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The Legend of "Crow Dog:" An Examination of Jurisdiction Over Intra-Tribal Crimes Not Covered by the Major Crimes Act

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I. INTRODUCTION

Native American tribes present unique problems to American jurisprudence and governance. Unquestionably subject to federal control on some levels, they have maintained the "inherent powers of a limited sovereignty" over internal affairs.[1] While both the Supreme Court[2] and Congress[3] have recognized this sovereignty, specific Congressional mandate can abrogate it at any time. This Note addresses the question of whether Congress has mandated federal jurisdiction over all serious crimes committed by Indians[4] against other Indians on tribal land.

The story is long and complicated, with its beginnings[5] in the 1883 Supreme Court case *Ex parte Crow Dog*, in which the Court declared that the United States could not prosecute intra-tribal crimes committed on tribal land.[6] Alarm in Congress over the perceived gap in law enforcement led to the Major Crimes Act,[7] which listed certain intra-tribal offenses as falling under federal jurisdiction for prosecution.[8] Specific enumeration begged the question that still rages in the circuit courts: whether Congress intended the list to stand for the full extent of federal jurisdiction over intra-tribal crimes, or whether other generally applicable federal criminal statutes could also be used to prosecute intra-tribal crimes that take place on tribal land. The circuit courts have fallen into essentially two camps, one favoring tribal jurisdiction and the other supporting federal jurisdiction.[9]

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1. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (photo. reprint 1986) (1942).

2. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . .").

3. *See* United States v. Quiver, 241 U.S. 602, 605-06 (1916) ("[T]he policy reflected by the legislation of Congress . . . [is] that the relations of the Indians among themselves . . . is to be controlled by the customs and laws of the tribe . . . .").

4. This Note refers to Native Americans as "Indians" for convenience, as nearly all the materials cited refer to the group in this way. The author intends no disrespect.

5. *See* B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 468-69 (1998).

6. *See Ex parte* Crow Dog, 109 U.S. 556, 571-72 (1883).

7. 18 U.S.C. § 1153 (1994).

8. The list of included offenses currently covers fourteen specific crimes, last expanded in 1986. *See id.*

9. Although there has not been a great amount of scholarly work done on this issue, commentators who have addressed the problem have generally found no federal jurisdiction

The pro-tribal group of circuit courts includes the Second, Fourth, and Seventh Circuits, whose decisions generally follow the traditional reading of the statute, first suggested by the Supreme Court in *United States v. Quiver*, that "enumeration . . . of certain offenses as applicable to Indians in the reservations carries with it some implication of a purpose to exclude others."[10] The Fourth Circuit adopted this reasoning in its purest form, stating that "[w]hen there is a crime by an Indian against another Indian within Indian country only those offenses enumerated in the Major Crimes Act may be tried in the federal courts."[11] The Second[12] and the Seventh[13] Circuits have adopted a less stringent approach, allowing an exception that extends federal jurisdiction for "peculiarly Federal" crimes.[14] These circuits operate on the assumption of tribal sovereignty and require the federal government to demonstrate its authority to prosecute non-enumerated intra-tribal offenses.[15]

In contrast, the Sixth,[16] Eighth,[17] Ninth[18] and Tenth[19] Circuits all adopted postures that presume federal predominance for crimes covered by generally applicable federal statutes.[20] Each of these cir-

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over non-enumerated crimes. *See, e.g.*, Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 540 (1976) ("The crimes enumerated in [the Major Crimes Act] are exclusive in that a federal district court only has jurisdiction to entertain charges against Indians which are brought for one of the 14 specified crimes."); Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 333 (1989) ("Tribal courts have exclusive criminal jurisdiction over Indian defendants for all crimes not covered by . . . the Major Crimes Act . . . ."); Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 390 (1974) ("The basic jurisdictional structure, then, for Indian against Indian crimes in Indian Country gives the United States jurisdiction over those offenses enumerated in the Major Crimes Act, and leaves exclusive jurisdiction over all other crimes with the tribes.").

10. United States v. Quiver, 241 U.S. 602, 606 (1916).

11. United States v. Welch, 822 F.2d 460, 464 (4th Cir. 1987).

12. *See generally* United States v. Markiewicz, 978 F.2d 786 (2d Cir. 1992).

13. *See generally* United States v. Funmaker, 10 F.3d 1327 (7th Cir. 1993).

14. *See infra* notes 143-47, 154-57 and accompanying text.

15. *See* Richard W. Garnett, *Once More into the Maze:* United States v. Lopez, *Tribal Self-determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. REV. 433, 472-74 (1996).

16. *See generally* United States v. Yannott, 42 F.3d 999 (6th Cir. 1994).

17. *See generally* United States v. Wadena, 152 F.3d 831 (8th Cir. 1998).

18. *See generally* United States v. Begay, 42 F.3d 486 (9th Cir. 1994).

19. *See generally* Head v. Hunter, 141 F.2d 449 (10th Cir. 1944). The Tenth Circuit will not be considered separately in analysis of the circuit split, *infra* Part III.B, because it has not directly dealt with this issue since its ruling in 1944.

20. These circuits recognize an exception to this predominance when the defendant can prove that federal jurisdiction contravenes a treaty between the Indian nation and the United

cuits reads the Major Crimes Act ("M.C.A.")[21] in conjunction with the General Crimes Act ("G.C.A."),[22] which immediately precedes it in the U.S. Code and contains an exemption from federal jurisdiction for intra-tribal crimes. These courts all reject the argument that the G.C.A. and M.C.A. enumerate the only criminal sanctions which the federal government can pursue against Native Americans,[23] arguing that the exemption from federal prosecution for intra-tribal crime applies only to crime where situs is an element of the offense (so-called "situs crimes" or "enclave laws").[24] Therefore, the federal government can prosecute generally applicable federal criminal statutes (which do not have a situs requirement) in cases of intra-tribal crimes.[25] Ultimately, the difference between the two groups rests on a question of statutory interpretation.

This jurisdiction issue is becoming more important as tribes gain affluence (mainly through the introduction of gaming on tribal lands) and face an increase in the number and complexity of criminal cases that appear on tribal court dockets.[26] The little scholarship that focuses specifically on this split suggests resolving it in favor of tribal sovereignty, relying solely on concerns of "fairness" and history.[27] However, as one commentator has argued, these considerations do not by themselves lead to the best possible solution in such a complex

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States, a nearly impossible task, as no such treaties have been signed since Congress effectively banned them in 1871. *See* COHEN, *supra* note 1, at 66-67 (citing 16 Stat. 566 (1871)).

21. 18 U.S.C. § 1153 (1994).

22. 18 U.S.C. § 1152 (1994). This section of the Code is also referred to as the Indian Country Crimes Act or the Enclaves Act.

23. *See* United States v. Wadena, 152 F.3d 831, 840 (8th Cir. 1998); United States v. Yannott, 42 F.3d 999, 1004 (6th Cir. 1994); *Begay*, 42 F.3d at 498.

