

## Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds

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[N]o man is good enough to govern another man, without that other's consent . . . . [T]his is the leading principle—the sheet anchor of American republicanism.

—Abraham Lincoln, Speech at Peoria, Illinois, October 16, 1854<sup>1</sup>

I [have] grave doubts as to the wisdom of certain provisions contained in [Public Law 280] . . . .

—Dwight D. Eisenhower, Signing Statement for Public Law 280,  
August 15, 1953<sup>2</sup>

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#### INTRODUCTION

When enacted in 1953, President Eisenhower expressed “grave doubts” about provisions of Public Law 280 (“P.L. 280”),<sup>3</sup> a law empowering states to assert jurisdiction over Indian Country without tribal consent.<sup>4</sup> Consistent with President

3. *Id.*

4. Public Law 280 has both a criminal and civil component. See Public Law 280, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2006 & Supp. IV 2010), and 28 U.S.C. § 1360 & note (2006)). This article will address criminal, rather than civil, jurisdiction under

Eisenhower's doubts, the State of Washington enacted legislation in 1957 that enabled its courts to assert P.L. 280 jurisdiction over Indian Country only if a tribe requested the State to exercise such power.<sup>5</sup> Yet, Washington soon amended its law in 1963 and baldly asserted limited P.L. 280 jurisdiction over all of Indian Country, regardless of tribal consent.<sup>6</sup> In 1968, recognizing the inappropriateness of nonconsensual assertions of state authority over tribes, the federal government amended P.L. 280 to require tribal consent and to create a path for retrocession of state authority.<sup>7</sup> Despite the changes in federal law, however, Washington has never acted to rectify its assertion of nonconsensual authority over tribal nations.

In the 2011 Washington legislative session, a joint executive-legislative workgroup on tribal retrocession studied the desirability of enacting a law that would require Washington to retrocede P.L. 280 jurisdiction back to the federal government when specifically requested by an affected tribe.<sup>8</sup> This article advocates for such changes and the return of Washington law to its original consent-based grounds. In doing so, the article explains how Indian Country criminal jurisdiction would work with such changes, how it currently operates under P.L. 280 generally and within Washington specifically, and why a mandatory retrocession provision ought to be adopted for both moral and pragmatic reasons.

In Part I, this article outlines the modern status of Indian Country criminal jurisdiction in non-P.L. 280 states. Part II addresses how jurisdiction in P.L. 280 states differs from that in non-P.L. 280 states, and examines the history and general failings of P.L. 280. Part III discusses Washington's uniquely confusing implementation of P.L. 280. Part IV argues that the State of Washington should return to its original consent-based model for asserting jurisdiction over Indian Country.

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P.L. 280.

5. Act of Mar. 23, 1957, ch. 240, §§ 1-2, 1957 Wash. Sess. Laws 941, 941-42 (codified as amended at WASH. REV. CODE § 37.12.010 (2010)); *State v. Paul*, 337 P.2d 33, 36 (Wash. 1959).

6. Act of Mar. 13, 1963, ch. 36, § 1, 1963 Wash. Sess. Laws 346, 346-47 (codified at WASH. REV. CODE § 37.12.010).

7. See Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tits. II-VII, § 406, 82 Stat. 77, 80 (codified at 25 U.S.C. § 1326 (2006)). Retrocession is defined as "[t]he act of ceding something back (such as a territory or jurisdiction)." BLACK'S LAW DICTIONARY 1432 (9th ed. 2009).

8. See, e.g., Memorandum from Robert T. Anderson, Professor, Univ. of Wash. Sch. of Law, Dir., Native Am. Law Ctr., to the Wash. Joint Exec.-Legislative Workgrp. on Tribal Retrocession, Regarding Criminal & Civil Jurisdiction & P.L. 280 (Mar. 3, 2011), available at <http://www.leg.wa.gov/JointCommittees/JELWGTR/Documents/2011-07-18/PL280%20Washington3%2003%2011.pdf>. This memorandum was presented at the July 18, 2011 meeting of the Joint Executive-Legislative Workgroup on Tribal Retrocession. See *Joint Executive-Legislative Workgroup on Tribal Retrocession*, WASH. STATE LEGISLATURE, <http://www.leg.wa.gov/JointCommittees/JELWGTR/Pages/Meetings.aspx> (last visited Feb. 28, 2012).

Prior to publication of this article, on March 19, 2012, the Washington State Governor signed House Bill 2233 into law.<sup>9</sup> The new law sets out a process by which the State of Washington may retrocede P.L. 280 jurisdiction back to the United States, as advocated by this article.<sup>10</sup> However, retrocession under the law is not guaranteed.<sup>11</sup> Part V thus briefly addresses the new law and reiterates that Washington should enact legislation *requiring* the State to retrocede jurisdiction over Indian Country at the request of an affected Indian tribe.

#### I. MODERN INDIAN COUNTRY CRIMINAL JURISDICTION IN NON-P.L. 280 STATES

Criminal jurisdiction in Indian Country is complex. Professor Robert Clinton has aptly termed Indian Country criminal jurisdiction a “jurisdictional maze.”<sup>12</sup> Even without state assertion of authority under P.L. 280, the maze creates law enforcement problems from the dispatch and initial investigation of officers, to the courtroom prosecution of defendants. Depending on the facts of a given incident, it may be that tribal, federal, or state officials are needed to fully investigate and respond to a crime.<sup>13</sup> As such, initial responders may not have the authority to fully investigate a crime, book a suspect, or cite and release offenders.<sup>14</sup> It might be that the crime can only be filed in tribal, state, or federal court.<sup>15</sup> On the other hand, there may be concurrent jurisdiction.<sup>16</sup> There may even be uncertainty about whether the crime occurred in “Indian Country”<sup>17</sup> or whether the defendant is an “Indian.” In some

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9. Act of Mar. 19, 2012, ch. 48, 2012 Wash. Sess. Laws, <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Law%202012/2233-S.SL.pdf> (to be codified at WASH. REV. CODE ch. 37.12).

10. *Id.* § 1(2).

11. *Id.* § 1(4).

12. Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976).

13. This arises primarily from the interplay of inherent tribal jurisdiction, the General Crimes Act, the Assimilative Crimes Act, the Major Crimes Act, and the U.S. Supreme Court decisions in *United States v. McBratney* and *Oliphant v. Suquamish Indian Tribe*. See discussion *infra* Part I.A-G.

14. See *id.* Even in non-P.L. 280 states, jurisdiction is held exclusively by the state for crimes involving non-Indian suspects and non-Indian victims. See *United States v. McBratney*, 104 U.S. 621, 624 (1882). In non-P.L. 280 states, federal jurisdiction is limited to cases falling within the Major Crimes Act, General Crimes Act (which, in turn, incorporates the Assimilative Crimes Act), and crimes of general applicability. See discussion *infra* Part I.B-D. Tribal jurisdiction is presently limited to crimes involving Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195, 212 (1978).

15. See discussion *infra* Part I.G (setting forth a chart on non-P.L. 280 jurisdiction).

16. See discussion *infra* Part I.G.

17. Whether a certain piece of land is “Indian Country” was an issue before the Washington

circumstances, the uncertainty may remain until a federal or state appellate court decides the issue many years after the fact.<sup>18</sup> Public Law 280 adds to this jurisdictional conundrum. Unfortunately, Washington's history of piecemeal implementation adds even greater complexity and confusion to that found in general P.L. 280 jurisdictions.

A full exposition of Indian Country criminal jurisdiction and its vexing issues is not possible within the limited scope of this article. Nevertheless, a general overview is necessary to understand how criminal jurisdiction in Washington currently works, and how it would work in a post-P.L. 280 world. The following section describes Indian criminal jurisdiction in non-P.L. 280 states, thus providing an example of what Indian criminal jurisdiction would look like if Washington retroceded its assertion of criminal jurisdiction.<sup>19</sup>

### A. *A Brief History of Indian Country Criminal Jurisdiction*

#### 1. The Treaty Period

Prior to the existence of treaties, tribal nations exercised jurisdiction over all persons in their lands, regardless of race or citizenship.<sup>20</sup> Thus, treaties between the federal government and tribal nations often included provisions related to handling crimes committed by a citizen of one nation against a citizen of the other.<sup>21</sup> In

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State Supreme Court in *State v. Jim*. See Brief of Amici Curiae Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Nez Perce Tribe, & Confederated Tribes & Bands of the Yakama Nation at 9-17, *State v. Jim*, No. 84716-9 (Wash. Feb. 14, 2011), 2011 WL 1054542, at \*9-17. The Washington State Supreme Court held, in accordance with the Tribes' position, that the Maryhill Treaty Fishing Access Site was an "established Indian reservation" under the Revised Code of Washington. *State v. Jim*, 273 P.3d 434, 437-38 (Wash. 2012) (construing WASH. REV. CODE § 37.12.010 (2010)).

18. Brief of Amici Curiae Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Nez Perce Tribe, & Confederated Tribes & Bands of the Yakama Nation, *supra* note 17.

19. Eight tribes in Washington are not subject to P.L. 280 jurisdiction, as they were recognized or restored after 1968 and have not consented to the extension of state jurisdiction. See discussion *infra* Part III.C.

20. Prior to the existence of treaties, tribal nations exercised inherent authority over anyone who came within their territory as acknowledged in early treaty provisions requiring the return of non-Indian prisoners. See, e.g., Treaty with the Six Nations art. I, Oct. 22, 1784, 7 Stat. 15, 15 ("Six hostages shall be immediately delivered to the commissioners by the said nations, to remain in possession of the United States, till all the prisoners, white and black, which were taken by the said Senecas, Mohawks, Onondagas and Cayugas, or by any of them, in the late war, from among the people of the United States, shall be delivered up.')

21. See, e.g., Treaty with the Delawares, U.S.-Delaware Nation, art. IV, Sept. 17, 1778, 7 Stat. 13, 14 ("For the better security of the peace and friendship now entered into by the contracting parties . . . neither party shall proceed to the infliction of punishments on the citizens of the other,

particular, treaties often addressed the right of tribal nations to punish non-Indians attempting to live or hunt on Indian lands.<sup>22</sup> These treaty terms indicate an understanding on the part of both sovereigns that tribal nations had inherent authority to punish non-Indians for acts occurring in their lands.<sup>23</sup>

The United States and tribal nations entered into at least nine treaties between 1785 and 1795 that explicitly recognized the power of tribes to exercise criminal jurisdiction over non-Indian citizens of the United States.<sup>24</sup> Four of these treaties predate the adoption of the U.S. Constitution.<sup>25</sup>

In 1790, Congress extended federal jurisdiction in Indian Country to non-Indians committing crimes against Indians.<sup>26</sup> Treaty provisions at this time included authorization for territorial governments to prosecute Indians for specific serious offenses against non-Indians.<sup>27</sup> Those provisions also provided for the exercise of

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otherwise than by securing the offender . . . by imprisonment . . . till a fair and impartial trial can be had by judges or juries of both parties . . .”).

22. See, e.g., Treaty with the Choctaws, U.S.-Choctaw Nation, art. IV, Jan. 3, 1786, 7 Stat. 21, 22 (“If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands hereby allotted to the Indians to live and hunt on, such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please.”).

23. See *supra* notes 21-22. *But see* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197-98 n.8 (1978) (interpreting settlement provisions not as a recognition of inherent sovereignty but as “a means of discouraging non-Indian settlements on Indian territory”). *Oliphant* does not discuss why the Court viewed discouragement and inherent authority as mutually exclusive explanations or how the continued exercise of authority over non-Indians by tribal nations could have been anything other than a continued exercise of inherent authority. This seems particularly true because treaties by their nature reserved rights that tribes already had. *United States v. Winans*, 198 U.S. 371, 381 (1905) (“[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”).

24. Treaty with the Wyandots, Delawares, Shawnees, Ottawas, Chippewas, Pottawatimies, Miamies, Eel-Rivers, Weas, Kickapoos, Piankeshaws, and Kaskaskias art. VI, Aug. 3, 1795, 7 Stat. 49, 52; Treaty with the Cherokees, U.S.-Cherokee Nation, art. VIII, July 2, 1791, 7 Stat. 39, 40; Treaty with the Creeks, U.S.-Creek Nation, art. VI, Aug. 7, 1790, 7 Stat. 35, 36; Treaty with the Wyandots, Delawares, Ottawas, Chippewas, Pottawatimies, and Sacs art. IX, Jan. 9, 1789, 7 Stat. 28, 30; Treaty with the Shawnees, U.S.-Shawano Nation, art. VII, Jan. 31, 1786, 7 Stat. 26, 27; Treaty with the Chickasaws, U.S.-Chickasaw Nation, art. IV, Jan. 10, 1786, 7 Stat. 24, 25; Treaty with the Choctaws, *supra* note 22; Treaty with the Cherokees, U.S.-Cherokee Nation, art. V, Nov. 28, 1785, 7 Stat. 18, 19; Treaty with the Wyandots, Delawares, Chippewas, and Ottawas art. V, Jan. 21, 1785, 7 Stat. 16, 17.

25. The Constitution was adopted on September 17, 1787. U.S. CONST. art. VII. The 1785 Treaty with the Wyandots, Delawares, Chippewas, and Ottawas; the 1785 Treaty with the Cherokees; the 1786 Treaty with the Choctaws; the 1786 Treaty with the Chickasaws; and the 1786 Treaty with the Shawnees predate the Constitution’s adoption. See treaties cited *supra* notes 22, 24.

26. See Trade and Intercourse Act of 1790, ch. 33, §§ 5-6, 1 Stat. 137, 138, *amended* by Trade and Intercourse Act of 1796, ch. 30, §§ 2-12, 1 Stat. 469, 470-72 (expressly defining the crimes and sentences covered by the Trade and Intercourse Act of 1790).

27. See Treaty with the Choctaws, U.S.-Choctaw Nation, arts. VI, XII, Sept. 27, 1830, 7

state jurisdiction over Indians for the same offenses if occurring outside of Indian Country and within the state's territory.<sup>28</sup>

After 1796, treaties between tribal nations and the federal government began to recognize that tribal exercise of criminal jurisdiction over non-Indians dwelling in Indian lands was not exclusive of the federal government.<sup>29</sup> The result, unfortunately, was that the foundations for jurisdiction in Indian Country became grounded in race and citizenship, rather than geographic boundaries.<sup>30</sup>

In 1817, Congress adopted the General Crimes Act, which extended federal criminal jurisdiction over interracial crimes committed in Indian Country.<sup>31</sup> While it is typically viewed as an act governing non-Indian criminal conduct, by its terms, the Act applies to both Indian and non-Indian defendants.<sup>32</sup> The Act does not apply, however, if an Indian has already been punished by the laws of a tribe or if a treaty provision prevents it.<sup>33</sup> Consequently, federal jurisdiction under the General Crimes Act extends to the internal affairs of an Indian tribe only if the offense is committed by an Indian against a non-Indian and the tribe fails to hold the Indian perpetrator accountable. The Act does not limit inherent tribal sovereignty any more than modern federal criminal laws asserting federal jurisdiction over the activities of foreigners in foreign countries limit the inherent sovereignty of those nations.<sup>34</sup>

In 1825, Congress passed the Federal Crimes Act, a precursor to the Assimilative Crimes Act.<sup>35</sup> The Assimilative Crimes Act makes state law applicable to unlawful conduct occurring on federal lands, including Indian Country, when the conduct is not otherwise punishable by federal statute.<sup>36</sup> The interplay of the General Crimes Act and the Assimilative Crimes Act means that crimes occurring in Indian Country

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Stat. 333, 334-35; Treaty with the Wyandots, Delawares, Ottawas, Chippewas, Pottawatimies, and Sacs, *supra* note 24, arts. V-VI, 7 Stat. at 29-30.

28. See Treaty with the Choctaws, *supra* note 27; Treaty with the Wyandots, Delawares, Ottawas, Chippewas, Pottawatimies, and Sacs, *supra* note 24, arts. V-VI, 7 Stat. at 29-30.

29. See Treaty with the Delawares, U.S.-Delaware Nation, art. 14, May 6, 1854, 10 Stat. 1048, 1051; Treaty with the Quapaws, U.S.-Quapaw Nation, art. 6, Aug. 24, 1818, 7 Stat. 176-77.

30. Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 955 (1975).

31. General Crimes Act, ch. 92, § 2, 3 Stat. 383, 383 (1817) (codified as amended at 18 U.S.C. § 1152 (2006)).

32. 18 U.S.C. § 1152 (2006).

33. *Id.*

34. Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990) (holding that Fourth Amendment protections did not apply when the defendant “was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico”). Citizens of tribal nations were not considered citizens of the United States until 1924. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2006)).

35. See *Williams v. United States*, 327 U.S. 711, 721-23 (1946).

36. 18 U.S.C. § 13(a) (2006).

involving non-Indians against Indians are typically subject to federal prosecution based on state criminal law.

With one exception,<sup>37</sup> 1825 also marks the period in which treaties between the United States and tribal nations began to regularly limit the tribal exercise of criminal jurisdiction over non-Indian settlers.<sup>38</sup> In all, there appear to be twelve treaties that limited such jurisdiction, all negotiated over a four-month period.<sup>39</sup> These treaties often featured boilerplate language, presumably favored by the United States.<sup>40</sup>

Despite the federal policy shift toward more limited tribal authority over non-Indians, the United States Supreme Court recognized that states had no jurisdiction over crimes committed in Indian Country through much of the nineteenth century.<sup>41</sup> Accordingly, in 1861, Congress began inserting provisions into state enabling acts prohibiting states from extending their jurisdiction into Indian Country.<sup>42</sup> Washington

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37. Treaty with the Sacs and Foxes art. 5, Nov. 3, 1804, 7 Stat. 84, 85. This treaty marks the first appearance of language that became boilerplate in 1825. *See* treaties cited *infra* note 38.

38. Treaty with the Mahas, U.S.-Maha Tribe, art. 5, Oct. 6, 1825, 7 Stat. 282, 283; Treaty with the Pawnees, U.S.-Pawnee Tribe, art. 5, Sept. 30, 1825, 7 Stat. 279, 280-81; Treaty with the Crows, U.S.-Crow Tribe, art. 5, Aug. 4, 1825, 7 Stat. 266, 267; Treaty with the Mandans, U.S.-Mandan Tribe, art. 6, July 30, 1825, 7 Stat. 264, 265; Treaty with the Minnetarees, U.S.-Minnetaree Tribe, art. 6, July 30, 1825, 7 Stat. 261, 262-63; Treaty with the Ricaras, U.S.-Ricara Tribe, art. 6, July 18, 1825, 7 Stat. 259, 260; Treaty with the Hunkpapas Band of the Sioux, U.S.-Hunkpapas Band of the Sioux Tribe, art. 5, July 16, 1825, 7 Stat. 257, 258; Treaty with the Chayennes, U.S.-Chayenne Tribe, art. 5, July 6, 1825, 7 Stat. 255, 256; Treaty with the Siouones and Ogallalas art. 5, July 5, 1825, 7 Stat. 252, 253-54; Treaty with the Tetons, Yanctons, and Yanctonies Bands of the Sioux art. 5, June 22, 1825, 7 Stat. 250, 251; Treaty with the Poncars, U.S.-Poncar Tribe, art. 5, June 9, 1825, 7 Stat. 247, 248-49; Treaty with the Kansas, U.S.-Kansas Nation, art. 10, June 3, 1825, 7 Stat. 244, 246-47.

