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CONFLICT AND INJUSTICE: A DISCUSSION OF FRANCIS PAUL PRUCHA'S "AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS"

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History is a matter of selection, exclusion, and organization. The historian must not only decide what is pertinent to his theme, but must also weigh degrees of pertinency when he discards, if for no other reason than to present his materials in managable form, consideration and appraisal of factors which influenced the topic on which he is writing. The history of American law and the history of the American Indian have, more often than not, been treated as expendable by historians. The result has been that American historiography has isolated legal history and Indian history from the center of discussion, and has relegated them to the position of special topics best suited to treatment in isolation by trained experts.

While there are many explanations, the effects are more important than the reasons. One effect is that the isolation of legal history and of Indian history from the mainstream of general history has meant that they have also been isolated from each other. This is unfortunate, for it has obscured a two-sided truth which might have been uncovered earlier and which is even now to be gleaned only vaguely from unrelated studies of separate specialists. First, that the central force which shaped Indian history during the nineteenth century was legal not military; that is, that emphasis should be placed not on the sporadic outbursts of frontier warfare, but rather on the failure of federal law to offer to the Indians adequate judicial alternatives to armed conflict and "self-help". Second, that one of the most important chapters in American legal history is the neglected story of our jurisdictional relations with the Indians. While some of the clashes between the two races should continue to be approached in conventional terms, such as difficulties (like that with Sitting Bull in North Dakota during 1891)

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which may be traced, in part, to the personalities of individual Indians,[1] other events (such as Chief Joseph's epic dash in 1877 through the neighboring state of Montana) should be attributed, in large measure, to the fact that Indian chiefs had no tribunal in which to seek redress for wrongs done their peoples.[2]

President Washington believed the key to successful relations with the Indians lay in the judicial machinery the federal government was willing to place at their disposal. In his Fifth Annual Message to Congress he asserted that the way "most likely to conciliate their attachment" was "a vigorous execution of justice on the violators of peace."[3]

One of the great tragedies in the history of the American Indian, and one of the great foibles in the history of American law, is to be found in the failure of Congress to heed Washington's warning. The reasons why, along with an appraisal of the watered-down substitutes and the half-hearted compromises which took the place of bold action, are discussed in vivid detail by Francis Paul Prucha, S. J., in his recently published book, *American Indian Policy In The Formative Years.*[4]

The author delineates the failure of the law without resorting to strictures which mar so many works dealing with Indian affairs. Instead, he seeks a balanced explanation, at

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1. At least the Indian Agent at Standing Rock Agency, ignoring the causes for Sitting Bull's frustrations, predicted trouble on this basis:
Sitting Bull is a polygamist, libertine, habitual liar, active obstructionist, a great obstacle in the civilization of these people, and he is so totally devoid of any of the nobler traints of character, and so wedded to the old Indian ways and superstitutions that it is very doubtful if any change for the better will ever come over him at his presented age of fifty-six years.
Report of Comm'r. of Indian Affairs 329 (1891).

2. Following the capture of Chief Joseph, the Commissioner of Indian Affairs reported:
These Indians [the "nontreaty" Nez Perces] were encroached upon by white settlers on soil they believed to be their own, and when these encroachments became intolerable they were compelled, in their own estimation, to take up arms. Joseph now says that the greatest want of the Indians is a system of law by which controversies between Indians, and between Indians and white men, can be settled without appealing to physical force. He says that the want of law is the great source of disorder among Indians.
Report of the Comm'r. of Indian Affairs—(1878). It is worth noting that Sitting Bull may also have been able to make this complaint. He had been confined to Standing Rock Agency without a court in which to appeal since 1883.

3. I Richardson, Messages and Papers of the Presidents 141 (1896). Earlier, in his Third Annual Message he had sounded the same note:
[E]fficacious provision should be made for inflicting adequate penalties upon all those who, by violating their rights, shall infringe the treaties and endanger the Union.
Id at 105.

times bending over backwards to be fair to the Indian-hating frontiersmen. He places on the scales such factors as premature administrative demands on the embryonic Indian Department, the law-manipulating influence of John Jacob Astor's American Fur Company, and the political causes behind the exile to the west which resulted in the Cherokee "Trail of Tears". He makes clear, however, that important as were the conventional topics of Indian history—government bureaucracy, economic considerations, military attitudes, and political pressures—their most significant effect is measured in how they contributed to law or to the lack of law. By describing the evolution of the concept of the "Indian country" as a legal jurisdiction[5] he sets the stage for an understanding of some of the causes of later difficulties in the Indian Territory,[6] the Southwest desert, and the Black Hills of Dakota. Indeed, the refusal of early law makers to come to grips with the problem of precise definition, not only of what was meant by the "Indian country" but also of its boundaries, would plague authorities in the Dakota Territory as late as 1883.[7] This ranks with the Judiciary Act of 1801 as one of the anomalies which the nineteenth century legal mind seemed incapable of solving. Knowledge of the law's defects was there, but the will to act and the ability to utilize that knowledge in a concerted reform effort was lacking until 1891 when the decision by a South Dakota judge, that the killing of a United States officer by an Indian was not murder because his tribe was at war with the United States, shocked eastern lawyers into action.[8] The book makes this clear, although it is not the author's central theme. He stresses, instead, the inevitability of the westward movement. The Indians blocked the way, and the law had to find means to brush them aside. The trouble is that it found the means

4. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834 303 (1961).

5. Sec. 1, Intercourse Act of May 19, 1796.

6. The "Indian Territory" should not be confused with the "Indian country". The "Indian Territory" (which later became the State of Oklahoma) was a part of the "Indian country".

7. See the famous case of Ex Parte Chow Dog, 109 U.S. 556 (1883) in which the conviction of a member of the Brule Sioux band for murder of another Indian was set aside on the grounds that the crime had occurred within the Indian Country and beyond the jurisdiction of the territorial court.