24. Situs as an element of the offense means that the federal criminal law is only applicable to activities that occur in a certain location—land under exclusive federal control. Thus if the same person performed exactly the same action at a different location, the federal government could not prosecute. This makes the situs of the crime as much an element as the *mens rea*. The statutes defining such crimes currently contain the language "applicable in the special maritime and territorial jurisdiction of the United States." *See, e.g.*, S. REP. NO. 98-225, at 322 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3498.

25. *See Wadena*, 152 F.3d at 840; *Yannott*, 42 F.3d at 1004; *Begay*, 42 F.3d at 498.

26. *See* James H. Frey, *Federal Involvement in U.S. Gaming Regulation*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 147-49 (1998) (noting that the rise of Indian gaming has led to increased tribal affluence, as well as rampant jurisdictional disputes). *See generally*, Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998) (presenting an overview of caselaw published by tribal courts in 1996 that illustrates the increasing complexity of the tribal justice system, in part spurred by increasing tribal prosperity).

27. *See* Garnett, *supra* note 15, at 471-74.

legal situation.[28] While fairness and historical concerns play a part, this Note demonstrates that the best solution is reached by applying a dynamic statutory interpretation regime to the legal problem.[29] This Note employs analysis suggested by William Eskridge,[30] studying the problem in light of the statute's text, early decisions interpreting the statute, and recent developments in societal attitudes toward tribal sovereignty. By using such analysis, this Note concludes that, while tribal sovereignty (and jurisdiction) should be the default, the federal government has the need and power to seize some jurisdiction over unenumerated intra-tribal crimes that are "peculiarly federal" in nature.

Part II of this Note sets out the evolution of the problem outlined above, with an examination of the development of tribal jurisdiction over the past two hundred years, both in Congress and in the courts. Part III examines the two distinct lines of cases that have emerged in the circuit courts. Part IV sets out the dynamic statutory interpretation model that will be used to examine the problem. Part V explains the resolution of the jurisdictional controversy, inserting the important factors identified in Parts II and III into the model established in Part IV.

II. THE DEVELOPMENT OF TRIBAL JURISDICTION

Understanding the current circuit split over the reach of federal jurisdiction for intra-tribal crimes requires an examination of the history of tribal relations with the United States, the development of tribal legal status, and various courts' interpretation of tribal rights and obligations over time.

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28. Prof. Louis Kaplow argued this position in an address to the Law and Economics Symposium at Vanderbilt Law School. Professor Kaplow stated that courts should examine more than just the moral philosophists' view when making normative decisions about the law. Louis Kaplow, Address at the Vanderbilt University Law and Economics Symposium (Nov. 4, 1998).

29. Though not without its critics, *see infra* note 232, this type of statutory interpretation provides the most nuanced, sophisticated look at the problem and yields the most logical analytical result, given the complexity of the legal issues faced here, the constant reexamination by the courts and Congress, and the amount of time that has passed since the original bill's enactment.

30. *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

A. Historic Recognition of Tribal Sovereignty and Criminal Jurisdiction

From colonial times, the United States and its forebears recognized the sovereignty of the Indian nations.[31] Recognition first came in the form of delegations sent and received by the colonial and native governments and, more importantly, in the signing of over 800 treaties with the various Indian nations.[32] The Supreme Court more completely defined this implicit recognition of sovereignty in its decisions of the early 1800s.

Worcester v. Georgia established United States law on tribal sovereignty,[33] clearly stating that the tribes were independent sovereigns, pre-dating European settlement of the Americas.[34] However, the Court noted that the European powers had long granted their citizens the right to own land that the natives were willing to sell.[35] While the governments of Europe allowed dealings with the Indians for land, they generally did not attempt to interfere with the internal workings of the natives' governments.[36] By the 1830s, the realities of extensive land holdings and the decimation of tribal populations led the Court to hold in *Worcester* that the Cherokee Indian Nation in Georgia was a "weak state" that had placed itself under the protection of a more powerful one.[37] Nevertheless, in placing itself under this protection, the Cherokee Nation had not completely surrendered its

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31. Sovereignty, as used in this Note, refers to self-governance. In the case of the tribes, it has been limited by the "domestic dependant nations" doctrine. To the extent that sovereignty still exists at all, it will be referred to as "tribal sovereignty." *See infra* notes 33-39 and accompanying text.

32. Under international law, treaties were a means for sovereigns to relate to one another and to show recognition. *See* Kirke Kickingbird et al., *Indian Sovereignty, in* 6 NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN SOVEREIGNTY 1, 6 (John R. Wunder ed., 1996).

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

34. As Chief Justice Marshall noted in his opinion for the majority:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other . . . or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

Id. at 542-43.

35. *See id.* at 544.

36. *See id.* at 547.

37. *Id.* at 561.

independence.[38] This form of dual sovereignty later became known as the "domestic dependent nations" framework for describing the relationship between the Indian Nations and the United States.[39] This model retains its vitality in the courts today.

Because "domestic dependent nation" status allowed for both tribal and federal sovereignty, the issue of law enforcement by the United States on tribal lands arose early. The federal government, in many of its early treaties with the tribes, mentioned the possibility of policing various crimes in conjunction with the tribes.[40] Congress eventually discarded this cooperative approach and unilaterally applied criminal law to Indians as well as non-Indians on tribal lands in the Act of March 3, 1817.[41] The Act allowed prosecution in federal court for any activity punishable when committed elsewhere in the United States, whether the offender was Indian or not.[42] However, the Act contained a critical exception that recognized continuing tribal sovereignty over internal affairs: "nothing in this act shall be so construed as to . . . extend to any offence committed by one Indian against another, within any Indian boundary."[43] Congress retained this language when it revised federal Indian law in the Trade and Intercourse Act of 1834. The House Indian Committee noted, "it is rather of courtesy than of right that we undertake to punish crimes committed in [Indian] territory by and against our citizens."[44] The Committee stated that Indians, in the early stages of developing European-style governments, could not yet handle jurisdiction over crimes against U.S. citizens, but that the assistance provided by the federal government in no way extended to prosecution of intra-tribal crimes.[45]

The first congressional attempt to uniformly regnlate law enforcement on Indian reservations was the General Crimes Act (G.C.A.), which extended jurisdiction over general situs crimes (those

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38. *See id.*

39. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 4 (1994).

40. *See* Treaty between the Wyandot and the United States, Arts. V & IX (1785); Pickering Treaty (between the Iroquois and the United States), art. VII (1794).

41. *See* Act of March 3, 1817, ch. 92, sec. 1, 3 Stat. 383 (1817).

42. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 165 (1983).

43. Act of March 3, 1817, ch. 92, sec. 2, 3 Stat. 383 (1817).

44. DELORIA, *supra* note 42, at 166 (quoting H.R. REP. NO. 23-474, at 13-14 (May 20, 1834)).

45. *See id.*

crimes containing a requirement that they occur in any place under the sole jurisdiction of the United States) to Indian country.[46] Although this Act was a significant step in extending federal jurisdiction to Indians, its most important feature was continued recognition of tribal sovereignty over intra-tribal crimes.[47] Yet pure tribal sovereignty did not last long, as a famous case involving a high profile intra-tribal murder prompted Congress to enact tighter federal controls over Indian criminal jurisprudence.