39. *See* treaties cited *supra* note 38.

40. *See, e.g.*, Treaty with the Kansas, *supra* note 38 (“Lest the friendship which is now established between the United States and the said Indian Nation should be interrupted by the misconduct of Individuals, it is hereby agreed, that for injuries done by individuals, no private revenge or retaliation shall take place, but instead thereof, complaints shall be made by the party injured, to the other by the said nation, to the Superintendent, or other person appointed by the President to the Chiefs of said nation. And it shall be the duty of the said Chiefs, upon complaints being made as aforesaid, to deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished, agreeably to the laws of the State or Territory where the offence may have been committed; and in like manner, if any robbery, violence, or murder, shall be committed on any Indian or Indians belonging to said nation, the person or persons so offending shall be tried, and, if found guilty, shall be punished in like manner as if the injury had been done to a white man.”).

41. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”).

42. *See, e.g.*, Act of Jan. 29, 1861, ch. 20, § 1, 12 Stat. 126, 127 (admitting Kansas into the union).



was subject to such a prohibition in its enabling act, now codified in Article XXVI of the state constitution.<sup>43</sup>

In 1871, Congress ended the practice of tribal nation treaty making.<sup>44</sup> Until this “treaty period” ended, federal statutes regarding Indian Country jurisdiction largely reflected commonly negotiated nation-to-nation treaty provisions.<sup>45</sup>

## 2. After the Treaty Period: Cases and Codifications (1870-1950)

In 1881, the U.S. Supreme Court recognized limited state authority in Indian Country with regard to non-Indian crimes.<sup>46</sup> In *United States v. McBratney*, the Court effectively extended exclusive criminal jurisdiction to states over criminal activity in Indian Country involving only non-Indians.<sup>47</sup> This also included non-Indian victimless crimes.<sup>48</sup>

In 1883, the Supreme Court decided *Ex parte Crow Dog*,<sup>49</sup> leading to the enactment of the Major Crimes Act and marking a significant shift in the federal government’s policies toward Indian Country crime.<sup>50</sup> The facts of the case involved the killing of Spotted Tail—a Brule Sioux chief—by Crow Dog.<sup>51</sup> Initially the parties resolved the crime in accordance with Brule Sioux customary law.<sup>52</sup> Pursuant to custom and tradition, the parties agreed that Crow Dog would provide Spotted Tail’s dependents with reparations.<sup>53</sup>

In spite of this resolution, Crow Dog was also tried and convicted in a federal territorial court.<sup>54</sup> Following the trial, Crow Dog moved to dismiss the conviction.<sup>55</sup>

43. Wash. Const. art. XXVI; Omnibus Statehood (Teller) Act, ch. 180, § 4, 25 Stat. 676, 677 (1889).

44. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2006)).

45. Clinton, *supra* note 30, at 953, 957-58.

46. *United States v. McBratney*, 104 U.S. 621, 624 (1882); *see also* *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984); *Draper v. United States*, 164 U.S. 240, 242-43 (1896).

47. *McBratney*, 104 U.S. at 624.

48. For example, driving under the influence crimes committed by non-Indians in Indian Country may be prosecuted in state courts as victimless crimes. *See, e.g.*, *State v. Snyder*, 807 P.2d 55, 56 (Idaho 1991); *State v. Warner*, 379 P.2d 66, 67-68 (N.M. 1963).

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

50. *See United States v. Bruce*, 394 F.3d 1215, 1219-20 (9th Cir. 2005) (“Congressional displeasure with the *Crow Dog* decision led to the passage of a second statute, 18 U.S.C. § 1153, designed to establish as federal crimes, fourteen named offenses committed by Indians in Indian country.”).

51. *Crow Dog*, 109 U.S. at 557.

52. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *American Indians, American Justice* 168-69 (1983).

53. *Id.*

54. *Crow Dog*, 109 U.S. at 557.

In particular, he argued it was expressly excepted from federal jurisdiction under the General Crimes Act as a crime committed by one Indian against another.<sup>56</sup> The prosecution alleged that despite the language of that Act, a treaty had effectively repealed the exception.<sup>57</sup> The Supreme Court held that no treaty language repealed the Act, and that the territorial court did not have jurisdiction to prosecute Crow Dog as his case fell within the General Crimes Act exception.<sup>58</sup>

In reaction to the Court's decision, Congress passed the Major Crimes Act.<sup>59</sup> Congress's adoption of the Major Crimes Act was fundamentally driven by racist views. The *Congressional Record* reflects the belief that the resolution of the incident in accordance with tribal customary law amounted to "no law at all."<sup>60</sup> This implicit racism and explicit discounting of the customary laws of tribal nations is reflected throughout much of the Act's legislative history.<sup>61</sup>

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55. *Id.* at 557-58.

56. *Id.* at 557-58.

57. *Id.* at 562.

58. *Id.* at 572.

59. See Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2006)); EXEC. OFFICE FOR U.S. ATT'YS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL NO. 679, THE MAJOR CRIMES ACT—18 U.S.C. § 1153 (1997), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00679.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00679.htm). The Act originally created federal jurisdiction over seven serious felonies in Indian Country: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. Major Crimes Act § 9, 23 Stat. at 385.

60. See 16 CONG. REC. 934 (1885) (statement of Rep. Byron Cutcheon), quoted in *Keeble v. United States*, 412 U.S. 205, 210-11 (1973).

61. Representative Cutcheon, the sponsor of the Act, stated:

Thus Crow Dog went free. He returned to his reservation, feeling, as the Commissioner says, a great deal more important than any of the chiefs of his tribe. The result was that another murder grew out of that—a murder committed by Spotted Tail, jr., upon White Thunder. And so these things must go on unless we adopt proper legislation on the subject.

It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. Under our present law there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that the "blood-avenger"—that is, the next of kin to the person murdered—shall pursue the one who has been guilty of the crime and commit a new murder upon him.

.....

If . . . an Indian commits a crime against an Indian on an Indian reservation there is now no law to punish the offense except, as I have said, the law of the tribe, which is just no law at all.

16 CONG. REC. 934. Secretary of the Interior Lamar, who supported the Act, stated:

If offenses of this character can not be tried in the courts of the United States, there

By extending federal criminal laws to intra-Indian affairs, the Major Crimes Act is a significant incursion on tribal sovereignty in a manner inconsistent with the development of federal Indian criminal law during the treaty period. Many treaties up to that point had explicitly preserved exclusive tribal jurisdiction over intra-tribal crimes.<sup>62</sup> Despite the lack of any foundational language in the U.S. Constitution, the Supreme Court upheld the Major Crimes Act as constitutional in 1886 under the doctrine of plenary power.<sup>63</sup> This power was ultimately justified on perceptions of racial inferiority, the need to protect tribal nations, geographic location, the extra-legal ability of the federal government to enforce laws on all tribes—and because it had never been denied in the past.<sup>64</sup> These dubious grounds for congressional authority amount to a mere assertion of bare power under the paternalistic guise of protecting Indians.<sup>65</sup>

### 3. The Termination Era to Present

In 1953, Congress enacted P.L. 280.<sup>66</sup> During this period, Congress actively terminated many tribal nations by ending the federal trust relationship and subjecting Indians to state and federal laws on the same terms as other citizens of the United

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is no tribunal in which the crime of murder can be punished. Minor offenses may be punished through the agency of the “court of Indian offenses,” but it will hardly do to leave the punishment of the crime of murder to a tribunal that exists only by the consent of the Indians of the reservation. If the murderer is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative by either killing the murderer or some one of his kinsmen . . . .

16 CONG. REC. 935 (statement of Rep. Byron Cutcheon quoting Lucius Q.C. Lamar, U.S. Sec’y of the Interior).

62. See Treaty with the Creeks and Seminoles arts. XIV-XV, Aug. 7, 1856, 11 Stat. 699, 703-04; Treaty with the Choctaws and Chickasaws arts. 6-7, June 22, 1855, 11 Stat. 611, 612-13.

63. United States v. Kagama, 118 U.S. 375, 383-85 (1886).

64. The Court explained:

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

*Id.* at 384-85.

65. See Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 162-235 (2002) (discussing the questionable legal underpinnings of the plenary powers doctrine).

66. Public Law 280, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2006 & Supp. IV 2010), and 28 U.S.C. § 1360 & note (2006)).

States.<sup>67</sup> Public Law 280 played a role in this effort by shifting federal criminal jurisdiction over Indian Country to states regardless of tribal consent.<sup>68</sup> By 1960 the termination policy was abandoned.<sup>69</sup> Consistent with this shift in policy, the Indian Civil Rights Act (“ICRA”) amended P.L. 280 in 1968 to mandate tribal consent for future assertions of state authority and to provide a vehicle for state retrocession of jurisdiction.<sup>70</sup>

Despite its positive intent and important amendments to P.L. 280, ICRA nevertheless constitutes a significant intrusion into tribal sovereignty. For example, it extended to Indians in Indian Country certain federal rights similar to federal constitutional rights that are otherwise inapplicable to the internal affairs of tribes.<sup>71</sup> The most significant intrusion, however, was the restriction on tribal court sentencing power. As originally passed, the Act limited tribal court sentences to six months in jail and a \$500 fine for any offense.<sup>72</sup> Preeminent Indian scholar Vine Deloria, Jr. notes that

[t]his limitation effectively eliminates tribal courts from regulating serious criminal activity in Indian Country. For all practical purposes, the act indirectly bestows exclusive jurisdiction on the federal courts in the handling of major crimes. This result is especially disconcerting . . . because the role of the federal government in dealing with serious criminal conduct on the reservations has been far from satisfactory.<sup>73</sup>

The reduced sentencing power established by ICRA is even more alarming because federal criminal jurisdiction over felonious conduct in Indian Country is limited to crimes against non-Indians,<sup>74</sup> major crimes,<sup>75</sup> or crimes otherwise falling under a statute of nationwide applicability.<sup>76</sup> This constitutes a small subset of potentially serious crime. For example, the Major Crimes Act covers assault resulting

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67. H.R. CON. RES. 108, 83d Cong., 67 Stat. B132 (1953); Felix S. Cohen, Cohen’s Handbook of Federal Indian Law § 1.06, at 89-97 (2005 ed.).

68. Public Law 280 sec. 2, § 1162(a), sec. 4, § 1360(a), 67 Stat. at 588-89 (codified as amended at 18 U.S.C. § 1162(a) (2006), and 28 U.S.C. § 1360(a)).

69. See Cohen, *supra* note 67, § 1.07, at 98.

70. See Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tits. II-VII, § 202, 82 Stat. 77, 77 (codified as amended at 25 U.S.C. § 1302 (2006)); see also discussion *infra* Part II.D.3.

71. Compare 25 U.S.C. §§ 1301-1303 (2006), with *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (under which tribal governments were not subject to the United States’ Bill of Rights).

72. Indian Civil Rights Act of 1968 § 202(7), 82 Stat. at 77 (codified as amended at 25 U.S.C. § 1302).

73. DELORIA & LYTLE, *supra* note 52, at 175.

74. See 18 U.S.C §§ 18, 1152 (2006).

75. *Id.* § 1153(a).

76. See discussion *infra* Part I.D.

in *serious* bodily injury, but not an assault resulting in *substantial* bodily injury.<sup>77</sup> As a result, ICRA initially mandated that many serious felonies in Indian Country be treated as misdemeanors within the sole jurisdiction of tribal courts. Congress later increased the sentencing authority in ICRA to one year in jail and a \$5000 fine in 1986.<sup>78</sup>

Congress reinstated felony-sentencing authority in 2010.<sup>79</sup> The Tribal Law and Order Act (“TLOA”) now allows for sentencing up to three years in jail and \$15,000 per offense or nine years per criminal proceeding, provided tribes guarantee certain rights to defendants, such as the right to indigent defense counsel for sentences exceeding one year in jail.<sup>80</sup>

In 1978, the U.S. Supreme Court decided *Oliphant v. Suquamish Indian Tribe*.<sup>81</sup> *Oliphant* was a combination of two tribal court cases brought by the Suquamish Indian Tribe against non-Indian residents.<sup>82</sup> In the first case, the Tribe brought suit against Mr. Oliphant for “assaulting a tribal officer and resisting arrest.”<sup>83</sup> In the second, the Tribe brought suit against Mr. Belgrade for crashing into a tribal police vehicle following a high-speed chase.<sup>84</sup> The Supreme Court ultimately dismissed both cases, holding that tribes have no criminal jurisdiction over non-Indians<sup>85</sup> pursuant to a new court-created theory commonly referred to as the “implicit divestiture” doctrine.<sup>86</sup>

In 1990, the Supreme Court nearly eviscerated tribal authority in *Duro v. Reina*, holding that a tribal court’s criminal jurisdiction does not extend to Indians of other tribes.<sup>87</sup> This ruling prevented tribal courts from prosecuting nonmember Indians,

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77. The Major Crimes Act covers “assault resulting in serious bodily injury.” 18 U.S.C. § 1153(a). “Serious bodily injury” is defined under as “a substantial risk of death,” “extreme physical pain,” “protracted and obvious disfigurement,” or “protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” *Id.* § 1365(h)(3). However, the Act does not cover assault resulting in “substantial bodily injury,” which is defined as “a temporary but substantial disfigurement” or “a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.” *Id.* § 113(b)(1).

78. Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, tit. IV, subtit. C, § 4217, 100 Stat. 3207-137, 3207-146 (codified as amended at 25 U.S.C. § 1302 (Supp. IV 2010)).

79. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 234(a)(2)(B)-(3), 124 Stat. 2261, 2279-80 (codified at 25 U.S.C. § 1302(a)(7)(A), (b)).

80. *Id.*

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

82. *Id.* at 194-95.

83. *Id.* at 194.

84. *Id.*

85. *Id.* at 212.

86. Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 627 (2011).

87. *Duro v. Reina*, 495 U.S. 676, 679 (1990).

even for crimes committed on that tribe's land. Given the significant relationships that existed between tribes, and the fact that many Indian families had members who were citizens of different tribes, the *Duro* ruling crippled the ability of tribes to ensure public safety in their own territories.<sup>88</sup> Congress immediately responded by granting tribes inherent sovereign authority to prosecute any Indian regardless of tribal affiliation.<sup>89</sup> This legislation—often referred to as the “*Duro* fix”<sup>90</sup>—was upheld in *United States v. Lara*, effectively acknowledging that *Oliphant* and *Duro* were pronouncements of common law rather than constitutional law.<sup>91</sup>

Tribal nations continue to push for federal legislative changes that enhance their ability to address crime in Indian Country.<sup>92</sup> History has shown that this crime is most effectively dealt with when tribes are empowered to handle matters themselves. In many cases, however, federal statutory and common law prevent the full exercise of tribal sovereign authority.

### B. *Modern Status of the General Crimes Act and Assimilative Crimes Act*

The General Crimes Act extends to Indian Country all “general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States.”<sup>93</sup> This means that “federal enclave” laws also apply to Indian Country.<sup>94</sup>

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88. See, e.g., Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of the Rosebud Sioux Tribe, the Upper Skagit Indian Tribe, the Northern Arapahoe Tribe of the Wind River Reservation, the Assiniboine & Sioux Tribes of the Fort Peck Reservation, the Colorado River Indian Tribes, the Confederated Tribes of the Colville Reservation, the Confederated Tribes of the Warm Springs Reservation, the Grand Traverse Band of Ottawa & Chippewa Indians, the Lummi Tribe, the Quinalt Indian Nation, the Sault Ste. Marie Tribe of Chippewa Indians, the Shoshone Tribe of the Wind River Reservation, the Tulalip Tribes, the Winnebago Tribe of Nebraska and the Ass'n on American Indian Affairs in Support of Respondents at 9-16, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546), 1989 WL 1126953, at \*9-16.

89. See Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, § 8077(b)-(c), 104 Stat. 1856, 1892-93 (codified at 25 U.S.C. § 1301(2)-(4) (2006).

90. *United States v. Lara*, 541 U.S. 193, 216 (2004) (Thomas, J., concurring in the judgment).

91. *Id.* at 196 (2004) (majority opinion).

92. See, e.g., Stand Against Violence and Empower (SAVE) Native Women Act, S. 1763, 112th Cong. (2011).

93. 18 U.S.C. § 1152 (2006).

94. See *United States v. Wheeler*, 435 U.S. 313, 330 n.30 (1978); *United States v. Young*, 936 F.2d 1050, 1055 (9th Cir. 1991), *overruled on other grounds* by *United States v. Vela*, 624 F.3d 1148 (9th Cir. 2010); *United States v. Markiewicz*, 978 F.2d 786, 797-98 (2d Cir. 1992); *Stone v. United States*, 506 F.2d 561, 563 (8th Cir. 1974). Federal enclaves are lands within the “special maritime and territorial jurisdiction of the United States,” which are defined to include “[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof.” 18 U.S.C. § 7(3) (2006). Therefore, any property under the exclusive or

There are three statutory exceptions to the extension of jurisdiction provided by the General Crimes Act. First, the Act does not apply to crimes committed by one Indian against another Indian.<sup>95</sup> Second, the Act does not apply to any crime committed by an Indian if a tribe has already punished the Indian for that act.<sup>96</sup> Third, the Act does not apply where a treaty gives exclusive jurisdiction over the crime to a tribe.<sup>97</sup> Finally, the *McBratney* rule provides a fourth, common law exception for crimes involving only non-Indians.<sup>98</sup>

The General Crimes Act extends federal enclave laws to Indian Country,<sup>99</sup> and thus also effectively extends the Assimilative Crimes Act. The Assimilative Crimes Act allows for the application of state law to crimes committed on federal lands, including Indian Country, when no federal criminal statute covers the crime.<sup>100</sup> The crime is still prosecuted in federal court at the discretion of federal prosecutors.<sup>101</sup> Whether federal law covers a particular crime, however, is not always clear.<sup>102</sup>

The interplay between the General Crimes Act and the Assimilative Crimes Act means that many offenses involving crimes by non-Indians against Indians in Indian Country can be prosecuted in federal court applying relevant state law. Unfortunately, the Assimilative Crimes Act does not cover the crime of assault because it is specifically defined by federal statute.<sup>103</sup> And, pursuant to that federal statute, an assault by “striking, beating, or wounding” is only subject to a sentence of “not more than six months.”<sup>104</sup> As such, non-Indian domestic violence cases involving an Indian victim are often only punishable by a maximum of six months in

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concurrent jurisdiction of the United States is a federal enclave land. Federal enclave laws include “arson, 18 U.S.C. § 81; assault, 18 U.S.C. § 113; maiming, 18 U.S.C. § 114; theft, 18 U.S.C. § 661; receiving stolen property, 18 U.S.C. § 662; murder, 18 U.S.C. § 1111; manslaughter, 18 U.S.C. § 1112, and sexual offenses, 18 U.S.C. § 2241 *et. seq.*” EXEC. OFFICE FOR U.S. ATT’YS, U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, CRIMINAL RESOURCE MANUAL NO. 678, THE GENERAL CRIMES ACT—18 U.S.C. § 1152 (1997), *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00678.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00678.htm).

