34 Idaho L. Rev. 465

Idaho Law Review
1998

CIVIL RIGHTS IN TRIBAL COURTS: THE INDIAN BILL OF RIGHTS AT THIRTY YEARS

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*466 I. INTRODUCTION

"Non-public proceedings, no representation by counsel, no notification of procedural rights and whipping are all customary in criminal proceedings." [1] United States Senator Orrin Hatch of Utah voiced this perception of tribal courts in 1988, as he introduced legislation which would have waived tribes' sovereign immunity to suit in federal court. [2] A decade later, Senator Slade Gorton of Washington echoes these criticisms, arguing for similar legislation to ensure that Indian tribal governments not be permitted to escape responsibility when they act in a "totally lawless fashion." [3] In support of his most recent proposal, which would subject tribes to a wide range of state and federal court suits, [4] Gorton contends that suing in tribal courts doesn't work because tribal courts are not adequate or neutral. [5]

Others present a far more favorable and supportive view of tribal justice systems. Roberta Cooper Ramo, during her recent term as president of the American Bar Association, wrote that traditional tribal courts should be seen as a model for alternative dispute resolution in the larger society. [6] In a similar vein, Diane LeResche, a proponent of traditional tribal justice systems, has written:

> Native Americans are generally not as concerned with distributive justice (equitable distribution of resources), or rough and wild justice (revenge, punishment, control, determination of who is right), as they

are with sacred justice (healing of broken relationships). Peacemaking processes which provide ***467** for sacred justice provide procedural justice for Native American people. [7]

These contrasting visions of native justice have changed little since the adoption of the Indian Civil Rights Act (ICRA) of 1968, [8] a complex compromise intended to guarantee that tribal governments respect civil rights while minimizing federal interference with tribal culture and tradition. [9] The central purpose of the ICRA was to apply most of the provisions of the Constitution's Bill of Rights to tribal governments, [10] and the "Indian Bill of Rights" [11] is the centerpiece of the legislation.

This article examines thirty years of litigation under the ICRA, with an emphasis on habeas corpus relief in federal courts, tribal sovereign immunity, the status of tribal sovereignty, and implementation of the Indian Bill of Rights by tribal courts. Part II reviews the legislative history of the Indian Bill of Rights and application of the Act by federal courts prior to the Supreme Court's 1978 decision in Santa ***468** Clara Pueblo v. Martinez. [12] Because habeas corpus provides the only avenue for federal court oversight of tribal court practices after Martinez, Part III examines habeas corpus litigation in federal courts to attempt to understand the current extent and effect of federal review. Since suits against Indian tribes are barred by tribal sovereign immunity, Part IV identifies how the ICRA can be enforced pursuant to waiver of tribal sovereign immunity or suit against a defendant who does not share the tribe's immunity. Part V discusses the tremendous evolution of tribal courts in the thirty years since the ICRA was adopted and the accompanying backlash against tribal sovereignty, including efforts to strip tribes of sovereign immunity and to expand federal court review of tribal court proceedings. Finally, since the ICRA leaves enforcement of the Indian Bill of Rights largely to tribal courts, Part VI searches for the meaning of the ICRA as interpreted in tribal courts throughout the United States. Finding that proposals to infringe on tribal sovereignty are based less on actual tribal court practice than on anecdote or cultural prejudice, this article concludes that the cause of civil rights would be better served if greater resources were to be made available for advocacy in tribal courts.

II. THE INDIAN BILL OF RIGHTS

More than a century of federal Indian law jurisprudence recognizes that tribal governments are not constrained by the constitutional limits placed on state and federal governments. In 1896, the Supreme Court held in Talton v. Mayes [13] that a Cherokee court which indicted and convicted a Cherokee for murder was not bound by the grand jury requirements of the Fifth Amendment, since tribal sovereign powers are pre-constitutional and Indian courts are not federal agencies. [14] Federal courts extended the holding of Talton to other provisions of the Bill of Rights. For example, in Native American Church v. Navajo Tribal Council, [15] the Tenth Circuit Court of Appeals held that the First Amendment did not limit the right of the Navajo Tribal ***469** Council to prohibit the exercise of the peyote religion, since "Indian tribes are not states. They have a status higher than that of states." [16]

Tempered by respect for tribal sovereignty, growing concern for the civil rights of Native Americans led to enactment of the ICRA following several years of hearings by the Senate Subcommittee on Constitutional Rights. [17] The primary sponsor of the ICRA legislation was Senator Sam Ervin of North Carolina, who had concluded that the rights of Indians were "seriously jeopardized by the tribal government's administration of justice," which he attributed to "tribal judges' inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system." [18]

The ICRA was passed over the objections of many tribal governments, some of which felt the economic burdens of compliance would be too great and others, especially the Pueblos in New Mexico, which felt their own cultural traditions were superior to

"white-man's justice." [19] The requirement of jury trials, for example, implicated both of these concerns. The potential costs were high and the jury system was foreign to traditional methods of dispute resolution among the ex- ***470** tended families which tribes comprise. [20] Witnesses testified that tribal traditions of fairness and justice made the ICRA an unnecessary intrusion on tribal sovereignty. [21] The final version of the ICRA reflects some of these concerns, [22] and judicial construction of the Act ultimately negated opponents' greatest fear - pervasive federal oversight of tribal courts. [23]

The "Indian Bill of Rights" [24] provides that "[n]o Indian tribe in exercising powers of self government shall:" [25]
(1) prohibit or abridge the free exercise of religion, freedom of speech, and freedom of assembly;

(2) violate freedom from unreasonable search and seizures, or issue warrants without probable cause;

(3) subject any person to prosecution more than once for the same offense;

(4) compel any person to testify against himself in a criminal case;

(5) take private property for public use without just compensation;

(6) deny the rights to a speedy and public trial, to be informed of the charges, to confront witnesses, to subpoena witnesses, and at one's own expense to be assisted by an attorney in all criminal cases;

(7) require excessive bail, excessive fines, inflict cruel and unusual punishment, or impose punishment greater than imprisonment for one year and a fine of $5,000 or both for conviction of any one offense; [26]

(8) deny equal protection of the laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; and

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(10) deny the right, if accused of an offense punishable by imprisonment, to a trial by a jury of not less than six persons. [27]

Not all of the provisions of the U.S. Constitution's Bill of Rights apply to tribal governments. [28] The ICRA guarantee of free exercise of religion does not prohibit a tribe from establishing a religion, in recognition of the fact that to many tribes religion is inseparable from government and other areas of life. [29] Although the ICRA guarantees a criminal defendant the right to have an attorney at his own expense, there is no requirement that a tribe provide an attorney for a defendant who cannot afford to hire an attorney. [30] The ICRA does not require a tribe to provide the right to jury trial in civil cases. [31]

The statute's text provides only one federal court remedy for ICRA violations: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian Tribe." [32] Nevertheless, in the first case under the ICRA, a federal judge in Phoenix invalidated as a violation of due process an order by the Navajo Tribal Council excluding from the reservation a legal services program director who was accused of disrespectful behavior at a Council meeting. [33] Thereafter, federal courts routinely found that the ICRA had waived tribal

sovereign immunity, and the courts regularly enjoined tribal governments and even awarded damages in ICRA cases.[34] The courts generally found federal jurisdiction to adjudicate ICRA claims under stat- ***472** utes providing for either federal question or civil rights jurisdiction.[35] Indian law scholars criticized this pervasive application of the ICRA.[36]

Ten years after the ICRA became law, the Supreme Court abruptly reversed this course of judicial interpretation in Santa Clara Pueblo v. Martinez.[37] Julia Martinez, a full-blooded member of the Santa Clara Pueblo, challenged a tribal ordinance which barred children of female tribal members married to nonmembers from tribal membership.[38] The federal district court upheld the ordinance as a matter of tribal tradition.[39] On appeal, the Tenth Circuit, noting the ordinance was of relatively recent origin, found the ordinance violated the ICRA's equal protection clause.[40] The Supreme Court held that the ICRA authorized suit against neither the tribe nor tribal officials in federal courts, finding that Congress intended no such interference with tribal self-government.[41] The Court stated: "Tribal forums are available to vindicate rights created by the ICRA . . . ."[42] Other than federal habeas jurisdiction, the Court suggested that only one alternative existed to tribal court enforcement of the ICRA: where tribal constitutions required that the Secretary of the Interior approve new ordinances, the Department of the Interior might enforce the ICRA.[43]

Martinez rekindled the debate regarding the appropriate roles of federal courts and tribal courts in enforcement of the Indian Civil ***473** Rights Act.[44] The Court's decision coincided with an era of tribal self-determination in federal Indian policy, to which proponents of Indian assimilation have responded with fiery political rhetoric, legislative proposals to limit tribal sovereignty, and a radical shift in Indian law jurisprudence.[45]

III. HABEAS CORPUS JURISDICTION IN FEDERAL COURTS

The ICRA provides only one federal court remedy for its violation: a person may seek a writ of habeas corpus to test the legality of his or her detention when the person is being held in jail or otherwise detained by an order of an Indian tribe.[46] Since Martinez, litigants continue to raise ICRA claims in federal courts in ever-increasing numbers, yet the relief granted by the courts has been limited almost exclusively to writs of habeas corpus.[47] Non-Indians especially are unlikely to be in a position to assert any claim under the ICRA, as a result of the combined effect of Martinez and the Supreme Court's decision in Oliphant v. Suquamish Indian Tribe,[48] which stripped tribal courts of criminal jurisdiction over non-Indians.[49] In a habeas corpus case, the Supreme Court ruled that tribal courts had no jurisdiction over nonmember Indians.[50] Congress thereafter amended the ICRA to include a reference to "the inherent power of Indian tribes, hereby ***474** recognized and affirmed, to exercise criminal jurisdiction over all Indians."[51]

On a petition for writ of habeas corpus, the Ninth Circuit found that a tribal court of appeals violated the ICRA when it dismissed an appeal as untimely because the tribal court's failure to rule on a tribal member's motion to waive filing fees violated the ICRA.[52] Habeas relief was not available to a tribal member to overturn a tribal court conviction for manslaughter although she previously was acquitted of voluntary manslaughter in federal district court.[53]

Tribal Council orders of permanent banishment from the reservation may constitute restraints on liberty sufficiently severe to satisfy the jurisdictional prerequisites for the ICRA's habeas corpus relief in federal court. The Second Circuit found federal jurisdiction under the ICRA to hear a petition for a writ of habeas corpus following a tribal government decree permanently banishing several tribal members from the reservation where the tribal government acknowledged there was no recourse for tribal court or other tribal review of the decree.[54] The United States District Court for the Northern District of New York

declined to find federal habeas corpus jurisdiction where tribal members had not been banished, but merely deprived of tribal employment, excluded from certain tribal facilities, and denied certain privileges of tribal membership, sanctions which plaintiffs had alleged effectively "resulted in" their banishment.[55]

Federal courts are split on whether a writ of habeas corpus is available to test the validity of a child custody decree issued by a tribal court. The Supreme Court held in Lehman v. Lycoming County Children's Services Agency[56] that federal courts lack habeas corpus jurisdiction in state cases involving determination of child custody or termination of parental rights.[57] The Lehman court noted, however, that habeas corpus is used in child custody cases in many states.[58] The Court's decision not to permit its use in Lehman appears to be based on concerns for federalism and comity, but it noted that there were other means for parents to find a federal forum for constitutional issues which arise in state court proceedings, including "appeal, certio- ***475** rari and the civil rights statutes."[59] Of course, none of these avenues of relief exist with respect to tribal courts. Thus, the extent of available habeas corpus relief for child custody under the ICRA remains an open question. In the Eighth Circuit, habeas corpus relief was available to a plaintiff who alleged that the tribal court denied his due process rights in determining child custody in a divorce proceeding where the plaintiff was not a tribal member, did not reside on the tribe's reservation, and had obtained a state court custody decree which the tribal court did not recognize.[60] The Ninth Circuit granted habeas relief to a tribal member in similar circumstances, although he had not attempted to exhaust tribal remedies.[61] Where original jurisdiction of the tribal court was not in question, however, at least two federal courts found no habeas corpus jurisdiction to review child custody decrees.[62]

Declaring an exception to Martinez, the Tenth Circuit ruled in Dry Creek Lodge v. Arapahoe and Shoshone Tribes[63] that the ICRA creates federal jurisdiction in non-habeas actions where there is no tribal remedy and the case involves a non-Indian and matters outside of internal tribal affairs.[64] The Tenth Circuit has limited this exception to cases where the tribal remedy has actually been sought and refused.[65] A federal court in Montana exercised jurisdiction under this exception where a non-Indian creditor had tried unsuccessfully for two years to use tribal courts to enforce a judgment against a tribal member who defaulted on a promissory note.[66] The court found:

> [T]here are no further adequate tribal remedies available to plaintiff. Plaintiff has recognized the establishment of the Tribal Court and carefully followed its procedures. Notwithstanding its diligence in providing notice to the defendants and complying with the Tribal Court system, plaintiff has been unable to obtain a simple default judgment. Plaintiff has ***476** no other tribal remedies available . . . and should not be required to expend any futile efforts with tribal authorities.[67]

Other jurisdictions have generally declined to follow Dry Creek.[68] The United States District Court for the Eastern District of Washington ruled that the exception would not apply where the plaintiffs had not even attempted to resolve their complaints in any tribal forum.[69] The court noted, however, that lack of access to a tribal court might well present a basis for federal question jurisdiction.[70]

Before seeking habeas corpus relief in federal court, a petitioner who is a member of a tribe generally must first exhaust all remedies available through the tribal court, including tribal court appeals.[71] The Ninth Circuit recently ordered a district court to dissolve its injunction of tribal court proceedings, entered prior to exhaustion of tribal court appellate remedies, where a tribal court jury had awarded $250 million in damages to heirs of two tribal members killed by a train.[72] A party who failed

to raise a confrontation clause claim in his tribal court appeal was not entitled to have that claim heard on a petition for habeas corpus in federal court.[73]

An exception to the general rule applies when exhausting tribal court remedies would be futile or irreparable injury would result from the delay.[74] A party was not required to exhaust tribal court remedies where the tribal court did not come into existence until after his com- ***477** plaint was filed.[75] In dicta, the Ninth Circuit suggested that a nonmember is not required to exhaust tribal remedies, at least where the action involves assertion of tribal court criminal jurisdiction.[76] The United States District Court for the District of Utah has rejected that view, holding instead that wherever a tribal court has apparent jurisdiction to proceed, whether in a criminal or civil matter, a nonmember Indian must exhaust tribal remedies.[77]

In applying the tribal exhaustion rule (where its exceptions are inapplicable), a federal court has discretion whether to stay or to dismiss the federal action.[78] Federal courts have expressed a preference in abstention cases for issuance of a stay rather than dismissal.[79] A stay is preferred because if the proceedings in the other court "do not resolve all the federal claims, a stay preserves an available federal forum in which to litigate the remaining claims, without the plaintiff having to file a new federal action."[80] Where timely resolution of the case is critical, the Eighth Circuit has advised that "[t]he exhaustion process should be given a reasonable time to proceed, but the District Court may wish to consider lifting the stay if satisfied that undue delays detrimental to either party are attending the tribal court exhaustion process."[81]

A tribal judgment is enforced by a federal court according to principles of comity, not full faith and credit.[82] Therefore, a tribal judgment should not be enforced if the tribal court did not have both personal and subject matter jurisdiction or if the defendant was not afforded due process of law.[83] This general principle is also tempered by a nonexclusive list of equitable exceptions to be applied at the court's discretion, including such factors as whether the judgment was obtained by fraud or when recognizing the judgment would conflict ***478** with public policy.[84] A federal court cited principles of comity in finding tribal court compliance with a federal habeas corpus order to commence proceedings within sixty days when the tribal court merely entered an order to reopen the case and did not schedule a hearing for several months thereafter.[85]

IV. TRIBAL SOVEREIGN IMMUNITY

In Santa Clara Pueblo v. Martinez, the Supreme Court held that suits against an Indian tribe are barred by the tribe's sovereign immunity.[86] Tribal officers are not protected by the tribe's immunity from suit, but except for habeas corpus the ICRA creates no cause of action for equitable relief even against tribal officials in federal court.