8. See Address by William B. Hornblower and the committees and petitions which resulted from that address in, Transactions of the 14th Annual Meeting of the A.B.A. (1891).

in piecemeal fashion and the result was "conflict and injustice."[9]

Father Prucha's frame of reference is a series of statutes "to regulate trade and intercourse with the Indians." "The first of these laws[10] was passed in 1790, the final and enduring one[11] in 1834."[12] This last *Intercourse Act,* he says, "marked the end of the formative period of American Indian policy. For a full century after the passage of the final intercourse act there was no comparably comprehensive law touching on Indian matters."[13] He calls it "a restatement and codification of Indian policy as it had developed during the four and one-half decades of United States history, the fruit of earlier legislation, ripened now in the bright light of frontier experience and the warm winds of congressional debate."[14] His book gives us an understanding of that frontier experience and of how it forced "the warm winds" in Congress to abandon principles and to compromise solutions.[15] It makes clear that the Intercourse Act of 1834 was no clean break, no reassessment of problems and failures by an investigation of causes and effects. Rather, it was a carry-over of the tried and proven;[16] a consolidation of those experiments which had encountered the least resistance.[17] These experiments had demonstrated that there were six areas of policy which the federal government was prepared to pursue and which formed the heart of the Intercourse Act of 1834:

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9. "But if the goal was an **orderly** advance, it was nevertheless **advance** of the frontier, and in the process of reconciling the two elements, conflict and injustice were often the result." at 3.
10. 1 Stat. 137 (1790).
11. 4 Stat. 729 (1834).
12. At 2.
13. At 4.
14. At 251.
15. The acts [of 1834] bore traces of the complaints of the Indians as the white tide bore down upon them. They reflected the **facts accomplis** of the frontiersmen, kho moved unbidden into Indian lands. They were colored by the humanitarian cares of New Englanders for the "poor Indian" and by the awareness of legislators of the weakness of human nature, especially as it was exhibited by the ill-famed, unscrupulous, fly-by-night Indian Traders. at 4.
16. [The Intercourse Act of 1834] is a good example of the continuity of American Indian policy. It offered no sharp break with the past but embodied, occasionally in modified form, the principles that had developed through the previous decades. One who has seen the provisions of the earlier laws feels much at home here. Where changes did occur they were by and large the culmination of long-term agitation for correction of abuses. at 261.
17. The two laws passed in 1834 summed up the experience of the past; they offered the well-grounded legal basis for the Indian service which had been so long in coming and embodied the principles for regulating the contacts between the whites and the Indians that had proved necessary through the preceding decades. at 274.

(1) Protection of Indian rights to their land by setting definite boundaries for the Indian Country, restricting the whites from entering the area except under certain controls and removing illegal intruders.

(2) Control of the disposition of Indian lands by denying the right of private individuals or local governments to acquire land from the Indians by purchase or by any other means.

(3) Regulation of the Indian trade by determining the conditions under which individuals might engage in the trade, prohibiting certain classes of traders, and actually entering into the trade itself.

(4) Control of the liquor traffic by regulating the flow of intoxicating liquor into the Indian Country and then prohibiting it altogether.

(5) Provision for the punishment of crimes committed by members of one race against the other and compensation for damages suffered by one group at the hands of the other, in order to remove the occasions for private retaliation which led to frontier hostilities.

(6) Promotion of civilization and education among the Indians. . . .[18]

In separate chapters Father Prucha discussed the background of each of these problems and explains why the political realities of the day forced Congress to focus attention on these six particular goals. Although he speaks with caution, stressing clearly that many sections were bitter compromises to those knowledgable in Indian affairs, the author leaves the reader with the impression that the Act of 1834 would serve its purpose; that it would enjoy some success in achieving its ends. Although there is much research yet to be done and the final word is far from written, the judgment of history undoubtedly will be that it did not serve its purpose; that it was not a success.

It is yet too early to conjecture upon what evidence the judgment of history will be based. Of course, none of the drafters of the Intercourse Act expected that they had settled all difficulties. They were practical men who realized

18. At 2.

that changing conditions, unknown in Jacksonian days, would arise to create unforseen demands. Thus, the Act can hardly be criticized for such things as failing to anticipate the railroad, which in time would obtain permission to push across the Indian country.[19] Special statutory provision would eventually have to be made for a court in which residents of the Indian country could seek tort redress, for otherwise they would have had no remedy against this unwelcomed intruder.[20] Nor could the drafters have believed that they had eliminated every area of potential conflict. Time would surely turn up loopholes, as happened when one court discovered that there was no provision for punishing the unauthorized cutting of timber on Indian lands[21] and that Congress, by neglecting to give tribal executives power to demand extradition of their own criminals who were fugitives in the states or territories, had hampered the enforcement of native law within the Indian country.[22] Yet, on the whole, it was thought that the Act satisified both the needs of the day and the expectations of the future. That this notion persisted long after events proved it wrong, was probably the most important factor shaping the early legal history of states like North Dakota. It meant that overhaul of the law was delayed for decades and that friction and conflict continued long after they might otherwise have been corrected.

Of course there were some sections of the Intercourse Act which proved satisfactory and which helped ease, if not eliminate, areas of contention that had been serious problems dur-

19. Cherokee Nation v. Southern Kan. Ry., 33 Fed. 900 (D.C.W.D. Ark. 1888); 135 U.S. 641 (1890).

20. As one judge said, "As the plaintiff could not sue in the Indian country, he could not sue anywhere. . . ." Briscoe v. Southern Kan. Ry., 40 Fed. 273 (C.C.W.D. Ark. 1889).