95. 18 U.S.C. § 1152.

96. *Id.*

97. *Id.*

98. *United States v. McBratney*, 104 U.S. 621, 624 (1882).

99. 18 U.S.C. § 1152.

100. *See id.* § 13(a).

101. *See id.* § 13.

102. *Compare Williams v. United States*, 327 U.S. 711, 717 (1946) (holding that the Assimilated Crimes Act did not trigger application of Arizona’s statutory rape law, under which the age of consent was eighteen where federal law provided the age of consent was sixteen), *with Fields v. United States*, 438 F.2d 205, 207-08 (2d Cir. 1971) (holding that the state statute prohibiting batteries applied notwithstanding a federal statute proscribing assaults); *see also* 18 U.S.C. § 113 (2006) (not covered).

103. 18 U.S.C. § 113(a).

104. *Id.* § 113(a)(4).

jail.<sup>105</sup> More problematically, assaults involving substantial bodily injury—defined as “a temporary but substantial disfigurement” or “a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty”—are punishable by a maximum of five-years imprisonment.<sup>106</sup> Yet even those provisions only apply to cases where the victim is under the age of sixteen.<sup>107</sup> Consequently, a non-Indian “assault by striking, beating, or wounding” an Indian victim over the age of sixteen that results in substantial bodily injury, but does not rise to the definition of “serious bodily injury,” is subject merely to a maximum of six months in jail.<sup>108</sup>

### C. *Modern Status of the Major Crimes Act*

Federal courts have jurisdiction over Indians who commit a crime specifically enumerated in 18 U.S.C. § 1153, commonly known as the Major Crimes Act.<sup>109</sup> Federal jurisdiction under this statute is exclusive of states.<sup>110</sup> However, tribes retain concurrent jurisdiction over those offenses, limited to the maximum sentence allowed under the Indian Civil Rights Act.<sup>111</sup> The offenses listed in the Act are mostly defined by federal statute, as indicated below, and those few listed offenses not defined by federal statute are defined in accordance with state law.<sup>112</sup> This has the inevitable result of often subjecting Indians to disparate criminal prosecution compared to non-Indians.

In *United States v. Antelope*, the U.S. Supreme Court upheld the Major Crimes Act as constitutional, despite its disparate impact on Indian defendants.<sup>113</sup> In *Antelope*, the Indian defendants were charged and convicted of felony murder in Idaho federal district court.<sup>114</sup> If prosecuted under Idaho state law, however, the defendants could not have been subject to a felony-murder charge because Idaho did not recognize the crime of felony murder.<sup>115</sup> The defendants thus challenged their convictions, arguing that prosecution under the Act amounted to “invidious racial

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105. *Id.*

106. *See id.* § 113(7)(b)(1).

107. *Id.* § 113(a)(5).

108. *Id.* § 113(a)(5)-(7).

109. *Id.* §§ 1152-1153.

110. *See United States v. John*, 437 U.S. 634, 651 (1978).

111. *See Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990); *United States v. Gallaher*, 624 F.3d 934, 942 (9th Cir. 2010); *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995); *United States v. Young*, 936 F.2d 1050, 1055 (9th Cir. 1991), *overruled on other grounds by United States v. Vela*, 624 F.3d 1148 (9th Cir. 2010); *United States v. Arcoren*, No. CR. 89-30049, 1999 WL 638244, at \*6 (D.S.D. July 27, 1999).

112. 18 U.S.C. § 1153.

113. *United States v. Antelope*, 430 U.S. 641, 647-50 (1977).

114. *Id.* at 643.

115. *Id.* at 644.



discrimination” and a violation of the Equal Protection Clause.<sup>116</sup> In other words, but for their status as Indians, the defendants would not have been charged with felony murder. The Court rejected their argument, holding that the Major Crimes Act’s reliance on Indian status was not an impermissible racial classification.<sup>117</sup> Rather, the Court held that the Act’s reliance on Indian status was primarily a political designation and therefore not a violation of the defendants’ civil rights.<sup>118</sup> Crimes falling within the Major Crimes Act include

murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [felony sex crimes], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury . . . , an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country.<sup>119</sup>

#### D. *Crimes of General Applicability*

The General Crimes Act only applies to federal enclave laws.<sup>120</sup> Thus, federal laws of general applicability are not subject to the three statutory limitations set forth in the General Crimes Act<sup>121</sup> or the *McBratney* rule.<sup>122</sup> This means that laws of general applicability are also applicable in Indian Country. The Ninth Circuit, however, recognizes three exceptions to this rule. Crimes of general applicability will not apply if the law touches “exclusive rights of self-governance in purely intramural matters”; the application of the law to the tribe would “abrogate rights guaranteed by

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116. *Id.*

117. *Id.* at 646-47.

118. *Id.*

119. 18 U.S.C. § 1153(a) (2006); *see id.* § 81 (proscribing arson); *id.* § 113(a)(1) (proscribing assault with intent to commit murder); *id.* § 113(a)(5), (7) (proscribing assault against an individual under age sixteen); *id.* § 113(a)(6) (proscribing assault resulting in serious bodily injury); *id.* § 114 (proscribing maiming); *id.* § 661 (proscribing felony theft); *id.* § 1111 (proscribing murder); *id.* § 1112 (2006 & Supp. IV 2010) (proscribing manslaughter); *id.* § 1153(b) (2006) (deferring to state law for the definition of incest, felony child abuse, and felony child neglect); *id.* § 1201 (proscribing kidnapping); *id.* § 1365(h)(3) (defining “serious bodily injury” under the Major Crimes Act); *id.* § 2111 (proscribing burglary and robbery); *id.* §§ 2241-2248 (2006 & Supp. IV 2010) (proscribing felony sex crimes).

120. *See United States v. Markiewicz*, 978 F.2d 786, 797-98 (2d Cir. 1992).

121. *See United States v. Young*, 936 F.2d 1050, 1055 (9th Cir. 1991) (involving unlawful possession of a firearm and use of that firearm in an assault on a federal officer); *United States v. Blue*, 722 F.2d 383, 384 (8th Cir. 1983) (involving narcotics violations); *United States v. Smith*, 562 F.2d 453, 458 (7th Cir. 1977) (involving assault on a federal officer).

122. *United States v. Wheeler*, 435 U.S. 313, 325 n.21 (1978); *Antelope*, 430 U.S. at 643 n.2; *Williams v. United States*, 327 U.S. 711, 714 (1946).

Indian treaties”]; or there is proof “by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.”<sup>123</sup>

The following are common crimes of general applicability in Indian Country: possession, distribution, or manufacture of a controlled substance;<sup>124</sup> domestic assault by a habitual offender;<sup>125</sup> interstate domestic violence;<sup>126</sup> interstate stalking;<sup>127</sup> interstate violation of a protective order;<sup>128</sup> assault, resistance, or impediment of a federal officer;<sup>129</sup> destruction of federal government property;<sup>130</sup> possession, receipt, or distribution of child pornography;<sup>131</sup> transfer of obscene materials to minors;<sup>132</sup> sexual exploitation of children;<sup>133</sup> failure to register as a sex offender;<sup>134</sup> felon in possession of a firearm;<sup>135</sup> and minor in possession of a handgun.<sup>136</sup>

#### E. “Indian Country” Defined

A threshold question of any case involving Indian criminal jurisdiction is whether the offense occurred in “Indian Country.” That term is defined by 18 U.S.C. § 1151 and generally refers to Indian reservations, dependent Indian communities, and Indian allotments.<sup>137</sup> Each of these categories is a term of art within Indian law. While courts sometimes use the terms interchangeably with “Indian Country,” they are not identical and refer to specific types of land.<sup>138</sup> In certain circumstances, a parcel of land may fall into more than one category.

123. United States v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980).

124. 21 U.S.C. §§ 841, 844 (2006 & Supp. IV 2010).

125. 18 U.S.C. § 117 (2006).

126. *Id.* § 2261.

127. *Id.* § 2261A.

128. *Id.* § 2262.

129. *Id.* § 111 (2006 & Supp. IV 2010).

130. *Id.* § 1361 (2006).

131. *Id.* § 2252A(a)(2), (5)(B) (2006 & Supp. IV 2010).

132. *Id.* § 1470 (2006).

133. *Id.* § 2251 (2006 & Supp. IV 2010).

134. *Id.* § 2250 (2006).

135. *Id.* § 922(g).

136. *Id.* § 922(x)(2).

137. The text of 18 U.S.C. § 1151 (2006) provides as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

138. *See id.*

## 1. “Indian Reservation”

Pursuant to 18 U.S.C. § 1151(a), Indian Country includes “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent . . . .”<sup>139</sup> The term “Indian reservation” is not defined in § 1151, but is an established term of art historically used in the Major Crimes Act prior to its amendment in 1948.<sup>140</sup> At one point, the term “Indian reservation” referred to land reserved by a tribe after ceding other land to the federal government by treaty and over which the tribe never extinguished title.<sup>141</sup> By the mid-nineteenth century, it referred to lands held in the public domain that were reserved for Indian use and benefit.<sup>142</sup> Presently, the term “Indian reservation” generally refers to federally protected Indian tribal lands, regardless of origin.<sup>143</sup>

The Supreme Court has ruled that land declared by Congress to be held in trust by the federal government for the benefit of Indians is a reservation for purposes of criminal jurisdiction.<sup>144</sup> Similarly, the Court has found that land “validly set apart for the use of the Indians as such, under the superintendence of the Government” is also reservation land.<sup>145</sup> Consequently, noncontiguous lands such as tribal fishing sites may be included within the scope of an Indian reservation.<sup>146</sup> However, land set aside for another purpose is not Indian reservation land, even if it is actually used for the benefit of a tribe.<sup>147</sup>

Trust land is land set aside for the benefit of a tribe or an individual Indian and held in fee by the United States.<sup>148</sup> Failure to use the term “trust” or “reservation” in legislation setting aside land for the benefit of tribes does not affect whether or not it

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139. *Id.* § 1151(a).

140. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2006)).

141. COHEN, *supra* note 67, § 3.04[2][c][iii], at 189.

142. *Donnelly v. United States*, 228 U.S. 243, 269 (1913).

143. COHEN, *supra* note 67, § 3.04[2][c][iii], at 189.

144. *United States v. John*, 437 U.S. 634, 649 (1978).

145. *United States v. Pelican*, 232 U.S. 442, 449 (1914). The *Pelican* Court uses the term “Indian country” to describe both lands set aside for use by Indians (reservation lands) and lands allotted to individual Indians (allotted lands). *Id.*

146. *John*, 437 U.S. at 649-50; *Pelican*, 232 U.S. at 449; *United States v. Sohappy*, 770 F.2d 816, 823 (9th Cir. 1985).

147. *See United States v. Meyers*, 206 F. 387, 393-95 (8th Cir. 1913) (holding that ceded land set aside for the general educational purposes of the Oklahoma Territory was not Indian Country, despite the fact that it was actually used as an Indian boarding school); *United States v. M.C.*, 311 F. Supp. 2d 1281, 1295, 1297 (D.N.M. 2004) (holding that land transferred to the Department of the Interior specifically for the use of the Bureau of Indian Affairs (“BIA”), rather than an Indian tribe, is not Indian Country because, even though the BIA used some of those lands for use as an Indian school, the land was not “set aside by the federal government for the use of Indians as Indian land”).

148. *United States v. West*, 232 F.2d 694, 697 (9th Cir. 1956).

is Indian reservation land. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, the Supreme Court stated,

[No] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges . . . . [W]e [have] stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated “trust land” or “reservation.” Rather, we ask whether the area has been “validly set apart for the use of the Indians as such, under the superintendence of the Government.”<sup>149</sup>

The Ninth Circuit adhered to this standard in *United States v. Sohappy*.<sup>150</sup> In holding that the Celilo treaty fishing site was an Indian reservation, the court noted that one tract was purchased “‘in trust . . . for the use of the Yakima Indian Tribes’” while another tract was transferred to the Secretary of Interior “‘for the use and benefit of certain Indians now using and occupying the land as a fishing camp site.’”<sup>151</sup> The fact that one purchase used the term “trust” and the other simply noted it was for the use and benefit of tribes did not make a difference in determining whether land was considered an “Indian reservation.”<sup>152</sup>

The common law definition of an “Indian reservation” was arguably expanded by § 1151(a) to include “all land . . . notwithstanding the issuance of any patent . . . .”<sup>153</sup> This additional language effectively includes all federal land located within Indian reservations that are reserved, not for the benefit of Indians, but for an independent federal governmental purpose.<sup>154</sup> In addition, and contrary to the pre-1948 developed common law, it includes all unrestricted fee simple lands lying within an Indian reservation.<sup>155</sup>

Unlike § 1151(a), Washington’s P.L. 280 statute effectively retains the pre-1948 common law definition of an “Indian reservation” by excluding from the definition federal lands reserved for a non-Indian purpose and unrestricted fee lands, subject to some enumerated exceptions.<sup>156</sup> Pursuant to the statute, Washington retains criminal jurisdiction over lands within an Indian reservation that are neither “tribal lands” nor

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149. *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (quoting *John*, 437 U.S. at 649).

150. *Sohappy*, 770 F.2d at 822-23.

151. *Id.*; see also *United States v. Roberts*, 185 F.3d 1125, 1130-31 (10th Cir. 1999) (“[O]fficial ‘reservation’ status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. § 1151.”).

152. *Okla. Tax Comm’n*, 498 U.S. at 511.

153. 18 U.S.C. § 1151(a) (2006).

154. See *id.*

155. *Clairmont v. United States*, 225 U.S. 551, 558 (1912); *Dick v. United States*, 208 U.S. 340, 349-50 (1908); COHEN, *supra* note 67, § 3.04[2][c], at 190-91.

156. WASH. REV. CODE § 37.12.010 (2010).

“allotted lands” that are “held in trust by the United States or subject to a restriction against alienation imposed by the United States . . . .”<sup>157</sup> This language is consistent with the pre-1948 common law definition of the term “Indian reservation” as excluding federal lands not acquired for the benefit of Indians. It also resolves questions of unrestricted fee simple land in favor of state jurisdiction, as opposed to § 1151’s resolution in favor of tribal and federal jurisdiction.

## 2. “Dependent Indian Community”

The term “dependent Indian community”<sup>158</sup> derives from two U.S. Supreme Court decisions: *United States v. Sandoval*<sup>159</sup> and *United States v. McGowan*.<sup>160</sup> The notion of a dependent Indian community can be confusing because it shares several common features with Indian reservation land.<sup>161</sup>

*Sandoval* involved whether a federal law that prohibited introducing alcohol into Indian Country applied to certain lands of the Santa Clara Pueblo Tribe.<sup>162</sup> The tribal land at issue was originally obtained through Spanish grants, later confirmed by the United States.<sup>163</sup> Thus, the Santa Clara Pueblo Tribe communally owned the land in fee simple.<sup>164</sup> In holding that the land in question was Indian Country, the Court stated:

It also is said that such legislation cannot be made to include the lands of the Pueblos, because the Indians have a fee simple title. It is true that the Indians of each pueblo do have such a title . . . but it is a communal title . . . . In other words, the lands are public lands of the pueblo . . . subject to the legislation of Congress enacted in the exercise of the Government’s guardianship over those tribes and their affairs. Considering the reasons which underlie the authority of Congress to prohibit the introduction of liquor into the Indian country at all, it seems plain that this authority is sufficiently comprehensive to enable Congress to apply the prohibition to the lands of the Pueblos.<sup>165</sup>

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157. *Id.*

158. *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 525 (1998).

159. *United States v. Sandoval*, 231 U.S. 28 (1913).

160. *United States v. McGowan*, 302 U.S. 535 (1938).

161. *See United States v. Azure*, 801 F.2d 336, 338-39 (8th Cir. 1986); FELIX S. COHEN, FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1(D)(3)(b), at 38 (1982 ed.) (stating that overlap exists between the definitions of “Indian reservations” and “dependent Indian communities”).

162. *Sandoval*, 231 U.S. at 36.

163. *Id.* at 39.

164. *Id.*

165. *Id.* at 48 (citations omitted).

Although the lands were held in fee simple, some of the lands in question were “reserved by executive orders for the use and occupancy of the Indians,” rather than held in trust or otherwise actively set aside by the federal government.<sup>166</sup> This property classification may be a factor distinguishing the land as a “dependent Indian community” rather than an Indian reservation.

*McGowan* involved the land status of the Reno Indian Colony—an area set aside for various “needy Indians” scattered throughout Nevada over which the federal government exercised superintendence.<sup>167</sup> The *McGowan* Court found the Reno Indian colony constituted Indian Country.<sup>168</sup> Quoting *Sandoval* for its discussion of dependent Indian communities, the *McGowan* Court stated, “[t]his protection is extended by the United States ‘over all *dependent Indian communities within its borders . . .*’”<sup>169</sup>

The fundamental consideration . . . in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as “reservations.” . . . [I]t is immaterial whether Congress designates a settlement as a “reservation” or “colony.”

. . . . The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the Government. The Government retains title to the lands which it permits the Indians to occupy. The Government has authority to enact regulations and protective laws respecting this territory.<sup>170</sup>

Notably, the land in question was not set aside for a specific Indian nation or group of Indian nations.<sup>171</sup> Rather, it was set aside for a conglomerate of individual Indians who were otherwise without a homeland.<sup>172</sup> This may explain why the Court designated the land Indian community, and not Indian reservation.

More recently, in *Alaska v. Native Village of Venetie Tribal Government*, the Supreme Court sought to clarify the requirements for qualification as a dependent Indian community.<sup>173</sup> The Court held that there are two requirements for land to be considered a dependent Indian community: first, the land must be set aside by the federal government as Indian land to be used by Indians;<sup>174</sup> second, there must be

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166. *Id.* at 39.

167. *United States v. McGowan*, 302 U.S. 535, 537 (1938).

168. *Id.* at 539.

169. *Id.* at 538 (quoting *Sandoval*, 231 U.S. at 46).

170. *McGowan*, 302 U.S. at 538-39.

171. *Id.*

172. *Id.*

173. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530-31 (1998).

174. *Id.* at 530.

federal superintendence over that land.<sup>175</sup> According to *Venetie*, the federal set-aside ensures there is an Indian community, and the superintendence requirement ensures the community is sufficiently dependent on the federal government.<sup>176</sup>

Oddly, if these are considered necessary and sufficient conditions for a dependent Indian community, it may be that Indian reservations and dependent Indian communities are largely a distinction without a difference.<sup>177</sup> Given the lack of clarity created by the holding in *Venetie*, this distinction will likely need further refinement by the Supreme Court in the future.<sup>178</sup>

### 3. “Indian Allotments”

The federal statutory definition of “Indian Country” also includes “Indian allotments.”<sup>179</sup> Like “Indian reservation,” the term “Indian allotment” is a well-defined term of art.<sup>180</sup> Federal common law defines an “Indian allotment” as land

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175. *Id.*

176. *Id.* at 531.