Sovereign immunity may leave a party with no forum for its claims.[87] The immunity extends to agencies of the tribes,[88] protects the tribe from suits on contracts, whether on- or off-reservation,[89] and prevents garnishment actions.[90] Tribal officials acting in their representative capacity and within the scope of their authority are protected by the tribe's immunity from suit.[91] Individual tribal members, including officials who act outside such capacity and authority, are not immune from suit.[92] Tribes are not immune from suit by the United States.[93] Congress can waive a tribe's immunity from suit,[94] but congressional waiver must be clearly expressed and will not be implied.[95] Federal officials acting without congressional authorization are not capable of waiving tribal immunity.[96] A state may not condition a tribe's right to sue on the tribe's waiver of tribal sovereign immunity.[97] A tribe does not waive its immunity from counterclaims, ***479** even "compulsory" ones, by bringing an action.[98]

However the tribe does consent to a full adjudication of the claim sued upon.[99] A tribal corporate charter which authorizes powers including the power to "sue and be sued" may constitute a waiver of sovereign immunity.[100]

Yet as broad as tribal sovereign immunity may seem, it is similar to the common law sovereign immunity enjoyed by state and federal governments.[101] State governments have successfully raised defenses of sovereign immunity to prevent Indian tribes from suing under the Indian Gaming Regulatory Act[102] for good faith negotiation of tribal-state agreements.[103] States are also immune from suit in tribal court.[104] A litigant who hopes to sue the federal government must find a statutory waiver for the type of relief sought. For example, the Administrative Procedures Act (APA) waives sovereign immunity as a defense in judicial proceedings brought to compel or set aside agency actions,[105] and the Federal Tort Claims Act (FTCA) waives sovereign immunity for negligent or wrongful acts by United States government officials.[106] However, the APA waiver does not extend to claims for money damages;[107] and the FTCA denies liability for a wide range of intentional torts[108] and the exercise of discretionary functions.[109]

Congress has waived tribal immunity for several types of proceedings. These include proceedings brought under the Resource Conservation and Recovery Act[110] as well as suits to adjudicate water rights.[111] Federal courts have applied the doctrine of Ex parte Young[112] to permit suit against tribal officials for acts allegedly beyond the ***480** scope of their authority.[113] This exception has been broadly applied to permit suit challenging the validity of various tribal laws or actions.[114] Federal law also waives the sovereign immunity of the United States to be sued for certain acts by tribal employees.[115]

Tribes themselves may voluntarily waive their immunity from suit. Although the Supreme Court stated in Martinez that such waivers must be "unequivocally expressed,"[116] federal courts have found waivers in contract language requiring arbitration of disputes to be enforceable "in any court having jurisdiction,"[117] or in standard "sue and be sued" clauses in corporate charters.[118]

Indian law scholars Ralph Johnson and James Madden wrote just a decade ago that they could find no published tribal court opinions prior to the ICRA that addressed the issue of sovereign immunity.[119] They suggested this might be due to tribal courts' historically smaller civil caseloads, the "lack of legal training of [tribal] judges, and the widespread assumption after 1968 that the Indian Civil Rights Act had waived tribal sovereign immunity."[120] All of that has changed in recent years.

In a tort action against the Navajo Nation and unidentified Navajo police officers, the Supreme Court of the Navajo Nation held that the ICRA does not waive tribal sovereign immunity in tribal court, just as it does not waive sovereign immunity to suit in federal courts.[121] The court noted that Martinez instructs Indian tribes to "provide forums to vindicate rights created by the ICRA."[122] However, it reasoned that "ICRA suits which result in money damages against ***481** the Navajo Nation will only divert funds allocated for essential governmental services."[123] Therefore, the Navajo Nation had enacted laws permitting suit against tribal officials for acting outside the scope of their authority, and even against the Nation where any money damages would be covered by insurance.[124] Similarly, other tribes have authorized monetary damages only where any award would be paid from insurance.[125]

In a suit for wrongful discharge and violation of due process, the Turtle Mountain Tribal Court launched into a wide ranging discussion of tribal court practices with respect to the ICRA and sovereign immunity.[126] The court concluded it had subject matter jurisdiction[127] after finding "[t]he doctrine of tribal sovereign immunity is no longer absolute and has been

effectively abrogated by this express, unequivocal expression of congressional intent to provide [ICRA] jurisdiction to the tribal court. . . ." [128] The court noted that some tribal courts have embraced the Supreme Court's conclusion in Martinez that the ICRA does not waive tribal sovereign immunity, and applied this holding from federal courts to bar suit in tribal courts. However, it noted, most tribal courts have found violations of civil rights to be actionable in tribal courts, at least where ultra vires acts are alleged. [129] The court dismissed the claim against individual officers on the basis of qualified immunity, while inviting further briefing on the liability of the tribal government itself. [130]

Holding that the ICRA does not function as an implied waiver of sovereign immunity permitting suit against an Indian tribe, the Court of Indian Appeals for the Pawnee Tribe issued a writ of mandamus ordering the Pawnee Tribal Court to dismiss a breach of contract action filed by a gaming corporation against the Tribe. [131] The court stated that the only instances in which sovereign immunity would be waived is where the complaint alleged ultra vires actions by tribal officials. [132] Similarly, the Shawnee Tribe was held to be immune from suit in an action by a gaming patron invoking the ICRA in a claim for ***482** winnings allegedly not paid by the Tribe's gaming contractor. [133]

The Election Committee of the Sac and Fox Tribe of Indians of Oklahoma was held to be cloaked by the Tribe's sovereign immunity in a suit alleging violation of the ICRA. [134] The same court found the Tribe's Grievance Committee also shared the Tribe's sovereign immunity, although tribal officials who act outside their authority could be sued. [135] However, the court reasoned, members of the Committee could not be sued individually because they have no authority as individual members but only as a committee. [136]

Some tribal courts have had no trouble finding a waiver of sovereign immunity. The Oglala Sioux Tribal Court of Appeals held:

> [T]he rights of freedom of speech and due process of law guaranteed by the Indian Civil Rights Act of 1968 can be asserted against a tribal government just as any citizen can assert his or her rights against a state or municipal government. [137]

The sovereign immunity of the Election Board of the Iowa Tribe was lost when the Board exceeded its lawful authority in disqualifying a candidate after the election, and the tribal court enjoined the Election Board from holding a new election. [138] The Intertribal Court of Appeals of Nevada held that the ICRA waives tribal sovereign immunity for the narrow purpose of vindicating rights guaranteed by the Act and ordering an appropriate remedy. [139] In an employment dispute, the Cheyenne River Sioux Tribal Court of Appeals held that sovereign immunity could be waived if the plaintiff had been employed under a written contract subject to a "sue or be sued" clause or if the ICRA applied to the dispute. [140] Pointing to the Supreme Court's statement in Martinez that "[t]ribal forums are available to vindicate rights created by the ICRA," [141] the court held that "tribal courts must entertain causes of action based on the ICRA." [142] The presumption of waiver ***483** was bolstered because the tribal agency involved was bound by federal regulations requiring application of the ICRA and the tribe's constitution waived sovereign immunity in tribal court. [143]

Still, many tribal courts are reluctant to find an implied waiver. The Sisseton-Wahpeton Sioux Tribal Court awarded $57,000 to a tribal member, formerly employed as chief executive officer of the tribal community college, who had been terminated in violation of her employment agreement. [144] Upon appeal of a claim based on the ICRA and a defense of sovereign immunity, the appellate court, with rhetorical flourish, recounted a history of judicial erosion of sovereign powers. "Is then tribal sovereignty to be sacrificed on the altar of sacrificial word play - impliedly diminished by sue and be sued clauses predicated on doubtful

intent, the result of boilerplate draftsmen legalese?" [145] The court held that the "sue and be sued" clause of the college charter, without a specific additional reference in the employment agreement, constituted no waiver of sovereign immunity. [146]

V. THE EVOLUTION OF TRIBAL COURTS

Colonial American law, with its courts, juries and jails, was alien to Native Americans. [147] The Indians viewed law and justice as personal and clan affairs, not involving impersonal public institutions. [148] Within Indian Country, traditional tribal dispute resolution was largely unaffected by federal intrusion until the late eighteenth century, when individual treaties and statutes provided for federal prosecution of crimes by non-Indians. [149] Congress extended federal jurisdiction in 1817 to cover crimes by both Indians and non-Indians, but left crimes by Indians against Indians to exclusive tribal jurisdiction. [150] The Supreme Court held in Ex parte Crow Dog that tribal law alone applied to crimes by Indians against Indians. [151] Congress responded to ***484** the Crow Dog decision with the Major Crimes Act, creating concurrent federal jurisdiction over many crimes committed by Indians. [152]

While Congress expanded the reach of federal jurisdiction within Indian Country, the administration sought to modernize tribal judicial systems. In 1883, the United States established Courts of Indian Offenses to provide law and order on Indian reservations and to strip traditional tribal authorities of their remaining powers. The Bureau of Indian Affairs (BIA) appointed the judges and police. Congress subsequently appropriated money for the courts and their legitimacy was sustained by the federal courts. [153] Conflicts between Indians and whites escalated as a result of the General Allotment (Dawes) Act of 1887, [154] which subdivided tribal lands into individual parcels and opened reservations to non-Indian settlement. Allotment reduced Indian landholdings from 138 million to 52 million acres, and created a patchwork of tribal, Indian and non-Indian land ownership which is at the root of many Indian law controversies to this day. [155]

The Indian Reorganization Act (IRA) of 1934 [156] marked a reversal of the government's decades-long policy of assimilation of Indian tribes into non-Indian society. The IRA encouraged the adoption of BIA-written tribal constitutions which called for elected tribal councils. [157] By 1947, 161 tribes had adopted constitutions under the IRA provisions. [158] In 1935, the BIA published a Code of Indian Offenses, [159] an updated version of which includes criminal provisions as well as provisions for domestic relations, probate, and money judgments in civil actions. [160] The Code expressly recognizes that tribes may create their own courts and enact their own laws, which most tribes have done. [161]

Federal Indian policy reverted to one of assimilation and termination of federal recognition of Indian Tribes in the 1950s. [162] Congress declared its goal to be "as rapidly as possible, to make the Indians ***485** within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States." [163] Public Law 280, adopted during this era, especially encroached on tribal sovereignty by extending state civil and criminal jurisdiction to Indian Country in five states and permitting other states to assume such jurisdiction by statute. [164]

The pendulum of federal policy swung back to one of Indian self-determination in the late 1960s and '70s. [165] President Nixon openly called for repudiation of the termination policy and embraced a new era of respect for tribal sovereignty. [166] In the Indian Child Welfare Act of 1978, Congress recognized that historic bias in state courts had greatly harmed Indian children, and mandated tribal court jurisdiction over most Indian child custody proceedings. [167] The ICRA, while imposing

constitutional restraints on tribal governments, also amended Public Law 280 to end any further extension of state jurisdiction into Indian Country without tribal consent,[168] and created a mechanism by which states could retrocede previously acquired jurisdiction.[169] The Indian Self-Determination and Education Assistance Act (ISDEAA) gave Indian tribes control of certain federal programs benefiting Indians.[170] Tribal self-governance has accelerated in the intervening years, with a wholesale transfer of social services and tribal governance funds from the BIA in the form of block grants to tribes, with minimal regulation.[171] The Department of Housing and Urban Development also radically deregulated tribal housing in the 1990s.[172]

The ability of tribes to assert adjudicatory jurisdiction has ebbed and flowed with the changes in federal Indian law, although the existence of that sovereign power has often been recognized by the federal courts. The United States has consistently recognized Indian tribes as ***486** "distinct, independent political communities,"[173] with inherent powers of self-government.[174] The Supreme Court has recognized the authority of tribal governments to provide for the protection of health and safety of reservation residents and the political integrity of the tribe.[175] "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[176] The Supreme Court has acknowledged the breadth of tribal court jurisdiction, stating: "If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law."[177] The Court has ruled that a question of a tribal court's jurisdiction over a reservation-based suit against a non-Indian must be determined in the first instance not in federal court but in tribal court.[178]

There has been a tremendous evolution in tribal court practice in the years since the passage of the ICRA.[179] There were 119 tribal courts as of 1978. Ten years later, the number had increased to about 150, handling an estimated 230,000 cases annually.[180] The growth in tribal judiciaries in the most recent decade has been astounding. Today, of the more than 500 federally recognized tribal governments,[181] virtually all have some system of civil dispute resolution and most have criminal court systems.[182]

The assertion of tribal sovereignty on an expanding scale has paralleled a resurgence of hostility toward Indian tribes. A 1978 report on tribal courts commissioned by the American Bar Foundation seems to be steeped in the ideology of the termination era of the 1950s.[183] Finding unqualified judges, procedural irregularities, dis- ***487** crimination, political partiality and "the outright abdication of juridical responsibilities,"[184] the report proposed elimination of tribal courts.
The Tribal courts do not work well, and necessary improvements would require much time and involve many difficulties. To perpetuate them at all runs counter to the evolutionary trends in the Indians' relation to the dominant culture in this country. Therefore, it would be more realistic to abandon the system altogether and to deal with Indian civil and criminal problems in the regular county and state court systems.[185]

Recognizing that tribes would strenuously oppose such assimilation, the report reluctantly offered several recommendations for improvement of tribal courts. The recommendations included professional training for tribal judges and law enforcement personnel, legal representation for the accused, improved factual investigation and screening of cases, better salaries, facilities, and equipment, and insulation of tribal courts from political and social pressures.[186]

The National American Indian Court Judges Association also assessed the strengths and weaknesses of tribal courts in 1978.[187] The Association made similar recommendations for improvement of tribal courts, describing serious problems with political interference, inadequate tribal laws, and a tendency toward "summary justice"[188] resulting from absence of defense

counsel.[189] But the Judges also found many strengths in the tribal court systems, including quick access to a fair forum, the ability to bridge the gap between law and Indian culture, a dedicated judiciary, and increased respect from federal courts, federal agencies, and tribal governments.[190]

According to Indian law scholar David Getches, an activist Supreme Court has placed new limits on tribal sovereignty and substituted judicial subjectivism for congressional legislation and more than a century of established jurisprudence.[191] Beginning in the late 1970s, the Court has increasingly found inherent limitations on tribal sovereignty, including the power to try non-Indians,[192] to be free of state ***488** taxation of on-reservation sales to non-Indians,[193] to prohibit hunting and fishing by non-Indians on reservation fee lands,[194] and to zone reservation fee lands.[195] The Court has inferred congressional intent to diminish a reservation,[196] to permit state taxation of Indian-owned reservation allotments held in fee,[197] and to authorize state regulation of commerce with Indian tribes.[198] The trend has quickened in recent years, culminating in a recent decision denying tribal court jurisdiction over a suit by a nonmember spouse of a deceased tribal member, and by her member children, for injuries they suffered when their car was struck by a gravel truck while traveling on a right-of-way through tribal trust lands.[199] Most recently, the Court struck a blow to sovereign powers of Native Alaskan Villages, ruling that the Alaska Native Claims Settlement Act (ANCSA) extinguished Indian Country in Alaska.[200]

In the most recent decade, there has been a revitalized movement for expanded federal court oversight of tribal court operations. Even some staunch supporters of tribal sovereignty have sided with those calling for greater federal review of tribal court decisions under the ICRA, albeit with more concern for preserving essential attributes of tribal sovereignty.[201] Senator Gorton sponsored a measure in 1992 which would have required a comprehensive study of tribal court implementation of the ICRA, with specific consideration of the appropri- ***489** ateness of greater federal court review of tribal court decisions.[202] Indian tribes would need to waive sovereign immunity in order to receive federal funds, under legislation proposed in 1996 by Senator Gorton, who is chairman of the Interior Subcommittee of the Senate Appropriations Committee.[203] The Senator's most recent proposal would waive the immunity of Indian tribes to suit in federal courts for alleged ICRA violations, permit states to sue tribes in federal courts to collect taxes on the sale of goods or services to nonmembers, and subject tribes to state court jurisdiction for torts and contract actions.[204] Individual tribal court cases increasingly seem to elicit strident attacks on the courts themselves.[205]

VI. CIVIL RIGHTS IN TRIBAL COURTS

Tribal court criticism seems to be based to a large extent on anecdotal evidence, since there has been virtually no scholarship dealing with actual construction of the ICRA by tribal courts. Yet an analysis of published tribal court opinions suggests that despite serious financial constraints, tribal courts have been no less protective of civil rights than have federal courts. With unique cultural perspectives, tribal courts appear to have looked to federal precedent as well as ***490** tribal traditions to discern the essential fairness implied by the requirement of due process. There is an inherent risk in relying on self-selected case reports as a barometer of due process in tribal courts, and the number of reported cases is relatively few. Nevertheless, with those caveats, tribal courts appear to be no less protective - and much more accessible - than federal courts have been in protecting civil rights on Indian reservations.