21. United States v. Reese, 5 Dillon 405, 27 Fed. Cases 742, 8 Cent. L.J. 453 (W.D.D.C. Ark. 1849).

> The blame of many of the conflicts between the Government and its [Indian] wards is rightly laid upon the miners and homesteaders who encroach upon the possessions of the Indians. The wide-awake prospector knows perfectly that, if a lead runs into an Indian reservation, he may follow it beyond the line without danger of being successfully prosecuted for infringement. The restless and unscrupulous squatter in Northern Nebraska or Southern Dakota knows perfectly that the horses of the Russian who lives just to the east of him may not be stolen with impunity, but that the ponies of the Indian residing just to the west may be appropriated and the owner can make no appeal to the law—indeed, can only secure his property by stealing it back. And in this transaction should a squabble occur, the only result, in all probability, would be that a hue and cry would be raised in the land against the Indian, so that his removal would be more speedy and inevitable.
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> Harsha, **Law for the Indians,** 134 N. Am. Rev. 272 (1882).

22. Ex Parte Morgan, 20 Fed. 298 (D.C.W.D. Ark. 1883).

ing the years covered by this book. Father Prucha suggests that one of these, which he mentions in his fifth point above, was the provision providing for compensation to members of either race when they suffered a loss at the hands of the other.[23] This was one of its key aspects and sums up much of what was both good and bad about the Act. Undoubtedly this provision did aid authorities in keeping the peace, for it removed, in some cases, the need for individual self-help. Yet it was never anything more than a clumsy substitute for the judicial process and, by placing civilized nations on the same level with wild nomads, failed to take into account the varying degrees of progress which some tribes had made.[24] The weakness of this approach to remedial law was demonstrated when the Supreme Court ruled that the words "white man" in the statute did not mean "not an Indian", and denied compensation to a friendly Indian whose property was stolen by a Negro.[25]

A white man or a Negro within the Indian country was even worse off. The Intercourse Act had a provision under which American citizens could enter the Indian country if they obtained a special permit. Once there, however, the Act left them in a sort of legal no-man's land. As one contemporary summed it up:

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23. Faulty as the operation of the law was, it regularized this point of contact between the two races. By providing machinery for recovery of losses by peaceful means, it eliminated any justification for private retaliation and was largely successful in removing this fiction, except on the rawest frontiers before they were amenable to juridical procedures. In numerous cases the injured whites received compensation for their losses out of the annuities due the Indians, and in some cases—although far fewer—the Indians were paid for injuries sustained from the whites. It should be noted, however, that frequently large numbers of claims on both sides were summarily provided for in treaties made with specific tribes. at 210-11.

24. As early as 1857 the Superintendent of Indian Affairs reported that the Five Civilized Nations were unhappy regarding this aspect of the law and its administration:

> The laws that govern in their country are precisely the same as those that are in force in that occupied by the rudest and most uncivilized tribes. No greater consideration is shown for them than for the Blackfeet, and no evidence is exhibited in the law that they are regarded as any more competent to govern themselves than the Indians of Oregon.
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> The Cherokees, Choctaws, and Chickasaws have regular constitutions that will compare favorably with those of any of the southwestern States. . . . The Creeks have not advanced so far, but they have laws and a settled government; and all these tribes and the Seminoles have become a settled people, no longer living by hunting, but cultivating the soil.
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> It is very evident that any code of laws, all the provisions of which apply alike to these people and the barbarious heathen tribes of the mountains, the northwest, and the Pacific coast, must be imperfect, and, in other respects, injurious. . . .

Report of the Comm'r. of Indian Affairs 485-86 (1857).

25. United States v. Perryman, 100 U.S. 235 (1879).

> There is no law compelling a person to fulfill a contract.[26] A man may rent a farm and discharge his obligations to the very letter by making the required improvements; may raise crops; and when they are ready to be harvested, if he receives a notice to vacate the farm, he must do so at once, leaving behind him the fruits of his labor for others to enjoy. Aside from personal inclination to pay, there is no way of collecting bills and no way of obtaining redress for any sort of civil offense. If a man borrows another's horse and he chooses never to return it, he cannot be forced to do so.[27]

Thus, "people who had a dispute over property had no recourse except to 'shoot it out', or to refer it to the arbitration of the Indian Agent."[28]

If we count the Indian Agent, there were three jurisdictions working concurrently in the Indian country—*i.e.*, the federal court, located in a neighboring state or territory, which enforced the Intercourse Act and other special statutes, the Agent,[29] and the Indian courts. The last, the Indian courts, enforced native law between members of the same tribe.[30] The Intercourse Act failed to consider the implications of this, and a vacuum existed in regard to criminal and civil contacts between Indians of different nations which had to be partly filled by inter-tribal treaties.[31] Also the Act did not consider the organizational structure of Indian tribunals[32] or the weight to be given their judgments.[33] Among the ad-

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26. See Clark v. Crosland, 17 Ark. 43 (1856).
27. Jenness, **The Indian Territory**, 43 Atlantic Monthly 444 (1879).
28. DEBO, AND STILL WATERS RUN 19 (1940).
29. For a discussion of this "third system of jurisdiction" among the Choctaws see, DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 189 (1934).
30. They applied tribal customary law, for the common law was not presumed to run in the Indian country. Davidson v. Gibson, 56 Fed. 443 (C.C.A. 8th Cir. 1893). If there was no tribal law to cover a situation no action could be taken. In re Mayfield, 141 U.S. 107 (1890).
31. It was never completely filled as demonstrated as late as 1883 by the amazing story of a Creek who murdered a half-breed Arapaho, within the boundaries of the Absentee Shawnees and Pottawatomies, was arrested by the Seminole Light Horse and delivered to the Cheyenne-Arapaho Agency. No Indian court could be found to try him (the Absentee Shawnees and Pottawatomies had no law applicable to the situation), and both the United States Attorney-General and United States District Attorney at Fort Smith, Arkansas, denied that a federal court had jurisdiction. Report of the Comm'r. of Indian Affairs (1883).
32. It was held that they were not subject to the Fifth Amendment. Talton v. Mayes, 163 U.S. 376 (1896). Hence they were left pretty much on their own.
33. It was held that Cherokee decrees were entitled to the same full faith and credit given to courts of the terriories. Mechlin v. Ice, 56 Fed. 12 (1893). Federal courts had some difficulty with Indian laws governing ownership of property, but nevertheless sought to apply them. Eddy v.