B. Crow Dog

The most important case affecting the development of Indian criminal justice was also one of the most compelling stories of its day. Early in the afternoon on August 5, 1881, a Sioux medicine man named Crow Dog (Kan-gi-shun-ca) shot and killed a popular Sioux chief named Spotted Tail (Sin-ta-ga-le-Scka) on a dusty road in the Great Sioux Reservation of the Dakota Territory.[48] Spotted Tail had been a peaceful leader of the Sioux whom the federal government supported because he acted as a buffer between it and radical traditionalist chiefs like Sitting Bull and Crazy Horse.[49] His conciliatory stance towards the U.S. government angered many of his fellow Sioux and probably served as the impetus for his murder by Crow Dog.[50] After the murder, Crow Dog's family met with Spotted Tail's family.[51] As Indian tradition prescribed, they reached a compensation agreement to settle the murder.[52] Following tribal law, Crow Dog's family agreed to pay Spotted Tail's family $600 in cash, eight horses, and one blanket.[53] As far as the tribe was concerned, the matter was settled.

When word of this traditional resolution spread (and with it outrage among the populace surrounding the reservation that retributive justice had not been served), the federal government decided to take action.[54] Crow Dog was arrested, tried, and convicted of murder

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46. Act of June 20, 1874, sec. 2145, 18 Stat. 113 (1874).
47. *See id.*
48. *See* HARRING, *supra* note 39, at 1.
49. *See* DELORIA, *supra* note 42, at 168.
50. *See id.* According to reports of the day, Spotted Tail also had extended his chiefly privileges to the wives of fellow tribesmen, adding to the animosity against him. *See id.*
51. *See id.*
52. *See* HARRING, *supra* note 39, at 1.
53. *See id.*
54. *See* DELORIA, *supra* note 42, at 168.

in a federal territorial court in Deadwood, South Dakota.[55] The story might have ended in a standard hanging, but Crow Dog convinced the marshal to release him so he could put his affairs in order before execution.[56] While most people suspected that this would be the last that white society would see of Crow Dog, he came back as promised one snowy day and surrendered to the marshal.[57] This remarkable act of honesty and character received broad newspaper coverage, and Crow Dog soon had attorneys volunteering to take a writ of habeas corpus to the Supreme Court on his behalf.[58] He had gone from villain to hero, and the Court accepted his case.

In *Ex parte Crow Dog* the Court found that the federal government did not have power to prosecute intra-tribal crimes.[59] It reached this conclusion after in-depth statutory and treaty interpretation, and held that the treaty with the Sioux signed in 1868 did not repeal the G.C.A.'s clause exempting intra-tribal crimes from federal prosecution.[60] Accordingly, the intra-tribal crimes (or tribal sovereignty) exception in the G.C.A. applied to Crow Dog's case. Justice for Spotted Tail's murder was outside federal jurisdiction and left to the tribe.[61] The writ of habeas corpus was issued, and Crow Dog released.

C. The Major Crimes Act and Its Interpretation

Despite the popular support Crow Dog received, many people considered the result in *Crow Dog* a travesty, and public outcry prompted Congress to ensure that nothing similar would happen again. Pressure on Congress came from two different directions. First, "friends" of the Indians considered this result horrible because they saw domestication as in the Indians' best interests.[62] They be-

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55. *See id.* at 169.
56. *See id.*
57. *See id.*
58. *See id.* In fact, Congress ended up paying for the costs of Crow Dog's appeal.
59. *Ex parte Crow Dog*, 109 U.S. 556 (1883).
60. *See id.* at 567-68. The government had claimed that language from the first article of the treaty (which said that "if bad men among the Indians shall commit a wrong . . . upon the person or property of any one white, black, or Indian," the tribal government agreed to turn the perpetrator over to the U.S. government) voided the exclusions of intra-tribal prosecution in the G.C.A. *Id.* at 567 (quoting Treaty between the Sioux Indians and the United States, art. I, Apr. 29, 1868). The Court did not find the argument persuasive, believing the treaty referred only to crimes by Indians of one tribe against those of another tribe. *See id.* at 568.
61. *See id.* at 572.
62. *See* DELORIA, *supra* note 42, at 169.

lieved the continued vitality of primitive tribal traditions would impede the development of the tribes, ultimately to their detriment. Public pressure also stemmed from incredulity among some in the general populace that the federal government would release a convicted murderer on a "technicality" instead of hanging him.[63]

In response to this pressure, Congress attached a short rider to the general appropriations act of 1889, which is now known as the Major Crimes Act ("M.C.A.").[64] The provision took jurisdiction from the tribes for enumerated "serious" crimes and conferred it on the federal government.[65] The original legislation enumerated only seven offenses, but subsequent legislation and judicial interpretation have expanded the list to fourteen felonies.[66] The Act currently reads, in substance:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [sexual abuse], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury . . ., an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title [theft] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.[67]

As it stands, the law applies only to crimes committed by Indians, although the victims may be of any race. The crimes must occur within Indian country. Although the Act seemingly conflicts with the intra-tribal exclusion still present in the G.C.A., the Court has interpreted the M.C.A. as controlling.[68]

The Supreme Court examined the constitutionality of the M.C.A. in *United States v. Kagama*, describing the United States' relationship with the Indian nations in more detail than it had before and establishing a framework for U.S. sovereignty over the Indian

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63. *Id.* at 170.

64. *See id.* The M.C.A. is codified at 18 U.S.C. § 1153 (1994).

65. At least one commentator has argued, based on the legislative history, that the tribes still have concurrent jurisdiction over the enumerated crimes, albeit with no real effect, given the limitations placed on tribal courts by the Indian Civil Rights Act. *See* Clinton, *supra* note 9, at 559 n.295.

66. 18 U.S.C. § 1153(a) (1994).

67. *Id.*

68. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW: IN A NUTSHELL 129 (1988) (citing Henry v. United States, 432 F.2d 114 (9th Cir. 1970), *modified*, 434 F.2d 1283 (9th Cir. 1971)).

nations.[69] In addressing whether Congress had power to extend federal jurisdiction to the defendant, the Court looked first to the Constitution but found little help in its language.[70] The Court rejected the use of the Indian Commerce Clause, noting that finding Congressional sovereignty over the criminal laws of the tribes would require an extreme stretch of the power conferred by the text.[71] It was, however, able to glean from the Indian Commerce Clause that the tribes were not like other sovereigns, and because they resided on land controlled by two superior recognized sovereigns (the state and federal governments) they must fall under the jurisdiction of one of the two.[72] The Court chose the power of the federal government, primarily because it considered the Indians' main enemies to be the states immediately adjacent to the reservations.[73] This decision established two fundamental principles in Indian law: (1) the plenary power doctrine, which essentially provides that Congress may pass any law affecting the activities of the tribes and their relations to the federal government (including extending federal jurisdiction over criminal matters to tribesmen), and (2) the rule that the tribes shall deal directly with the federal government, giving the federal courts the power to shut out state jurisdiction.[74] Thus, there is no question that Congress, by specific action, can abrogate tribal jurisdiction over intra-tribal crimes.[75] The only real question, then, is whether it has done so for crimes not enumerated in the M.C.A.