One might expect that tribal courts would have been inundated with ICRA claims since Martinez announced the end of expansive federal court jurisdiction. However, it is hard to find evidence to support this thesis.[206] There is no official reporter for tribal court cases, most of which are unpublished. The Indian Law Reporter publishes selected tribal court decisions provided by tribal

court personnel or parties.[207] The Northwest Intertribal Court System (NICS) has published tribal appellate court opinions from 1981 through 1997 for several tribal courts in Washington, Alaska, Northern California, Oregon, and Montana.[208] Another source of published tribal court opinions is the Oklahoma Tribal Court Reports, which can be accessed through Westlaw. The Navajo Court Reporter was not included in this analysis, although many Navajo court opinions are also reported in the Indian Law Reporter.[209]

***491** Perhaps surprisingly, a review of the indexes to the Indian Law Reporter indicates that ICRA claims are raised in fewer than five percent of the published tribal court decisions. Of 724 tribal court cases reported from 1983 through 1996, a mere thirty-two concern the ICRA. There does not seem to be any trend toward greater consideration of ICRA claims in more recent years, and in 1997 only seven of 135 reported cases involve the ICRA. Of 146 opinions found in the index to the Oklahoma Tribal Court Reports spanning the period from 1979 through 1993, only eleven, or 7.5%, reference the ICRA. Many northwest tribal appellate decisions reported in the Indian Law Reporter are not included in the four-volume Northwest Intertribal Court System reports. Nevertheless, viewed as a representative sample of appellate decisions, the northwestern tribal appellate opinions suggest a greater degree of civil rights litigation in the tribal appellate courts of this region. Of eighty-three published appellate opinions from 1983 through 1994, nineteen, or 23%, directly apply the ICRA. However, in the latest volume of NICS Tribal Appellate Court Opinions, covering the period 1995 through 1997, only five of thirty-nine opinions mention the ICRA. The scope of this review does not include published decisions which address civil rights issues without specifically invoking the ICRA, nor, of course, the vast majority of tribal court cases which go unreported. It appears nonetheless that the ICRA does not constitute a significant proportion of issues being raised in tribal court proceedings.[210]

The modest number of reported tribal court ICRA cases reflects a similar pattern found in federal courts prior to 1978. Senator Hatch, introducing the Indian Civil Rights Act Amendments of 1989, observed that the number of reported federal district court cases under the ICRA between 1968 and 1978 was substantially less than 100, or roughly ten per year nationwide.[211] The Senator attributed the relatively low numbers of federal ICRA cases to "the positive impact or value that possible Federal civil rights enforcement has on encourag- ***492** ing tribal compliance with the act."[212] Of course, the same claim could be made for the salutatory effect of potential tribal court enforcement.

Tribal court enforcement of the ICRA came under the scrutiny of the United States Commission on Civil Rights in an investigation which began in 1986.[213] Tribal officials, attorneys and lay advocates testified at hearings held throughout the country.[214] The Commission found tribal courts had addressed a wide variety of issues under the ICRA, including due process, trial by jury, equal protection, search and seizure, excessive force, and right to counsel.[215] The Commission recommended greater federal funding and training for tribal courts, but specifically rejected expanded federal court jurisdiction.[216]

A. Separation of Powers

The source for much suspicion of the ability of tribal courts to guarantee due process in tribal governments is an alleged lack of independence of tribal judiciaries from powerful political forces. The U.S. Commission on Civil Rights heard extensive testimony from tribal judges concerning attempts by tribal council officials to interfere with judicial functions.[217] Perhaps no less apocryphal than stories of tribal council interference, however, are tales of judges who seemingly abuse their power.[218]

Nevertheless, a series of studies have called for greater independence of the tribal judiciary, culminating in the 1989 report of the Special Committee on Investigations of the United States Senate Select Committee on Indian Affairs.[219] Similarly, a study of Montana Indian tribal governments published in 1990 concluded that a lack of separation of powers within tribal

governments, combined with scarce ***493** resources, had prevented tribal members from freely exercising their federal civil rights and tribal constitutional rights.[220]

Yet the published cases would seem to indicate that tribal courts generally prevail in clashes with tribal councils over interpretation and enforcement of the ICRA and tribal law. For example, the Duck Valley Tribal Court reinstated a chief judge, holding that the Tribal Council may remove a judge only after the Council conducts a hearing complying with tribal law and due process under the ICRA.[221] A federal court, faced with a similar complaint, refused to find a conspiracy to deprive the constitutional rights of a tribal judge who was terminated by the tribal business council for continuing to hear a case after the chief judge reassigned it to another associate judge.[222]

A classic case of separation of powers was decided under the ICRA when the Ute Tribal Court ruled that the Tribal Business Committee lacked authority to withdraw jurisdiction from the court and vest jurisdiction in the Business Committee itself where the Business Committee was a party to the litigation.[223] The tribal court and appellate court previously had ordered the Business Committee to enroll the plaintiffs' children as tribal members. Despite a permanent injunction and writ of mandamus from the tribal court, the Business Committee refused to enroll the children.[224] The court noted the Business Committee would have authority to establish an alternative forum for addressing future grievances related to enrollment, but that such a forum would need to ensure a fair, impartial, and independent hearing pursuant to the ICRA.[225]

The Southern Ute Tribal Court ruled that it had jurisdiction to hear a claim that the tribal election board violated the ICRA and tribal law although the tribal constitution, without any reference to ***494** the tribal court, made the election board the final authority on election disputes.[226] The court held that, although courts have no inherent authority to hear election disputes, tribal courts are the proper forum to present ICRA claims. The ICRA's guaranty of equal protection makes it impermissible for tribes to intentionally interfere with a member's right to vote as granted by the tribe. Judicial review of actions by tribal agencies and boards is necessary to provide a remedy for an injured party.[227] "Where a tribe has not adopted a form of tribal government providing for distinct separation of powers, allowing court review for purposes of insuring compliance with constitutional provisions, statutory requirements and the Indian Civil Rights Act becomes a critical component in insuring a remedy exists to adequately protect guaranteed rights."[228]

Tribal constitutions may provide independent bases for civil rights enforcement. The 1991 Report of the U.S. Commission on Civil Rights noted that most tribes with constitutions had followed a model prepared by the BIA. The model did not include a separation of tribal government powers into executive, legislative, and judicial branches, but instead placed judicial power with the tribal councils.[229] A survey of 220 tribal constitutions in effect in 1981 in all states except Alaska and Hawaii found that over half were written under the authority of the Indian Reorganization Act.[230] Twenty-two of the governing documents incorporate the ICRA.[231] Fifty-nine constitutions reference state or federal constitutional rights which are not to be abridged by tribal law.[232] Eighty-nine of the documents list First Amendment rights, protecting free speech and religion, although several limit free speech against abuse.[233] Seventy-three constitutions guaranty equality, with twenty-seven of these specifying equality of economic participation in tribal activities.[234] Due process of law and property rights are protected in thirty-five constitutions,[235] but only one constitution prohibits discrimination on the basis of sex, and that constitution confines ***495** the right to holding tribal office.[236] Only a handful of constitutions mention the rights of persons accused of crime.[237]

"Constitutional decision making in tribal courts provides a unique opportunity for the tribes, in the framework of actual cases, to develop a body of indigenous constitutional law."[238] Although most have their origins in a federal model, tribal constitutions

nevertheless represent a set of core values affirmatively adopted by the governed, rather than being imposed, like the ICRA, by another sovereign power. Tribal court opinions interpreting tribal constitutions seem imbued with a higher authority than many ICRA decisions.

Several appellate opinions have found tribal constitutional rights to equal or exceed the requirements imposed by the ICRA. For example, the Hoh Tribal Court of Appeals reinstated a complaint for wrongful termination from tribal employment, finding the Hoh Constitution guaranteed tribal members the right to petition for redress of grievances, which the court construed as a waiver of the Tribe's sovereign immunity.[239] Looking solely to the Navajo Nation Bill of Rights, the Navajo Supreme Court rejected a claim by attorneys appointed to represent an indigent defendant in a criminal proceeding that their appointment constituted a taking of private property - their services - for public use without just compensation.[240]

B. Tribal Tradition and Custom

As tribal judicial systems have evolved over the course of the past two centuries, some tribes have attempted to retain or to re-establish traditional forums for dispute resolution. Perhaps the best known of these is the Navajo Nation's Peacemaker Court, which allows parties to choose a culturally-based type of mediation as an alternative to adversarial litigation.[241] Much more common are efforts among tribal courts to incorporate Indian custom as tribal common law.[242] One scholar criticizes reliance on Anglo-American law by tribal courts as being based in non-Indian values and causing tribes to lose ***496** their own unique world views, and urges litigants and judges to identify and apply customary law whenever possible.[243]

Prior to Martinez, federal courts had held the ICRA should be construed with due regard for tribal tradition and custom, and that the ICRA was not coextensive with the U.S. Constitution's Bill of Rights.[244] A few decisions, however, have found specific ICRA requirements to be identical to the Bill of Rights.[245]

Many tribal courts have held that tribes have greater flexibility in applying principles of due process as found in the ICRA than do state and federal courts in applying principles of due process found in state and federal constitutions.[246] The northwestern tribal appellate courts have generally recognized that the ICRA is not intended to interfere with tribal traditions and institutions. Even as they have recognized that the ICRA grants to tribal members rights comparable to those contained in the Bill of Rights, the courts routinely have ruled that the meaning and application of the ICRA is not determined by Anglo-American constitutional interpretations.[247]

Traditional methods may be the only way to effectively resolve certain disputes. After issuing some initial orders which led to potentially violent confrontations between the parties and tribal police, the District Court of the Cheyenne Arapaho Tribes declined to exercise jurisdiction to decide the rightful possession of sacred ceremonial items.[248] The court held that civil rights must be interpreted in the ***497** light of centuries of customs and traditions, in ordering that the right of possession be decided by Cheyenne tribal members, chiefs, and headsmen in traditional dispute resolution procedures.[249]

Attempts to balance traditional law and Anglo common law are not always successful. The Nisqually Tribal Court of Appeals held that a provision of the Tribal Code which permitted the tribal court to apply state law where not in conflict with Tribal law was impermissibly vague. As a result, the appellate court reversed the conviction of a tribal member for negligent driving, where the charge had been brought under a Washington statute.[250] A dissenting opinion stridently castigated the majority for its application of the Anglo doctrine of vagueness to invalidate a prosecution based on “the central role of traditional mores in the tribal community.”[251]

C. Enumerated Rights

1. Free Exercise of Religion, Speech, and Assembly [252]

Ironically, given the legislative history of the ICRA, freedom of religion, speech, and assembly have not been the subject of published tribal court opinions. Although the ICRA does not impose the establishment clause on tribes, the integration of religion and politics common to many tribes would suggest the likelihood of litigation in this area. [253] Moreover, tribal suppression of the peyote religion preceded the passage of the ICRA. [254] The enactment of the Indian Bill of Rights was motivated at least in part by a belief that free speech was imperiled by allegedly authoritarian practices in some tribal governments. [255] Yet ICRA litigation in tribal courts has emphasized much more tangible issues, such as personal freedom from confinement, custody of children, and rights to housing and employment.

*498 2. Search and Seizures, Warrants, and Probable Cause [256]

Tribal courts have not hesitated to dismiss criminal proceedings where tribal police have violated the right against unreasonable search and seizure. The Metlakatla Tribal Court of Appeals reversed a conviction on charges of resisting arrest, threat, and indecent exposure, where the charges and convictions resulted from a search for alcohol and drugs conducted pursuant to an invalid search warrant. The court held a search warrant which does not include a specific address, date or time period, obtained on an affidavit citing "loud music and people talking loud" did not provide any basis for a reasonable belief that a crime was being committed in the residence. [257] The Walker River Tribal Court dismissed without prejudice a criminal complaint where it did not include sufficient detail to permit the judge to determine whether probable cause existed. [258]

Absence of a search warrant is not necessarily fatal to admissibility of evidence. Where a defendant was properly stopped as a result of a moving violation, and a roadside sobriety test properly administered as a search incident to arrest or by consent, the results were admissible. [259] The Winnebago Tribal Court held that a law enforcement officer may rely on a citizen's report if it contains facts sufficient to establish probable cause, but that such facts were lacking in the officer's stop for suspicion of driving while intoxicated. [260]

*499 3. Double Jeopardy [261]

The Supreme Court has held that the Double Jeopardy Clause of the Fifth Amendment does not bar federal prosecution following tribal court prosecution for the same acts, since the courts derive their jurisdiction from two separate sovereigns. [262] However, tribal members are protected against double jeopardy within the tribal justice system. The Lummi Tribal Court of Appeals held that the Lummi Constitution's double jeopardy provision, which incorporated 25 U.S.C. §1302(3), barred appeal of the trial court's dismissal of fishing violation charges. [263] The appellate court found that the Tribal Constitution explicitly incorporated the rights against double jeopardy enjoyed by citizens under both the United States Constitution and the ICRA. [264] Because an appeal would be barred under federal law, the court dismissed the appeal. [265]

4. Self-Incrimination [266]

Tribal courts have generally found that the right against self-incrimination implies that Miranda-like warnings need to be given to custodial suspects. The Lower Elwha Court of Appeals ruled that the proper remedy for failure to give Miranda warnings was exclusion of statements made by the defendants, rather than dismissal of the charges.[267] An officer had no obligation to give Miranda warnings where the suspect was not in custody, but rather had been transported to a hospital by ambulance.[268] Similarly, defendants charged with civil infraction of fishing rules were not entitled to Miranda warnings.[269]

*500 5. Property[270]

No published tribal court opinions apply the ICRA to tribal governments takings of private property for public use. Perhaps this is in part because much Indian land is held in trust by the federal government for the entire tribe,[271] or, in the case of allotments, for individual tribal members.[272] The Supreme Court has held that Congressional attempts to consolidate small individual interests into tribal ownership constitute unconstitutional takings of property in violation of the Fifth Amendment.[273]