vanced tribes, such as the Five Civilized Nations in the Indian Territory, the machinery of native law became very similar to that of the white man's, with such trappings as writs of ejectment, process servers, and letters of administration.[34] But, with the more primitive Indians, as those clustered in small bands on North Dakota reservations, the process of adjudication seems to have reached its highest sophistication with the semi-formal hearing. As late as 1891, at Devils Lake Agency near the heart of the state, the agent was still supervising the administration of a "law" which combined custom with paternal authority.

> The court meets every second Saturday in the council chamber. It is composed of the agent, who supervises it; the head farmer, who acts as clerk and makes a report of such complaints as have been made in the interim, and three Indians of age and character, as judges. There is no formal trial of the case. The policeman of the district in which the offense was committed calls up the case and makes a statement, after which the complainant is called on and anyone else who knows anything about it. The prisoner defends himself. No one is sworn. No lawyers perplex the judge . . . .[35]

Even if the law makers of 1834 could have forseen the problems which this "triple jurisdiction" would cause, it is doubtful they would have moved to correct the chaos. The military realities would not have permitted them to deprive the Indians of their native law or to impose a uniform federal jurisdiction throughout the Indian country.[36] It is not so easy to excuse them for failing to define more precisely the area of authority which they assigned to the federal courts; *i.e.*, the punishment of certain crimes committed by or against

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Lafayette, 163 U.S. 456 (1896); Journeycake v. Cherokee Nation, 28 Ct. of Claims 281 (1893).

34. As early as 1855 Justice McLean praised Cherokee procedure, saying letters of administration were granted by Cherokee probate judges "with as much regularity and responsibility as letters of administration are granted by the state courts of the Union." Mackey v. Coxe, 59 U.S. 100 (1855).

35. Report of the Comm'r. of Indian Affairs 317 (1891).

36. Thus it was case law, rather than statutory law, which made the system work. It was held, for example, that an American citizen could escape the penalty of Indian law by petitioning, in a federal court, for a writ of **habeas corpus. Ex parte** Kenyon, 5 Dillion 385 (D.C.W.D. Ark. 1878). This could not be used to avoid just punishment. **Ex parte** Kyle, 67 Fed. 306 (D.C.W.D. Ark. 1895).

white men within the Indian country.[37] Even since 1790, the government had been assenting this jurisdiction in one form or another,[38] but the procedure had become complicated.[39] Attempting to profit from past experience, the Intercourse Act of 1834 sought to simplify the law.

> For the purposes of the Act, the Indian country was annexed to the judicial districts of the adjoining territories or states. Offenders might be apprehended in other states or territories and transported to the territory or judicial district having jurisdiction. The provision of the Act of 1817 that declared that laws providing punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States should be in force also in the Indian Country was continued, along with the proviso that these laws did not extend to crimes committed by one Indian against another.[40]

It was not long before this "reform" proved to be inadequate. Not only did loopholes soon appear,[41] but courts began to question their own jurisdiction.[42] Worse, federal authorities

37. Some of the blame must be shared by the courts themselves. In 1834 Justice McLean, sitting on the United States Circuit Court for Tennessee, threw the law into confusion by holding that federal courts had no constitutional power to punish a white man for murdering another white man within Cherokee country when the crime was not connected with Indian commerce and did not interfere with Indian prosperity or safety. The United States v. Bailey, 1 McLean 234 (1834). This decision was never accepted as settling the law, and twelve years later Chief Justice Taney established that federal writs ran in the Indian country whenever Congress chose. United States v. Rogers, 45 U.S. 567 (1846). Earlier Intercourse Acts made no attempt to legislate against Indians who injured whites within the Indian country. The Act of March 3, 1817 corrected this oversight. 3 Stat. 383 (1817). See discussion by Prucha, at 193.

38. At first, only against white men who injured Indians. The Act of March 3, 1817 extended it to Indians who injured American citizens. 3 Stat. 383 (1817).

39. "The act of 1790 equated a crime against an Indian with the same deed committed against an inhabitant of one of the states or territories. The white offender was to be subject to the same punishment and the same procedure was to be followed as though the offense had been committed outside the Indian country against a white." At 189-90, referring to 1 Stat. 138 (1790).

40. At 268.

41. Six years after its passage one court arrested judgment in the case of a Cherokee who was indicted and convicted for robbery of a white man in the Indian country, ruling that it lacked jurisdiction since Congress had enacted no law punishing robbery on land. United States v. Terrel, 1 Hemp 411, Fed. Case No. 16 452 (C.C.D. Ark. 1840). Thereafter it was necessary to indict Indian country robbers under larceny statutes.