The Supreme Court has said that some non-enumerated offenses, specifically lesser included offenses of the enumerated crimes, fall within the jurisdiction of federal district courts in certain circumstances. *Keeble v. United States* involved Francis Keeble, an Indian convicted of assault with intent to commit serious bodily harm.[76] At trial, he asked the judge to instruct the jury that it could convict him of the lesser included offense of simple assault, but the judge refused

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69. United States v. Kagama, 118 U.S. 375 (1886). The Court addressed the issue of whether the federal government had the power to prosecute Kagama, who had been indicted for killing another Indian on the Hoopa Valley Reservation in California. *See id.* at 376.

70. *See id.* at 378.

71. *See id.* at 378-79.

72. *See id.* at 379.

73. *See id.* at 384.

74. *See* HARRING, *supra* note 39, at 146, 150.

75. Subsequent decisions by the Supreme Court have stated that Congress must be clear when it exercises this plenary power to take away tribal sovereignty. *See* Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968).

76. *See* Keeble v. United States, 412 U.S. 205, 206 (1973).

because the M.C.A. did not specifically mention simple assault, making that offense a "matter for the tribe."[77] The Supreme Court ruled that, because defendants are generally entitled to instruction on lesser included offenses to avoid inappropriate conviction of a more serious offense, the district court could not deny the Indian defendant that right simply because he was an Indian.[78] The Supreme Court could "hardly conclude that Congress intended to disqualify Indians from the benefits of a lesser offense instruction, when those benefits are made available to any non-Indian charged with the same offense."[79] The Court cautiously noted that its ruling did not in any way infringe on the residual jurisdiction of the tribe, but that it could only be used when raised as a defense to charges, the prosecution of which was authorized by statute (i.e. the M.C.A.).[80] The dissent highlighted the logical problems with this semantic construct and noted that the M.C.A. "vested a residual jurisdiction in [tribal courts] over all other offenses" not covered by the Act.[81] The dissent argued that because the federal government is one of enumerated powers and because residual jurisdiction here rested with the tribes, federal courts do not have the power to convict on lesser included—but unenumerated—crimes, regardless of the benefit to the criminal defendant, because they have no jurisdiction over those offenses.[82]

D. Recent Legislative History

Congress has had several opportunities to reexamine the meaning of the M.C.A. in amendments to the Act. The ambiguous nature of the these reexaminations is one of the major reasons for the current circuit split. Since the views of Congress and the nation change significantly over long periods of time, this Note will only consider modifications of the last thirty years.[83] Starting in 1968, some House members attempted to amend the M.C.A. to permit fed-

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77. *Id.* at 206.
78. *See id.* at 211-12.
79. *Id.* at 212.
80. *See id.* at 214.
81. *Id.* at 217 (Stewart, J., dissenting).
82. *See id.* at 216-17.
83. As Eskridge stated, "Cultural shifts generate movement of statutery meaning. Changes in society, its values, and its competing ideologies shape and reshape statutory meaning as they reveal new practical problems unresolved by the statute . . . and novel political environments attentive to interpretive developments." ESKRIDGE, *supra* note 30, at 81.

eral jurisdiction over intra-tribal aggravated assaults.[84] Although this effort initially failed, statements of the amendment's sponsor clearly indicate a belief that, without specifically enumerated jurisdiction, punishment is left to the tribal courts.[85]

This clarity of thought evaporated just eight years later, when Congress amended the M.C.A. to adjust for a constitutional defect that a number of circuit court decisions had illuminated.[86] The House Committee Report considered in detail the status of jurisdiction over crimes committed on tribal lands.[87] The report noted that for intra-tribal crimes, the federal government had jurisdiction over the thirteen enumerated offenses of the M.C.A. and that "[j]urisdiction over other offenses rest[ed] with the tribe."[88] However, the report cited two "overriding exceptions" to the rule: the first for situations where the federal government had ceded to certain states' jurisdiction over the tribes within their borders,[89] and a second for "peculiarly Federal [crimes] . . . such as assaulting a Federal officer or defrauding the United States."[90] Even with this exception for peculiarly federal

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84. This proposed change was originally to be included in the Indian Civil Rights Act, but was eventually enacted as a free-standing bill. *See* S. REP. NO. 90-721 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1837, 1854-67.

85. "Without this amendment an Indian can commit a serious crime and receive only a maximum sentence of 6 months. Since Indian courts cannot impose more than a 6-month sentence, the crime of aggravated assault should be prosecuted in a Federal court . . . ." *Id.* at 1866.

86. The unconstitutional provision concerned different treatment of Indian and non-Indian rape defendants. Since the Indian could be tried in federal court using state law standards, and the non-Indian using federal law standards, a disparity in sentencing for the same offense could arise. *See* H.R. REP. NO. 94-1038, at 3-4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1125, 1127-28.

87. *See id.* at 2-3.

88. *Id.* at 3. In support of this point, the committee noted that a section-by-section analysis of the bill indicated that, since kidnapping was not enumerated, intra-tribal kidnappings would be "subject to prosecution only in a tribal court." *Id.* at 5. Consequently, Congress added kidnapping to the list of enumerated offenses. *See id.*

89. This essentially acknowledges Public Law 280, discussed *infra* Part II.F.

90. H.R. REP. NO. 94-1038, at 3, *reprinted in* 1976 U.S.C.C.A.N. 1125, 1127 (citation omitted). The origin and use of this language deserves some attention. From the cites listed in the Committee report, it appears that Congress found this exception based on a law review article by Tim Vollmann. *See supra* note 9. In that article, Vollmann noted that the basic structure for criminal jurisdiction was that the federal government had jurisdiction only over crimes listed in the M.C.A., and the tribes had exclusive jurisdiction over all other crimes. He then acknowledged that the Ninth Circuit may have carved out an exception for any generally applicable "federal" crime, such as assaulting a federal officer. However, Vollmann dismissed this possibility as unworkable. *See* Vollmann, *supra* note 9, at 390-91. The committee nevertheless picked up on this language and included it in its report. This is particularly ironic because Vollmann's reading of the Ninth Circuit's decision was incorrect according to the

crimes, the committee remained concerned about the possibility that some defendants accused of intra-tribal crimes could go free.[91] However, the report offers no definitive indication of whether Congress believed that the intra-tribal exception was limited to situs crimes.[92]

Congress has not yet carefully considered whether the exception to intra-tribal crimes applies only to situs crimes or in general. Articulating its reasons for amending the M.C.A. to include maiming and involuntary sodomy,[93] the committee noted that outside of intra-tribal situations, Congress regulated maiming as a situs crime, so it should be included in the list of enumerated offenses.[94] However, the committee conspicuously left out any situs references when discussing forcible sodomy. Rather, it stated that sodomy is a serious sexual offense that the M.C.A. should cover, as it was then "impossible" to prosecute outside of the tribal courts.[95] From this language, one cannot tell whether Congress regarded only intra-tribal situs crimes as exempted by implication, but the committee clearly found at least one unenumerated intra-tribal crime, forcible sodomy, beyond the jurisdiction of the federal courts.