6. Speedy Trial, Confronting Witnesses, and Assistance of Counsel[274]

Tribal courts have dismissed criminal proceedings for violations of the rights to a speedy trial and to be informed of the nature of the proceedings only where the defendant was prejudiced thereby. The Lummi Tribal Court of Appeals found no violation of the right to a speedy trial where the eighteen-month delay was caused by the defendant.[275] Even where the defendant was not at fault, the Tulalip Tribal Court of Appeals found no violation of the right to a speedy trial where the defendant suffered no prejudice.[276] The Intertribal Court of Appeals for the Crow Creek Sioux Tribe, however, held that failure to schedule and conduct a jury trial in a timely manner violated the right to a speedy trial even though the delay was the result of turnover among tribal court officers and complicated issues regarding tribal jurisdiction over nonmember Indians.[277] Although denying a defendant's petition for habeas corpus, a tribal court warned that future arraignments would need to meet minimum standards to ensure defendants would understand the effect of a ***501** guilty plea.[278] These standards included "a written, verified complaint following [ ] arrest," "a copy of such complaint at [ ] arraignment," and "advising each defendant as to the alleged violations of tribal law."[279]

The ICRA guarantee of right to counsel at one's own expense in tribal court is illusory for most tribal members who, as among the very poorest of Americans, cannot afford an attorney.[280] Federal courts have offered little assistance to litigants so deprived. Prior to the enactment of the ICRA, federal courts held that the right to counsel did not apply to Indians appearing in tribal courts.[281] Federal courts have also interpreted the ICRA right to counsel narrowly. ICRA language guaranteeing due process of law did not create a right to appointed counsel where another ICRA provision specifically provided that a defendant in a criminal proceeding may have counsel at his own expense.[282] The fact that lawyers were required to pay a $300 license fee to practice before tribal courts did not establish that the tribal code effectively denied assistance of counsel in proceedings before tribal courts.[283]

Since Martinez, tribal courts have frequently addressed the ICRA right to assistance of counsel at defendant's own expense in a criminal proceeding, with no indication that defendants have ever prevailed. The Hoh Tribal Court of Appeals explicitly declined to follow federal constitutional law requiring a knowing, voluntary, and intelligent waiver of this right. Instead, the court found no violation of the ICRA where the record showed merely that the trial court had advised the defendant of his right to counsel but the defendant chose to represent himself at trial.[284] The Puyallup Tribal Court held that a party who was

informed of her right to counsel and chose to proceed pro se thereby waived her right to later obtain counsel.[285] Similarly, the Lummi Tribal Court of Appeals held that the district court's refusal to grant a continuance to allow counsel to prepare a defense did not violate the right to effective assistance of counsel where eighteen months elapsed between arraignment and trial but the defendant took no ***502** steps to retain counsel until shortly before trial.[286] Sometimes the party appears to be better off without an attorney. The Navajo Supreme Court found notice to the counsel of record served as notice to the party and satisfied the due process requirement of the ICRA, even where the attorney was incapacitated and had requested removal.[287]

Tribal codes generally are quite liberal in regard to admitting attorneys as well as lay counsel to practice in tribal courts.[288] Tribal courts themselves, rather than self-regulating bar associations, generally police the practice of law in Indian Country.[289] The Hoopa Valley Tribal Court of Appeals upheld the right of the tribal judiciary to regulate all practice of law on the reservation, whether or not in tribal court.[290] The appellant had been representing a client in proceedings before a tribal administrative agency without having been admitted to the tribal bar.[291] The tribal court admitted the appellant to the tribal bar, but included a finding that he had made "knowingly inaccurate statements to the Tribal Court"[292] by claiming to have only "assisted" his client.[293] The appeal challenged the authority of the tribal court to regulate practice outside of tribal court, sought to expunge the finding of unethical conduct, and complained that a scheduling misunderstanding deprived him of a due process right to a hearing.[294] The appeals court found no violation of due process since there was ample opportunity to make written argument,[295] and ruled that an ethics code giving the tribal court authority to regulate practice within its jurisdiction should be construed to include the entire reservation.[296] In a very strongly worded rebuke to both opposing counsel, the Appeals Court found their behavior throughout the proceedings would have merited sanctions.[297]

*503 7. Excessive Bail, Fines, and Punishment[298]

There has been little litigation in either federal courts or tribal courts concerning either the ICRA limits on penalties which can be imposed by tribal courts or issues of excessive punishment. A federal court held that a tribal court which imposed consecutive sentences upon a tribal member convicted of several violations did not violate the prohibition against cruel and unusual punishment where no individual sentence exceeded the ICRA limit of six months for any one offense.[299] Similarly, the Colville Court of Appeals has held that due process and equal protection under the ICRA, construed with due regard for historical, governmental and cultural values of Indian tribes, do not prohibit consecutive sentences as long as they do not violate statutory limits.[300] Nor did an order of restitution or reparation in an amount which exceeded the jurisdictional limits of § 1302(7) violate the ICRA, since neither restitution nor reparations constituted punishment.[301]

However, some appellate tribal courts have set aside sentences on due process grounds. The Southwest Intertribal Court of Appeals for the Ute Tribe held that a sentence imposed within statutory limits violated due process where (1) the defendant was not advised that arraignment could be postponed if he desired to consult with counsel; (2) the trial court did not explain the specific authorized penalty for each charge; and (3) the trial court did not state why it selected the sentence it did, as required by tribal law.[302] The Nevada Inter-Tribal Court of Appeals set aside a conviction entered by the Shoshone-Paiute Tribal Court of the Duck Valley Indian Reservation and dismissed with prejudice charges against the defendant.[303] The trial court had refused to provide the appellate court with a trial transcript, and had sentenced the defendant to a term of imprisonment of 13 months, even though the ICRA authorizes a maximum sentence of one year. These abuses resulted in the ***504** sweeping relief accorded to the defendant.[304]

Jail conditions cases are surprisingly rare, given the minimal resources which tribes have to devote to such facilities. Prisoners at the five jails on the Navajo Nation filed a class action in 1992, alleging the conditions of confinement constituted cruel and unusual punishment in violation of the ICRA.[305] Attorneys for the plaintiffs described "severe overcrowding, dismal sanitation, inadequate food, nonexistent medical and psychological care, broken-down facilities, and lack of any exercise or recreation programs."[306] Negotiations led to a consent decree which closed two of the jails except for short-term confinement, set cell population limits, provided standards for fire safety, health care, nutrition, sanitation, exercise and updating facilities.[307] Poor jail conditions on the Colville Reservation led the tribal court, on its own motion, to close the facility in 1986.[308] The court rescinded its order six weeks later, after some improvements had been made.[309] The court again closed the jail in 1990, finding severe health and safety problems that had existed since at least 1987.[310]

8. Equal Protection and Due Process[311]

In early litigation under the ICRA, federal courts set a pattern of departing from federal common law to the extent that it would impede on tribal sovereignty, traditions, or customs. Tribal courts likewise have developed their own interpretations of due process and equal protection in the tribal context. Claims of due process violations are commonly raised in criminal proceedings, child custody proceedings, civil jurisdiction over nonmembers, and the allocation of tribal housing, employment, and governmental positions.

Faced with claims of due process violations prior to Martinez, federal courts regularly balanced the interests of tribal government with the interests and liberties at stake in determining the extent of due process required. Weighing a tribe's interest in the public welfare against non-Indian resort owners' hope of obtaining a liquor license, a ***505** federal court found that a ten-day notice and opportunity to speak before the tribe's Business Council met the requirements of due process.[312] Although a tribal chairman was entitled to a hearing before an impartial tribunal with respect to his impeachment and removal from office, his failure to present his side of the case in the traditional tribal forum - a tribal council - did not constitute a violation of due process.[313] As one federal court noted, "Essential fairness in the tribal context, not procedural punctiliousness, is the standard against which the disputed actions must be measured."[314] Yet federal courts did not always uphold tribal actions against claims of due process violations. Alleged deprivation of a land assignment by a tribe required a meaningful opportunity to be heard.[315] A federal court struck down a tribal disorderly conduct ordinance which was overly broad both on its face and in application.[316]

Federal rulings regarding due process and equal protection, both within and outside the ICRA context, have provided guidance to tribal courts. A tribal court of appeals in Alaska reversed a judgment of the tribal court which had found the defendant, who failed to appear for trial, guilty of liquor possession and resisting arrest.[317] The appellate court held that a finding of guilt by default violates the ICRA requirement for due process, which includes the right to a meaningful opportunity to be heard in a full and fair hearing. While explicitly stating that it was not bound by federal case law, the court found decisions of the U. S. Supreme Court "instructive."[318] Another court examined federal law regarding "conclusive presumptions" before ruling that due process is not violated by a presumption that one who writes a bad check and after notice fails to make it good does so knowingly.[319]

***506** Claims of due process violations are raised most commonly in criminal proceedings. The Burns Paiute Court of Appeals reversed a conviction for battery where the trial judge placed upon the defendant the burden of proving a right to claim self-defense.[320] Following a minor scuffle between two tribal members, the defendant was charged with battery and claimed self-defense. Finding nothing in the tribal code explicitly permitting such a defense, the judge (a lawyer) ordered the defendant to

find support under federal law for her right to claim self-defense. Receiving no citation from the defendant, the court found her guilty,.[321] The appellate court found the presumption of innocence and a requirement of proof beyond a reasonable doubt to be part of the fundamental fairness required by due process in criminal cases. It also chastised the judge for placing not only the burden of proof but also the burden of legal research on a pro se defendant.[322] Similarly, the Lummi Tribal Court of Appeals reversed a conviction for driving while intoxicated on the grounds of insufficient evidence where the trial court failed to articulate sufficient findings of fact.[323] There was no violation of due process where the defendant received no written notice of hearing, but had actual knowledge and chose not to appear to contest a charge of violating fishing rules.[324]

Recognizing the ICRA's interest in the vitality of tribal courts, and balancing the need to conserve tribal resources against the requirements of due process, the Suquamish Tribal Court of Appeals dismissed with prejudice the conviction of a tribal member for exceeding shellfish harvest limits.[325] The appellate court granted dismissal on two grounds: lack of an adequate record of the trial procedures, and an excessive delay of eighteen months between the trial and the appellate hearing.[326]

Tribal custom may influence equal protection analysis by tribal courts. The Winnebago Tribal Court rejected a juvenile defendant's equal protection challenge to a tribal law under which he was charged (as an adult) with unlawful sexual intercourse with a female under ***507** the age of eighteen.[327] The tribal court found that neither federal constitutional law nor even the ICRA were necessarily binding on the tribe in light of inherent tribal powers and Congressional intent not to override tribal traditional law.[328] The Court held the tribal constitution, rather than the ICRA, was controlling law, and the meaning of its language was to be defined solely by reference to tribal custom even though the constitution employed identical language to the ICRA.[329] After this exhaustive analysis, however, the court ruled that there was no gender bias in prosecuting only the male, since the evidence showed he was much older than the female and had employed force.[330]

Tribal courts generally have upheld the exercise of civil jurisdiction over nonmembers for reservation-based torts. An appellate court sustained tribal court jurisdiction over an assault suit brought by a tribal member against a non-Indian who claimed a due process violation on the basis that he could not vote in tribal affairs.[331] Tribes have inherent authority to exclude non-Indians as well as Indians from their reservations, even though exclusion may be seen as quasi-criminal.[332] However, the Burns Paiute Court of Appeals held an ordinance that permitted exclusion of non tribal members from the reservation for any "act that harms the health, welfare, safety, morals, image, cultural traditions, or spirit of the Burns Paiute Tribe" was too vague to put nonmembers on notice as to the kind of conduct that would result in exclusion.[333]

Since federal law favors tribal court jurisdiction of child custody proceedings,[334] it is perhaps not surprising that due process claims are frequently raised in that context. The Intertribal Court of Appeals for the Crow Creek Sioux Tribe found that where the prosecution failed to prove beyond a reasonable doubt that a child was dependent or neglected, due process required that the court either restore parental custody or issue a written opinion from which appeal could be made.[335] The Port Gamble S'Klallam Tribal Court found that the trial court violated due process when it terminated the maternal grandmother's ***508** guardianship in favor of the child's father, since the grandmother was not permitted to present witness testimony or argument.[336] The Northern Plains Intertribal Court of Appeals invalidated under the ICRA a tribal code provision which the tribal court had interpreted as precluding the father of children born out of wedlock from obtaining custody.[337] A tribal court held it would be a violation of equal protection to apply the "tender age doctrine" to automatically give a maternal child custody preference.[338]

Due to the scarcity of housing on Indian reservations, the management of tribal housing presents another arena for claims of due process violations.[339] The Suquamish Tribal Court held that the tribal housing authority violated the defendant's rights

to due process by terminating her housing agreement without following grievance procedures mandated by federal law.[340] HUD regulations suggest that tribal housing authorities need not comply with the ICRA where equal protection and due process rights would "violate customs, traditions, and practices of the tribe."[341] It is perhaps not surprising, then, that tribal courts more commonly find no due process violations in eviction proceedings. The Hoh Tribal Court of Appeals held that the former husband of a tribal member who was occupying the member's house "was not due any process at all" in an eviction action when the member fell behind on payments to the tribal housing authority.[342] The former husband was a member of another tribe, as were their children. The former husband did not have a sublease with ***509** current tribal approval.[343] Because he had no property interest in the home, the court held that he was not entitled to be made a party to the action or to due process in the eviction proceedings.[344]

Reservation jobs are, if anything, more scare than reservation housing, in spite of the widespread advent of tribal gaming establishments and steady growth in tribal government employment.[345] As a result, there has been considerable litigation over due process rights in employment.[346] The Umatilla Tribal Court noted that an applicant for a tribal job has no property interest which requires due process protection.[347] The Nooksack Court of Appeals held that when a tribal employee appeals a termination action, the employer must follow applicable tribal ordinances, rules, regulations, policies and the Indian Civil Rights Act in order to afford the employee due process throughout the grievance procedure.[348] The Citizen Band Potawotami Tribal Court held where the tribal constitution authorized the removal of a business committee member by other members, it did not violate due process for committee members who testified at the removal hearing to also vote on the removal.[349]

The Northwest Regional Tribal Supreme Court for the Hoopa Valley Tribal Court of Appeals has held that continued employment with the Tribe and its entities "is an important property interest to ***510** which due process rights attach [[[,]"[350] necessitating adequate notice, an impartial hearing, burden of proof on the employer, and the right to confront and cross-examine witnesses.[351] The standard has been applied to recuse two tribal council members as Tribal Employment Rights Commission hearing officers where the council members may have obtained confidential information in previous settlement negotiations.[352] In an action for wrongful termination from tribal employment, a tribal appellate court found no violation of equal protection where a sixty day statute of limitations applied to actions against the tribal government, whereas actions against non-governmental parties could be filed within two years.[353]

Elective and appointive positions within tribal government carry prestige and influence which may exceed the importance of the often-times modest salaries they carry.[354] The Citizen Band Potawotami Tribal Court held that where the tribal constitution authorized the removal of a business committee member by other members, it did not violate due process for committee members who testified at the removal hearing to also vote on the removal.[355] The appointment of a tribal member to a housing board by the tribal president, subject to confirmation by the tribal council, created no property right or contract which was abridged by the council's failure to confirm the appointment, according to the Northern Cheyenne Tribal Court.[356]

Tribal courts seek to integrate Anglo concepts of due process and equal protection with tribal traditions and customs. The rights of individuals often are balanced against the communal good of the tribe. Tribal Courts frequently look to federal law for guidance, but they generally insist that tribal tradition and statutory law are the final arbiters of due process and equal protection in Indian Country.