42. Section 24 gave the territorial court of Arkansas jurisdiction over that part of the Indian country into which the Five Civilized Nations and several plains tribes had been moved. When Arkansas became a state (5 Stat. 50) that court was vested with a jurisdiction similar to any other federal court which combined district and circuit court powers (5 Stat. 176) and it held that without a special enabling statute it was no longer enpowered to try cases under the Intercourse Act. United States v. Al-

were not sure just what power they possessed[43] and clashes with their Indian counterparts actually occurred.[44] Even the provision that the Act did not extend "to crimes committed by one Indian against the person or property of another Indian," clear and uncontroversial as it seemed in 1834, soon it proved to be gravid with difficulties. The law makers apparently saw no need to define what they meant by an "Indian"; in those days every one knew what an "Indian" was. Yet as time went on, inter-racial crime not only became more frequent, but so did mixed marriages. Blood lines blurred and courts were often faced with the preliminary task of determining, for purpose of the Intercourse Act, the nationality of both the criminal and his victim. Eventually a body of case law evolved to fill the void as best it could. Whether the defendant, the victim, or both were "Indians" became a matter to be settled in federal courts[45] as a question of fact.[46] Sometimes it was determined by federal law,[47] sometimes by Roman law,[48] and sometimes by common law rules.[49] While this may have worked satisfactorily in indi-

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berty, 1 Temp. 444, Fed. Case No. 14, 426 (C.C.D. Ark. 1844). Congress corrected the error (5 Stat. 680), but the statute was held not to be retrospective. United States v. Starr, 1 Hemp. 469, Fed. Case No. 16, 379 (C. C.D. Ark. 1846). Forty years later this jurisdiction was divided between federal courts in Arkansas, Kansas, and Texas. 22 Stat. 400 (1883). The vagueness of this provision caused an opposite result, for the courts began a struggle between themselves for the custody of prisoners. See United States v. Rogers, 23 Fed. 658 (W.D. Ark. 1885).

43. See for example the correspondence between General Arbuckle, the military commandant of the Arkansas district, and John Ross, Principal Chief of the Cherokee Nation, concerning Arbuckle's authority to invade the Indian country and to arrest the murderers of Ridge and Boudinot. H.R. Exec. Doc. No. 129, 26th Cong., 1st Sess. 114-117. While this controversy is somewhat clouded by the treaty between the Cherokees and the United States, which provided that federal troops could act to prevent civil war within the Nation, it nevertheless is a clear indication of the jurisdictional haze that existed.

44. A famous incident of a United States marshall seizing, from a Cherokee sheriff, an Indian already duly arrested under a writ issued by a Cherokee court, occurred at Going Snake district in 1856. See The Report of Comm'r. of Indian Affairs (1856). In his Annual Message of 1857, the Principal Chief of the Cherokees complained of the "encroachments upon our rights by United States courts", which he called a "palpable violation of treaty stipulations." He asserted that "the conduct of [U.S.] marshals in arresting our citizens upon various pretexts, and even in taking prisoners out of the hands of our officers, is productive of vexation and injustice." Report of Comm'r. of Indian Affairs 509 (1857). Federal officers sometimes arrested Indian police who killed United States citizens peddling whiskey or resisting arrest. In such cases, the Indian nation had to appropriate funds to enable its sheriffs or lighthorsemen to defend themselves against murder charges in Federal courts. Debo, **supra** n. 29 at 187.

45. **In re** Wolf and Another, 27 Fed. 606 (W.D. Ark. 1886).

46. Lucas v. United States, 163 U.S. 612 (1895).

47. Alberty v. United States, 162 U.S. 499 (1895).

48. United States v. Sanders, 1 Hemp.. 483, Fed. Case No. 16, 220 (C. C.W.D. Ark. 1847).

49. **Ex parte** Reynolds, 5 Dillion 394, Fed. Case No. 11, 719 (C.C.W.D. Ark. 1879).

vidual cases, it added a note of uncertainty to criminal law and to the enforcement of the Intercourse Act.

The two sections dealing with liquor and intruders on Indian lands are examples which demonstrate the failings of the Intercourse Acts, both before and after 1834. As already noted,[50] Father Prucha has cited them as two of the Act's six goals. His discussions of the pre-1834 background to these sections constitute two of the most valuable chapters of his book, for he frames them within a revealing picture of the failure of frontier civil courts to enforce the law. Hatred for the Indians, animosity towards the military, distrust of the central government, and a greed for land, together with the economic interests many frontiersmen had in the illicit fur and liquor traffic made it virtually impossible to find a prosecutor who would indict or a jury who would convict before 1834. Indeed, army officers and Indian agents, overzealous in the performance of their duties, were as likely to be hauled into court as were the violators they were supposed to surpress.[51]

Perhaps the most famous criminal jurisdiction under the various Intercourse Acts was that relating to the importation of liquor into the Indian country. Prior to 1834 it had been extremely difficult to punish violators. One frustrated agent at Saint Louis had written to Lewis Cass in 1831 a somewhat overdrawn picture, describing the almost impossible proof which local courts demanded for a conviction:

> [In order to have] a successful prosecution, there are many things to be proven before a court having cognizance of the offense, which would not occur at the time to the witness testifying. It would prove nothing that he should have witnessed the process of reducing the *alcohol* in the trader's house, and the putting it into casks; that he should have seen the liquor drawn from these casks, put into kegs, and

50. Text to n. 18 **supra.**

51. "Every subaltern in the command knows", reported one civilian traveler in the West, "that if he interferes between an Indian and a white man, he will be sued instantly in the courts of the State. When I was at Prairie du Chien, there were several of the officers who had been cited to appear in court for having, pursuant to order, removed 'squatters' from the Indian lands over the Mississippi. The Indians then despise the agent, because he is clothed with no military authority; and the pioneer despises the military, because their hands are tied by the local civil power, whatever it be." at 182.