177. *See* *United States v. Roberts*, 185 F.3d 1125, 1133 (10th Cir. 1999) (“[T]he relationship between informal reservations and dependent Indian communities is not entirely clear under current case law.”).

178. The lack of clarity arises from the Court’s mistaken analysis in *Venetie*. The *Venetie* Court purportedly derived the set-aside and superintendence elements from an analysis of *Sandoval* and *McGowan*. *See Venetie*, 522 U.S. at 528-30. However, in its discussion of *Sandoval*, the *Venetie* Court seemingly reads the case as requiring a federal set-aside. *See id.* at 528. But, in discussing the fee simple aspect of the Pueblo land, the *Sandoval* Court nowhere suggested a federal set-aside existed other than congressional acknowledgment of the original Spanish land grant and the Nonintercourse Act itself. *See United States v. Sandoval*, 231 U.S. 28, 38-40, 48. The Nonintercourse Act, however, applies to all land owned by a tribe unless expressly excepted from its restrictions by an act of Congress. *See* Native American Technical Corrections Act of 2004, Pub. L. No. 108-204, § 126(a), 118 Stat. 542, 546 (permitting the sale of land held by the Shakopee Mdewakanton Sioux Community). Even if such a set-aside somehow existed indirectly through application of the Nonintercourse Act, as the *Venetie* majority suggested, *see Venetie*, 522 U.S. 528 & n.4, the *Sandoval* Court did not indicate that a federal set-aside was a factor in its analysis, *see Sandoval*, 231 U.S. 28. Rather, communal ownership and federal superintendence appear to be the only critical factors in the *Sandoval* Court’s decision on the underlying fee simple nature of the land. *See id.* at 38-44, 47. Further, if simply applying the Nonintercourse Act meets the federal set-aside requirement, it would seem that in almost all cases involving land owned by a tribe, the question of whether there was federal superintendence would be the only significant question as to whether there is an Indian reservation or a dependent Indian community. This seems like an odd result given that the common law previously focused on the existence of a federal set-aside through treaty, executive order, or statute for purposes of identifying an Indian reservation, and focused on whether the land in question amounted to an Indian community for purposes of identifying a dependent Indian community.

179. 18 U.S.C. § 1151(c) (2006).

180. *Clairmont v. United States*, 225 U.S. 551, 558 (1912); *United States v. Sutton*, 215 U.S. 291, 294 (1909).

owned by individual members of a tribe that is held in trust by the federal government or otherwise has a restriction on alienation.<sup>181</sup> Indian allotments and Indian reservations are not identical. An Indian allotment may not be an Indian reservation. Likewise, land within an Indian reservation may not be an Indian allotment.

There are two types of Indian allotments: restricted fee allotments and trust allotments. A restricted fee allotment is land held in fee by an individual Indian although the government has restrained the individual's ability to alienate the land without its consent.<sup>182</sup> A trust allotment is land specifically set aside for the benefit of an individual Indian although the government has retained the fee title.<sup>183</sup> While this distinction may have once been important, it does not appear to have much effect on modern federal Indian criminal jurisprudence.<sup>184</sup> Nevertheless, it may still be significant in applying Washington's 1963 enactment of P.L. 280 jurisdiction.<sup>185</sup>

The impact of 18 U.S.C. § 1151(c)—which defines Indian allotments as falling within the scope of Indian Country—is most prominent in circumstances where an Indian allotment is not part of an Indian reservation. Alaskan Native allotments and public domain allotments are among the many examples.<sup>186</sup> With one exception, there are no Indian reservations in Alaska.<sup>187</sup> There are, however, many Indian allotments.<sup>188</sup> Disestablished reservation lands are another example. In this circumstance, an Indian reservation may be disestablished at a certain point in time, but this does not eliminate the trust status of individual allotments previously within the reservation.<sup>189</sup> Prior to 1976, federal statutes included an Indian homesteading law that could create Indian allotments outside of an Indian reservation.<sup>190</sup> Fee lands purchased for individual Indians and converted to trust lands are also Indian allotments.<sup>191</sup>

The case of *Washington v. Cooper* helps illustrate the difference between Indian allotments and Indian reservations.<sup>192</sup> In *Cooper*, the land at issue was allotted to a

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181. *United States v. Jackson*, 280 U.S. 183, 190 (1930); *United States v. Ramsey*, 271 U.S. 467, 471 (1926); *United States v. Pelican*, 232 U.S. 442, 449 (1914).

182. *See Ramsey*, 271 U.S. at 470.

183. *Id.*

184. COHEN, *supra* note 67, § 16.03[1], at 1039-40.

185. *See infra* notes 362-372 and accompanying text.

186. 25 U.S.C. §§ 334, 336 (2006).

187. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 & n.2 (1998).

188. *See Native Allotment Act of 1906*, ch. 2469, 34 Stat. 197.

189. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 n.48 (1977); *DeCoteau v. Dist. Cnty. Court*, 420 U.S. 425, 427 n.2, 446 (1975).

190. *Moses Agreement (Indian Land Patents)*, ch. 180, 23 Stat. 76.

191. *See City of Tacoma v. Andrus*, 457 F. Supp. 342, 346 (D.D.C. 1978).

192. *State v. Cooper*, 928 P.2d 406, 410-11 (Wash. 1996).



member of the Nooksack Tribe.<sup>193</sup> However, the land was placed into trust for the benefit of an individual Indian in 1891.<sup>194</sup> This was the case despite the fact that the Nooksack Tribe was not federally recognized nor its reservation established until 1973.<sup>195</sup> Since the Nooksack Reservation did not exist until 1973, it did not include the 1897 allotted land. Under § 1151, the land at question in *Cooper* is considered an Indian allotment, not Indian reservation.

#### F. *Who Is an “Indian”?*

The determination of who qualifies as Indian under federal Indian criminal law is a difficult and counterintuitive issue that continues to evolve in federal courts. The obvious case is an individual who is enrolled in a federally recognized Indian tribe (assuming a tribe’s membership rules require some degree of Indian blood quantum).<sup>196</sup> The category of who is an Indian for purposes of criminal jurisdiction is broader in scope. Instead of being a simple issue of political designation, it is ultimately an issue of race with some level of political recognition.

For example, in *United States v. Rogers*, the U.S. Supreme Court upheld the federal murder conviction of a defendant with no Cherokee blood quantum but whom the Cherokee Tribe adopted and recognized as a member of its tribe.<sup>197</sup> The defendant maintained that the federal courts had no jurisdiction over the case because both he and the victim were members of the Cherokee Nation.<sup>198</sup> The Court disagreed, explaining that the exception for Indians dealt with “those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, — of the family of Indians . . . .”<sup>199</sup> Because the Court did not find the defendant to be sufficiently Indian, it held that he was subject to federal jurisdiction.<sup>200</sup>

Race is thus a critical factor in determining who is an Indian in the criminal context. Modern courts have distilled a two-pronged test for “Indian” status where no specific statutory definition applies: “(1) the degree of Indian blood; and (2) tribal or

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193. *Id.* at 407.

194. *State v. Cooper*, 912 P.2d 1075, 1077 n.6 (Wash. Ct. App. 1996).

195. *Id.* at 1076.

196. *United States v. Rogers*, 45 U.S. (4 How.) 567, 572-73 (1846).

197. *Id.* at 571-73.

198. *Id.* at 571. The federal government had asserted jurisdiction under the Nonintercourse Act. *Id.* at 572-73 (citing Intercourse Act, ch. 161, § 12, 4 Stat. 729, 730-31 (1834) (codified as amended at 25 U.S.C. § 177 (2006))). The defendant based his argument on section 25 of that Act, which provides that the provisions “shall not extend to crimes committed by one Indian against the person or property of another Indian.” *Id.* at 572 (quoting Intercourse Act § 25, 4 Stat. at 733 (codified as amended at 25 U.S.C. § 177))).

199. *Id.* at 573.

200. *Id.*

governmental recognition as an Indian.<sup>201</sup> This is a highly fact driven inquiry, often treated differently in different jurisdictions.<sup>202</sup> Therefore, actual tribal membership is not dispositive.<sup>203</sup>

The interplay of the above-mentioned laws can be graphically depicted as follows:

ACCUSED	VICTIM	JURISDICTION	BASIS/STATUTES
Indian	Indian/Victimless*	Tribe; Sometimes concurrent with Feds if Major Crimes Act applies	Tribal Sovereignty; Major Crimes Act
Indian	Non-Indian	Tribe; Sometimes concurrent with Feds if Major Crimes Act or General Crimes Act applies	Tribal Sovereignty; Major Crimes Act; General Crimes Act; Assimilative Crimes Act
Non-Indian	Indian	Exclusively Feds	General Crimes Act; Assimilative Crimes Act; <i>Oliphant</i>
Non-Indian	Non-Indian/Victimless	Exclusively State	<i>McBratney</i> ; <i>Draper</i> ; <i>Solem</i> ; <i>Oliphant</i>
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability, or statute otherwise applies	Specific Federal Statute

\*It is also possible for federal jurisdiction to apply under the General and Assimilative Crimes Act when there is a victimless Indian crime and the tribe has not sought to prosecute the accused.

201. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979).

202. *Compare* *United States v. Pemberton*, 405 F.3d 656, 658-59 (8th Cir. 2005) (focusing on self-identification as an Indian rather than government identification), *with* *St. Cloud v. United States*, 702 F. Supp. 1456, 1461-62 (D.S.D. 1988) (focusing on government recognition, benefits received, and social recognition).

203. *See* *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005); *Lee v. Pero* (*Ex parte Pero*), 99 F.2d 28, 31 (7th Cir. 1938).

## II. INDIAN COUNTRY CRIMINAL JURISDICTION UNDER P.L. 280

## A. P.L. 280 Jurisdiction

Public Law 280 is a federal statute enacted in 1953.<sup>204</sup> Generally speaking, P.L. 280 conferred state criminal jurisdiction over Indian Country in certain circumstances.<sup>205</sup> The state exercise of jurisdiction under P.L. 280 is concurrent with that of tribal nations.<sup>206</sup>

States falling within 18 U.S.C. § 1162(a) are considered “mandatory” P.L. 280 states because *all* Indian Country in these states, with a few statutorily enumerated exceptions, were immediately subject to state criminal jurisdiction.<sup>207</sup> Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin are all mandatory P.L. 280 states.<sup>208</sup> Federal jurisdiction under the Major Crimes Act and the General Crimes Act expressly does not apply in mandatory P.L. 280 states, thus making state exercise of authority exclusive of the federal government.<sup>209</sup> The only exception to this rule occurs when the federal government has asserted concurrent authority with the state and tribes pursuant to the Tribal Law and Order Act’s amendments to P.L. 280.<sup>210</sup>

Public Law 280 also grants authority to states not listed in the mandatory provision to assume criminal jurisdiction over Indian Country within their borders.<sup>211</sup> States asserting jurisdiction under this section of P.L. 280 are referred to as “optional” P.L. 280 states.<sup>212</sup> Some optional P.L. 280 states, like Washington, chose not to assert full jurisdiction over Indian Country.<sup>213</sup> The states currently asserting jurisdiction

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204. Public Law 280, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2006 & Supp. IV 2010), and 28 U.S.C. § 1360 & note (2006)).

205. Limited civil jurisdiction is also conferred, but a detailed discussion of that issue and its implications is beyond the scope of this paper.

206. *See* Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 561 (9th Cir. 1991); Confederated Tribes of the Colville Reservation v. Superior Court, 945 F.2d 1139, 1140 n.4 (9th Cir. 1991); *see, e.g.*, Cabazon Band of Mission Indians v. Smith, 388 F.3d 691, 694 n.3 (9th Cir. 2004) (noting the tribe did not challenge the lower court’s grant of summary judgment in favor of the tribe on the issue of whether it lawfully operated a law enforcement agency on the reservation (citing with approval Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1195, 1196 (C.D. Cal. 1998))).

207. 18 U.S.C. § 1162(a) (2006). The only statutory exceptions to the state exercise of jurisdiction over Indian Country in mandatory P.L. 280 states are the Annette Islands of the Metlakatla Indian community in Alaska, the Red Lake Reservation in Minnesota, and the Warm Springs Reservation in Oregon. *Id.*

208. *Id.*

209. § 1162(c).

210. § 1162(d) (Supp. IV 2010).

211. 25 U.S.C. § 1321(a) (Supp. IV 2010).

212. This is because, unlike the “mandatory” states, “optional” P.L. 280 states have discretion to assert such jurisdiction. *See id.*

213. *See* WASH. REV. CODE § 37.12.010 (2010). The U.S. Supreme Court upheld this

over Indian Country under the optional P.L. 280 provisions are Washington, Idaho, Florida, and—with respect to felonies on the Confederated Salish and Kootenai Tribe's Indian Country lands—Montana.<sup>214</sup>

Unlike mandatory P.L. 280 states, the Major Crimes Act and General Crimes Act apply to optional P.L. 280 states.<sup>215</sup> Comparing the statutory scheme of 18 U.S.C. § 1162 with 25 U.S.C. § 1321 indicates that the state exercise of criminal jurisdiction in mandatory P.L. 280 states is exclusive of federal jurisdiction, but concurrent under optional P.L. 280 states. Subsection (c) of § 1162 is explicit in removing federal jurisdiction, while such language is conspicuously absent in § 1321. This is particularly true if the tribal canons of construction are invoked to interpret ambiguous statutes in favor of tribes.<sup>216</sup> The Eighth Circuit's decision in *United States v. High Elk* is consistent with this reading of the federal statutes, as is the Department of Justice's ("DOJ") position recently reflected in the *Federal Register*.<sup>217</sup> It is also the position favored by *Cohen's Handbook of Federal Indian Law*.<sup>218</sup>

Nevertheless, in Washington, the unpublished decision of *United States v. Johnson* has produced a different result.<sup>219</sup> In *Johnson*, the federal district court held that Washington state jurisdiction was exclusive of the federal government despite Washington's optional P.L. 280 status.<sup>220</sup> The defendant cited to several federal court decisions for the proposition that state jurisdiction under P.L. 280 was exclusive of the federal government.<sup>221</sup> Each of those cases, however, dealt with mandatory P.L. 280 states.<sup>222</sup> Thus, the federal District Court's ruling in *Ronald Percy Johnson* is incorrect. Even so, the U.S. Attorney offices for both the Western and Eastern

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piecemeal assertion of jurisdiction by optional P.L. 280 states. See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 502 (1979).

214. Carole Goldberg, *Tribal Jurisdiction Status Analysis*, TRIBAL CT. CLEARINGHOUSE, <http://www.tribal-institute.org/lists/tjsa.htm> (last updated Feb. 16, 2010).

215. See *United States v. High Elk*, 902 F.2d 660, 661 (8th Cir. 1990); Office of the Attorney General; Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. 76,037, 76,038 (Nov. 28, 2011) (to be codified at 28 C.F.R. pt. 50).

216. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943) ("[T]reaties are construed more liberally than private agreements . . . . Especially is this true in interpreting treaties and agreements with the Indians . . . .").

217. See *supra* note 215 and accompanying text.

218. COHEN, *supra* note 67, § 6.04[3][d][i], at 566-70.

219. *United States v. Johnson*, CR80-57MV (W.D. Wash. May 13, 1980) (Order on Defendant's Motion to Dismiss).

220. *Id.* at 2-4.

221. Memorandum of Points & Authorities in Support of Motion to Dismiss Information at 8-9, *Johnson*, No. CR80-57MV (Mar. 17, 1980).

222. See *Anderson v. Gladden*, 293 P.2d 463, 464-65 (9th Cir. 1961) (pertaining to Oregon); *Quechan Tribe of Indians v. Rowe*, 350 F. Supp. 106, 109 (S.D. Cal. 1972) (pertaining to California); *United States v. Brown*, 334 F. Supp. 536, 538 (D. Neb. 1971) (pertaining to Nebraska).

Districts of Washington appear to have taken the position that the decision is binding on them until overturned.<sup>223</sup>

Originally, P.L. 280's optional grant of authority for states to assert jurisdiction over Indian Country did not require the consent of affected tribes.<sup>224</sup> But in 1968, consistent with the newly adopted federal policy of self-determination and pursuant to ICRA, Congress amended P.L. 280 to require optional states to obtain tribal consent before asserting jurisdiction in Indian Country.<sup>225</sup> Yet the consent limitation was not retroactive, thus leaving intact jurisdiction already assumed by states prior to the amendment's passage.<sup>226</sup> Further, with regard to Indian Country created after 1968, the law seems to require that optional P.L. 280 states obtain consent before asserting jurisdiction over after-acquired Indian Country lands.<sup>227</sup>

Pursuant to 25 U.S.C. § 1323(a), the United States can accept a retrocession of jurisdiction from a state of all or any measure of the jurisdiction conferred to the state under P.L. 280.<sup>228</sup> Executive Order 11,435 grants the Secretary of the Interior the power to exercise all authority granted in 25 U.S.C. § 1323(a), subject to publication in the *Federal Register* after consulting with the U.S. Attorney General.<sup>229</sup> Using this process, tribes may seek and obtain state retrocession of P.L. 280 jurisdiction.<sup>230</sup>

There are twelve states where state criminal jurisdiction applies to Indian Country pursuant to laws other than P.L. 280. These states are Colorado, Connecticut, Iowa, Kansas, Maine, Massachusetts, New York, North Dakota, Rhode

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223. The author has come to this conclusion based upon discussions with attorneys from the offices of both districts. For yet another view, see *State v. Marek*, 736 P.2d 1314, 1317 (Idaho 1987), and *State v. Major*, 725 P.2d 115, 122 n.7 (Idaho 1986), each of which takes the position that, under optional P.L. 280 states, federal jurisdiction over crimes within the Major and General Crimes Acts is exclusive of states.

224. Public Law 280, ch. 505, sec. 2, § 1162(a), 67 Stat. 588, 588-89 (1953) (codified as amended at 18 U.S.C. § 1162(a) (2006)).

225. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tits. II-VII, § 401(a), 82 Stat. 77, 78 (codified as amended at 25 U.S.C. § 1321(a) (Supp. IV 2010)); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 539, 546, 549 (1975). The tribal consent provision requires a majority vote of the tribe's citizens. 25 U.S.C. § 1326 (2006).

226. See Indian Civil Rights Act of 1968 § 403(b), 82 Stat. at 79 (codified at 25 U.S.C. § 1323(b) (2006)) (“[S]uch repeal shall not affect any cession of jurisdiction made . . . prior to its repeal.”).

227. Cf. *State v. Squally*, 937 P.2d 1069, 1073-74 (Wash. 1997); *State v. Cooper*, 928 P.2d 406, 411 n.6 (Wash. 1996).

228. 25 U.S.C. § 1323(a).