***511 9. Ex Post Facto Laws**[357]

Tribal courts have rejected claims that either federal legislation affecting tribal jurisdiction or tribal legislation affecting only procedural matters constitutes a prohibited ex post facto law. A member of the Rosebud Sioux Tribe, charged in 1991 with a misdemeanor offense in Colville Tribal court, challenged the court's jurisdiction in the wake of the Supreme Court's decision in Duro v. Reina [358] that tribal courts lack jurisdiction over nonmember Indians. [359] Congress had enacted an amendment to the ICRA in 1990 which temporarily reinstated tribal court jurisdiction over nonmember Indians, but it expired shortly before the defendant went to trial. Subsequent to the trial and conviction, Congress enacted a new law indefinitely extending the Duro "fix." [360] The Colville Tribal Court of Appeals rejected the claim that the ICRA amendments constituted ex post facto laws with respect to the defendant, reasoning that they did not form the basis for the court's jurisdiction. Rather, the court held, "the tribal court had inherent authority to exercise misdemeanor criminal jurisdiction" [361] over the defendant, an authority the ICRA amendments merely recognized, but did not confer. [362] The Southern Ute Tribal Court rejected a claim by an elected member of the tribal council that procedural rules adopted after he had been served with notice of a removal hearing constituted an ex post facto law prohibited by the ICRA. [363]

10. Jury Trials [364]

Although federal courts appear not to have been presented with the issue, the U.S. Commission on Civil Rights heard complaints from tribal officials that jury trials present insurmountable practical and financial problems for tribal courts. [365] A Coeur d'Alene tribal judge suggested that defendants would request jury trials knowing that the ***512** court would not have sufficient resources to go to trial. [366] It also can be difficult to empanel an objective jury in tight-knit tribal communities, and jury convictions are difficult to obtain. [367]

Many tribal courts have narrowly construed the ICRA guarantee of a jury trial for a defendant accused of an offense punishable by imprisonment. There is no such right when, despite statutory sentencing authority, tribal court practice precludes imprisonment for first time offenders, according to a ruling of the Hoopa Appellate Court of Indian Offenses. [368] In a similar vein, where the defendant was accused of stealing a rifle from the tribal police, the Pojoaque Pueblo Tribal Court denied the defendant's motion for a jury trial. [369] Although the tribal code permitted imposition of a sentence of incarceration for theft, the court determined in advance of trial that such a sentence would not be imposed. The court noted that "[w]hile the Indian Civil Rights Act ideally imposes jury trials, no funding has been forthcoming for unlimited imprisonment of offenders. . . . Faced with the budgetary restraints concomitant with incarceration, it is left to this Court to impose a system of triage in dealing with criminal offenders." [370]

Defendants need to be vigilant in order not to lose the precious right to a jury trial. The Squaxin Island Tribal Court found that despite the right to jury trial under the ICRA, the defendant waived or forfeited his opportunity for jury trial by twice failing to appear at scheduled trials without justification. [371] By the same token, defendants charged with offenses punishable by imprisonment who fail to assert their right to trial by jury are deemed to have waived that right, but waiver must be knowing and intelligent. [372]

Tribal courts generally have rejected challenges to jury composition. The Hopi Tribal Court ruled that equal protection was not violated when a Navajo defendant was tried in front of a jury composed entirely of Hopi tribal members. [373] The Navajo Supreme Court re- ***513** jected claims that the method of using voter lists for jury selection denied the defendant a fair cross section of the community. [374]

VII. CONCLUSION

Tribal court construction of the ICRA appears to be strikingly consistent with pre-Martinez federal court cases. Tribal courts have found, as did federal courts before them, that the ICRA is not intended to displace tribal tradition and custom. Most tribal courts have found the ICRA to be enforceable against tribal officials but not against the sovereign itself, a break from early federal court holdings but in line with Martinez. Tribal courts routinely look to prior federal case law for guidance in applying concepts of due process and equal protection, although cultural considerations and financial constraints sometimes contribute to unique interpretations. Persistent critics of tribal governments seem to presuppose that tribal courts are incapable or unwilling to enforce the Indian Bill of Rights without close federal supervision. The evidence suggests that efforts to strip tribes of sovereign immunity or to greatly expand federal review of tribal courts are overbroad remedies for an exaggerated problem, unfairly based on anecdote and cultural prejudice.

It is clear that tribal courts are desperately underfunded, many barely able to keep their doors open, let alone preserve traditional dispute resolution procedures and accord Anglo-style civil rights. Only 170 of the approximately 500 tribal justice systems received BIA funding assistance in 1992, which amounted to a total of only $13 million.[375] Congress recently recognized the need for making adequate resources available to tribal courts. The Indian Tribal Justice Act[376] establishes an office of Tribal Justice Support and authorizes $59 million annually through the year 2000 to support tribal courts,[377] but commensurate appropriations have not been forthcoming. As of April, 1998, the National American Indian Court Judges Association complained, "Congress has yet to appropriate a single dollar under these authorizations."[378]

***514** It is also clear that most tribal members cannot afford the counsel to which they are legally entitled.[379] Yet the Indian Tribal Justice Act makes no mention of the need for funding defense counsel for indigent tribal members, nor for community education for pro se litigants. Nor is the right to counsel passionately advocated in many quarters.[380] Deep cuts in federal funding for legal services programs[381] threaten the very existence of those programs which provide the most effective advocacy for tribal members.[382] Similarly, Department of Education funding for law school clinical programs has dried up, threatening the few programs which serve Native Americans.[383] Some tribes attempt to provide public defenders or lay advocates for tribal members charged with criminal conduct, although the availability of counsel may depend upon the current status of the court's budget. In the absence of such resources, many tribal members have learned to advocate on behalf of themselves or other tribal members.

Any proposal which truly values extension of civil rights to tribal members must recognize the need for increased tribal court advocacy. Judges do not generally raise ICRA claims on their own initiative. As important as a trained and well-funded judiciary is to effective im- ***515** plementation of the ICRA, real progress requires real guarantees of equal access to the courts. Effective implementation of the ICRA depends not so much on federal courts located far from poor reservation communities, more so on well-trained and financed tribal courts, but mostly on an Indian civil rights movement in which low income Native Americans have equal access to justice in tribal courts, in traditional peacemaking practices, and in the larger society.

Footnotes

a1 Director, Northwest Indian Law Clinic, University of Washington; Attorney, Northwest Justice Project, Seattle, Washington. B.A. Carroll College, 1976; J.D., University of Montana, 1988. This article is dedicated to the memory of Margery Hunter Brown, who always inspired and enlightened her students of Indian law at the University of Montana. The author gratefully acknowledges the

contributions of Nancy Luebbert, Stacy Williams, Elisabeth Tutsch, Laurie Mercier, and the Northwest Justice Project. Opinions expressed are solely those of the author.

1 135 Cong. Rec. 3530 (1989) (statement of Sen. Hatch, citing testimony given before U.S. Civil Rights Commission).

2 Id. at 3527-33 (statement of Sen. Hatch, introducing S. 517, the Indian Civil Rights Act Amendments of 1989).

3 Danny Westneat, Nation's Tribes Gather to Combat Gorton's Ideas on Indian Sovereignty, Seattle Times, Sept. 4, 1997, at A1.

4 See infra note 204 and accompanying text. ...

5 Lynda V. Mapes, Backlash for Tribal Immunity, Seattle Times, Apr. 5, 1998, at B1. While Senator Gorton has become a forceful critic of tribal courts, even federal courts have not entirely escaped his enmity. A proponent of breaking up the Ninth Circuit Court of Appeals, Gorton says the West needs to be freed from "California judges and judicial philosophy." Mark Trahant, California Gives the 9th Circuit Court Its Character, Whether We Like It or Not, Seattle Times, May 24, 1998, at B1, available in 1998 WL 3154677.

6 Roberta Cooper Ramo, Lawyers as Peacemakers, 81 A.B.A. J., Dec. 1995, at 6.

7 Diane LeResche, The Reawakening of Sacred Justice, 27 Clearinghouse Rev. 893, 899 (1993). Traditional tribal dispute resolution may have as many meanings as there are distinct tribal cultures. Traditional courts were largely displaced in the late nineteenth century by federally-controlled "Courts of Indian Offenses," and in the twentieth century by Anglo-American type courts. Many tribes, however, seek to retain Indian custom, either through re-establishment of traditional forums or recognition of tribal common law. See infra Part VI(B).

8 Indian Civil Rights Act, Pub. L. No. 90-284, Tit. II-VII, §§ 201-701, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-1341 (1994)). See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 n.1 (1978) for the basic legislative history of the ICRA. The ICRA was signed into law as Titles II through VII of the **Civil Rights Act** of **1968**. Thus, the first Title of the ICRA (25 U.S.C. §§ 1301-1303) was enacted as Title II of the **Civil Rights Act** of **1968**. This article and most commentators refer primarily to Title II, 25 U.S.C. §§ 1301-1303, which includes the "**Indian** Bill of Rights," when using the term ICRA. However, the other Titles of the Act are also of great significance. Title III, §§ 1311-1312, directed the Secretary of the Interior to publish a model code for Courts of **Indian** Offenses (established by the Secretary for those tribes without tribal courts) and to provide training for the judges of these courts. Title IV, §§ 1321-1326, provides that states may not assume civil or criminal jurisdiction over **Indian** Country without the prior consent of the tribe. Title V, 18 U.S.C. § 1153, makes a minor amendment to federal criminal law applicable to **Indian** country, and Title VI, 25 U.S.C. § 1331, lessens Bureau of **Indian** Affairs (BIA) control over tribal employment of legal counsel. Title VII, 25 U.S.C. § 1341, authorized the Secretary of the Interior to revise and republish the landmark work, Felix Cohen's Handbook of Federal **Indian** Law. See generally Robert L. Bennett & Frederick M. Hart, Foreward to Felix Cohen, Handbook Of Federal **Indian** Law v, v-vi (photo. reprint Univ. of N.M. Press 1971) (1st ed. 1942); Felix Cohen's Handbook Of Federal **Indian** Law (Rennard Strickland & Charles F. Wilkinson, eds., Michie 1982) (hereinafter Cohen, 1982 ed.).

9 See infra Part II.

10 See S. Rep. No. 721 (**1968**), reprinted in **1968** U.S.C.C.A.N. 1837, 1864.

11 25 U.S.C. § 1302 (1994). See infra notes 24-27 and accompanying text.

12 436 U.S. 49 (1978).

13 163 U.S. 376 (1896).

14 Id. at 379, 384.

15 272 F.2d 131 (10th Cir. 1959).

16 Id. at 134. See also, e.g., Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 533 (8th Cir. 1967) (the Fourteen Amendment's Due Process Clause not applicable to tribes); Barta v. Oglala Sioux Tribe, 259 F.2d 553, 556-57 (8th Cir.

1958) (Fifth and Fourteenth Amendments); Martinez v. Southern Ute Tribe, 249 F.2d 915, 919 (10th Cir. 1957) (Fifth Amendment's Due Process Clause). But see Colliflower v. Garland, 342 F.2d 369, 378-79 (9th Cir. 1965) (applying Fifth Amendment's Due Process Clause to tribal court proceedings when extensive federal control made the court an "arm[ ] of the federal government"). Subsequent to the passage of the **Indian** Bill of Rights, the Supreme Court held that the double jeopardy provision of the Fifth Amendment was not infringed when an **Indian** was convicted in federal court after having been convicted of a lesser included offense in tribal court, since the tribal court exercised independent sovereignty that did not derive from the federal government. United States v. Wheeler, 435 U.S. 313, 315-16, 329-30 (1978).

17 See Donald L. Burnett, Jr., An Historical Analysis of the **1968** '**Indian Civil Rights**' **Act**, 9 Harv. J. on Legis. 557, 574-602 (1972). Burnett's article provides a thorough legislative history of the statute. For additional legislative history, see Comment, The **Indian** Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343 (1969) (hereinafter Comment, The **Indian** Bill of Rights) and S. Rep. No. 721 (**1968**), reprinted in **1968** U.S.C.C.A.N. 1837, 1863-67.

18 See 113 Cong. Rec. 13,473 (1967) (statement of Sen. Ervin, quoting conclusions of the Subcommittee on Constitutional Rights).

19 See, e.g., Rights of Members of **Indian** Tribes: Hearing on H.R. 15419 Before the Subcomm. On **Indian** Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong. 127 (**1968**) (hereinafter Rights of Members Hearing) (statement of John S. Boyden on behalf of Ute and Hopi Tribes referring to "white man's justice"). See generally Amendments to the **Indian** Bill of Rights: Hearing on Title II on the **Civil Rights Act** of **1968** Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong. (1969) (hereinafter Amendments Hearing).

20 See, e.g., Amendments Hearing, supra note 19, at 8-9, 14 (testimony of Domingo Montoya, Chairman, All **Indian** Pueblo Council). See also Rights of Members Hearing, supra note 19, at 37 (testimony of Domingo Montoya, Chairman, All **Indian** Pueblo Council).

21 Rights of Members Hearing, supra note 19, at 37 (testimony of Domingo Montoya), 39 (Resolution of All **Indian** Pueblo Council), 42 (testimony of Tom Olson, attorney for All **Indian** Pueblo Council).

22 See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-65 (1978).

23 Id. at 53 n.4, 70.

24 25 U.S.C. § 1302 (1994).

25 Id.

26 The ICRA originally limited tribal courts to sentences of six months or fines of $500, or both. It was amended to allow harsher penalties in 1986 by the **Indian** Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, Tit. IV, § 4217, 100 Stat. 3207-146 (1986) (codified at 25 U.S.C. § 1302 (1994)).

27 25 U.S.C. § 1302.

28 For a discussion of differences between the **Indian** Bill of Rights and the U.S. Constitution, see Martinez, 436 U.S. at 63 & n.14; see also Comment, The **Indian** Bill of Rights, supra note 17, at 1359.

29 On the integration of religion and law, see generally Rennard Strickland, Wolf Warriors and Turtle Kings: Native American Law Before the Blue Coats, 72 Wash. L. Rev. 1043, 1045 (1997).

30 25 U.S.C. § 1302(6).

31 25 U.S.C. § 1302(10).

32 25 U.S.C. § 1303 (1994).

33 Dodge v. Nakai, 298 F. Supp. 26, 31-32 (D. Ariz. 1969).

34 Federal courts reviewed such matters as election procedures, voting rights, and membership. See, e.g., Two Hawk v. Rosebud Sioux Tribe, 534 F.2d 101 (8th Cir. 1976) (candidate qualifications); Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082-84 (8th Cir. 1975) (voting rights); Brown v. United States, 486 F.2d 658 (8th Cir. 1973) (apportionment); Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971) (tribal membership).

35 Courts found federal question jurisdiction under 28 U.S.C. § 1331 and civil rights jurisdiction under 28 U.S.C. § 1343(a)(4). Cases involving civil remedies are collected in Note, Implication of Civil Remedies Under the **Indian Civil Rights Act**, 75 Mich. L. Rev. 210 (1976).

36 See, e.g., Robert T. Coulter, Federal Law and **Indian** Tribal Law: The Right to Civil Counsel and the **1968 Indian** Bill of Rights, 3 Colum. Surv. of Hum. Rts. L. 49, 50 (1971); Tim Vollmann, Criminal Jurisdiction in **Indian** Country: Tribal Sovereignty and Defendants' Rights in Conflict, 22 U. Kan. L. Rev. 387 (1974); Alvin J. Ziontz, In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the **Indian Civil Rights Act**, 20 S.D. L. Rev. 1 (1975).

37 436 U.S. 49, 66-67 (1978).

38 Id. at 51. The facts are set forth in greatest detail in the Tenth Circuit opinion, Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1040-41, 1047-48 (10th Cir. 1976), and the district court decision, Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 11-16 (D.N.M. 1975).

39 Martinez, 402 F. Supp. at 16-19.

40 Martinez, 540 F.2d at 1047-48.

41 Martinez, 436 U.S. at 59, 72. For a particularly lucid analysis of the complex issues resolved in Martinez, see Robert Laurence, A Quincentennial Essay on Martinez v. Santa Clara Pueblo, 28 Idaho L. Rev. 307 (1991-92).