In 1986, another proposed change to the M.C.A. yielded several notable pieces of legislative history, specifically in the committee report on the proposed inclusion of the sexual molestation of a minor in Indian country.[96] The committee expressed views on jurisdiction similar to those contained in the 1976 report.[97] It again apparently

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Circuit's later interpretations. *See infra* notes 198-99 and accompanying text. However, this language became self-perpetuating, as the Seventh Circuit relied on it in *Smith*. *See infra* note 157.

91. *See supra* note 88.

92. See *supra* note 24 for an explanation of situs crimes.

93. *See* S. REP. NO. 98-225, at 322-23 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3498-99.

94. "There seems no reason why this offense, presently applicable within the special maritime and territorial jurisdiction of the United States, is not included within the Major Crimes Act, the purpose of which is to extend Federal jurisdiction over all serious offenses . . . that are committed by an Indian in Indian country." *Id.*

95. "[Forcible sodomy's] absence represents a serious gap in felony coverage making it impossible to prosecute and punish (except by a tribal court at a petty offense level) this offense when committed against an Indian victim by an Indian in Indian country." *Id.* at 323.

96. *See* H.R. REP. NO. 99-528 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1298.

97. In particular, it adopts the same approach of designating jurisdiction over various offenses based on the race of the perpetrator and the victim and the location of the crime. *See supra* note 88. In describing intra-tribal crimes, it diverges from the earlier formula in one significant way: omitting the line that stated that jurisdiction over all other crimes rests with the tribes. However, the report makes an even stronger statement along these same lines in its discussion of problems with the current law. *See infra* note 98 and accompanying text.

considered exclusive tribal jurisdiction the rule subject to federal jurisdiction for "peculiarly federal" crimes, such as assaulting a federal officer.[98] Also, according to the report, tribe members themselves called for federal jurisdiction over intra-tribal child molestation.[99] Tribal support for incorporation casts doubt on the popular notion that Indians generally regard more tribal jurisdiction as a desirable end. Much of the tribe members' hesitation toward retaining exclusive tribal jurisdiction over serious, non-enumerated crimes stems from the nature of the tribal court system as it currently stands.[100]

E. Tribal Court Systems

Historically, Indian tribes have recognized three ways to solve legal problems: (1) traditional courts, (2) Courts of Indian Offenses, and (3) Tribal Courts.[101] Traditional courts functioned in the traditional Indian ways, with little concern for retributive punishment and great focus on restitution.[102] They were often steeped in religious ceremony and frequently very secretive. After years of assimilation efforts by the federal government, most of these traditional tribal structures no longer function.

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98. The Committee describes an exception for "peculiarly Federal" crimes, again relying on an interpretation of case law. The Committee relied on a reading of *Walks on Top v. United States*, 372 F.2d 422 (9th Cir. 1967), which, as discussed earlier, does not comport with the Ninth Circuit's reading of that decision. *See supra* note 90. In describing the problems with the current law, it uses very strong language supporting the idea of exclusive tribal jurisdiction for non-enumerated offenses. "Under current law, the Federal government can prosecute an Indian for committing, in Indian country, a serious offense against another Indian, only if the offense is listed in the Major Crimes Act. If the offense is not listed, only the tribe has jurisdiction to punish the offense . . . ." H.R. REP. NO. 99-528, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1298, 1301.

99. *See id.* at 5-8. The committee heard from a number of Indian witnesses, including representatives of the National Congress of American Indians, the Navajo Nation, the American Indian Law Center, and the Association on American Indian Affairs. *See id.* at 5 n.18. While some of these did express reservations about certain provisions of the bill, most called for incorporation of child molestation into the M.C.A. so that the federal government could prosecute these offenses. The testimony by Nancy Tuthill, the Director of the American Indian Law Center, was typical. She was concerned about effects on tribal sovereignty but nevertheless pushed for the amendment. "[T]he inability of tribes to effectively combat the problem of child sexual abuse has reached crisis proportions and my primary concern is for an immediate vehicle for prosecution of child sexual offenders," she said. *Id.* at 8.

100. Knowledge of the current tribal court system serves two purposes for this Note: (1) it helps explain why some Indians might not favor more jurisdiction, and (2) it enables a realistic discussion of the alternatives to the federal court system.

101. *See* Clinton, *supra* note 9, at 554-55.

102. *See* DELORIA, *supra* note 42, at 111-12.

The Courts of Indian Offenses were offspring of the Bureau of Indian Affairs ("B.I.A.") and only fleetingly recognized by the federal government.[103] Though they dealt with criminal offenses, they handled criminal justice in an administrative way, without structural guidelines, which meant they could handle as many or as few issues as they desired.[104] These quasi-legal institutions may have contributed to the current confusion over the extent of federal jurisdiction because they handled all tribal justice the federal government thought necessary outside of the M.C.A. but did so without real authority. While they affected the historical development of the current problem, the Courts of Indian Offenses have essentially been relegated to history's dustbin, phased out by the Indian Reorganization Act of 1934.[105]

Modern Tribal Courts started with the same legislation that ended the old Courts of Indian Offenses. Unlike traditional courts, which focused on restitution and religion, these reflect the influence of the U.S. court system.[106] Nevertheless, they hold on to Indian cultural values and remain reluctant to incorporate legal precedent from European-style systems.[107] These courts govern most civil disputes between tribe members and criminal matters not preempted by federal legislation like the M.C.A.[108] However, these courts are not completely effective, according to the National American Indian Court Judges Association, due to political pressure from tribal and religious leaders, lack of judicial training for judges, lack of support staff, inability to enforce court orders, too close a relationship with tribal law enforcement, and interference from the B.I.A.[109]

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103. *See* HARRING, *supra* note 39, at 186-88.

104. *See id.*

105. Under this act, the tribes could take over the function of the courts if they elected te do so, and the vast majority have. A few Courts of Indian Offenses still function, but their numbers and significance are negligible. *See* DELORIA, *supra* note 42, at 115-16.

106. *See id.* at 116.

107. *See id.* at 120.

108. *See id.* at 116.

109. *See* National American Indian Court Judges Association, *The Indian Judiciary and the Concept of Separation of Powers, in* 2 JUSTICE AND THE AMERICAN INDIAN 30-37 (1974). At least one commentator has argned that the development of viable tribal courts is not worth the costs. As such, the system should be scrapped and intra-tribal disputes handled by a court system integrated with regnlar county and state courts. He claims that there is no histerical evidence justifying the fear that such integration would hasten the demise of Indian culture. *See* Samuel J. Brakel, *American Indian Tribal Courts, in* INDIANS AND CRIMINAL JUSTICE 147, 162 (Lawrence French ed., 1982).