229. Exec. Order No. 11,435, 3 C.F.R. 142 (1968), reprinted in 25 U.S.C. § 1323 note.

230. See, e.g., Umatilla Indian Reservation; Oregon's Acceptance of Retrocession of Jurisdiction, 46 Fed. Reg. 2195 (Dec. 16, 1980) (involving retrocession of “all criminal jurisdiction exercised by the State of Oregon over the Confederated Tribes of the Umatilla Indian Reservation”).

Island, South Carolina, Texas, and Utah.<sup>231</sup> Many of the acts conferring such jurisdiction to these states do so as if jurisdiction were conferred under P.L. 280 or have language similar to that of P.L. 280.<sup>232</sup> This can cause confusion insofar as the underlying statute may not distinguish whether jurisdiction is conferred as if it were a mandatory or an optional P.L. 280 state.<sup>233</sup> The DOJ has taken the position that, with the exception of the mandatory P.L. 280 states listed in 18 U.S.C. § 1162, federal government jurisdiction under the Major Crimes Act and General Crimes Act is concurrent with states.<sup>234</sup>

It should be noted that some tribes straddle more than one state—such as the Navajo, Standing Rock, Lake Traverse, and Washoe tribes—which may result in divergent jurisdictional analyses depending on the particular part of tribal land on which a crime was committed. States with Indian Country lands that do not appear to presently be affected directly or indirectly by P.L. 280 or P.L. 280-like statutes are Alabama, Arizona,<sup>235</sup> Louisiana, Michigan, Mississippi, Nevada, New Mexico, North Carolina, Oklahoma, South Dakota,<sup>236</sup> and Wyoming.<sup>237</sup>

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231. See Goldberg, *supra* note 214. Utah also passed legislation to assert P.L. 280 jurisdiction upon tribal consent, but no consent has ever been given. See *infra* notes 317-318 and accompanying text (discussing Utah and P.L. 280). Nonetheless, the Paiute Tribe's restoration legislation confers jurisdiction on Utah as if it came under P.L. 280. 25 U.S.C. § 766(b) (2006).

232. See Goldberg, *supra* note 214.

233. Compare *United States v. Burch*, 169 F.3d 666, 669-70 (10th Cir. 1999) (holding that state jurisdiction is exclusive of federal jurisdiction), with *United States v. High Elk*, 902 F.2d 660, 660 (8th Cir. 1990) (holding that state jurisdiction is concurrent with federal jurisdiction).

234. Office of the Attorney General; Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. 76,037, 76,038 (Nov. 28, 2011) (to be codified at 28 C.F.R. pt. 50); see Goldberg, *supra* note 214 (providing a detailed list of P.L. 280 and similarly affected non-P.L. 280 states along with relevant legislation, case law, and a list of affected tribes).

235. Arizona tried to assert civil P.L. 280 jurisdiction over air and water pollution issues, see *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 177 n.17 (1973) (discussing ARIZ. REV. STAT. § 36-1801 (Supp. 1972) (renumbered as ARIZ. REV. STAT. § 49-561) (repealed 2003)), and *id.* § 1856 (repealed 1986)), but the U.S. Supreme Court later held that P.L. 280 did not permit state civil regulatory authority in Indian Country. See *Bryan v. Itasca Cnty.*, 426 U.S. 373, 390 (1976). Arizona subsequently repealed its statutes. Act of May 19, 2003, ch. 238, § 4, 2003 Ariz. Sess. Laws 997, 1001; Act of May 13, 1986, ch. 368, § 19, 1986 Ariz. Sess. Laws 1343, 1369.

236. For example, in 1957 South Dakota passed a law to accept P.L. 280 jurisdiction over a consenting tribe, see Act of Mar. 18, 1957, ch. 319, 1957 S.D. Sess. Laws 427 (codified at S.D. CODIFIED LAWS §§ 1-1-12 to -16 (2004)), but no tribe has consented. In 1959, South Dakota passed a law to assert P.L. 280 jurisdiction over highways maintained jointly by the state and federal government, but that condition of joint maintenance has never been met. Act of Mar. 11, 1959, ch. 144, 1959 S.D. Sess. Laws 200 (codified at S.D. CODIFIED LAWS § 1-1-17 (2004)). Accordingly, South Dakota is not presently a P.L. 280 state. *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1166-67, 1174 (8th Cir. 1990).

237. Goldberg, *supra* note 214. Professor Goldberg also listed Massachusetts, Montana, North Dakota, and Utah, see *id.*, but those states appear to be affected directly or indirectly by P.L.

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B. *Jurisdictional Chart (P.L. 280)*

The following is a general graphical depiction of jurisdiction in P.L. 280 states<sup>238</sup>:

ACCUSED	VICTIM	JURISDICTION	BASIS/STATUTES
Indian	Indian/Victimless	Tribe; Mandatory states have jurisdiction, but not Feds (unless TLOA is exercised); Optional states have both state (subject to state statute) and federal jurisdiction	Tribal Sovereignty; P.L. 280; State authorizing statute
Indian	Non-Indian	Tribe; Mandatory states have jurisdiction, but not Feds (unless TLOA is exercised); Optional states have both state (subject to state statute) and federal jurisdiction	Tribal Sovereignty; P.L. 280; State authorizing statute
Non-Indian	Indian	Mandatory states have exclusive jurisdiction (unless TLOA is exercised); Option states have both state and federal jurisdiction	P.L. 280

280-like statutes, *see* Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, §§ 7, 9, 101 Stat. 704, 707-10, (codified at 25 U.S.C. §§ 1771e, 1771g (2006)); Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, § 7, 94 Stat. 317, 320-21 (1980) (codified as amended at 25 U.S.C. § 766 (2006)); Act of May 31, 1946, ch. 279, 60 Stat. 229; Confederated Salish and Kootenai Tribes, Montana; Acceptance of Retrocession of Jurisdiction, 60 Fed. Reg. 33,318 (June 9, 1995).

238. Specific state statutes must be consulted for a more accurate determination of jurisdiction because some states, like Washington, have asserted P.L. 280 jurisdiction in a piecemeal manner. *See* WASH. REV. CODE § 37.12.010 (2010). In Washington, such assertion is made all the more confusing due to the use of terms of art intermixed with nontechnical terms, and the use of modifiers to what would otherwise be considered a term of art. *See id.*

Non-Indian	Non-Indian/ Victimless	Exclusively state	<i>McBratney; Draper; Solem; Oliphant</i>
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability, or statute otherwise applies	Specific federal statutes

C. Matrix of P.L. 280 and Similarly Affected States

MANDATORY P.L. 280	Optional P.L. 280	SIMILARLY AFFECTED	NON- AFFECTED
Alaska	Washington	Colorado	Alabama
California	Idaho	Connecticut	Arizona
Minnesota	Florida	Iowa	Louisiana
Nebraska	Montana (CSKT: felonies only)	Kansas	Michigan
Oregon		Maine	Mississippi
Wisconsin		Massachusetts	Nevada
		New York	New Mexico
		North Dakota	North Carolina
		Rhode Island	Oklahoma
		South Carolina	South Dakota
		Texas	Wyoming
		Utah	

D. P.L. 280's History and Failings

1. The Original 1953 Law

Public Law 280 was originally introduced in 1953 as House Bill 1063.<sup>239</sup> When introduced, it only extended the criminal laws of the State of California to its Indian Country.<sup>240</sup> As such, congressional hearings on P.L. 280 only focused on California<sup>241</sup> and those hearings were never formally published.<sup>242</sup> Despite its initial focus on California, the end result of H.R. 1063 was a law mandating federal cession

239. H.R. 1063, 83d Cong. (1953) (enacted).

240. S. REP. NO. 83-699, at 5 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2411.

241. RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL IDENTITY* 127-28 (1980).

242. *Id.*



of criminal and limited civil jurisdiction over Indian Country to six states,<sup>243</sup> and permitting all other states to seek jurisdiction in the future.<sup>244</sup>

The law was developed in what is commonly referred to as the “Termination era.” In 1952, the Bureau of Indian Affairs (“BIA”) requested a seventy percent increase for its 1953 budget.<sup>245</sup> Congress reacted by announcing its new policy of termination in House Concurrent Resolution 108.<sup>246</sup> That resolution declared it should be “the policy of Congress, as rapidly as possible . . . to end [Indians’] status as wards of the United States,” effectively calling for the swift termination of federal supervision over tribes.<sup>247</sup> Consequently, rather than increase BIA funding to meet tribal needs, the government sought to terminate tribes altogether. The historic result of H.R. Con. Res. 108 was the termination of federal recognition of roughly 110 tribes and the removal of over 1.3 million acres from trust status.<sup>248</sup>

Enacted two weeks after H.R. Con. Res. 108, P.L. 280 is a product of the federal government’s historic policy of actively terminating tribes.<sup>249</sup> Public Law 280 was primarily developed to deal with perceived lawlessness in Indian Country.<sup>250</sup> Few tribes had the resources to effectively deal with routine crime occurring in their communities at the time.<sup>251</sup> Rather than deal with lawlessness by increasing federal funding to improve tribal criminal justice systems, the federal government shifted its burden to willing states.<sup>252</sup>

The Senate Subcommittee on Indian Affairs held a hearing on June 29, 1953 regarding H.R. 1063.<sup>253</sup> At that hearing, the Subcommittee amended the bill to make

243. Public Law 280, ch. 505, sec. 2, § 1162(a), sec. 4, § 1360(a), 67 Stat. 588, 588-89 (1953) (codified as amended at 18 U.S.C. § 1162(a) (2006), and 28 U.S.C. § 1360(a) (2006)). Originally, only five states fell within the mandatory provisions. *Id.* Alaska was added upon becoming a state. *See* Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545, 545 (codified as amended at 18 U.S.C. § 1162(a), and 28 U.S.C. § 1360(a)).

244. 25 U.S.C. § 1321 (2006 & Supp. IV 2010).

245. BARSH & HENDERSON, *supra* note 241, at 127.

246. *Id.*

247. H.R. CON. RES. 108, 83d Cong., 67 Stat. B132 (1953).

248. P.G. MCHUGH, ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF TRIBAL LAND RIGHTS 35 & n.10 (2011).

249. BARSH & HENDERSON, *supra* note 241, at 127.

250. S. REP. NO. 83-699, at 1, 5 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2409, 2411-12; Goldberg, *supra* note 225, at 541.

251. S. REP. NO. 83-699, at 1, 5 (“As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States . . .”).

252. *See* Public Law 280, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2006 & Supp. IV 2010), and 28 U.S.C. § 1360 & note (2006)).

253. S. REP. NO. 83-699, at 1.

it a law of general application, rather than limit its reach solely to the State of California.<sup>254</sup> The Subcommittee had requested the Department of Interior (“DOI”) to furnish it with a report on the attitudes of state and tribal governments regarding the potential transfer of federal jurisdiction.<sup>255</sup> The DOI produced its report on July 7, 1953, indicating that it had consulted with the “Indian groups” within California, Minnesota, Nebraska, Nevada, Oregon, Washington, and Wisconsin.<sup>256</sup> Excluding the Fourth of July, weekends, and the dates of both the subcommittee hearing and the report, this gave the DOI *four* business days to conduct such consultations.<sup>257</sup> It is inconceivable that an adequate consultation on a topic of such serious consequence could have been conducted between seven states and over 170 tribal nations during that period.<sup>258</sup>

Nevertheless, the DOI indicated that, with the exception of Nevada, states were generally in agreement with the proposed transfer of jurisdiction.<sup>259</sup> The Department also indicated that “[t]he Indian groups” were also generally agreeable to such transfer, but noted some opposition.<sup>260</sup> The report indicated neither the method by which the Department determined that potentially affected tribal nations were agreeable to a transfer of jurisdiction, nor the particular “Indian groups” that agreed to such a transfer. The report did, however, indicate that the Red Lake Band of Chippewa Indians in Minnesota was opposed to such a transfer, as were the Colville and Yakama tribes in Washington, the Menominee Tribe in Wisconsin, and the Warm Springs Tribe in Oregon.<sup>261</sup> These tribes were identified not just because they objected, but because the Department also believed them to have a tribal justice system that functioned in a “reasonably satisfactory manner.”<sup>262</sup> No mention was given as to how that determination was made and no other tribes were referred to in the report.

The upshot of those tribal nations deemed to have reasonably functioning justice systems is that they were, with the exception of the Menominee Tribe in Wisconsin,

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254. *Id.* at 1, 2, 5.

255. *Id.* at 6.

256. *Id.*

257. There were four business days between June 29, 1953 and July 7, 1953, excluding weekends and the fourth of July holiday.

258. As of October 19, 2010 there were over 170 tribes in these states. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810, 60,810-13 (Sept. 22, 2010), *supplemented by* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 66,124, 66,124 (Oct. 19, 2010). It is presumed that at least this many tribes existed prior to the termination era.

259. S. REP. NO. 83-699, at 6.

260. *Id.*

261. *Id.*

262. *Id.*

specifically excluded from P.L. 280's initial reach.<sup>263</sup> However, since Washington was not one of the initial mandatory states, the Colville and Yakama nations were not explicitly excluded from the reach of P.L. 280.<sup>264</sup> Had Washington become a mandatory state, those tribes presumably would have been expressly excluded from P.L. 280 and thus not subject to the law.<sup>265</sup>

The DOI included in its report to the Subcommittee on Indian Affairs that it believed certain states would have to amend their constitutions to eliminate language that expressly disclaimed state jurisdiction over Indian Country, consistent with the enabling acts of those states.<sup>266</sup> The Department wrote: "Congress would be required to give its consent and the people of each State would be required to amend the State constitution before the State legally could assume jurisdiction."<sup>267</sup> This statement appears to be the origin of language found in P.L. 280 that grants states federal consent to amend their constitutions or statutes for the purpose of removing any barrier to the assumption of jurisdiction under P.L. 280, regardless of any enabling act requirements.<sup>268</sup> It is also likely the reason that Washington was not included as a mandatory P.L. 280 state.

As originally enacted, P.L. 280 did not require the consent of an affected tribal nation.<sup>269</sup> In fact, when an attempt was made to insert a consent requirement into predecessor bills, the BIA requested the requirement be eliminated.<sup>270</sup> The Bureau feared that tribes with supposedly inadequate justice systems would nonetheless oppose the extension of state jurisdiction into their territories.<sup>271</sup> While the basis for the BIA's fear was uncertain, tribal opposition to state jurisdiction would have undermined the ability of the federal agency to shift the burden and cost of developing adequate tribal justice systems to states.

President Eisenhower expressed serious concerns over the law's failure to require tribal consent before states were permitted to assert jurisdiction over tribal nations. When enacting Public Law 280 in 1953, he issued a signing statement declaring,

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263. 18 U.S.C. § 1162 (2006 & Supp. IV 2010).

264. Only tribes in mandatory states were explicitly excluded from the reach of Public Law 280. *See id.*; *see also* S. REP. NO. 83-699, at 1.

265. It should be noted that Colville and Yakama objected on two primary grounds: first, they feared "inequitable treatment in State courts"; second, they feared the extension of state jurisdiction "would result in the loss of various [sovereign] rights." S. REP. NO. 83-699, at 7.

266. *Id.* Of particular concern were Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. *Id.*

267. *Id.*

268. Public Law 280, ch. 505, § 6, 67 Stat. 588, 590 (1953) (codified at 28 U.S.C. § 1360 note (2006)); *see also* 25 U.S.C. § 1324 (2006)).

269. Public Law 280 §§ 2-7, 67 Stat. at 588-90 (codified as amended at 18 U.S.C. § 1162 (2006 & Supp. IV 2010), and 28 U.S.C. § 1360 & note).

270. Goldberg, *supra* note 225, at 544-45.

271. *Id.*

I [have] grave doubts as to the wisdom of certain provisions contained in H.R. 1063 . . . .

. . . .

My objection to the bill arises because of . . . [t]he failure to include in these provisions a requirement of full consultation in order to ascertain the wishes and desires of the Indians and of final Federal approval . . . . I recommend, therefore, that at the earliest possible time in the next session of the Congress, the Act be amended to require such consultation with the tribes prior to the enactment of legislation subjecting them to state jurisdiction, as well as approval by the Federal government before such legislation becomes effective.<sup>272</sup>

Despite the President's call for Congress to amend P.L. 280, passage of a consent amendment was not easy. During the period of the 84th through the 89th Congress (1955-1965), twenty-three bills were introduced for the purpose of amending P.L. 280 to require tribal consent for the assertion of state jurisdiction over Indian Country.<sup>273</sup> These bills all received near unanimous support from tribes.<sup>274</sup> It wasn't until ICRA was passed in 1968 that P.L. 280 was finally amended to achieve Eisenhower's plea.<sup>275</sup>

## 2. Failings of P.L. 280

While tribes clearly opposed P.L. 280 on the ground that it did not require tribal consent, states had their own concerns—primarily from a financial standpoint. In seeking to improve law and order in Indian Country without having to pay for it, Congress shifted the financial burden to the states.<sup>276</sup> Unfortunately for those states, Congress also failed to provide a mechanism whereby states could generate income by taxing Indian trust lands.<sup>277</sup>

Some states had the foresight to avoid assumption of P.L. 280 jurisdiction without adequate federal funding. For example, when initially considering adoption of P.L. 280, Montana and South Dakota conditioned acceptance of jurisdiction on

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272. Eisenhower, *supra* note 2.

273. *Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the H. Comm. on Interior & Insular Affairs*, 90th Cong. 30 (1968) [hereinafter *Federal Hearing*] (statement of Harry R. Anderson, Assistant U.S. Sec'y of the Interior).

274. *Id.*

275. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tits. II-VII, § 406, 82 Stat. 77, 80 (codified at 25 U.S.C. § 1326 (2006)).

276. *See infra* notes 277-278.

277. Public Law 280, ch. 505, sec. 2, § 1162(b), sec. 4, § 1360(b), 67 Stat. 588, 588-89 (1953) (codified as amended at 18 U.S.C. § 1162(b) (2006), and 28 U.S.C. § 1360(b) (2006)); 25 U.S.C. §§ 1321(b), 1322(b) (2006 & Supp. IV 2010); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 375, 391 (1976); Goldberg, *supra* note 225, at 551.

complete federal subsidy.<sup>278</sup> Nevada had similar concerns. The legislative history indicates that some counties in Nevada would also accept jurisdiction only with accompanying federal subsidies.<sup>279</sup>

The United States Commission on Civil Rights reported several serious complaints concerning P.L. 280 in 1961. In particular, the Commission reported that police refused to provide protection or respond to phone calls from Indians, and further, that police ignored Indian offenses against Indians, but were very severe when a white person was the victim.<sup>280</sup> The situation in Nebraska, a mandatory P.L. 280 state, was particularly disturbing. Due to a lack of funds there, state law enforcement advised the Commission that law enforcement over the Omaha and Winnebago reservations was virtually nonexistent.<sup>281</sup> California, Minnesota, Oregon, Wisconsin, and Alaska reported similar problems to the Commission.<sup>282</sup>

By 1968, state financial difficulties in implementing P.L. 280 had become readily apparent.<sup>283</sup> Local governments were often unable to assume the financial burdens the added jurisdiction brought.<sup>284</sup> In Nebraska and Wisconsin, affected counties could not provide law enforcement services to Indian Country without additional state or federal financial aid.<sup>285</sup> Tribal nations complained of inadequate services under P.L. 280 in other affected states as well.<sup>286</sup> The DOI itself acknowledged that before P.L. 280, there were *some* federal law enforcement services provided in Indian Country of affected tribes.<sup>287</sup> Still, the BIA's request for a seventy percent increase in 1953 funding suggests that these services were scarce. After states assumed jurisdiction under P.L. 280, the federal government provided *no* direct assistance to affected tribes.<sup>288</sup>

Prior to the 1968 amendments, Indian Country crime in some P.L. 280 states became worse than it was under exclusive federal jurisdiction. This was the experience of the Confederated Tribes of the Umatilla Indian Reservation in Oregon,

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278. S. REP. NO. 83-699, at 7 (1953).