42 Martinez, 436 U.S. at 65.

43 Id. at 66 n.22.

44 See, e.g., Robert Berry, Civil Liberties Constraints on Tribal Sovereignty After the **Indian Civil Rights Act** of **1968**, 1 J.L. & Pol'y 1 (1993); Carla Christofferson, Note, Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the **Indian Civil Rights Act**, 101 Yale L.J. 169 (1991); Christina D. Ferguson, Comment, Martinez v. Santa Clara Pueblo: A Modern Day Lesson on Tribal Sovereignty, 46 Ark. L. Rev. 275 (1993); Kevin Gover & Robert Laurence, Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions Under the **Indian Civil Rights Act**, 8 Hamline L. Rev. 497 (1985); Robert C. Jeffrey, Jr., The **Indian Civil Rights Act** and the Martinez Decision: A Reconsideration, 35 S.D. L. Rev. 355 (1990); Robert Laurence, Federal Court Review of Tribal Activity Under the **Indian Civil Rights Act**, 68 N.D. L. Rev. 657 (1992); Robert Laurence, Martinez, Oliphant and Federal Court Review of Tribal Activity Under the **Indian Civil Rights Act**, 10 Campbell L. Rev. 411 (1988); Alvin J. Ziontz, After Martinez: Civil Rights Under Tribal Government, 12 U.C. Davis L. Rev. 1 (1979).

45 See infra notes 162-199.

46 25 U.S.C. § 1303 (1994).

47 Over 220 federal cases, including unpublished opinions, have discussed the ICRA in the twenty years after Martinez. Only 69 federal cases discussed the ICRA in the ten-year period prior to Martinez. Notwithstanding the concomitant explosion in federal court litigation of all types in recent decades, the apparent growth in federal ICRA litigation is surprising. However, many of the post-Martinez cases mention the ICRA only in passing, and only a relative few, discussed infra, find jurisdiction to grant relief under the Act.

48 435 U.S. 191 (1978).

49 Id. at 195.

50 Duro v. Reina, 495 U.S. 676, 688 (1990).

51 Pub. L. No. 101-511, § 8077(b), 104 Stat. 1892 (1990) (amending 25 U.S.C. § 1301).

52 Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 899, 901-02 (9th Cir. 1988).

53 Wetsit v. Stafne, 44 F.3d 823, 826 (9th Cir. 1995).

54 Poodry v. Tonawanda Band, 85 F.3d 874, 876, 879 (2d Cir. 1996).

55 Shenandoah v. U.S. Dep't of the Interior, 24 **Indian** L. Rep. 3116, 3120, No. 96-CV-258, 1997 WL 214947, at *8 (N.D.N.Y Apr. 14, 1997).

56 458 U.S. 502 (1982).

57 Id. at 515-16.

58 Id. at 514.

59 Id. at 515 (quoting Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103, 1111 (1st Cir. 1978)).

60 DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510, 511-12, 515 (8th Cir. 1989).

61 United States ex rel. Cobell v. Cobell, 503 F.2d 790, 793, 795 (9th Cir. 1974).

62 Sandman v. Dakota, 816 F. Supp. 448, 451 (W.D. Mich. 1992) (dicta); Weatherwax ex rel. Carlson v. Fairbanks, 619 F. Supp. 294, 295-96 (D. Mont. 1985).

63 623 F.2d 682 (10th Cir. 1980).

64 Id. at 685.

65 White v. Pueblo of San Juan, 728 F.2d 1307, 1312 (10th Cir. 1984).

66 Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919, 920-21 (D. Mont. 1988).

67 Id. at 922.

68 See Shortbull v. Looking Elk, 677 F.2d 645, 650 (8th Cir. 1982); R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 981 (9th Cir. 1983).

69 Ramsey v. Confederated Tribes and Bands of the Yakama **Indian** Nation, 24 **Indian** L. Rep. 3115, 3115 (E.D. Wash. 1997).

70 Id. (noting that whether tribal court exceeded jurisdictional limits is federal question under 28 U.S.C. § 1331).

71 E.g., O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1148 (8th Cir. 1973) (noting that each case requires "a balancing of the merits of exhaustion against the harm an exhaustion requirement might threaten with regard to those who claim their constitutional rights have been violated"); McCurdy v. Steele, 506 F.2d 653, 656-67 (10th Cir. 1974) (stating that "[t] he fact that tribal procedures for handling internal political disputes . . . are not specifically provided for in the tribal constitution does not justify immediate intervention by the courts."). Cf. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856-57 (1985) (requiring exhaustion in case not arising under the ICRA).

72 Burlington N. R.R. Co. v. Red Wolf, 106 F.3d 868, 870 (9th Cir. 1997), vacated and remanded for further consideration in light of Strate v. A-1 Contractors sub. nom. Burlington N. R.R. Co. v. Estate of Red Wolf, 118 S. Ct. 37 (1997).

73 Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948, 953 (9th Cir. 1998).

74 E.g., National Farmers Union Ins. Cos., 471 U.S. at 856 n.21 (1985); Necklace v. Tribal Court of the Three Affiliated Tribes, 554 F.2d 845, 846 (8th Cir. 1977); United States ex rel. Cobell v. Cobell, 503 F.2d 790, 793-94 (9th Cir. 1974).

75 Krempel v. Prairie Island **Indian** Community, 125 F.3d 621, 624 (8th Cir. 1997).

76 Wetsit, 44 F.3d at 826.

77 Lyda v. Tah-Bone, 962 F. Supp. 1434, 1434-35 (D. Utah 1997) (concluding that the Wetsit court erred by failing to note the amendment to 25 U.S.C. § 1301 which confers criminal jurisdiction over "all **Indians**").

78 See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 20 n.14 (1987); National Farmers Union Ins. Cos., 471 U.S. at 857 ("Whether the federal action should be dismissed, or merely held in abeyance . . . is a question that should be addressed in the first instance by the District Court.").

79 Allen v. Board of Educ., 68 F.3d 401, 404 (10th Cir. 1995); cf. Iowa Mutual, 480 U.S. at 16 n.8.

80 Allen, 68 F.3d at 404 (quoting Fox v. Maulding, 16 F.3d 1079, 1083 (10th Cir. 1994)).

81 Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412, 1422 (8th Cir. 1996).

82 Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997) (noting that "Congress did not extend full faith and credit to the tribes.").

83 Id. at 810.

84 Id.

85 Smith v. Confederated Tribes, 783 F.2d 1409, 1412-13 (9th Cir. 1986).

86 Martinez, 436 U.S. at 58-59.

87 Makah **Indian** Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990).

88 Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 670-71 (8th Cir. 1986).

89 Kiowa Tribe v. Manufacturing Techs., Inc., 118 S. Ct. 1700, 1705 (1998).

90 North Sea Prods., Ltd. v. Clipper Seafoods Co., 595 P.2d 938, 940 (Wash. 1979) (en banc).

91 Imperial Granite Co. v. Pala Band, 940 F.2d 1269, 1271 (9th Cir. 1991); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985).

92 Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 171-72 (1977); Imperial Granite Co., 940 F.2d at 1271.

93 United States v. Yakima Tribal Court, 806 F.2d 853, 861 (9th Cir. 1986).

94 United States v. Oregon, 657 F.2d 1009, 1013 (9th Cir. 1981) (citations omitted).

95 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978). _

96 United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 513 (1940).

97 Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 889-93 (1986).

98 Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 773-74 (D.C. Cir. 1986).

99 United States v. Oregon, 657 F.2d at 1014.

100 See Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 671 (8th Cir. 1986).

101 See Tribal Sovereign Immunity: Hearing Before the Senate Comm. on **Indian** Affairs, 104th Cong. 132 (1996) (statement of Susan M. Williams).

102 25 U.S.C. §§ 2701 2721 (1994).

103 Seminole Tribe v. Florida, 517 U.S. 44, 47, 51-52 (1996).

104 Montana v. Gilham, 133 F.3d 1133, 1134, 1138-40 (9th Cir. 1998) (holding state's sovereign immunity bars tort action in Blackfeet Tribal Court arising out of motor vehicle accident on reservation).

105 5 U.S.C. § 702 (1994).

106 28 U.S.C. §§ 1346(b), 2674 (1994).

107 Although the APA does not waive sovereign immunity to claims for money damages, the United States has consented in the Tucker Act to be sued in the United States Claims Court for a breach of contract or a taking of property without just compensation. 28 U.S.C. §1346 (1994).

108 28 U.S.C. § 2680(h) (1994).

109 28 U.S.C. § 2680(a) (1994).

110 Blue Legs v. U.S. Bureau of **Indian** Affairs, 867 F.2d 1094, 1097 (8th Cir. 1989).

111 Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 569-70 (1983).

112 209 U.S. 123 (1908).

113 Burlington N. R.R. Co. v. Blackfeet Tribe, 924 F.2d 899, 901 (9th Cir. 1991).

114 See, e.g., Tenneco Oil Co. v. Sac and Fox Tribe, 725 F.2d 572, 574-75 (10th Cir. 1984) (challenging validity of tribal ordinances regulating oil and gas leases).

115 The **Indian** Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 450-450n (1994), gives **Indian** tribes control of certain federal programs benefiting **Indians**. Under an ISDEAA contract, the federal government provides funds to a tribe to administer programs that otherwise would be provided directly by the federal government. 25 U.S.C. § 450b(j). FTCA liability attaches to the United States for personal injury or death claims arising from negligent conduct performed under a "self-determination contract," 25 U.S.C. § 450b(j), by a tribe, tribal organization, or **Indian** contractor. 25 U.S.C. § 450f(d).

116 Martinez, 436 U.S. at 58.

117 Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., 86 F.3d 656, 659 (7th Cir. 1996).

118 Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 671 (8th Cir. 1986).

119 Ralph W. Johnson & James M. Madden, Sovereign Immunity in **Indian** Tribal Law, 12 Am. **Indian** L. Rev. 153, 155 (1984).

120 Id.

121 Johnson v. Navajo Nation, 14 **Indian** L. Rep. 6037, 6040 (Nav. Sup. Ct. 1987).

122 Id.

123 Id.

124 Id. at 6040 n.4.

125 See, e.g., Quinault Tribal Code § 99.02.020, 99-3.

126 Davis v. Keplin, 18 **Indian** L. Rep. 6148, 6148-49 (Turt. Mt. Tr. Ct. 1991).

127 Id. at 6150.

128 Id. at 6149.

129 Id.

130 Id. at 6151.

131 Pawnee Tribe v. Franseen, 19 **Indian** L. Rep. 6006, 6008 (Ct. **Indian** App. - Pawnee 1991).

132 Id.

133 Kotch v. Absentee Shawnee Tribe, 3 Okla. Trib. 184, 195 (Absentee Shawnee Tribe Sup. Ct. 1993).

134 McCormick v. Election Comm., 1 Okla. Trib. 8, 19 (Ct. Ind. Off. Sac. & Fox Tribe 1980).

135 Grant v. Grievance Comm., 1 Okla. Trib. 34, 44 (Ct. Ind. Off. Sac. & Fox Tribe 1981).

136 Id. at 54.

137 Oglala Sioux Tribal Personnel Bd. v. Red Shirt, 16 **Indian** L. Rep. 6052, 6053 (1983).

138 Murray v. Dailey, 3 Okla. Trib. 274, 286 (Dist. Ct. Iowa Tribe 1993).

139 Works v. Fallon Paiute-Shoshone Tribe, 24 **Indian** L. Rep. 6033, 6033 (Intertr. Ct. App. Nev. 1997).

140 Dupree v. Cheyenne River Hous. Auth., 16 **Indian** L. Rep. 6106, 6108-09 (Chy. R. Sx. Ct. App. 1988).

141 Martinez, 436 U.S. at 65, quoted in Dupree, 16 **Indian** L. Rep. at 6108.

142 Dupree, 16 **Indian** L. Rep. at 6108.

143 Id. at 6109.

144 Board of Trustees v. Wynde, 18 **Indian** L. Rep. 6033, 6033-34 (N. Plns. Intertr. Ct. App. 1990).

145 Id. at 6035.

146 Id.

147 Rennard Strickland, Fire and the Spirits: Cherokee Law from Clan to Court 10-11 (1975). See also generally Yasuhide Kawashima, The **Indian** Tradition in Early American Law, 17 Am. **Indian** L. Rev. 99 (1992).

148 See Strickland, supra note 147, at 27.

149 See, e.g., Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139.

150 Act of Mar. 3, 1817, ch. 92, 3 Stat. 383. The 1817 statute, considerably revised, is now codified at 18 U.S.C. § 1152 (1994). See generally Robert N. Clinton, Development of Criminal Jurisdiction Over **Indian** Lands: The Historical Perspective, 17 Ariz. L. Rev. 951 (1975).

151 109 U.S. 556, 571-72 (1883).

152 Major Crimes Act, ch. 321, § 328, 35 Stat. 1151 (1909) (codified as amended at 18 U.S.C. § 1153 (1994)).

153 See Cohen, 1982 ed., supra note 8, at 333.

154 **Indian** General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended in sections of 25 U.S.C. §§ 331-381 (1994)).

155 Charles F. Wilkinson, American **Indians**, Time, and the Law 8-9 (1987) (Wilkinson, American **Indians**).

156 **Indian** Reorganization Act (Wheeler-Howard Act), ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1994)).

157 25 U.S.C. § 476 (1994).

158 Comment, Tribal Self-Government and the **Indian** Reorganization Act of 1934, 70 Mich. L. Rev. 955, 972 (1972).

159 Cohen, 1982 ed., supra note 8, at 333.

160 See Law and Order on **Indian** Reservations, 25 C.F.R. Part 11 (1997).

161 See 25 C.F.R. § 11.100(c) (1997).

162 See Cohen, 1982 ed., supra note 8, at 152-53.

163 H.R. Con. Res. 108, 83rd Cong. § 1, 67 Stat. B132 (1953).

164 Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§ 1161-1162, 25 U.S.C. §§ 1321-1322, 28 U.S.C. § 1360 (1994)).

165 See Cohen, 1982 ed., supra note 8, at 180.

166 116 Cong. Rec. 23,259 (1970).

167 Public Law 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1963 (1994)); Mississippi Band v. Holyfield, 490 U.S. 30, 32-35 (1989).

168 25 U.S.C. §§ 1321-1322, 1326 (1994).

169 25 U.S.C. § 1323 (1994).

170 25 U.S.C. § 450 450n (1994).

171 See, e.g., 61 Fed. Reg. 46,660 (1996).

172 See, e.g., 62 Fed. Reg. 35,718-51 (1997) (implementing the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA)). NAHASDA, Pub. L. No. 104-330, 110 Stat. 4016 (codified at 25 U.S.C. §§ 4101-4212 (1994), eliminates several separate programs of assistance and replaces them with a single block grant program.

173 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

174 United States v. Wheeler, 435 U.S. 313, 323-24 (1978).

175 Montana v. United States, 450 U.S. 544, 566 (1981).

176 Martinez, 436 U.S. at 65.

177 Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987).

178 National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 (1985).

179 See generally Michael Taylor, Modern Practice in the **Indian** Courts, 10 U. Puget Sound L. Rev. 231 (1987).

180 U.S. Commission on Civil Rights, The **Indian** **Civil** **Rights** **Act** (hereinafter Civil Rights Commission Report) 29, 41 (1991).

181 See 61 Fed. Reg. 58211-16 (1996) (listing 557 federally-recognized tribes).

182 S. Rep. No. 103-88, at 3 (1993).

183 See Samuel J. Brakel, American **Indian** Tribal Courts: The Costs of Separate Justice (1978). After visits to five reservations, id. at 4, the author describes the "cynicism that pervaded most reservation affairs," id. at 17, observing that "[o]n the reservations, already seriously lacking in forceful and capable leadership (the reservation setting seldom breeds such people, and those it produces often leave), political events conspire toward keeping those few who do have relevant qualities and qualifications away from the tribal judge positions." Id. at 23.

184 Id. at 100-01.

185 Id. at 103.

186 Id. at 104-11.

187 The National American **Indian** Court Judges Association, **Indian** Courts and the Future (1978).

188 Id. at 95.

189 Id. at 94-102.

190 Id. at 88-93.

191 David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in **Indian** Law, 84 Cal. L. Rev. 1573, 1576 (1996).

192 Oliphant v. Suquamish **Indian** Tribe, 435 U.S. 191, 212 (1978).

193 Washington v. Confederated Tribes, 447 U.S. 134, 155 (1980).

194 Montana v. United States, 450 U.S. 544, 566 (1981).

195 Brendale v. Confederated Tribes and Bands, 492 U.S. 408, 428 (1989).

196 Hagen v. Utah, 510 U.S. 399, 420 (1994).

197 County of Yakima v. Confederated Tribes and Bands, 502 U.S. 251, 270 (1992).

198 Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995).