F. The Indian Civil Rights Act and Public Law 280

Two related laws that must be mentioned to complete the picture of jurisdiction over tribal crimes are the Indian Civil Rights Act ("I.C.R.A.") and Public Law 280. Congress passed the Indian Civil Rights Act[110] in 1968 to combat perceived defects in the tribal court system by codifying most of the guarantees found in the Bill of Rights, which does not directly apply to the tribes.[111] In addition to extending those rights, the law set restrictions in the sentences tribal courts can hand down, limiting the maximum sentence such a court can impose to one year in tribal jails and a $5,000 fine.[112] Obviously, this severe restriction must be considered when deciding whether tribal courts should handle serious, unenumerated crimes.

Public Law 280[113] removed some tribes from federal jurisdiction and placed them under exclusive control of the state. It handed five states (California, Minnesota, Nebraska, Oregon, and Wisconsin) civil and criminal jurisdiction over most Indian lands within their state borders.[114] It also gave other states the ability to voluntarily assume civil or criminal jurisdiction over tribal lands.[115] Those states, however, exercise only concurrent jurisdiction with the tribes and must comply with tribal extradition treaties where they exist.[116] Thus, jurisdictional issues for unenumerated crimes do not arise where a state, and not the federal government, has plenary power over the tribes.

G. Summary

The United States has a long history of recognizing the sovereignty of Indian tribes. However, the courts have acknowledged the "domestic dependent nation" status of the tribes and thus Congress's plenary power over tribal governments. The federal government

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110. Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (1968) (codified as amended at 25 U.S.C. §§ 1301-03, 1321-26, 1331, 1341 (1994)).

111. *See* DELORIA, *supra* note 42, at 175.

112. *See* 25 U.S.C. § 1302(7) (1994).

113. 18 U.S.C. § 1162(b) (1994).

114. *See id.*

115. *See* CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 94-95 (Nicholas J. Spaeth ed., 1993).

116. *See id.* at 97. In some instances, the states may have jurisdiction over some or all crimes on Indian reservations.

inarguably has responsibility for prosecution of certain major offenses that occur on Indian land between Indians, possibly has authority over "peculiarly federal" offenses, and also has circumstantially limited jurisdiction over lesser included offenses. Tribal courts, absent some state interference, maintain sovereiguty over minor offenses on tribal lands. The only question remaining is who can prosecute generally applicable federal offenses not specifically enumerated by the M.C.A. that are committed by one Indian against another on tribal lands. The circuits have addressed this question of statutory interpretation with varying results.

III. THE SPLIT AMONG CIRCUIT COURTS

A. Pro-Tribal Jurisdiction Circuits

The Second, Fourth, and Seventh Circuits fall into the broad category of pro-tribal jurisdiction circuits. Among these, the Fourth Circuit is the most pro-tribal, denying federal jurisdiction for any unenumerated crime. The Second and Seventh Circuits allow federal jurisdiction over non-enumerated crimes but only if they are "peculiarly federal."[117] This section discusses the most prominent recent decision on the subject from each circuit, starting with the Fourth Circuit's particularly pro-tribal sovereignty holding in *United States v. Welch*.[118]

The *Welch* court took the position that any non-enumerated crime fell outside the jurisdiction of the federal government, and prosecution and punishment for such crimes were left to the tribe. Welch appealed a district court conviction of child molestation under North Carolina law,[119] arguing that he faced prosecution only under the M.C.A. (applying federal criminal standards) because the crimes were allegedly committed by one Indian against another on tribal lands.[120] In addressing this claim, the court considered the relationship between the various federal statutes governing jurisdiction over

117. Whether the Seventh Circuit still follows this model is now an open question. *See infra* notes 158-72 and accompanying text.

118. United States v. Welch, 822 F.2d 460 (4th Cir. 1987).

119. *See id.* at 461.

120. *See id.* at 461-62.

intra-tribal crimes, specifically focusing its inquiry on the breadth of the M.C.A.

The court held that the Act only extended federal jurisdiction over Indians to specifically listed offenses, with unenumerated offenses left to the tribes.[121] The court first examined the Supreme Court's history of American Indian jurisprudence, using *Keeble* as a guide and quoting it at length regarding exclusive tribal jurisdiction as recognized by *Crow Dog* and the subsequent enactment of the M.C.A.[122] The court concluded that "[w]hen there is a crime by an Indian against another Indian within Indian country only those offenses enumerated in the Major Crimes Act may be tried in the federal courts."[123] The Indian tribes still possess all sovereignty not taken away by a treaty or law passed by Congress, including the power to punish intra-tribal offenses under tribal law.[124]

Given this finding, the court set the conviction aside because the crime, first degree sexual offense, was not enumerated in the M.C.A.,[125] which meant that federal courts lacked power to try and punish the defendant. The court did this in spite of the defendant's uncontested guilt and the particularly horrible nature of the crime charged.[126]

The Second Circuit took a more modest approach to the jurisdiction question, finding federal jurisdiction over non-enumerated crimes as long as they involve a "peculiarly Federal" interest. It laid out this framework in *United States v. Markiewicz*, a case resulting from a dispute over tribal governance and distribution of funds raised at the tribe's bingo hall.[127]

The New York branch of the Oneida tribe operated a bingo hall from 1985 until it was forced to close in 1987 after an intra-tribal disagreement.[128] The bingo hall was the major center of activity in the Oneida Territory and run by a three-person business committee.[129] The scope of the committee's authority and its administration

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121. *See id.* at 465.
122. *See id.* at 463-64 (quoting Keeble v. United States, 412 U.S. 205, 209-12 (1973)).
123. *Id.* at 464 (citation omitted).
124. *See id.* at 464-65 (quoting United States v. Wheeler, 435 U.S. 313, 323, 326-27 (1978)).
125. *See id.* at 465.
126. *See id.* The defendant had been convicted of raping a three year-old and infecting her with chlamydia. *See id.* at 462.
127. United States v. Markiewicz, 978 F.2d 786, 799-800 (2d Cir. 1992).
128. *See id.* at 793-94.
129. *See id.* at 794.

of the bingo hall became a major source of contention among tribe members.[130] Hostilities escalated until a group of the committee's dissenters forced the bingo hall to close in late 1987, illegally distributed tribe revenues, and finally burned down the hall in February, 1988.[131] Participating dissenters were arrested, and this appeal followed convictions for violating the anti-riot act, maliciously damaging a building used in interstate commerce by means of fire, and theft of tribal funds.[132]

The central issue on appeal was whether the federal district court had jurisdiction, because the crimes arose from an internal tribal dispute, which the defendants claimed exempted them from general federal criminal jurisdiction. The district court rejected this argument, holding that "federal criminal laws of general applicability apply even where a native American is both the defendant and the victim and the acts complained of occurred on a reservation."[133] While the appellate court ultimately upheld jurisdiction, it differed in its reasoning. It held that the federal courts did not have unlimited jurisdiction but only power over "peculiarly federal" crimes, and that, ultimately, jurisdiction was not really at issue because the case involved no non-enumerated crimes within tribal control.[134]

In coming to its conclusion, the court examined the role of enclave (situs) laws,[135] noting that these cover lands under federal control. This presented a problem in the case of tribal lands, since the United States historically recognized some level of tribal sovereignty.[136] The court explained that Congress had addressed this problem by passing two laws. The first (the G.C.A.) applied federal enclave laws to tribal lands, but included the exception that the laws

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130. *See id.*

131. *See id.* at 794-95. To prevent further disruption, the original tribal business manager filed a civil suit against two of the dissenters in federal district court and obtained a preliminary injunction in early 1988. *See id.* at 794. The suit only aggravated the dissenters, prompting them to declare the dormant tribal council revived for the purpose of distributing bingo hall money. *See id.* at 794-95. Eventually, the dissenters expressed their anger by burning down the bingo hall. *See id.* at 795.