279. *Id.* at 6.

280. 5 U.S. COMM'N ON CIVIL RIGHTS, JUSTICE: 1961 COMM'N ON CIVIL RIGHTS REPORT 147-48 (1961).

281. *Id.* at 148 ("Under Public Law 280, the Federal Government relinquished to Nebraska criminal and civil jurisdiction of the Omaha and Winnebago Reservation. However, the local governments nearby claim they do not have the funds to maintain station deputy sheriffs on the reservation. Consequently, the reservation must rely upon the sheriff to answer calls as he is able." (footnote omitted)).

282. *Id.*

283. Goldberg, *supra* note 225, at 551-58.

284. *See Federal Hearing, supra* note 273.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

and a significant reason the Umatilla tribes actively sought retrocession from Oregon in the 1970s.<sup>289</sup> Not only did P.L. 280 confer jurisdiction on states without providing adequate funding, it provided a basis for the federal government to refuse certain funding for improving tribal law enforcement systems.<sup>290</sup> These funds are often necessary for tribes to deal with law and order issues themselves.<sup>291</sup>

Unfortunately, accurate crime statistics regarding the effects of P.L. 280 on Indian Country do not exist.<sup>292</sup> Nonetheless, a statistical investigation has been conducted regarding the quality of police services in Indian Country as perceived by law enforcement and reservation residents in both P.L. 280 and non-P.L. 280 states.<sup>293</sup>

There is a statistically significant difference between the satisfaction of reservation residents toward law enforcement in P.L. 280 and non-P.L. 280 states. Specifically, residents in non-P.L. 280 states are more satisfied with law enforcement than those in P.L. 280 states.<sup>294</sup> There is also a statistically significant difference between law enforcement's view of residential perception of the thoroughness of criminal investigations and the actual perceptions of those residents. In non-P.L. 280 situations, both law enforcement and residential perceptions of the thoroughness of police investigations are relatively similar (average to slightly above average).<sup>295</sup> However, in P.L. 280 jurisdictions, there is a significant divergence between law enforcement's perception of the thoroughness of crime investigation (very high), and the perception of reservation residents (somewhat low to average).<sup>296</sup> Thus, reservation residents and state law enforcement in P.L. 280 jurisdictions have a significant difference in perception of how well crimes are investigated.<sup>297</sup> Reservation residents in P.L. 280 jurisdictions also have a significantly more positive view of the quality of services provided by tribal law enforcement than of services provided by state law enforcement agencies.<sup>298</sup> Finally, although P.L. 280 reservation residents view law enforcement community communication as poor, state law

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289. *Criminal Retrocession and Related Topics: Hearing on H. 1448 and H. 1773 Before the Joint Exec.-Legis. Workgrp. on Tribal Retrocession*, 62d Leg. 1-3 (Wash. Oct. 10, 2011) [hereinafter *State Hearing*] (statement of M. Brent Leonhard, Att'y, Confederated Tribes of the Umatilla Indian Reservation) (on file with *Gonzaga Law Review*).

290. *Id.* at 1; see *Federal Hearing*, *supra* note 273, at 4.

291. *State Hearing*, *supra* note 289, at 1-3.

292. CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 21 (Nat'l Inst. of Justice, U.S. Dep't of Justice Ser. No. NCJ 222585, 2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.

293. *Id.* at 113-80.

294. *Id.* at 115-16.

295. *Id.* at 119.

296. *Id.*

297. *Id.* at 120.

298. *Id.* at 125.

enforcement agencies view community cooperation as above average.<sup>299</sup> Notably, there is near convergence between residential views and law enforcement views in non-P.L. 280 jurisdictions.<sup>300</sup>

These statistics indicate a significant divergence in the perceptions of reservation residents and law enforcement in P.L. 280 jurisdictions, as compared to fairly convergent perceptions between the two groups in non-P.L. 280 jurisdictions. The differences may be attributable to a failure on the part of state law enforcement agencies with jurisdiction in Indian Country to understand or reflect the values of the community they serve. If so, P.L. 280 jurisdiction in Indian Country presents serious problems for effective community policing, a process designed to improve crime control and prevention through the active involvement of community members in the process of problem solving.<sup>301</sup>

### 3. The Indian Civil Rights Act and the 1968 Amendments to P.L. 280

In 1968, ICRA amended P.L. 280 to permit retrocession of state jurisdiction back to the federal government in both mandatory and optional P.L. 280 states.<sup>302</sup> The Senate Report for ICRA indicates that in many instances P.L. 280 “resulted in a breakdown in the administration of justice to such a degree that Indian citizens . . . [were] being denied due process and equal protection of the law.”<sup>303</sup> The report also highlighted as problematic the fact that some states were able to assume jurisdiction against the clear wishes of tribal nations.<sup>304</sup> Washington was such a state.<sup>305</sup> The primary reasons for including the retrocession amendment in ICRA, however, were its negative financial impact on state and local governments and a general acknowledgement that P.L. 280 often made Indian Country law enforcement matters worse.<sup>306</sup>

For states seeking to assert jurisdiction over Indian Country after 1968, the law required “the consent of the Indian tribe occupying the particular Indian Country or part thereof which could be affected by such assumption . . . .”<sup>307</sup> Furthermore, tribal

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299. *Id.* at 144.

300. *Id.*

301. CMTY. POLICING CONSORTIUM, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION (Bureau of Justice Assistance, U.S. Dep’t of Justice Ser. No. NCJ 148457, 1994), available at <https://www.ncjrs.gov/pdffiles/commpp.pdf>.

302. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tits. II-VII, § 403, 82 Stat. 77, 79 (codified at 25 U.S.C. § 1323 (2006)).

303. S.REP. NO. 90-841, at 11 (1967).

304. *Id.*

305. See discussion *supra* Part III.

306. See discussion *supra* Part II.D.2-3.

307. 25 U.S.C. § 1321(a) (Supp. IV 2010).

consent requires “the enrolled Indians within the affected area of such Indian country [to] accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose.”<sup>308</sup> To this date, the author knows of no tribe that has pursued this precise process of consent to jurisdiction over it. Thus, no tribe has ever consented to such an assertion of state authority over its lands.<sup>309</sup>

Moreover, providing tribal nations the power to seek retrocession of state criminal jurisdiction did not remedy the problem of pre-1968 nonconsensual assertions of state jurisdiction.<sup>310</sup> Consequently, tribes are dependent on states to seek retrocession. Retrocession can include any or all measure of criminal or civil jurisdiction previously conferred under P.L. 280.<sup>311</sup> Even then, the ultimate decision to accept state retrocession is left to the Secretary of Interior.<sup>312</sup> This has not prevented some states from placing the power to request a retrocession of state jurisdiction in the hands of tribal nations.

For example, in 1955 Nevada assumed P.L. 280 jurisdiction over Indian Country,<sup>313</sup> thereby affecting fifteen tribes. In 1973, the Nevada Legislature passed a law offering to retrocede jurisdiction, except for those tribes that expressly consented to continued jurisdiction.<sup>314</sup> Based on this legislation, Nevada sought and received retrocession of all jurisdiction over fifteen of sixteen tribes and colonies in 1975.<sup>315</sup> Nevada retroceded jurisdiction to the sixteenth colony—the Ely Colony—in 1988.<sup>316</sup>

In 1972 Utah passed legislation whereby the state would accept jurisdiction over Indian Country lands provided a tribe consented to such an assertion of jurisdiction under the requirements of ICRA.<sup>317</sup> At the same time, Utah obligated itself to “retrocede all or any measure of the criminal or civil jurisdiction acquired by it . . . whenever the governor receives a resolution from a majority of any tribe . . . certifying the results of a special election and expressly requesting the state to

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308. *Id.* § 1326.

309. *Cf. infra* notes 317-318 and accompanying text.

310. 25 U.S.C. § 1323 (2006).

311. *Id.* § 1323(a).

312. *Id.*; Exec. Order No. 11,435, 3 C.F.R. 142 (1968), *reprinted in* 25 U.S.C. § 1323 note; Goldberg, *supra* note 225, at 558-59.

313. Act of Mar. 23, 1955, ch. 198, 1955 Nev. Stat. 297 (codified at NEV. REV. STAT. § 41.430(1)-(3) (2009)).

314. Act of Apr. 26, 1973, ch. 600, 1973 Nev. Stat. 1052 (codified at NEV. REV. STAT. § 41.430(4) (2009)).

315. Certain Indian Reservations in Nevada: Acceptance of Offer to Retrocede Jurisdiction, 40 Fed. Reg. 27,501 (June 4, 1975).

316. Ely Indian Colony, NV; Acceptance of Retrocession of Jurisdiction, 53 Fed. Reg. 5837 (Jan. 25, 1988).

317. Act of Mar. 19, 1971, ch. 169, §§ 1-2, 1971 Utah Laws 538, 538-39 (codified as amended at UTAH CODE ANN. §§ 9-9-201 to -202 (LexisNexis 2007)).



retrocede jurisdiction . . . .”<sup>318</sup> It does not appear that any tribe ever requested Utah to assert jurisdiction in the first instance.

Full state retrocession of criminal law has occurred with regard to seven tribes in mandatory P.L. 280 states. These are the Bois Forte Tribe of Minnesota; the Omaha, Winnebago, and Santee Sioux tribes of Nebraska; the Burns Paiute and Umatilla tribes of Oregon; and the Menominee Tribe of Wisconsin.<sup>319</sup> Nevada is the only optional P.L. 280 state to effect full retrocession of criminal jurisdiction, and did so with respect to all fifteen tribes.<sup>320</sup> While not all affected tribes have been polled, those that have been asked view retrocession positively.<sup>321</sup> That is certainly the case with respect to the Confederated Tribes of the Umatilla Indian Reservation.<sup>322</sup>

Presently, there are 565 federally recognized Indian nations in the United States.<sup>323</sup> Public Law 280 currently affects roughly 370 tribes in the six mandatory states alone.<sup>324</sup> It also affects forty-two tribal nations in optional P.L. 280 states, including twenty-one in the State of Washington.<sup>325</sup> Consequently, over seventy-five percent of tribal nations come within the reach of P.L. 280.

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318. *Id.* § 7, 1971 Utah Laws at 539-40 (codified as amended at UTAH CODE ANN. § 9-9-207(1) (LexisNexis 2007)).

319. Goldberg & Champagne, *supra* note 292, at 410.

320. *Id.* at 410-11. Walking on Common Ground succinctly describes Nevada’s experience with P.L. 280 jurisdiction:

Nevada assumed optional jurisdiction under Public Law 280 in 1967, amending the provision a few years later to require tribal consent. Nev. Rev. Stat. § 41.430. *See also* Chapter 601, Statutes of Nevada (1973). A 1973 amendment provided for retrocession except for those tribes already subject to the Act which consented to continued state jurisdiction. No tribes requested continuation of state jurisdiction. In 1975, retrocession was accepted for 15 tribes that had been subjected to state jurisdiction under Public Law 280. 40 Fed. Reg. 27,501 (1975). In 1988, retrocession was offered and accepted for the Ely Colony. 53 F. Reg. 5837 (1988). At present, Nevada does not exercise any jurisdiction under Public Law 280.

*Jurisdiction: Nevada*, WALKING ON COMMON GROUND, <http://www.walkingoncommonground.org/state.cfm?topic=25&state=#alpha-NV> (last visited Mar. 23, 2012).

321. Goldberg & Champagne, *supra* note 292, at 409-72.

322. Umatilla Indian Reservation; Oregon’s Acceptance of Retrocession of Jurisdiction, 46 Fed. Reg. 2195 (Dec. 16, 1980).

323. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810, 60,810-13 (Sept. 22, 2010), *supplemented by* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 66,124, 66,124 (Oct. 19, 2010).

324. Goldberg & Champagne, *supra* note 292, at 8-10.

325. *Id.* This Washington figure is adjusted to exclude the Cowlitz, Jamestown-S’Klallam, Nooksack, Samish, Sauk-Suiattle, Snoqualmie, Stillaguamish, and Upper Skagit reservations, as they were either restored or first recognized after 1968 and never thereafter consented to Washington’s assertion of jurisdiction. *See State v. Cooper*, 928 P.2d 406, 411 n.6 (Wash. 1996); Paul Shukovsky, *Cowlitz Tribe Gains Federal Recognition*, SEATTLE POST-INTELLIGENCER (Jan. 3, 2002, 10:00 PM),

III. WASHINGTON'S ASSERTION OF P.L. 280 AUTHORITY:  
A LABYRINTH IN THE MAZE

A. *The 1957 Law, Tribes Currently Subject to Its Coverage,  
and Early Court Challenges*

After the federal government passed P.L. 280 in 1953, the State of Washington enacted legislation in 1957 asserting full jurisdiction over Indian Country within its boundaries provided affected tribes consent to its assertion of authority.<sup>326</sup> Between 1957 and 1962 only nine tribes in Washington consented to application of state criminal jurisdiction over their Indian Country lands. These are the Chehalis, Muckleshoot, Nisqually, Quileute, Quinault, Skokomish, Squaxin Island, Suquamish, and Tulalip tribes.<sup>327</sup> At the time, these tribes were affected by Washington's full assertion of P.L. 280 jurisdiction.<sup>328</sup> Two tribes also consented to state P.L. 280 jurisdiction after the 1963 amendments. These are the Swinomish on June 7, 1963 and the Colville on January 29, 1965.<sup>329</sup> Initially, however, these two tribes sought and received Washington's full assertion of P.L. 280 jurisdiction rather than the piecemeal assertion under the 1963 amendments.<sup>330</sup>

In total, only eleven of Washington's twenty-nine tribes have ever consented to application of state jurisdiction in their Indian Country lands.<sup>331</sup> Of those original eleven, seven have since sought and received partial retrocession of state jurisdiction back to the federal government.<sup>332</sup> Retrocession of those seven can only be partial

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<http://www.seattlepi.com/local/article/Cowlitz-Tribe-gains-federal-recognition-1076440.php>; *Snoqualmie Tribe*, GOVERNORS OFFICE OF INDIAN AFFAIRS, <http://www.goia.wa.gov/Tribal-Information/Tribes/snoqualmie.htm> (last visited Mar. 23, 2012); *Stillaguamish Indian Tribe*, U-S-HISTORY.COM, <http://www.u-s-history.com/pages/h1574.html> (last visited Mar. 23, 2012); *Treaty, Rights, Recognition, and Territory*, SAMISH INDIAN NATION, <http://www.samishtribe.nsn.us/samish-community/culture/treaty-rights-and-recognition-and-territory/> (last visited Mar. 23, 2012).

326. Act of Mar. 23, 1957, ch. 240, §§ 1-2, 1957 Wash. Sess. Laws 941, 941-42 (codified as amended at WASH. REV. CODE § 37.12.010 (2010)); *see also* State v. Paul, 337 P.2d 33, 36 (Wash. 1959).

327. *Tonasket v. State*, 525 P.2d 744, 746 n.2 (Wash. 1974); *Arquette v. Schneckloth*, 351 P.2d 921, 925 n.1 (Wash. 1960).

328. *See Tonasket*, 525 P.2d at 746 n.2; *Arquette*, 351 P.2d at 925 n.1.

329. *See Tonasket*, 525 P.2d at 746 n.2.

330. *See id.* at 746 & n.2.

331. *See id.*

332. Notice of Acceptance of Retrocession of Jurisdiction for the Tulalip Tribes, Washington, 65 Fed. Reg. 75,948 (Nov. 29, 2000); Confederated Tribes of the Chehalis Reservation, Quileute Indian Reservation and the Swinomish Tribal Community, Washington; Acceptance of Retrocession of Jurisdiction, 54 Fed. Reg. 19,959 (Apr. 25, 1989); Colville Indian Reservation, Washington; Acceptance of Retrocession of Jurisdiction, 52 Fed. Reg. 8372 (Mar. 9, 1987); Quinault Indian Reservation: Notice of Acceptance of Retrocession of Jurisdiction, 34 Fed. Reg. 14,288 (Aug. 30,

because Washington does not yet allow a tribe to seek full retrocession of state jurisdiction—or at least no statute has been enacted that would expressly permit a governor to approve full retrocession. The effect of this partial retrocession is that these seven tribes are now subject to state jurisdiction under the 1963 amendments.<sup>333</sup>

Four tribes remain subject to full state jurisdiction under the original 1957 law. These are the Muckleshoot, Nisqually, Skokomish, and Squaxin Island tribes.<sup>334</sup> Of those four, only the Muckleshoot and Skokomish are specifically permitted by statute to seek partial state retrocession.<sup>335</sup>

Washington's 1957 assertion of P.L. 280 jurisdiction was challenged early in *State v. Paul*.<sup>336</sup> There, an Indian defendant was charged in state court with second-degree assault for an incident arising on the Tulalip Indian Reservation.<sup>337</sup> Prior to the alleged incident, the Tulalip Tribe had consented to Washington's exercise of jurisdiction under P.L. 280.<sup>338</sup> The defendant moved to dismiss the case for lack of jurisdiction, challenging the validity of the State's exercise of P.L. 280 power.<sup>339</sup> The defendant argued that the disclaimer clause in article XXVI of the Washington State Constitution was not amended in accordance with section 6 of P.L. 280.<sup>340</sup> Despite the defendant's argument—and what also appears to have been Congress's view of Washington law—the Washington State Supreme Court rejected Mr. Paul's

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1969); see Port Madison Indian Reservation: Notice of Acceptance of Retrocession of Jurisdiction, 37 Fed. Reg. 7353 (Apr. 5, 1972); see also *History & Culture*, SUQUAMISH TRIBE, <http://www.suquamish.nsn.us/HistoryCulture.aspx> (last visited Mar. 1, 2012) (explaining that the Suquamish comprised a part of Port Madison).