199 Strate v. A-1 Contractors, 117 S. Ct. 1404, 1407-08 (1997).

200 Alaska v. Native Village of Venetie Tribal Gov't, 118 S. Ct. 948, 955 (1998).

201 One scholar has proposed that Congress overturn Martinez and reverse Oliphant v. Suquamish Tribe, so that federal courts could review tribal court decisions where ICRA claims are raised and tribal courts could once again exercise criminal jurisdiction over non-**Indians**. See Robert Laurence, Federal Court Review of Tribal Activity Under the **Indian** **Civil** **Rights** **Act**, 68 N.D. L. Rev. 657, 657 (1992). Preeminent **Indian** law scholar Charles Wilkinson expresses concern about "the legitimately troubling situation of reservation non-**Indians**." Wilkinson, American **Indians**, supra note 155, at 113 (1987). Wilkinson suggests that federal courts should have jurisdiction to engage in limited judicial review under ICRA, with respect for tribal tradition and reservation conditions, and

applying an arbitrary and capricious standard. Id. at 115. He also thinks it should be balanced by an expansion of tribal court criminal jurisdiction. See Tribal Court Systems and the **Indian** **Civil** **Rights** **Act**: Hearing Before the Select Comm. on **Indian** Affairs, 100th Cong. 5 (1988) (testimony of Professor Charles F. Wilkinson) (supporting "a partial repeal of the decision in Oliphant by providing tribal courts do have misdemeanor criminal jurisdiction over non-**Indians**").

202 138 Cong. Rec. S11804-02 (daily ed. Aug. 6, 1992) (introducing amendment No. 2912 to S. 1752).

203 See Tribal Sovereign Immunity: Hearing Before the Senate Comm. on **Indian** Affairs, 104th Cong. 1 (1996). See also Timothy Egan, Senate Measures Would Deal Blow to **Indian** Rights, New York Times, Aug. 27, 1997, at A1. The Senator reportedly dropped his legislation in exchange for hearings on alleged tribal court abuses. Joel Connelly, Tribes Score Victory as Gorton Is Forced to Retreat, Seattle Post-Intelligencer, Sept. 17, 1997, at A3; see also Danny Westneat, Nation's Tribes Gather to Combat Gorton's Ideas on **Indian** Sovereignty, Seattle Times, Sept. 4, 1997, at A1.

204 See S. 1691, the "American **Indian** Equal Justice Act," 105th Cong. § 2 (1998), reprinted in 144 Cong. Rec. S1155-56 (daily ed. Feb. 27, 1998). This legislation became the vehicle for Senator Gorton's hearings, which were hotly contested. At a hearing before the United States Senate Committee on **Indian** Affairs held at Seattle, Washington on April 7, 1998, some 500 citizens angrily debated the proposal. Outside the overcrowded hearing room, groups of non-**Indians** shouted the Pledge of Allegiance in response to tribal drums and chants. Lynne K. Varner, Tribal Immunity Issues Debated, Seattle Times, Apr. 8, 1998, at B1.

205 Efforts are underway to seriously weaken the tribal role in protecting their children following highly publicized cases of tribal courts asserting jurisdiction over attempted non-**Indian** adoptions of **Indian** children. See, e.g., S. 569, **Indian** Child Welfare Act Amendments (attempting to limit tribal court jurisdiction), H.R. 1082 (same), H.R. 1957 (same), 105th Cong. § 1 (1997). A Los Angeles newspaper article, in describing actions of the Crow Tribal Court in Burlington Northern Railroad Co. v. Red Wolf, (see supra text accompanying n.72), begins, "The lawyers for Burlington Northern Railroad Co. must have understood how General Custer felt." David A Price, The Newest Legal Playground: Tribal Courts, Lacking Rules, Are Ripe For Abuse, Investor's Business Daily, Sept. 26, 1996, at 1.

206 A recent survey comparing federal conceptions of due process with selected tribal court decisions concludes that "perhaps the most striking and important point learned in doing this research is the relative scarcity of cases that touch upon the ICRA at all." Christian M. Freitag, Note, Putting Martinez to the Test: Tribal Court Disposition of Due Process, 72 Ind. L.J. 831, 843 (1997).

207 The **Indian** Law Reporter, published by the American **Indian** Lawyer Training Program, began to publish tribal court opinions in Volume 10. It had previously been restricted to federal and state **Indian** Law cases. The **Indian** Law Reporter also reports administrative decisions of the Interior Board of **Indian** Appeals.

208 The first three volumes of the Northwest Intertribal Court System (NICS) Tribal Appellate Court Opinions cite only to the individual case number of the reported decision. Beginning with the fourth volume, the citation uses the volume number, followed by "NICS App.," followed by the page number. That citation form has been adopted herein and applied to all of the NICS opinions, including those found in the first three volumes.

209 Reliable statistics on tribal caseloads are difficult to come by. The Navajo Nation, which has by far the largest number of Native Americans residing on its reservation, handled a caseload of 40,406 in 1983. Many tribal courts see less than 100 cases in a year. Some have no written codes or court procedures whereas others have appellate courts and may participate in intertribal court systems. See Civil Rights Commission Report, supra note 180, at 33-35 (1991). A survey of tribal courts in Idaho revealed that in 1993 the Nez Perce Tribe heard 124 civil cases and 211 criminal cases; the Coeur d'Alene Tribal Court heard 276 civil cases and 337 criminal cases; and the Kootenai Tribal Court, a federally-regulated court established pursuant to 25 C.F.R. Part 11, hears only about 50 cases annually. Bob McCarthy, Native Justice in Idaho, Hard Times, Summer 1994, at 1, 4. In Montana, the Blackfeet Tribal Court, which has the largest caseload of any tribal court in the state, hears about 8500 cases annually, of which some 5000 are criminal cases. Margery H. Brown & Brenda C. Desmond, Montana Tribal Courts: Influencing the Development of Contemporary **Indian** Law, 52 Mont. L. Rev. 211, 227 (1991).

210 Several judges who testified before the U.S. Commission on Civil Rights indicated they had not personally adjudicated many ICRA claims. Elizabeth Fry, associate judge of the Colville Tribal Court, could recall only one case in her court involving a civil rights

claim. Civil Rights Commission Report, supra note 180, at 49 n.90. Edythe Chenois, chief judge of the Quinault Tribal Court, had adjudicated less than one ICRA case annually over eight years on the bench. Id. David Ward, chief judge of the Yakima Tribal Court, testified that cases involving the ICRA are rare at Yakima. Id.

211 135 Cong. Rec. 3528 (1989).

212 Id. Another way to read such statistics is that they reflect the geographic, cultural, and economic isolation of reservation residents from federal district courts.

213 Civil Rights Commission Report, supra note 180, at 1. The Department of the Interior provides minimal funding and training for tribal courts, and has played no role in ICRA enforcement, despite the fact that about half of tribal constitutions require secretarial approval of ordinances. Id. at 21, 71.

214 Id. at 1-2.

215 Id. at 11-12.

216 Id. at 72-74.

217 Id. at 44-51.

218 See, e.g., Joan Abrams, Tribal Judge Is Swept Off the Bench, Lewiston Morning Tribune, Oct. 24, 1995, at 5A; Joan Abrams, Tribal Leaders Say Judge's Firing Was Proper, Lewiston Morning Tribune, Oct. 25, 1995, at 5A (Nez Perce Tribal Executive Committee ultimately resorted to nailing the courtroom door closed to keep an ex-judge from interfering with court business.).

219 Civil Rights Commission Report, supra note 180, at 44-46; see also Special Comm. on Investigations of the Senate Select Comm. on **Indian** Affairs, Final Report and Legislative Recommendations (S. Rep. 101-216) (Comm. Print 1989).

220 James J. Lopach et al., Tribal Government Today: Politics on Montana **Indian** Reservations 179-85 (1990). These findings are especially credible given the authors' longstanding efforts in support of tribal sovereignty. The late Margery Brown, for example, founded and for many years directed the **Indian** Law Clinic at the University of Montana School of Law, in addition to serving as Chair of the Montana Human Rights Commission and as an associate justice of the Court of Appeals of the Confederated Salish and Kootenai Tribes. But see Margery H. Brown & Brenda C. Desmond, Montana Tribal Courts: Influencing the Development of Contemporary **Indian** Law, 52 Mont. L. Rev. 211 (1991). Brown and Desmond find that political interference has not prevented Montana tribal courts from playing a central role in shaping modern **Indian** law, although the authors imply that recent establishment of an intertribal appellate court provides a helpful buffer between the courts and tribal governing bodies. Id. at 301.

221 McKinney v. Business Council, 20 **Indian** L. Rep. 6020, 6020 (Duck Valley Tr. Ct. 1993).

222 Brunette v. Dann, 417 F. Supp. 1382, 1387 (D. Idaho 1976).

223 Chapoose v. Ute **Indian** Tribe, 13 **Indian** L. Rep. 6023, 6023 (Ute Tr. Ct. 1986).

224 Id. at 6024.

225 Id. at 6028.

226 Committee for Better Tribal Gov't v. Southern Ute Election Bd., 17 **Indian** L. Rep. 6095, 6095-96 (S. Ute Tr. Ct. 1990).

227 Id.

228 Id. at 6096.

229 Civil Rights Commission Report, supra note 180, at 36.

230 Elmer R. Rusco, Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions, 14 Am **Indian** L. Rev. 269, 270 (1989). Most IRA constitutions were "boiler-plate" documents drafted in 1936 by the BIA and did not reflect tribal traditions. See Cohen, 1982 ed., supra note 8. at 149.

231 Rusco, supra note 230, at 274.

232 Id. at 274-75.

233 Id. at 275.

234 Id. at 280.

235 Id. at 283.

236 Id. at 284.

237 Id. at 285.

238 Frank Pommersheim, A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts, 27 Gonz. L. Rev. 393, 393 (1992).

239 Hudson v. Hoh **Indian** Tribe, 2 NICS App. 160, 163-64 (Hoh Tr. Ct. App. 1992).

240 Boos v. Yazzie, 17 **Indian** L. Rep. 6115, 6119 (Nav. Sup. Ct. 1990).

241 See James W. Zion, The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New, 11 Am. **Indian** L. Rev. 89 (1983).

242 See generally Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, 24 N.M. L. Rev. 225 (1994); Fredric Brandfon, Comment, Tradition and Judicial Review in the American **Indian** Tribal Court System, 38 UCLA L. Rev. 991 (1991).

243 Christine Zuni, Strengthening What Remains, 7 Kan. J.L. & Pub. Pol'y 17 (1997).

244 See, e.g., Conroy v. Frizzel, 429 F. Supp. 918, 925 (D.S.D. 1977), aff'd sub nom. Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978); Tom v. Sutton, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976); Wounded Head v. Tribal Council, 507 F.2d 1079, 1082-83 (8th Cir. 1975).

245 See, e.g., United States v. Strong, 778 F.2d 1393, 1397 (9th Cir. 1985) (search and seizure); Daly v. United States, 483 F.2d 700, 706-07 (8th Cir. 1973) (one man - one vote).

246 See, e.g., In re The Sacred Arrows, 3 Okla. Trib. 332, 337-38 (Dist. Ct. Chy.-Arapaho Tribes 1990) ("Anglo-American concepts of fairness and civil rights are sometimes inappropriate, in their raw form, to **Indian** communities. These concepts can be applied only in conjunction with the unique cultural, social, and political attributes of the **Indian** heritage.").

247 See, e.g., Colville Confederated Tribes v. St. Peter, 20 **Indian** L. Rep. 6108, 6110 (Colv. Ct. App. 1993) ("We . . . apply due process principles under ICRA with flexibility and in a manner contextually adapted by the Colville Confederated Tribes."); Lummi **Indian** Tribe v. Edwards, 1 NICS App. 10, 15 (Lummi Tr. Ct. App. 1988) ("Though there is similarity in language of both the ICRA and the Bill of Rights and the 14th Amendment, the meaning and application of the ICRA must necessarily be somewhat different than the established Anglo-American legal meaning and application of the Bill of Rights on federal and state governments.").

248 In re The Sacred Arrows, 3 Okla. Trib. 332, 335-37 (Dist. Ct. Chy.-Arapaho Tribes 1990).

249 Id. at 337.

250 Stepetin v. Nisqually **Indian** Community, 2 NICS App. 224, 229 (Nisqually Tr. Ct. App. 1993).

251 Id. at 230 (Irvin, C.J., concurring in part and dissenting in part).

252 "No **Indian** tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances." 25 U.S.C. § 1302(1) (1994).

253 See supra note 29 and accompanying text.

254 See supra text accompanying notes 15-16.

255 See supra text accompanying note 18.

256 "No **Indian** tribe . . . shall violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." 25 U.S.C. § 1302(2) (1994).

257 Metlakatla **Indian** Community v. Williams, 4 NICS App. 91, 92-93 (Metlakatla Tr. Ct. App. 1996).

258 Walker River Paiute Tribe v. Jake, 23 **Indian** L. Rep. 6204, 6205, 6208 (Walk. R. Tr. Ct. 1996).

259 Southern Ute Tribe v. Scott, 18 **Indian** L. Rep. 6105, 6105-06 (S. Ute Tr. Ct. 1991).

260 Winnebago Tribe v. Pretends Eagle, 24 **Indian** L. Rep. 6240, 6243-44 (Winnebago Tr. Ct. 1997). The presiding judge employed what appears to be boilerplate language in this and other opinions rejecting the application of the ICRA to the tribe, apparently on grounds that it was in conflict with tribal custom, but then deciding the case according to almost identical tribal constitutional provisions. See id. at 6243; see also Winnebago Tribe v. Bigfire, 24 **Indian** L. Rep. 6232, 6236 (Winnebago Tr. Ct. 1997).

261 "No **Indian** tribe . . . shall subject any person for the same offense to be twice put in jeopardy." 25 U.S.C. § 1302(3) (1994).

262 United States v. Wheeler, 435 U.S. 313, 329-30 (1978).

263 Lummi **Indian** Nation v. Kinley, 2 NICS App. 130, 133, 136 (Lummi Tr. Ct. App. 1991).

264 Id. at 134.

265 Id. at 136.

266 "No **Indian** tribe . . . shall compel any person in any criminal case to be a witness against himself." 25 U.S.C. § 1302(4) (1994).

267 Lower Elwha Klallam **Indian** Tribe v. Bolstrom, 19 **Indian** L. Rep. 6026, 6027 (L. Elwha Ct. App. 1991).

268 Southern Ute Tribe v. Lansing, 19 **Indian** L. Rep. 6091, 6092 (S. Ute Tr. Ct. 1992).

269 Chippewa-Ottawa Tribes v. Pavement, 18 **Indian** L. Rep. 6141, 6142 (Chip.-Ott. Cons. Ct. 1991).

270 "No **Indian** tribe . . . shall take any private property for a public use without just compensation." 25 U.S.C. § 1302(5) (1994).

271 See generally Cohen, 1982 ed., supra note 8, at 471-528. Changes in the use or distribution of benefits from the use of trust land do not infringe any legally protectable rights of individual tribal members. United States v. Jim, 409 U.S. 80, 82 (1972).

272 See generally Cohen, 1982 ed., supra note 8, at 39-41.

273 Babbitt v. Youpee, 519 U.S. 234, ___, 117 S. Ct. 727, 732 (1997); see also Hodel v. Irving, 481 U.S. 704, 717 (1987).

274 "No **Indian** tribe . . . shall deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense." 25 U.S.C. § 1302(6) (1994).

