to whether tribal sovereignty can withstand the attack of states' attempted taxation. The first of these cases, *Tonasket v. State*,[198] arose in Washington. The plaintiff, a Colville Indian, had argued that the regulating and taxing of his sales of cigarettes on his reservation by the state interfered with tribal government. The court rejected this argument and based its decision on what it devined to be the Congressional intent in passing Public Law No. 280.[199] The upshot was that the court felt that the civil laws of the State of Washington should apply to the Indians on the reservations the same as to other citizens of the state. Such reasoning ignores the question of whether Public Law 280 authorizes the imposition of state taxation. Moreover, the Washington Supreme Court ignored the traditional immunities afforded to Indian tribes and individual tribal members.

Later that year the Arizona Appellate Court rejected a class action brought by a Navajo Indian who sought a refund of state income tax withheld in *McClanahan v. Arizona Tax Commission*.[200] The court seemed to base its decision upon the "personal nature of an income tax"[201] and an analogy to state-federal taxation. The court asked:

> If then, an income tax by the Federal government or a state upon the employee of the other does not interfere with the essential function of the government whose employee is being taxed, how can it be seriously argued that an income tax by the State of Arizona upon a Navajo Indian, regardless of his employer, causes an impairment of the right of the Navajo tribe to be self governing?[202]

The court answered its question in the negative with no apparent reasons given for its conclusion. Since Arizona never assumed civil jurisdiction under Public Law 280, it is difficult to comprehend how the state can be said to have the power to impose a state tax on Indians upon revenue earned upon the reservation.

197. Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (1969).
198. *Id.* at 100, 451 P.2d at 1004.
199. Tonasket v. State, 79 Wash. 2d 607, 488 P.2d 281 (1971).
200. *Id.* at 288.
201. Shubat v. State, 14 Ariz. App. 452, 484 P.2d 221 (1971).
202. *Id.* at 224.

The most recent of the state attempts to tax Indians is *Mescalero Apache Tribe v. Bureau of Revenue.*[203] The tribe claimed an interference with the tribe's right to reservation self-government caused by state taxation of operations conducted by the tribe on non-Indian land. The claim was based on the fact that revenue derived from the operation of the ski-resort is used for the welfare of the tribe and the resort provides job training for members of the tribe. The court dismissed these allegations as showing no interference with reservation self-government.[204] It was the contention of the Mescalero Apache tribe "that the taxation *might* interfere because the power to tax is the power to destroy and: 'The purpose for which the appellant entered into the ski-resort operation is being frustrated and possibly would be totally defeated if New Mexico is allowed to tax the operation.' "[205] The court found the argument to be speculative. To sustain the reasoning of the New Mexico court would be to discourage economic development by Indian tribes. Since the federal government has subsidized this particular economic development of the tribe, to allow state taxation would be to thwart the purposes of the federal program. This could be immunized from state taxation since the federal government has lent funds for this development and provided United States Forest Service lands for the project, hence any state taxation would be taxation of a federal instrumentality.

The *Tonasket, McClanahan,* and *Mescalero* cases afford the Supreme Court with the opportunity to redefine tribal sovereignty. To uphold the positions of the states of Washington, New Mexico, and Arizona would seriously undercut the sovereign immunity of Indian tribes, hence it would further erode tribal sovereignty. To reverse the states would buttress tribal sovereignty. Regardless of outcome, the decision is needed to clarify the powers of states to intrude in tribal operations as well as the rights of Indian tribes to exercise the sovereign immunity recognized since *The Kansas Indians* case of 1866.[206]

Conclusion

This appraisal of tribal sovereignty has emphasized recent cases which contain a faint promise of expansion of the scope of tribal

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203. *Id.* at 224.

204. Mescalero Apache Tribe v. Jones, 83 N.M. 158, 489 P.2d 666 (1971). *Compare* Sohol v. Clark, 479 P.2d 925 (Cal. 1971), *with* Palm Springs Spa v. County of Riverside, 95 Cal. Rptr. 879, 18 C.A. 3rd 372 (1971).

205. Mescalero Apache Tribe v. Jones, 83 N.M. 158, _____, 489 P.2d 666, 690 (1971).

206. *Id.*

207. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

sovereignty.[208] Glimmerings were noticed in the extent of tribal administration of justice,[209] the reluctance of courts to extend the Bill of Rights into controversies between a tribe and its members,[210] the respect shown by the Supreme Court for an Indian Court's subject matter jurisdiction over contracts transacted within the reservation,[211] the sort of comity accorded valid tribal divorce decrees,[212] and the recent restoration of treaty-protected rights to hunt, fish, trap, and gather wild rice.[213]

The aim of this article is not to prognosticate the rise nor the fall of tribal sovereignty, but instead to record present bounds. Of course, one can hope that the powers will increase. But until the effect of the 1968 Civil Rights Act[214] is registered, the limits of tribal sovereignty are incapable of more precise measurement. Nonetheless, contrary to the conclusions of some legal writers, tribal sovereignty is much more than a "legal fiction"[215] and its existence is real, not just a "theory."[216] Even if the doctrine of tribal sovereignty were a legal fiction, judicial enunciation of the doctrine has given Indians a theory today upon which to build more viable systems of self-government[217] and economic development.

208. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89. 92 (1956).
209. Note, *supra* note 84, at 1836.
210. *See, e.g.,* Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).
211. Williams v. Lee, 358 U.S. 217 (1959).
212. Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950).
213. Leech Lake Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971); Menominee Tribe v. United States, 391 U.S. 404 (1968).
214. 25 U.S.C. §§ 1301-1303 (1970).
215. Oliver, *Legal Status of American Indian Tribes,* 38 ORE. L. REV. 193, 231 (1959).
216. Kerr, *supra* note 37, at 325.
217. The right of self-government is a weapon against oppression for in a realm where the states are powerless to govern and where Congress, occupied with more pressing national affairs, cannot govern wisely and well, there remains a large no-man's-land in which government can emanate only from the officials of the Interior Department or from the Indians themselves. Self-government is thus the Indians' only alternative to rule by a government deparment.

F. COHEN, HANDBOOK, *supra* note 2, at 122.