> delivered to Indians, who conveyed the same to their camps, which, after a few hours, exhibited a scene of the most frightful drunkenness;— he must be able to testify that he has *tasted* this liquor, and found it to be spirituous, in order to produce a conviction. And when it is considered then an individual seeking to qualify himself by these means to produce the conviction of the traders, would at once arouse suspicions which might result in the most serious consequences to himself, the difficulty attending it may be easily imagined.[52]

There were many attempts to put teeth into the law. But as Father Prucha makes clear, this was usually a problem of interpretation rather than definition. It often depended upon the temper and prejudices of the judges, marshals, and agents. Some times it seems to have been so vigorously enforced that protests were sent to Washington asking it be toned down.[53] At other times enforcement was hampered by judicial disinterest or hostility. In 1891, Judge Bryant of the United States District Court at Paris, Texas, who had jurisdiction over that part of the Indian Territory comprising the Chickasaw and Choctaw nations, held that the law, as it then stood, did not prohibit the introduction of malt liquors into the Indian country. This was contrary to every previous pronouncement and the Indian country within Bryant's jurisdiction was soon flooded with beer. There was an outburst of lawlessness, which might have gotten entirely out of hand

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52. Letter from William Clark to Lewis Cass, Nov. 20, 1831, quoted at 116-17.

53. For example, in 1857 one agent protested against the manner in which the Act (as amended by the Second Section of the Act of March 3, 1847) was being interpreted:

> I believe an Indian has been convicted under this law for asking another Indian to take a glass of liquor with him in his own house, and that upon the information of the person so invited. [Note, that in these actions Indians were competent to testify.]
>
> I believe it has been ruled under the law that no spirits can be carried into the Indian country for medicinal purposes; that to carry the smallest quantity across the frontier exposes the party to the penalty of the law; . . . These rulings . . . become the law; and it must be admitted they are consistent with the letter. For, by that letter, if any person gives the least quantity of liquor or wine to an Indian, even if it were necessary to save his life, he is liable; and the law does not use the word "knowlingly" in connection with the words "introduce, or attempt to introduce."
>
> By that letter, if even a superintendent or agent invites a chief to drink a glass of wine with him at his table at dinner, he is liable to be fined $500, half going to the informer, and to be imprisoned in the penitentiary in Arkansas, among felons, for two years.

Letter from Ellias Rector to J. W. Denver, Sept. 24, 1857, quoted in Report of Comm'r. of Indian Affairs 481 (1857).

had not the Union Agent, who represented the government among the Five Civilized Nations, and Judge Isaac Parker, the famous "hanging judge" of Fort Smith, Arkansas, stepped into the picture. The Agent decided that even if introduction of malt liquor was no offense, sale was, and encouraged Choctaw officials to close many of the beer joints.[54] This, of course, meant violence would errupt between the Indian police, with their ill-defined powers over white men, and those who were determined to capitalize on Bryant's decision. Judge Parker, who retained jurisdiction over that part of the Indian Territory occupied by the remaining Civilized Nations, lent the Agent powerful support by handing down a verdict contrary to Bryant's and ordering his marshals to crack down on those who had already opened saloons on Cherokee land.[55] After some delay Congress amended the law, but as with the Intercourse Act of 1834 itself, and with other legislation in this field, those close to the scene of strife and bloodshed believed that the law makers in Washington had not understood the problem and had botched the job. Indeed, the Union Agent in his annual report for 1892, boldly stated that it would have been better had Congress not acted at all.[56]

An altogether different failing of the Intercourse Act of 1834 was demonstrated by its second major area of criminal jurisdiction—*i.e.*, the sections dealing with intruders in the Indian country. Where determined enforcement of the provisions on liquor was hampered by vague legislation, the clear, precise directives regarding intruders were made virtually a nullity by weak enforcement procedures. There was probably

54. Report of Leo E. Bennett, Union Agent, Sept. 7, 1891, quoted in Report of Comm'r. of Indian Affairs 248-49 (1891).

55. "It was not until the United States court at Fort Smith, by direction of his honor, Judge Isaac C. Parker, entered the field for the punishment of offenders that the beer venders were brought to realize that perhaps, after all, they were not to be allowed to violate the laws with impunity." Report of Leo E. Bennett, Union Agent, Sept. 26, 1892, quoted in Report of Comm'r. of Indian Affairs 259 (1891).

56. During the months of uncertainty, when crime and debauchery were rampant, Congress was dillydallying with the sections of the Revised Statutes and trying to patch them up to meet the situation. When Judge Parker rendered his decision and the situation within the jurisdiction of his court had changed, few persons here desired further legislation by Congress, fearing that the matter might then be made worst than it would be if Judge Parker were allowed to enforce the law as he interpreted it to be. The amendment to the law as made by Congress had had the effect to cripple the Indian police of this agency in the good work they were able to do under the old law, and thereby it has been a detriment instead of a benefit to this service. **Id.** at 259-60.

no more serious problem confronting the drafters of the Intercourse Act than how to deal with intruders. If white men could not be kept out of the Indian country and off Indian land, there was little hope of ending friction and war between the two races, as Father Prucha points out, ever since the first intercourse act of July 22, 1790, the prohibition against the private purchase of Indian property by whites had been "absolute."[57] In 1796 Congress authorized the President to use any military force necessary to remove illegal settlers on the lands of Indians.[58] But as General Andrew Jackson soon pointed out, removal alone had little effect:

> "Experience has proven", he wrote the War Department, "that it is useless to remove. . . [squatters] or stock therefrom, without prosecution for the infraction of the law: The experiment made last fall shewed the inutility of the bare destruction of improvements, and removal of stock; the intruders returned within a few days after the soldiers had retired, drove back their stock and recommenced their plan of robbery." Jackson had a special problem with the stock which he drove off the Indian lands. Was it liable to seizure or not? He thought that it was and that the only way to stop "the villianies practiced within the Indian boundaries" was to seize the cattle, turn them over to the civil authority and make them answerable for the damage.[59]

The War Department gave Jackson scant encouragement. It found nothing in the law authorizing tougher procedure and doubted whether it would be sanctioned by the courts.[60]