333. See Act of Mar. 13, 1963, ch. 36, § 1, 1963 Wash. Sess. Laws 346, 346-47 (codified at WASH. REV. CODE § 37.12.010).

334. Compare *Tonasket*, 525 P.2d at 746 n.2, with Notice of Acceptance of Retrocession of Jurisdiction for the Tulalip Tribes, Washington, 65 Fed. Reg. at 75,948, and Confederated Tribes of the Chehalis Reservation, Quileute Indian Reservation and the Swinomish Tribal Community, Washington; Acceptance of Retrocession of Jurisdiction, 54 Fed. Reg. at 19,959, and Colville Indian Reservation, Washington; Acceptance of Retrocession of Jurisdiction, 52 Fed. Reg. at 8372, and Port Madison Indian Reservation: Notice of Acceptance of Retrocession of Jurisdiction, 37 Fed. Reg. at 7353, and Quinault Indian Reservation: Notice of Acceptance of Retrocession of Jurisdiction, 34 Fed. Reg. at 14,288.

335. WASH. REV. CODE § 37.12.120 (2010).

336. *State v. Paul*, 337 P.2d 33, 34-35 (Wash. 1959).

337. *Id.* at 34.

338. *Id.* at 36.

339. *Id.* at 34-35.

340. *Id.* at 36. Public Law 280 contemplated that those certain states subject to enabling act language forgoing the exercise of jurisdiction in Indian Country would have to amend their constitutions to assert P.L. 280 authority. Congress's belief that Washington would have to amend its constitution appears to be the reason why Washington was not included as one of P.L. 280's initial mandatory states. See *supra* notes 266-268 and accompanying text.

argument.<sup>341</sup> Relying on *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, the court held that Washington's article XXVI disclaimer clause could effectively be lifted by legislation.<sup>342</sup>

In a series of cases in 1960, the Washington State Supreme Court trended away from state jurisdiction, dismissing several state actions over matters occurring in Indian Country over which a tribe had not consented to the assertion of state jurisdiction.<sup>343</sup> *Arquette v. Schneckloth*, for example, involved the prosecution of a Yakama Nation tribal member for stealing a car.<sup>344</sup> The lower court found the incident occurred in the City of Toppenish and wholly within the boundaries of the Yakama Indian Reservation.<sup>345</sup> Although the defendant was an Indian in Indian Country and the Yakama Nation had not consented to concurrent state jurisdiction under Washington's 1957 assertion of P.L. 280 jurisdiction, he nevertheless waived the right to counsel, pled guilty, and received a jail sentence not to exceed ten years.<sup>346</sup>

The defendant, appearing pro se, later filed a writ of habeas corpus challenging Washington's authority to prosecute him.<sup>347</sup> In particular, the defendant argued that Washington could not charge an Indian in this situation because the offense fell under the exclusive jurisdiction of the federal government pursuant to the Major Crimes Act.<sup>348</sup> The Washington State Supreme Court held that the defendant's offense did not fall within the Major Crimes Act, but still dismissed the action on the basis that the Yakama Nation never agreed to the assertion of state authority under the 1957 law.<sup>349</sup> The court wrote: "Until the remaining tribes elect to place themselves under the operation of the statute (RCW 37.12), or the legislature unconditionally assumes jurisdiction, as authorized by the 1953 Congressional enactment, jurisdiction over crimes committed by Indians in Indian country will remain in the federal courts."<sup>350</sup>

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341. *Paul*, 337 P.2d at 37.

342. *Id.* at 36-37 (citing *Boeing Aircraft Co. v. Reconstruction Fin. Corp.*, 171 P.2d 838, 841, 845 (Wash. 1946) (holding that WASH. CONST. art. XXVI's prohibition of the taxation of federal property did not bar the legislature's enactment of a law permitting the taxation of property leased from the federal government because the article's preamble allows for revocation of its provisions with "the consent of the United States and the people of this state"))).

343. *State ex rel. Adams v. Superior Court*, 356 P.2d 985, 990 (Wash. 1960); *State ex rel. Starlund v. Superior Court (In re Welfare of Colwash)*, 356 P.2d 994, 996 (Wash. 1960); *Arquette v. Schneckloth*, 351 P.2d 921, 925 (Wash. 1960).

344. *Arquette*, 351 P.2d at 922.

345. *Id.*

346. *Id.* at 922, 925.

347. *Id.* at 922.

348. *Id.* at 923.

349. *Id.* at 923, 925.

350. *Id.* at 925.

*B. The 1963 Nonconsensual Piecemeal Amendment, the Deepening of Confusion in Washington's Indian Country Criminal Jurisdiction Law, and Tribes Currently Subject to the 1963 Provisions*

Washington amended its P.L. 280 statute in 1963 to assert jurisdiction over all tribes regardless of tribal consent.<sup>351</sup> This nonconsensual assertion of authority was piecemeal, however, and further complicates an already complicated jurisdictional scheme. While other optional P.L. 280 states have asserted jurisdiction in a piecemeal fashion, Washington's assertion appears to be the most confusing. It contains Indian Country subject to full P.L. 280 jurisdiction under the 1957 law, piecemeal jurisdiction under the 1963 law, and Indian Country outside the reaches of P.L. 280 with regard to Indian Country acquired after the 1968 ICRA amendments.<sup>352</sup> Since 1968, no tribe in Washington has consented to state jurisdiction and thus there is no P.L. 280 jurisdiction over after acquired Indian Country lands.<sup>353</sup> Finally, adding to

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351. Act of Mar. 13, 1963, ch. 36, § 1, 1963 Wash. Sess. Laws 346, 346-47 (codified at WASH. REV. CODE § 37.12.010 (2010)). As codified, this Act provides as follows:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if [ ]chapter 36, Laws of 1963 had not been enacted.

WASH. REV. CODE § 37.12.010.

352. See discussion *supra* Part III.

353. In contrast, Florida's optional assertion of P.L. 280 jurisdiction is a full assertion. FLA. STAT. ANN. § 285.16 (West 2009). Idaho asserts jurisdiction over seven subject matter areas but does not have Washington's confused language attempting to discern fee land situations from trust and allotted land situations, and also does not make distinctions on the basis of race. IDAHO CODE ANN. § 67-5101 (2006). And Montana's assertion of jurisdiction is limited to any felony occurring on the

the confusion of a tripartite P.L. 280 jurisdictional structure, Washington's P.L. 280 enabling statutes contain terms of art intermixed with nontechnical terms.<sup>354</sup>

The following is a breakdown of Washington's 1963 amendments as codified by the Revised Code of Washington.<sup>355</sup> Without tribal consent, Washington has asserted jurisdiction over Indian Country as follows:

1. State assertion of jurisdiction applies to
  - a. Indians, and
  - b. Indian territory, reservations, country, and lands.
2. State assertion of jurisdiction does not apply to Indians when
  - a. they are on their tribal lands or allotted lands, and
  - b. those lands are
    - i. within an established Indian reservation and,
      1. held in trust by the United States, or
      2. subject to a restriction against alienation imposed by the United States.
3. Notwithstanding the above, State assertion of jurisdiction applies to Indians, regardless of location, with regard to:
  - a. compulsory school attendance,
  - b. public assistance,
  - c. domestic relations,
  - d. mental illness,
  - e. juvenile delinquency,
  - f. adoption proceedings,
  - g. dependent children, and
  - h. the operation of motor vehicles upon the public streets, alleys, roads and highways.
4. State assertion of jurisdiction is also in full if a tribe requests it pursuant to Revised Code of Washington section 37.12.021.

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Confederated Salish Kootenai Reservation, regardless of race or land status. MONT. CODE ANN. §§ 2-1-301 to -303 (2011); *see* Confederated Salish and Kootenai Tribes, Montana; Acceptance of Retrocession of Jurisdiction, 60 Fed. Reg. 33,318 (June 9, 1995).

354. *See* Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 482-87 (1979).

355. Act of Mar. 13, 1963, ch. 36, § 1, 1963 Wash. Sess. Laws 346, 346-47 (codified at WASH. REV. CODE § 37.12.010).

5. Tribes that agreed to the assertion of full state jurisdiction under the 1957 laws continue to be subject to full state jurisdiction unless partial retrocession has otherwise been granted.

The threshold question for the exercise of criminal jurisdiction is whether the defendant is an Indian.<sup>356</sup> The next relevant determination is whether the conduct occurred in or on “Indian territory,” “Indian reservation,” “Indian country,” or “Indian land.”<sup>357</sup> Unfortunately, this laundry list of lands includes terms of art *and* vague, nontechnical, and otherwise undefined terms. Normally, one would assume that the legislature used different terms to refer to different types of lands.<sup>358</sup> It seems likely, however, that the legislature intended the terms in Revised Code of Washington section 37.12.010 to overlap. Washington’s statutory scheme has thus left many practitioners scratching their heads.

Thankfully, P.L. 280 only uses the term “Indian country,” which is defined by federal statute.<sup>359</sup> Further, Washington cannot assert jurisdiction beyond the scope of P.L. 280 itself, even if the legislature intended to do so when it enacted the 1963 amendments.<sup>360</sup> Consequently, Washington’s criminal jurisdiction can only extend to “Indian country” as defined by P.L. 280.<sup>361</sup>

If it is determined that an offense involves an Indian, one must next determine if the first statutory exception applies. In particular, Washington does not assume jurisdiction over an Indian if the offense occurred on “tribal lands” or “allotted lands”

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356. See discussion *supra* Part I.F. It should also be noted that the statute does not mention non-Indians. Public Law 280 itself grants permission for states to assume jurisdiction over “offenses committed by *or against* Indians in . . . Indian country.” 18 U.S.C. § 1162(a) (2006)). The reason for mentioning offenses against Indians is that, otherwise, non-Indian offenses against Indians would be exclusively under federal jurisdiction. The Revised Code of Washington provides that “[t]he state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory.” WASH. REV. CODE § 37.12.010. It does not specifically mention crimes *against* Indians, or crimes otherwise committed by non-Indians that would fall under exclusive federal jurisdiction. However, the statutory language obligating the state to assume criminal jurisdiction over Indian Country generally can probably be read to include non-Indian crimes committed in Indian Country within its scope. The U.S. Supreme Court appears to have read it in this manner. See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470, 475 (1979).

357. WASH. REV. CODE § 37.12.010; see discussion *supra* Parts I.B, I.F (defining “Indian Country”).

358. See *Whatcom Cnty. v. City of Bellingham*, 909 P.2d 1303, 1308 (Wash. 1996) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”).

359. 18 U.S.C. § 1162(a); 25 U.S.C. § 1321(a) (Supp. IV 2010).

360. The scope of Public Law 280 jurisdiction conferred on a state is limited to that granted under the federal statutes.

361. See discussion *supra* Part I.E.

within an “established Indian reservation.”<sup>362</sup> This is an unfortunate choice of words and is unnecessarily confusing. First, this statutory exception requires the conduct to have occurred within an “Indian reservation.”<sup>363</sup> Unfortunately, the statute frustrates this definition by adding the modifier “established.”<sup>364</sup> Presumably, this was not intended to create a new term of art or to be used other than in accordance with its ordinary meaning or dictionary definition.<sup>365</sup> The term could, however, exclude historic reservations, areas that have been diminished from a reservation, or former reservations of terminated tribes.

Second, there is the further requirement that the incident arose on “tribal lands” or “allotted lands.”<sup>366</sup> Assuming the term “allotted lands” was intended to refer to “Indian allotments,” it should be treated the same as that term of art.<sup>367</sup> Thus, the term would refer to land either held in trust or over which title is restrained from alienation by the federal government for an individual Indian.<sup>368</sup> The term “tribal lands,” on the other hand, is not a term of art and presumably applies to lands over which a tribe, as opposed to an individual, has an enforceable property interest.<sup>369</sup>

The “tribal lands” or “allotted lands” must also either be held in trust or subject to a federal restraint on alienation.<sup>370</sup> In practice, this condition is already met if it has been determined that the land in question is “tribal land[]” or “allotted land[].” All Indian allotments are either held in trust or otherwise restrained from alienation.<sup>371</sup> All land owned by a tribe (“tribal land[]”) is subject to a federal restraint on alienation.<sup>372</sup> Given all of this, the effect of the first exception is that Washington does not assert criminal jurisdiction over an offense committed by an Indian on an Indian reservation unless the offense is on land which is neither tribally owned nor an Indian allotment.

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362. WASH. REV. CODE § 37.12.010 (2010); *see* discussion *supra* Part I.E.

363. WASH. REV. CODE § 37.12.010. The term “Indian reservation” is a term of art, defined by federal statute. *See* discussion *supra* Part I.E.1.

364. WASH. REV. CODE § 37.12.010.

365. The term “establish” is defined as follows: “to make or form; to bring about or into existence.” BLACK’S LAW DICTIONARY, *supra* note 7, at 626. Consequently, the statute appears to apply to an Indian reservation that has been brought into existence. The term “established Indian reservation” was recently litigated before the Washington State Supreme Court. *State v. Jim*, No. 84716-9, 2012 WL 402051 (Wash. Feb. 12, 2012) (publication forthcoming).

366. WASH. REV. CODE § 37.12.010.

367. *Id.*; *see* discussion *supra* Part I.E.3.

368. WASH. REV. CODE § 37.12.010; *see* discussion *supra* Part I.E.3.

369. Since “tribal land” it is not a term of art, the author assumes it refers to land in which a tribe has some ownership interest.

370. WASH. REV. CODE § 37.12.010.

371. *See* discussion *supra* Part I.E.3.

372. 25 U.S.C. § 177 (2006).



The first statutory caveat to the above exception is that Washington state jurisdiction applies regardless of land status if the matter falls within one of the eight enumerated exceptions in Revised Code of Washington section 37.12.010.<sup>373</sup> The final two caveats to the Indian on tribal or allotted lands exception apply when a tribe has either expressly sought state jurisdiction under Revised Code of Washington section 37.12.021<sup>374</sup> or agreed to Washington's assertion of jurisdiction after the passage of the 1957 law and before enactment of the 1963 amendment.<sup>375</sup>

The Yakima Nation challenged Washington's 1963 assertion of piecemeal jurisdiction under P.L. 280 on three grounds.<sup>376</sup> First, due to Washington's enabling act limitations, it should have amended article XXVI of the state constitution prior to asserting P.L. 280 jurisdiction. Second, P.L. 280 did not permit partial assertions of state authority. Third, the statute's checkerboard jurisdiction imposed on nonconsenting tribes violates the Equal Protection Clause.<sup>377</sup> The U.S. Supreme Court rejected the first argument in the same manner the Washington Supreme Court dealt with *State v. Paul*.<sup>378</sup> Next, the Court upheld Washington's piecemeal assertion of authority, finding that language in section 7 of P.L. 280 expressly contemplates assertion of state authority in a manner less than full assertion.<sup>379</sup> With regard to the equal protection challenge, the Court held that Revised Code of Washington section 37.12.010's classifications, based on tribal status and land tenure, are not "suspect" so as to require a compelling state interest, nor does the statute violate a fundamental

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373. WASH. REV. CODE § 37.12.010; *see discussion supra* Part III.B. Nonetheless, P.L. 280 did not grant states civil regulatory jurisdiction over Indians in Indian Country. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 390 (1976). Consequently, the exceptions only apply with regard to matters that are of a criminal, prohibitory, or civil adjudicatory nature.

374. The Swinomish and Colville tribes originally sought extension of state authority under Revised Code of Washington section 37.12.021. *See Tonasket v. State*, 525 P.2d 744, 746 n.2 (Wash. 1974). However, the state has since obtained retrocession of jurisdiction over both tribes' Indian Country, returning it to the 1963 statutory scheme. Confederated Tribes of the Chehalis Reservation, Quileute Indian Reservation and the Swinomish Tribal Community, Washington; Acceptance of Retrocession of Jurisdiction, 54 Fed. Reg. 19,959, 19,959 (Apr. 25, 1989); Colville Indian Reservation, Washington; Acceptance of Retrocession of Jurisdiction, 52 Fed. Reg. 8372, 8372 (Mar. 9, 1987).

375. As mentioned, there appears to be only four tribes currently subject to full state jurisdiction under the 1957 scheme: the Muckleshoot, Nisqually, Skokomish, and Squaxin Island tribes. *See supra* text accompanying note 329.

376. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 (1979).

377. *Id.* at 476-78.

378. *Id.* at 493. In other words, Washington's constitutional disclaimer on asserting jurisdiction in Indian Country, *see* WASH. CONST. art. XXVI, can effectively be repealed by legislation.

379. *Yakima Indian Nation*, 439 U.S. at 495.

right of self-government.<sup>380</sup> The Court held that Washington's statutory construct bore a rational relationship to the State's legitimate interest in providing protection to non-Indian citizens living within a reservation while allowing for tribal self-government on trust or restricted lands where tribal members have the greatest interest in being free of state authority.<sup>381</sup>

### C. *After-Acquired Indian Country*

The 1968 ICRA amendments to P.L. 280 require optional states, such as Washington, to obtain tribal consent prior to the assertion of jurisdiction.<sup>382</sup> This limitation was not retroactive, leaving intact jurisdiction assumed by a state prior to the Act's passage.<sup>383</sup> Still, it appears that lands acquired or created after 1968 require tribal consent in accordance with the requirements of ICRA before a state can assert P.L. 280 jurisdiction over those lands.<sup>384</sup> The 1968 amendment to Public Law 280 reads as follows:

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses . . . shall be applicable in *Indian country* only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose.<sup>385</sup>

The plain language of the 1968 amendment requires that, after its passage, a state obtain tribal consent prior to asserting jurisdiction over Indian Country.<sup>386</sup> However, if a state has already asserted jurisdiction over a given part of Indian Country, it

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380. *Id.* at 500-01.

381. *Id.* at 501-02.

382. 25 U.S.C. § 1321(a) (Supp. IV 2010); Goldberg, *supra* note 225, at 546, 549.

383. 25 U.S.C. § 1323(b) (2006) (“[S]uch repeal shall not affect any cession of jurisdiction made . . . prior to its repeal.”); *State v. Hoffman*, 804 P.2d 577, 587 (Wash. 1991).

384. The issue was recently before the Washington State Supreme Court. *State v. Jim*, No. 84716-9, 2012 WL 402051 (Wash. Feb. 12, 2012) (publication forthcoming). The author was the primary writer of the tribal amicus brief making such an argument. Brief of Amici Curiae Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Nez Perce Tribe, & Confederated Tribes & Bands of the Yakama Nation, *supra* note 17. The court ultimately ruled in accordance with the tribes' arguments.

385. 25 U.S.C. § 1326 (2006) (emphasis added).

386. See *Hoffman*, 804 P.2d 577, 586-87 (“Although the Civil Rights Act of 1968 amended Pub.L. 280 by adding tribal consent requirements, those requirements were not made retroactive; the 1968 amendments therefore did not displace jurisdiction previously assumed under Pub.L. 280 . . .” (quoting *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 150-51 (1984))).

retains that jurisdiction.<sup>387</sup> Liberally construing this language with all ambiguities in the tribes' favor,<sup>388</sup> the amendment should be read in a manner to prevent the extension of state criminal jurisdiction into Indian Country established after 1968 without tribal consent. The reason being that a state could not have asserted jurisdiction over Indian Country prior to 1968 if the Indian Country was established after 1968.