132. *See id.* at 795-96.

133. *Id.* at 797 (quoting United States v. Markiewicz, No. 89-CR-88, 1989 WL 139221, at *4 (N.D.N.Y. 1989)).

134. *See id.* at 800.

135. *See id.* at 797.

136. *See id.*

did not extend to intra-tribal crimes.[137] The second (the M.C.A.) specifically extended federal jurisdiction to some previously unprosecutable crimes.

The Second Circuit, in interpreting the reach of these two statutes, relied on the Supreme Court's ruling in *United States v. Quiver*,[138] in which the defendant faced an adultery charge—a crime not listed in the M.C.A. There, the Supreme Court ruled that "enumeration . . . of certain offenses as applicable to Indians in the reservations carries with it some implication of a purpose to exclude others."[139] The Second Circuit accordingly articulated the jurisdiction rule: "the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise."[140]

The Second Circuit wrote that the district court, like the Eighth and Ninth Circuits, ignored *Quiver* when it ruled that any federal criminal law of general applicability was in force on tribal lands, a position the Second Circuit declined to take.[141] Instead, the court followed the Seventh Circuit's decision in *United States v. Smith*,[142] applying a model focused on "peculiarly Federal" offenses.[143] This approach allows exclusive tribal jurisdiction over non-enumerated crimes with two exceptions: (1) where federal laws have ceded to certain states partial jurisdiction, such as under PL 280; and (2) when the crimes are "peculiarly Federal" in nature, such as assault on a federal officer or defrauding the U.S. government.[144] In addition to the Seventh Circuit precedent, the court relied on the

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137. This is the current version of the General Crimes Act. 18 U.S.C. §§ 1152, 1153 (1994). Section 1153 is the current form of the M.C.A. *See supra* notes 46-47, 64-67 and accompanying text.

138. United States v. Quiver, 241 U.S. 602 (1916).

139. *Id.*

140. *Markiewicz*, 978 F.2d at 798 (quoting *Quiver*, 241 U.S. at 605-06). *Quiver* is not dispositive on the issue this Note discusses for at least three reasons. First, the M.C.A. has been reauthorized numerous times since the decision. Second, the circuits have handed down a number of decisions challenging this language, which the Supreme Court has not overturned. Finally, since the contested adultery in *Quiver* was a situs crime, the Court's language might only be applicable in situs situations, leaving the question open as to laws of general applicability.

141. *See id.*

142. United States v. Smith, 562 F.2d 453 (7th Cir. 1977).

143. *See Markiewicz*, 978 F.2d at 800.

144. *See id.* at 799.

legislative history of the Indian Crimes Act passed in 1976,[145] and dicta in the Supreme Court's *United States v. Wheeler*.[146] The court observed that the "peculiarly Federal" crimes exception struck a good balance between *Quiver*'s recognition of exclusive tribal jurisdiction over intra-tribal crimes and the need to protect acute federal interests when they arise.[147]

Remarkably, this long discussion on the extent of federal jurisdiction did not ultimately play a role in the outcome of the case. The court, after explaining the doctrine, found no issue of tribal sovereignty because the crimes either were not intra-tribal, did not occur on tribal lands, or were enumerated in the Act and thus fell under federal jurisdiction.[148] The entire discussion, while clearly stating the position of the Second Circuit on this issue, was dicta unnecessary to the review of the district court's decision.

As the Second Circuit noted, the Seventh Circuit also follows the "peculiarly Federal" model,[149] but its precedent is a bit more confusing. *United States v. Smith*[150] dealt with an assault by one Indian on another who happened to be a Special Officer of the B.I.A.[151] The district court, although finding a technical assault, decided that the offense did not warrant a federal court trial and fined the defendant ten dollars.[152] The defendant appealed on the basis of lack of subject matter jurisdiction because simple assault does not appear in the M.C.A.'s list of offenses.[153]

The appellate court approached the question of tribal sovereignty carefully, concluding that the federal court had jurisdiction—albeit concurrent with the tribes—over this particular fact pattern

145. *See id.* The court cited part of the House Report on the bill as support for its conclusion. *See id.* The report specifically stated that jurisdiction over the crimes not enumerated by the M.C.A. rests with the tribes—with two exceptions, the reach of Public Law 280 and the "overriding exception . . . for crimes that are peculiarly Federal." H.R. REP. NO. 94-1038, *reprinted in* 1976 U.S.C.C.A.N. 1125, 1127. *See also supra* Part H.D.

146. United States v. Wheeler, 435 U.S. 313 (1978). The Second Circuit believed the Supreme Court implicitly adopted this reasoning in two footnotes to *Wheeler*, *id.* at 330 n.30, 331 n.32, in which it stated that federal jurisdiction existed when an Indian assaulted a federal officer, because there is an "independent federal interest to be protected." *Markiewicz*, 978 F.2d at 800.

147. *See Markiewicz*, 978 F.2d at 800.

148. *See id.*

149. *See id.*

150. United States v. Smith, 562 F.2d 453 (7th Cir. 1977).

151. *See id.* at 455. The defendant, a member of the Menominee tribe, pushed the officer (also Menominee) when the officer attempted to serve a summons on him. *See id.*

152. *See id.*

153. *See id.*

beit concurrent with the tribes—over this particular fact pattern because the crime was "peculiarly Federal" in nature.[154] The court carefully avoided determining whether any otherwise generally applicable federal criminal statute governs the tribes. The court looked at the Supreme Court's decision in *Quiver* and its more recent interpretations of tribal authority in *Keeble* and *United States v. Antelope*.[155] It noted that although the Supreme Court recognized that the M.C.A. is a "carefully limited intrusion of federal power into the otherwise *exclusive* jurisdiction of the Indian tribes," exclusive tribal jurisdiction over unenumerated criminal matters remains unresolved because the issue has not directly confronted the Court.[156] The *Smith* court found concurrent jurisdiction in this case because assaulting a B.I.A. officer, a "peculiarly Federal" offense, involved acts of paramount importance to the federal government. It reached this conclusion by observing that no case law prohibited concurrent jurisdiction and examining the legislative history of the Indian Crimes Act of 1976, which explicitly referred to federal jurisdiction over "peculiarly Federal" crimes, such as "assaulting a Federal Officer."[157]