The failure of the sections dealing with intruders in the pre-1834 intercourse acts was administrative and political

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57. At 144.
58. At 62. Act of May 19, 1796. 1 Stat. 470, 473-74 (1796).
59. At 164.
60. The Acting Secretary of War took a practical appraisal of the situation, giving as much consideration to judicial realities as to the letter of the law:

> This act gives no jurisdiction to the Federal courts in relation to the stock or other personal property belonging to the intruders on Indian lands, and it is hardly to be expected, that the Federal courts for the district of Tennessee, would assume a jurisdiction by construction, and on Common Law principles, when they have declined to take cognizance of cases over which jurisdiction had been specifically given. . . .
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> Letter from George Graham to Andrew Jackson, August 14, 1817, quoted in CARTER, TERRITORIAL PAPERS OF THE UNITED STATES 136 (1952).

as much as it was legislative and legal. White intruders knew, that aside from the Army, the Government lacked the will to take forceful action.[61] It was, Father Prucha says, "sincerely interested in preventing settlement on Indian lands only up to a point, and it readily acquiesced in illegal settlements when they had gone so far as to be irremediable. The basic policy of the United States intended that white settlement should advance and the Indian withdraw. Its interest was primarily that this process should be as free of disorder and injustice as possible."[62] Here promulgated legal policy and the letter of the law had to bow to the demands and the realities of economic and political life.[63] This, perhaps more than anything else, explains the philosophy behind the Intercourse Act of 1834. The law was clear. White men must not enter the Indian country. But as one Agent wrote to the Superintendent of Indian Affairs in 1856, there was no procedure for enforcing it:

> I call upon you for information in reference to white men who are in the Cherokee nation . . . . I have found it necessary to have some of these men removed from the country . . . ; but these fellows put law and order at defiance. They boastingly say that they will return and stay in the nation as long as they please. I have examined the intercourse law, and can learn no way by which they can be kept out of the country. The law says they must be put out, but makes no penalty for their return. I would be glad, if there is no penalty in such a case, if you would call the attention of the [war] department to it, in order that the department will make some regulation that will apply to them. These men sell whis-

61. "The settlers knew that they would be treated more or less considerably. They knew that the government did not have the troops for a continuing and effective patrol of the Indian lands. They had little fear that civil action would succeed against them, for they could rely on sympathetic courts. . . ." at 163.

62. At 186.

63. The energy of the government in removing intruders was, in fact, proportionate, either directly or inversely, to a number of other circumstances: to the length of time during which the Indian claims were expected to be maintained; to the seriousness of Indian objections to the intruders, since often removal was the only way to prevent an Indian war; to the necessity of convincing the Indians of the government's good faith, in order to keep them in a proper frame of mind for some impending treaty, at which more concessions of land were to be sought; to the pressures of white settlement. . . ; to the boldness and aggressiveness of the agents and the military commanders in enforcing the laws; to the military forces available. . . ; to the strength of frontier opposition to military action against the intruders; and to the color of title which the settlers on Indian lands could display and the character of the settlers themselves. at 187.

> key through their wives, get drunk, gamble, ride about the country with revolvers, double-barrel guns, knives, etc., in the company with the young Cherokee, etc., committing many other offenses against morality and good order. I am determined to put a stop to it if possible, and would be glad to have a law that will apply to these cases.[64]

Despite such pleas nothing was done. Many government officials tried to gill in the missing pieces. Presidents issued proclamations;[65] Indian Commissioners begged for power to punish violators;[66] and judges with pro-Indian sympathies, such as Parker, handed down strongly-worded opinions defending the right of the Indian to possess his land unmolested.[67] The most they obtained from Congress were statutes permitting Agents "to remove from the Indian country all persons found therein contrary to law" and authorizing the government to collect a penalty of one thousand dollars against anyone who had been removed and who had then returned or was later found within the Indian country.[68] These statutes were next to useless, as was shown by the career of most famous, persistent, and best financed intruder of all—David L. Payne, leader of the Oklahoma Boomers.[69] Payne tried to start a community on unoccupied land within the Indian Territory. The land had been purchased by the government from the Seminoles and, he claimed, was therefore open to homestead and preemption settlement. The Army removed him once and then, when he went back, arrested him. He was brought before Judge Parker, found guilty of violating the statutes, and ordered to pay the prescribed fine.[70] It was soon apparent that this was not going to keep him out of the Indian country. The government's action was a civil

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64. Letter from Geo. Butler, Cherokee Agent, to the Sup't. of Indian Affairs, quoted in Report of the Comm'r. of Indian Affairs (1856).

65. See, for example, the Proclamation of President Hayes directed against the Oklahoma Boomers, in Sen. Exec. Doc. No. 20, 46th Cong., 1st Sess. 1.

66. See Letter from H. Price, Comm'r. of Indian Affairs, to The Secretary of the Interior, March 13, 1882, H.R. Doc. No. 145, 47th Cong., 1st Sess.

67. A notable Parker decision was **In re** Wolf and Another, 27 Fed. 606 (D.C.W.D. Ark. 1886).

68. These statutes are quoted in United States v. Payne, 22 Fed. 426, 427 (D.C. Kan. 1884). The Intercourse Act, itself, contained a penalty for anyone settling on land specifically assigned to Indians by treaty.

69. Payne's career and its legal implications are treated in RISTER, LAND HUNGER, DAVID L. PAYNE AND THE OKLAHOMA BOOMERS (1942).