The Washington State Supreme Court implicitly recognized as much in *State v. Cooper*.<sup>389</sup> The *Cooper* case involved questions regarding Nooksack tribal territory and Washington's assertion of P.L. 280 authority.<sup>390</sup> Specifically, the defendant asserted that Washington had no authority over the land where his crime allegedly occurred because the Nooksack Tribe had not agreed to the assertion of state jurisdiction.<sup>391</sup> The *Cooper* Court assumed, but did not decide, that Washington had no jurisdiction over the Nooksack Reservation because its creation in 1973 postdated the 1968 amendments.<sup>392</sup> The land in question, however, was not part of the Nooksack Reservation because it had been allotted to an individual Indian in 1891.<sup>393</sup> The court noted that Washington necessarily had jurisdiction over the Indian allotment in question because it existed in 1963 when Washington passed Revised Code of Washington section 37.12.010, prior to both the reservation's creation and the 1968 amendments, and was located outside the newly created reservation lands.<sup>394</sup>

In *State v. Squally*, the Washington State Supreme Court again implicitly recognized that tribes must consent to state jurisdiction over land acquired after 1968.<sup>395</sup> In 1957, the Nisqually Tribe requested that Washington assert criminal jurisdiction over "the peoples of the Nisqually Indian Community, and all persons being and residing upon the Nisqually Indian Reservation . . .".<sup>396</sup> Based on this request, the Governor issued a proclamation stating, "[t]he criminal . . . jurisdiction of the State of Washington shall apply to the Nisqually Indian people, their reservation, territory, lands and country, and all persons being and residing therein."<sup>397</sup> Between 1979 and 1982, the Nisqually Tribe acquired additional lands and expanded its

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387. *Id.*

388. *See* *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930).

389. *State v. Cooper*, 928 P.2d 406 (Wash. 1996).

390. *Id.* at 408.

391. *Id.* at 411.

392. *Id.* at 411 n.6.

393. *State v. Cooper*, 912 P.2d 1075, 1077 n.6 (Wash. Ct. App. 1996).

394. *Cooper*, 928 P.2d at 411.

395. *State v. Squally*, 937 P.2d 1069, 1074 (Wash. 1997).

396. *Id.* at 1072.

397. Governor's Proclamation (Wash. Dec. 2, 1957), *reprinted in* Brief of Respondent at 22, *State v. Squally*, 915 P.2d 1151 (Wash. Ct. App. 1996) (No. 18070-7-II), 1995 WL 17217412.

reservation by thirty-six acres.<sup>398</sup> Later, the defendant in *Squally* was accused of crimes committed on this after-acquired property.<sup>399</sup> The defendant's argument was twofold: first, Washington did not have criminal jurisdiction because the Nisqually Tribe's consent was limited to the original reservation boundaries set forth in the legal description of the consent resolution; second, the Nisqually Tribe never granted Washington permission to exercise jurisdiction after acquiring the new lands.<sup>400</sup>

Recognizing that application of the 1968 amendment required tribal consent for after-acquired properties, the Washington State Supreme Court held that Washington retained jurisdiction over the territory in question.<sup>401</sup> In making its decision, the court pointed to the Nisqually Tribe's broad, original request for state jurisdiction over the "[c]ommunity, and all persons being and residing upon the Nisqually Indian Reservation," and the Governor's broad grant of authority in response to the request.<sup>402</sup> The court found that the Tribe had consented to state jurisdiction over the entire reservation, including after-acquired properties.<sup>403</sup> However, absent the broad tribal request and corresponding state proclamation, it does not appear that Washington's jurisdiction would have extended to the after-acquired lands.

Because they were recognized, restored,<sup>404</sup> or their Indian Country was created after 1968, there appear to be eight tribes in Washington that are not subject to state P.L. 280 jurisdiction. These are the Cowlitz, Jamestown-S'Klallam, Nooksack, Samish Nation, Sauk-Suiattle, Snoqualmie, Stillaguamish, and Upper Skagit tribes.<sup>405</sup> In addition, tribes acquiring Indian Country lands after 1968 are likely not subject to state jurisdiction unless (1) the tribe issued a broad grant of authority to the state under the 1957 law that can be read as including after-acquired property, or (2) the tribe sought and obtained partial retrocession after 1968 in a manner that might be

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398. *Squally*, 937 P.2d at 1072.

399. *Id.* at 1070.

400. *Id.* at 1070, 1073.

401. *Id.* at 1073-74.

402. *Id.* at 1075.

403. *Id.* at 1074-75.

404. The term "restored" is used to refer to tribes that existed prior to the termination era, were terminated during that period, and subsequently had their federal recognition restored.

405. *State v. Cooper*, 928 P.2d 406, 411 n.6 (Wash. 1996) (noting that the Sauk-Suiattle and Upper Skagit reservations were created after 1968); COWLITZ INDIAN TRIBE, <http://www.cowlitz.org/> (last visited Mar. 23, 2012); *Tribal Information, Jamestown S'Kallam History*, JAMESTOWN S'KALLAM TRIBE, [http://www.jamestowntribe.org/history/hist\\_jst.htm](http://www.jamestowntribe.org/history/hist_jst.htm) (last visited Mar. 1, 2012); *About Us*, NOOKSACK INDIAN TRIBE, <http://nooksackindiantribe.org/about/> (last updated Feb. 6, 2012); *About*, SNOQUALMIE INDIAN TRIBE, <http://www.snoqualmientation.com/about/about.htm> (last visited Mar. 23, 2012); *Stillaguamish Tribe*, GOVERNORS OFFICE OF INDIAN AFFAIRS, <http://www.goia.wa.gov/Tribal-Information/Tribes/stillaguamish.htm> (last visited Mar. 23, 2012); see *Samish Nation*, GOVERNORS OFFICE OF INDIAN AFFAIRS, <http://www.goia.wa.gov/Tribal-Information/Tribes/samish.htm> (last visited Mar. 23, 2012).

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interpreted as consent. This does not present much confusion because after-acquired Indian Country lands are generally going to be either tribal lands or Individual Indian allotments.<sup>406</sup> Thus, state jurisdiction generally would not apply under the 1963 amendments except with regard to the eight enumerated categories.<sup>407</sup> It could, however, affect state jurisdiction over non-Indian crimes involving Indian victims on those lands.

D. *Washington's P.L. 280 Jurisdiction Charts*

1. Tribes Subject to the 1957 Law:  
Muckleshoot, Nisqually, Skokomish, and Squaxin Island

ACCUSED	VICTIM	JURISDICTION	BASIS/STATUTES
Indian	Indian/Victimless	Tribe; State	Tribal Sovereignty; P.L. 280 1957 enactment; <i>Ronald Percy Johnson</i>
Indian	Non-Indian	Tribe; State	Tribal Sovereignty; P.L. 280 1957 enactment; <i>Ronald Percy Johnson</i>
Non-Indian	Indian	State	P.L. 280 1957 enactment; <i>Ronald Percy Johnson</i>
Non-Indian	Non-Indian/Victimless	Exclusively State	<i>McBratney; Draper; Solem; Oliphant</i>
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability, or statute otherwise applies	Specific federal statutes

406. Indian Country is either a reservation (tribal lands with the exception of lands issued in fee under the allotment acts, which are no longer applicable, or where land is set aside for a non-Indian purpose), a dependent Indian community (rare), or an Individual Indian allotment. *See supra* Part I.E.

407. WASH. REV. CODE § 37.12.010 (2010).

2. Tribes Subject to the 1963 Amendments: Chehalis, Colville, Hoh, Kalispel, Lower Elwha Klallam, Lummi Nation, Makah, Port Gamble S' Klallam, Puyallup, Quileute, Quinault Nation, Shoalwater Bay, Spokane, Suquamish, Swinomish, Tulalip, and Yakama Nation

ACCUSED	VICTIM	JURISDICTION	BASIS/STATUTES
Indian	Indian/Victimless	Tribe; State unless within Indian reservation and on trust or restricted land and not among 8 enumerated categories*	Tribal Sovereignty; P.L. 280 1963 enactment; <i>Ronald Percy Johnson</i>
Indian	Non-Indian	Tribe; State unless within Indian reservation and on trust or restricted land and not among 8 enumerated categories	Tribal Sovereignty; P.L. 280 1963 enactment; <i>Ronald Percy Johnson</i>
Non-Indian	Indian	State	P.L. 280 1963 enactment; <i>Ronald Percy Johnson</i>
Non-Indian	Non-Indian/Victimless	Exclusively State	<i>McBratney; Draper; Solem; Oliphant</i>
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability, or statute otherwise applies	Specific federal statutes

\*Some tribes sought, and received, exclusive tribal jurisdiction over child dependency cases pursuant to the Indian Child Welfare Act.

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3. Tribes Affected by the 1968 Amendments to P.L. 280 (and After-Acquired Indian Country Lands): Cowlitz; Jamestown S' Klallam, Nooksack, Samish Nation, Sauk-Suiattle, Snoqualmie, Stillaguamish, and Upper Skagit<sup>408</sup>

ACCUSED	VICTIM	JURISDICTION	BASIS/STATUTES
Indian	Indian/Victimless*	Tribe; Sometimes concurrent with Feds if Major Crimes Act applies	Tribal Sovereignty; Major Crimes Act
Indian	Non-Indian	Tribe; Sometimes concurrent with Feds if Major Crimes Act or General Crimes Act applies	Tribal Sovereignty; Major Crimes Act; General Crimes Act; Assimilative Crimes Act
Non-Indian	Indian	Exclusively Feds	General Crimes Act; Assimilative Crimes Act; <i>Oliphant</i>
Non-Indian	Non-Indian/Victimless	Exclusively State	<i>McBratney; Draper; Solem; Oliphant</i>
Anyone	Anyone	Federal jurisdiction if a crime of nationwide applicability, or statute otherwise applies	Specific Federal Statute

\*It is also possible for federal jurisdiction to apply under the General and Assimilative Crimes Act when there is a victimless Indian crime and the tribe has not sought to prosecute the accused.

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408. This is based on the fact that these tribes were recognized after 1968. It is possible either that they do not yet have Indian Country lands or that the statutes recognizing them subjected them to state jurisdiction, but the author is not aware of such statutory limitations on their recognition.

IV. CONCLUSION: WASHINGTON SHOULD RETURN TO ITS ORIGINAL CONSENT-BASED MODEL OF ASSERTING P.L. 280 AUTHORITY OVER INDIAN COUNTRY

Public Law 280 was enacted by the federal government during the termination era and significantly reflects that flawed and rejected federal policy.<sup>409</sup> Two weeks before enacting P.L. 280, Congress passed House Concurrent Resolution 108, declaring it should be the policy of the United States to terminate federal recognition of tribes.<sup>410</sup> The legacy of that policy has been the termination of over 100 tribes and removal of over 1 million acres from federal trust status.<sup>411</sup> Public Law 280 was thus a key component and product of the federal government's termination policy. While the termination era ended with a repudiation of its failed approach and the announcement of a new era of tribal self-determination, P.L. 280 remains a stain on federal and tribal relations. It also remains as a central component of Washington State's criminal justice system.<sup>412</sup>

Public Law 280 also marked a significant blow to tribal independence by permitting states to assert jurisdiction over tribes without their consent. Even President Eisenhower, upon signing P.L. 280 into law, expressed "grave doubts as to the wisdom" of excluding a tribal consultation and consent requirement.<sup>413</sup> He thus urged state governors to ascertain the views of tribes before asserting jurisdiction over them.<sup>414</sup>

The State of Washington initially heard President Eisenhower's call and asserted jurisdiction only if a tribe specifically requested it.<sup>415</sup> Indeed, eleven tribes requested such assertions of state power, seven of which have since sought and received partial state retrocession.<sup>416</sup> Retrocession has been partial because Washington does not provide a process for tribes to seek full state retrocession of power.

Nevertheless, Washington amended its law and forcefully asserted criminal jurisdiction in 1963 regardless of tribal consent.<sup>417</sup> Affected tribes rigorously fought against this nonconsensual extension of state jurisdiction to no avail.<sup>418</sup> Included

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409. See discussion *supra* Part II.D.1.

410. See *supra* notes 246-248 and accompanying text.

411. See *supra* note 248 and accompanying text.

412. See discussion *supra* Part III.

413. Eisenhower, *supra* note 2.

414. *Id.*

415. Act of Mar. 23, 1957, ch. 240, §§ 1-2, 1957 Wash. Sess. Laws 941, 941-42 (codified as amended at WASH. REV. CODE § 37.12.010 (2010)).

416. See *supra* notes 327-329 and accompanying text.

417. Act of Mar. 13, 1963, ch. 36, § 1, 1963 Wash. Sess. Laws 346, 346-47 (codified at WASH. REV. CODE § 37.12.010).

418. See, e.g., *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 465-66 (1979).



among them were the Yakama and Colville tribes—who arguably would have been expressly excluded from the scope of P.L. 280 but for the fact that the United States Congress erroneously believed that Washington could not exercise P.L. 280 jurisdiction until it amended its constitution.<sup>419</sup> Presently, only four tribes have fully consented to Washington’s assertion of power over their lands.<sup>420</sup>

At the same time, criminal jurisdiction in Washington is likely the most confusing in the nation.<sup>421</sup> Depending on which tribe is involved, Washington may be a non-P.L. 280 state, a piecemeal optional P.L. 280 state, or a full optional P.L. 280 state.<sup>422</sup> Where Washington has exercised piecemeal P.L. 280 jurisdiction, it remains a convoluted analysis due largely to the inartful drafting of Washington’s 1963 amendments.<sup>423</sup> For this reason alone, legislators should amend the law or, at least, add a provision empowering tribes to seek state retrocession of jurisdiction.

Nor did P.L. 280 have the intended effect of improving public safety in Indian Country.<sup>424</sup> In many circumstances, it made matters worse.<sup>425</sup> This was largely because the problem that P.L. 280 sought to cure was created by the failure of the federal government to fund tribal law enforcement and court programs.<sup>426</sup> Rather than fund them, P.L. 280 shifted the burden of tribal law enforcement to states. Yet the states receiving this newly created jurisdiction often did not have funding to provide for public safety. This shift in burden also effectively eliminated federal funding for dealing with crime. In some places, the result was true lawlessness.<sup>427</sup>

Current research indicates that there are statistically significant differences in law enforcement’s perception of law and order issues and those of the affected community in P.L. 280 jurisdictions.<sup>428</sup> That same research indicates that this is not the case in non-P.L. 280 states.<sup>429</sup> This reflects a disconnect between the tribal community and law enforcement in Indian Country. Such a disconnect is problematic to maintaining law and order insofar as it hampers the ability of law enforcement to implement effective community oriented policing programs.<sup>430</sup>

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419. *See supra* notes 264-268 and accompanying text.

420. *See supra* note 334 and accompanying text.

421. *See discussion supra* Part III.

422. *See discussion supra* Part III.

423. *See discussion supra* Part III.B.

424. *See discussion supra* Part II.D.2.

425. *See discussion supra* Part II.D.2.

426. *See supra* notes 276-291 and accompanying text.

427. *See supra* note 281 and accompanying text.

428. *See supra* notes 292-300 and accompanying text.

429. *See supra* notes 292-300 and accompanying text.

430. *See supra* note 301 and accompanying text.

The federal government eventually realized that P.L. 280 was a flawed, problematic, and untenable solution to tribal lawlessness.<sup>431</sup> As a result, Congress passed the 1968 ICRA amendments to P.L. 280, allowing states to retrocede jurisdiction back to the federal government and mandate tribal consent prior to future assertions of state authority in Indian Country. Unfortunately, those amendments did not give tribes the power to effectuate state retrocession, leaving the power solely in the hands of states. In either case, the State of Washington has failed to enact legislation allowing the Governor to seek full retrocession, let alone leaving the decision in the hands of tribes.

The Washington State Legislature has considered a law that would have *required* full retrocession of P.L. 280 criminal jurisdiction, at the urging and insistence of tribal nations.<sup>432</sup> Their call should be heard. Not only should Washington create a process for full retrocession, the power to seek retrocession should be placed in the hands of tribal nations. In this way, tribes will once again be given the power to choose whether Washington exercises criminal jurisdiction over their citizens and lands.

Amending Washington's law to bring it in line with its original consent-based grounds is the moral and pragmatic action to take. Placing power in the hands of tribal nations will enhance their ability to deal with crime in their community, and will once again tie Washington law to the principle that governments derive their just powers from the consent of the governed. In Abraham Lincoln's words, "consent of the governed" is the very "sheet anchor of American republicanism."<sup>433</sup> It is time for Washington to once again bind itself to that anchor.

#### V. POSTSCRIPT

Prior to publication of this article, on March 19, 2012 the Washington State Governor signed Engrossed Substitute House Bill 2233 into law.<sup>434</sup> The new session law sets out a process by which the State of Washington *may* retrocede P.L. 280 jurisdiction back to the United States, as advocated by this article. However, retrocession is not guaranteed. Under this session law, a tribe may request retrocession from the Governor by submitting both a resolution to the Governor and a plan regarding the tribe's exercise of jurisdiction following the proposed

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431. *See supra* notes 302-306 and accompanying text.

432. S. 5332, 62d Leg., Reg. Sess. (Wash. 2011) (as referred to S. Comm. on Gov't Operations, Tribal Relations & Elections, Jan. 20, 2011); H.R. 1448, 62d Leg., Reg. Sess. (Wash. 2012).

433. Lincoln, *supra* note 1.

434. Act of Mar. 19, 2012, ch. 48, 2012 Wash. Sess. Laws, <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Law%202012/2233-S.SL.pdf> (to be codified at WASH. REV. CODE ch. 37.12).

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retrocession.<sup>435</sup> Upon receiving a tribe's resolution, the Governor must conduct a government-to-government meeting with the tribe to discuss retrocession, as well as consult with proximately located counties, cities, and towns.<sup>436</sup> In addition, within 120 days of the Governor's receipt of a tribe's resolution, standing committees of the Washington State House and Senate may conduct public hearings on the tribe's request for state retrocession and submit recommendations to the Governor.<sup>437</sup>

This new law is laudable insofar as it provides an avenue for tribes to seek full state retrocession of P.L. 280 jurisdiction. Unfortunately, by placing the ultimate decision in the hands of the Governor and mandating the inclusion of non-Indian governments in the decision-making process, it does not truly place the power of consent back in the hands of tribes. Hopefully, any governor who is called upon to retrocede jurisdiction by a tribal nation will give ample deference to the decisions of that tribe, take into consideration the general failings of P.L. 280,<sup>438</sup> and recognize that full retrocession can simplify Washington's very confusing Indian Country jurisdictional labyrinth.<sup>439</sup> With respect to the Colville and Yakama nations, the Governor should also be aware of the fact that but for Congress's mistaken belief that Washington would have to amend its constitution before it could exercise P.L. 280 jurisdiction, those tribes would likely have been explicitly excluded from the reaches of state jurisdiction under P.L. 280.<sup>440</sup>

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435. *Id.* § 1(2).

436. *Id.* § 1(3).

437. *Id.* § 1(5).

438. *See* discussion *supra* Part II.D.

439. *See* discussion *supra* Part III.

440. *See supra* notes 259-268 and accompanying text.