275 Lummi **Indian** Tribe v. Edwards, 1 NICS App. 10, 15 (Lummi Tr. Ct. App. 1988).

276 Tulalip Tribes v. Cultee, 2 NICS App. 190, 194 (Tulalip Tr. Ct. App. 1992).

277 Miller v. Crow Creek Sioux Tribe, 12 **Indian** L. Rep. 6008, 6012 (Intertr. Ct. App. 1984).

278 Drags Wolf v. Tribal Business Council, 17 **Indian** L. Rep. 6051, 6052 (Ft. Bert. Tr. Ct. 1990).

279 Id.

280 See Bureau of the Census, 1990 Census of Population, Social and Economic Characteristics, United States 93, 95 (1993) (26.3% of all **Indians** and 38.6% of American **Indians**, Eskimo or Aleut persons in nonmetropolitan areas, compared to 9.3% of all white persons and 13.9% of white persons in nonmetropolitan areas, were below the poverty level.). See also infra notes 380-383 and accompanying text.

281 Settler v. Lameer, 507 F.2d 231, 241 (9th Cir. 1974).

282 Tom v. Sutton, 533 F.2d 1101, 1104 (9th Cir. 1976).

283 O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1147 (8th Cir. 1973).

284 Hoh **Indian** Tribe v. Penn, 1 NICS 24, 27 (Hoh Tr. Ct. App. 1988).

285 Puyallup Tribe v. McCloud, 21 **Indian** L. Rep. 6017, 6018 (Puy. Ct. App. 1990).

286 Lummi **Indian** Tribe v. Edwards, 1 NICS App. 10 (Lummi Tr. Ct. App. 1988); cf. Suquamish **Indian** Tribe v. Mills, 2 NICS App. 145, 146-47 (Suquamish Tr. Ct. App. 1991) (holding that appellant had no claim for lack of assistance of counsel when he had fifteen months to seek counsel before court date).

287 Chavez v. Tome, 14 **Indian** L. Rep. 6029, 6029, 6031 (Nav. Sup. Ct. 1987).

288 See, e.g., Muckleshoot Code of Laws, 1.07.02 (to be admitted to the Muckleshoot Bar, a person must be: of good moral character, approved by the Chief Judge of the court;, sign and take the Counsel's Oath, pay the bar admission fee, and be familiar with the Muckleshoot Code of Laws, the Muckleshoot Constitution, and the procedures of the Muckleshoot Court of Justice).

289 Id. at 1.07.06 (the Chief Judge initiates a complaint for disbarment, which is then heard by the Court of Appeals).

290 In re Robertson, 4 NICS App. 111, 117 (Hoopa Valley Tr. Ct. App. 1996).

291 Id. at 116.

292 Id. at 113.

293 Id. at 117.

294 Id. at 113-14.

295 Id. at 114-15.

296 Id. at 116-17.

297 Id. at 118.

298 "No **Indian** tribe . . . shall require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both." 25 U.S.C. § 1302(7) (1994).

299 Ramos v. Pyramid Tribal Court, 621 F. Supp. 967, 970 (D. Nev. 1985). On ICRA sentencing limits, see supra note 26.

300 Colville Confederated Tribes v. St. Peter, 20 **Indian** L. Rep. 6108, 6108, 6110 (Colv. Ct. App. 1993).

301 Ute Mountain Tribe v. Mills, 10 **Indian** L. Rep. 6046, 6047 (Ute Ct. App. 1981).

302 Carmenoros v. Southern Ute **Indian** Tribe, 18 **Indian** L. Rep. 6147, 6147-48 (S.W. Intertr. Ct. App. 1991).

303 Smartt v. Shoshone Paiute Tribes, 24 **Indian** L. Rep. 6101, 6101 (Inter-Tr. Ct. App. Nev. 1997).

304 Id.

305 James S. Manlowe et al., Jail Conditions on the Navajo Nation: A Case Study, 27 Clearinghouse Review 891, 891 (1993).

306 Id.

307 Id. at 892.

308 In re Colville Tribal Jail, 13 **Indian** L. Rep. 6021, 6021 (Colv. Tr. Ct. 1986).

309 In re Colville Tribal Jail, 13 **Indian** L. Rep. 6030, 6030 (Colv. Tr. Ct. 1986).

310 McDonald v. Colville Confederated Tribes, 17 **Indian** L. Rep. 6030, 6031-32 (Colv. Tr. Ct. 1990).

311 "No **Indian** tribe . . . shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8) (1994).

312 See, e.g., Berry v. Arapahoe and Shoshone Tribes, 420 F. Supp. 934, 943-44 (D. Wyo. 1976).

313 Stands Over Bull v. Bureau of **Indian** Affairs, 442 F. Supp. 360, 376, (D. Mont. 1977).

314 McCurdy v. Steele, 353 F. Supp. 629, 640 (D. Utah 1973), rev'd on other grounds 506 F.2d 653 (10th Cir. 1974).

315 Johnson v. Lower Elwha Tribal Community, 484 F.2d 200, 203 (9th Cir. 1973).

316 Big Eagle v. Andera, 418 F. Supp. 126, 130-31 (D.S.D. 1976).

317 Metlakatla **Indian** Community v. Lang, 4 NICS App. 86, 90 (Metlakatla Tr. Ct. App. 1996).

318 Id. at 88 & n.1 (citing Goldberg v. Kelly, 397 U.S. 254, 267 (1969) and Grannis v. Ordean, 234 U.S. 385, 394 (1969)).

319 Montreal v. Cheyenne River Sioux Tribe, 13 **Indian** L. Rep. 6002, 6004 (Cheyenne R. Sx. Ct. App. 1985).

320 Teeman v. Burns Paiute **Indian** Tribe, 4 NICS App. 185, 192 (Burns Paiute Tr. Ct. App. 1997).

321 Id. at 187-88.

322 Id. at 190-91.

323 Lummi **Indian** Tribe v. Edwards, 1 NICS App. 10, 17 (Lummi Tr. Ct. App. 1988).

324 United States v. Hostler, 10 **Indian** L. Rep. 6050, 6050 (Hoopa Ct. Ind. Off. 1983).

325 Suquamish **Indian** Tribe v. Purser, 2 NICS App. 176, 180-82 (Suquamish Tr. Ct. App. 1992).

326 Id. at 178, 182.

327 Winnebago Tribe v. Bigfire, 24 **Indian** L. Rep. 6232, 6233, 6239 (Winnebago Tr. Ct. 1997).

328 Id. at 6234-35.

329 Id. at 6235-39.

330 Id. at 6239.

331 Iron Cloud v. Meckle, 24 **Indian** L. Rep. 6229, 6230 (Standing Rock Sioux Nat. Sup. Ct. 1996).

332 See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-45 (1982).

333 Burns Paiute **Indian** Tribe v. Dick, 22 **Indian** L. Rep. 6016, 6017 (Burns Paiute Ct. App. 1994) (quoting tribal ordinance).

334 25 U.S.C. § 1911 (1994).

335 In re L.L.H., 10 **Indian** L. Rep. 6043, 6043-44 (Intertr. Ct. App. 1982).

336 In re Welfare of D.D., 22 **Indian** L. Rep. 6020, 6020 (Port Gam. S'Klallam Ct. App. 1994).

337 Griffith v. Wilkie, 18 **Indian** L. Rep. 6058, 6059 (N. Plns. Intertr. Ct. App. 1991).

338 Greger v. Greger, 11 **Indian** L. Rep. 6025, 6026 (Colo. R. Tr. Ct. 1984).

339 See generally Alison Joan Meyer, Note, Modern Problems in HUD **Indian** Housing Authorities, 16 Okla. City U. L. Rev. 441 (1991). The Seattle Times recently published a Pulitzer-prize winning series of articles concerning alleged fraud and abuse in tribally-run housing programs. The scandal has led to heated political rhetoric concerning tribal politics, Congressional hearings, and federal criminal prosecutions of tribal officials. See Eric Nalder et al., Tribal Housing: From Deregulation to Disgrace, Seattle Times (Reprint from December 1-5, 1996); see also Eric Nalder & Alex Tizon, Officials Ousted in HUD Scams, Seattle Times, Dec. 19, 1996, at A1.

340 Lawrence v. Southern Puget Sound Inter-Tribal Hous. Auth., 14 **Indian** L. Rep. 6011, 6012 (Suq. Tr. Ct. 1987). Unfortunately for other tribal tenants and homebuyers, recently adopted federal regulations effectively rescind the right to a tenant grievance procedure in evictions by **Indian** Housing Authorities. See Implementation of the Native American Housing Assistance and Self-Determination Act of 1996, 63 Fed. Reg. 12,334 (1998).

341 24 C.F.R. 950.115 (1997).

342 Garcia v. Southern Puget Sound Intertribal Hous. Auth., 4 NICS App. 142, 148 (Hoh Tr. Ct. App. 1996).

343 Id. at 146.

344 Id. at 147-48. The court distinguished Kopanuk v. AVCP Reg'l Hous. Auth., 902 P.2d 813 (Alaska 1995), which had held a tribal housing authority could not use an eviction procedure against a homebuyer who had equitable interests in the property. Id. at 148 n.5.

345 Although about one-third of all tribes have gaming establishments, a mere ten tribes receive over half the profit from tribal gaming. Meanwhile, unemployment on reservations is over three times the national average, and twice the national average of households with children are below the poverty level. Timothy Egan, Senate Bills Would Deal a Blow to the Rights of Tribes, New York Times, Aug. 27, 1997 at A1.

346 For a broader discussion of employment issues see G. William Rice, Employment in **Indian** Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship, 72 N.D. L. Rev. 267 (1996); William Buffalo & Kevin J. Wadzinski, Application of Federal and State Labor and Employment Laws to **Indian** Tribal Employers, 25 U. Mem. L. Rev. 1365 (1995); Vickie J. Limas, Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency, 26 Ariz. St. L.J. 681 (1994); Vickie J. Limas, Employment Suits Against **Indian** Tribes: Balancing Sovereign Rights and Civil Rights, 70 Denv. U. L. Rev. 359 (1993).

347 Shippentower v. Confederated Tribes, 20 **Indian** L. Rep. 6026, 6026-27 (Uma. Tr. Ct. 1993).

348 Regan v. Finkbonner, 1 NICS App. 82, 84 (Nooksack Tr. Ct. App. 1990).

349 Kinslow v. Business Comm., 15 **Indian** L. Rep. 6007, 6008-09 (C. B. Pot. Sup. Ct. 1988).

350 Hoopa Valley **Indian** Hous. Auth. v. Gerstner, 3 NICS App. 250, 259 (Hoopa Valley Tr. Ct. App. 1993).

351 Id.

352 Hoopa Valley Tribal Council v. Risling, 24 **Indian** L. Rep. 6224, 6226 (Hoopa Valley Tr. Ct. App. 1996).

353 Chatterson v. Confederated Tribes, 24 **Indian** L. Rep. 6231, 6231-32 (Siletz Ct. App. 1997).

354 Lopach, Tribal Government Today, supra note 220, at 179-85.

355 Kinslow v. Business Comm., 15 **Indian** L. Rep. 6007, 6008-09 (C. B. Pot. Sup. Ct. 1988).

356 McLean v. Bailey, 15 **Indian** L. Rep. 6013, 6013 (N. Chy. Tr. Ct. 1988).

357 "No **Indian** tribe . . . shall pass any bill of attainder or ex post facto law." 25 U.S.C. § 1302(9) (1994).

358 495 U.S. 676 (1990).

359 Colville Confederated Tribes v. Stead, 21 **Indian** L. Rep. 6005, 6005-06 (Colv. Ct. App. 1993).

360 Id. at 6006.

361 Id. at 6009.

362 Id. at 6008-10 (Colv. Ct. App. 1993).

363 Frost v. Southern Ute Tribal Council, 23 **Indian** L. Rep. 6135, 6136 (1996).

364 "No **Indian** tribe . . . shall deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons." 25 U.S.C. § 1302(10) (1994).

365 See Civil Rights Commission Report, supra note 180, at 9, 39.

366 Id. at 39.

367 Id. at 9.

368 United States v. McGahuey, 10 **Indian** L. Rep. 6051, 6051, 6051 (Hoopa Ct. Ind. Off. 1983).

369 Pueblo of Pojoaque v. Jagles, 24 **Indian** L. Rep. 6137, 6138 (Pojoaque Pueblo Tr. Ct. 1997).

370 Id.

371 Squaxin Island Tribe v. Johns, 15 **Indian** L. Rep. 6010, 6010-11 (Sq. I. Tr. Ct. 1987). See also Hummingbird v. Southern Ute **Indian** Tribe, 19 **Indian** L. Rep. 6067, 6067 (S.W. Intertr. Ct. App. 1991) (holding defendant entitled to jury trial only if she followed tribal procedures when she was twice informed of the right).

372 Confederated Salish & Kootenai Tribes v. Peone, 16 **Indian** L. Rep. 6136, 6137 (C.S. & K. Tr. Ct. 1989) (granting jury trial after finding defendant did not realize he had to request a jury).

373 Hopi Tribe v. Manycow, 21 **Indian** L. Rep. 6080, 6081 (Hopi Tr. Ct. 1994).

374 Navajo Nation v. McDonald, Sr., 19 **Indian** L. Rep. 6053, 6054 (Nav. Sup. Ct. 1991); see also Navajo Nation v. McDonald, Jr., 19 **Indian** L. Rep. 6079, 6080 (Nav. Sup. Ct. 1992).

375 See supra notes 181-182 and accompanying text.

376 25 U.S.C. §§ 3601-3631 (1994).

377 25 U.S.C. §§ 3611, 3613, 3621.

378 Economic Development: Hearing Before the Senate Comm. on **Indian** Affairs, 105th Cong. § 2 (1998), available in 1998 WL 272463 (prepared statement of National American **Indian** Court Judges Association).

379 See infra note 280.

380 See Vincent C. Milani, Comment, The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control, 31 Am. Crim. L. Rev. 1279, 1280 (1994) (arguing that tribal sovereignty, intertribal diversity, and the existing responsiveness of tribes militates against a congressionally imposed right to counsel).

381 The Legal Services Corporation appropriation for FY 1995 was $415 million. Pub. L. No. 103-317, 108 Stat. 1759 (1994). In FY 1996 the appropriation was $278 million, a 33 percent reduction. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-50 (1996).

382 See Katherine J. Wise, Comment, A Matter of Trust: The Elimination of Federally Funded Legal Services on the Navajo Nation, 21 Am. **Indian** L. Rev. 157, 177-78 (1997). Some legal services programs continue to provide civil representation in tribal courts. Despite a general prohibition on representation in criminal proceedings, 45 C.F. R. § 1613.3 (1997), Legal Services Corporation regulations permit representation in tribal court for misdemeanors and lessor offenses, 45 C.F.R. § 1613.2, although due to budget restrictions few programs actually provide such services. See also Boos v. Yazzie, 17 **Indian** L. Rep. 6115, 6119 (Nav. Sup. Ct 1990) (finding federal regulations permit legal services lawyers to represent clients in misdemeanor proceedings in tribal courts).

383 A few law schools located close to **Indian** reservations have operated clinics which provide student advocates for some tribal members, although these programs depend on year-to-year funding decisions. Gonzaga University recently ended its **Indian** law clinic, which had served the Coeur d'Alene Tribal Court. The University of Idaho provides public defenders at the Nez Perce Tribal Court, but has lost funding for its civil **Indian** law clinic, which had incorporated a unique mediation program involving tribal elders working alongside law students. Despite such funding cutbacks, **Indian** law clinics survivsity of Montana, the University of New Mexico, the University of North Dakota, the University of Colorado, and other law schools. The University of Washington recently established the Northwest **Indian** Law Clinic in collaboration with the Northwest Justice Project, a federally-funded legal services program.

34 IDLR 465

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