70. United States v. Payne, 8 Fed. 883 (D.C.W.D. Ark., 1881).

suit in the nature of debt to recover from Payne the one thousand dollars prescribed by law. But he had no property against which an assessment could be levied and no other penalty was provided. The Commissioner asked for a statute making an intruder liable for imprisonment. Instead, Congress responded by taking the area which Payne was invading from the jurisdiction of the Judge Parker's court and transferred it to the district of Kansas. Payne then returned, was rearrested, and brought to Kansas, where the government charged him with conspiracy "to enter upon and make settlement" within the Indian Territory. Judge C. G. Foster, who did not share Parker's tough-minded approach regarding violation of Indian rights, squashed the indictment and ruled that the only valid proceeding under the Intercourse Act was to collect the penalty of one thousand dollars.[71] Since this was ineffectual, the government's hands were tied. Lacking adequate procedures with which to control intrusion, Washington was trapped into following a familiar pattern. As the intruders established settled communities, attracting railroads and commercial interests, their political influence increased and when they began to agitate for territorial status, the government could do little else than take their side and force the Indians to surrender treaty privileges.

This procedural weakness of the Intercourse Act sets the stage for one of the most exciting chapters in the legal history of the Dakota Territory. It explains why gold prospectors were able to rush into the Black Hills despite the Army's determination to keep them out. The Army might remove them, but they always returned. The Sioux, seeing treaties violated, took to the warpath. The Army was obliged to protect the intruders and, in the process, crushed the Indians. Thus history, which must base its judgments upon cause and effect, should reevaluate the reasons usually attributed for the extinguishment of vast areas of the Indian country. The failure of the Intercourse Act to furnish adequate sanctions was a cause which should be considered along with land hunger and gold fever, for it meant that the government lacked means to check the appetites of white men.

The story would not be complete, however, without noting

71. United States v. Payne, 22 Fed. 426 (D.C. Kan. 1884).

that the Indians contributed to the problem. They were subject to similar economic pressures and were sometimes no more willing than congress to enact forceful legal sanctions. In the Cherokee country, for example, the political situation often made it difficult to take positive steps to remove intruders, even though most leaders agreed that it had to be done if their nation was to survive. There was much opposition to a statute, enacted by the Council in 1872, which charged non-citizen laborers two dollars a month for a permit, with stiff penalties up to one thousand dollars. Laws such as this were necessary if the Indians, who realized they could not depend on the machinery of the federal government, were to keep white men out of their territory and retain their independence. But economic pressures undermined the act. Many land owners who had come to depend on white or negro farm hands, paid the two dollars.[72]

Six years later the National Council increased the cost of a permit to twenty-five dollars a month. This was expected to drive out the whites, because native farmers could not afford to hire them at that price. But economic necessity was too great. The farmers simply disobeyed the law. Then the Cherokees became guilty of the very practices of which they had complained so bitterly back in Georgia during the years before 1834. They used their legal institutions to serve local and immediate ends. "No jury could be found that would convict the violators and the law was repealed soon after its passage. Finally a monthly fee of 50 cents became the general rule—and the law, with reasonable penalties for violations."[73] Thus the Indians had to blame their own ineffectual legal machinery, as much as the Intercourse Act, when the white intruders, a few years later, became powerful enough to agitate successfully for an end to the Indian Territory.[74]

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72. One Cherokee wrote three months after the act was passed: "Everything is at a standstill in this country. The late white man law is a death blow to the farmers and a great many farms will go to destruction for want of labor. . . ." WARDELL, A POLITICAL HISTORY OF THE CHEROKEE NATION 1838-1907 273 (1938).

73. **Id.** at 275.

74. The Cherokees were not the only Indians who undermined their national policy in this manner. In 1867, for example, the Chickasaws passed an act forbidding lease of land to a non-citizen. This was avoided by secret agreements and, "although many Chickasaw citizens were indicted for its violation, the practice was so common that it was virtually impossible to find a jury that would convict." DEBO, AND STILL THE WATERS RUN 16 (1940).

The end may have been slow in coming, but it was inevitable. Inevitable not only because the force of history dictated that the stronger race would wipe out the weaker; not only because of the need of the white man for land and the inability of the Indian to marshal the resources of nature to their fullest extent; but also because the legislative branch of the government failed to give the executive and the judiciary the means to enforce the law, and because, even when means were provided, the executive and the judiciary often lacked the legal will to implement them. When this theme is explored by scholars and is placed within its proper framework, then and only then, will the legal histories of states such as North Dakota approach their moment of truth.

In the legal history of every state there is a dominant aspect which must be appreciated before that legal history can be understood. To understand the legal history of Georgia one must appreciate the way in which the cavalier traditions of Virginia met the disorder of the frontier to shape a legal mind more in tune with violence than with the rule of law. To understand the legal history of Massachusetts one must appreciate how the shock of the Industrial Revolution was absorbed by a legal sub-conscious clinging to a bedrock of Puritan morality. To understand the legal history of New Hampshire one must appreciate how the anti-law philosophy of the post-Revolutionary lay judges found its legal flowering in the jurisprudence of Charles Doe three-quarters of a century later. So too, to understand the legal history of the section of the United States of which North Dakota is a part, one must appreciate the influence of the frontier, the Homestead Law, the railroads, and the Intercourse Act. And to appreciate the Intercourse Act it is necessary to remember that its importance lies not only in the principles it established, the rules it laid down, the machinery it set up and the rights it defined, but also in the principles it failed to establish, the rules failed to lay down, the machinery it failed to set up and the rights it failed to define. Father Prucha's book, which discusses only the events leading up to the Act, explains some of the reasons for these failures. It will remain for future scholars to discuss their effects during the post-1834 era. It may be doubted, however, whether they will

reach conclusions more definite than the one he reaches concerning the years before 1834.

> Weaknesses and inadequacies are easy to catalog. Harder to judge is the over-all effect of the intercourse acts in these early years. That they prevented much open conflict between the races and allowed the inevitable westward advance of white settlement to proceed with a certain orderliness is perhaps judgment enough.[75]

75. At 277.