After the *Smith* decision, the Seventh Circuit obscured its rule with *United States v. Funmaker*.[158] In that case, the defendant had set fire to the tribe's bingo hall and casino at the direction of tribe leaders, doing so because of an intra-tribal dispute over bingo hall management and revenues.[159] He pled guilty to attempting to destroy by fire a building involved in interstate commerce but reserved his right to appeal on the question of federal jurisdiction.[160]

This time, the Seventh Circuit discussed the history and development of the tribal sovereignty doctrine.[161] Although it quoted Justice Marshall's opinion in *Worcester v. Georgia*,[162] it noted that tribal sovereignty, limited in many ways, exists only in the absence of federal law to the contrary.[163] The court then considered whether stat-

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154. *See id.* at 458.
155. United States v. Antelope, 430 U.S. 641 (1977).
156. *Smith*, 562 F.2d at 457.
157. *Id.* at 456, 458 (citing H.R. REP. NO. 94-1038 (1976) at 3, *reprinted in* 1976 U.S.C.C.A.N. 1125, 1127). *See also supra* notes 87-92 and accompanying text.
158. United States v. Funmaker, 10 F.3d 1327 (7th Cir. 1993).
159. *See id.* at 1329.
160. *See id.*
161. *See id.* at 1330.
162. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).
163. *See Funmaker*, 10 F.3d at 1330.

utes that fail to address tribes specifically apply to tribe members. It found that

> [a]s a general rule, statutes written in terms applying to all persons include members of Indian tribes as well. An exception, however, follows on the heels of the rule, namely that when the application of a statute would affect . . . rights essential to self-governance of intramural matters, the law specifically must evince Congressional intent to interfere with those rights.[164]

Under this framework, the court considered whether the federal government had jurisdiction over Funmaker's crimes. The court's inquiry focused on whether laws criminalizing arson of a building involved in interstate commerce and using a destructive device in a crime of violence applied to the tribes.[165] Neither law specifically mentions Indian tribes, but the *Funmaker* court found them applicable based on the power vested in Congress by the Interstate Commerce Clause.[166] The court reasoned that since these laws applied to crimes that involved interstate commerce, they naturally extended beyond purely intra-tribal matters.[167] As such, the federal government has a unique interest in protecting the goods involved, especially where the tribe has no incentive to analyze how its actions affect others.[168]

This Seventh Circuit decision dilutes the peculiarly federal interest model by expanding its scope to include almost all generally applicable federal criminal law. Although one commentator has argued that tribal sovereignty proponents can use this case to support limiting federal jurisdiction to only those instances involving a "peculiarly Federal" interest,[169] the case did not explicitly recognize that narrow doctrine. Instead, it relied on the fact that the federal government had a unique interest in protecting interstate commerce[170]—a far cry from the Second Circuit's doctrine, which finds the federal interest only in cases like assault on a federal officer.[171] That the court cited *Ollie's Barbecue* (*Katzenbach v. McClung*) suggests that it

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164. *Id.* at 1330-31 (citations omitted).
165. *See id.*
166. *See id.* at 1331.
167. *See id.*
168. *See id.*
169. *See* Garnett, *supra* note 15, at 470-71.
170. *See Funmaker*, 10 F.3d at 1331.
171. *See supra* notes 149-50 and accompanying text.

crafted an extremely expansive doctrine.[172] Indeed, it is difficult to imagine what generally applicable federal criminal law escapes the net of "unique federal interest" proposed by this case. If the result of *Funmaker* represents the current position of the Seventh Circuit, it has severely weakened the "peculiarly Federal" interest doctrine in that circuit.

B. Pro-Federal Jurisdiction Circuits

Three circuits,[173] the Sixth, Eighth, and Ninth, have ruled that the federal government has jurisdiction to prosecute any generally applicable federal criminal statute regardless of whether the crime occurred between Indians on tribal land.[174] These circuits reject the argument that the list of crimes in the M.C.A. is exhaustive, believing instead that the prohibition drawn by the G.C.A. and early Supreme Court decisions applies only to situs crimes, i.e., crimes which must occur on federal lands. To understand the circuits' reasoning, this Note examines the most recent major decisions on the subject from each, starting with the Eighth Circuit's *United States v. Wadena*.[175]

Wadena involved an appeal by tribal council members convicted of a number of crimes relating to the construction of a casino on tribal lands. All of the defendants were found guilty of accepting kickbacks, stealing tribal funds, and tribal election conspiracy.[176] The defendants challenged the federal court's jurisdiction to prosecute them for the various offenses, claiming that the M.C.A. and the G.C.A. represent the only federal law applicable to this type of case, and that neither of those conferred federal jurisdiction for the crime of which the defendants were accused.[177]

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172. *See Funmaker*, 10 F.3d at 1331 (citing Katzenbach v. McClung, 379 U.S. 294 (1964)).

173. As noted *supra*, the Tenth Circuit has also ruled on this issue but only once, in 1944. As such, independent discussion of its conclusions adds no insights to this Note. *See supra* note 19.

174. These circuits recognize a narrow exception. The federal courts will step aside where the tribes have a treaty with the federal government giving them exclusive jurisdiction over intra-tribal crimes, an extremely rare situation and very difficult for defendants to prove. *See supra* note 20.

175. United States v. Wadena, 152 F.3d 831 (8th Cir. 1998).

176. *See id.* at 837-39.

177. *See id.* at 839.

The court rejected this argument, finding it too restrictive of government power. The court looked first at the G.C.A.[178] and discussed its history through the *Crow Dog* decision and congressional passage of the M.C.A.[179] The defendant claimed that the language in the G.C.A. excepting intra-tribal crimes from federal prosecution was a general exemption, overcome only for those crimes specifically enumerated in the M.C.A., as the Supreme Court seemed to rule in *Quiver*.[180] The court declined to read the statute in this way, citing its own precedent[181] while acknowledging that its decision conflicted with those of other circuits.[182]

The court gave five separate reasons before it arrived at this conclusion. First, it noted that a number of appellate courts agreed with its reading that, because the limited intra-tribal exception contained in the G.C.A. applied only to situs crimes, the federal courts may enforce any generally applicable federal criminal laws on the Indians.[183] Next, it found the ambiguous rule allowing prosecution for "peculiarly federal" crimes difficult to apply, as any time Congress passes a law it must have a federal interest in order for its actions to pass constitutional muster.[184] Identifying a federal interest in a general federal criminal law seemed "redundant."[185] Third, the court found that, although it may have been assumed at the time of the G.C.A.'s passage that only federal enclave laws applied to Indians, that presumption has since been discarded.[186] Fourth, the court looked to the actual language of the M.C.A., claiming that the exception only applied to situs crimes and no others, affording Indian criminals no protection from general federal law.[187] In support of this, it observed that the adultery law conviction overturned in *Quiver* was

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178. The court here referred to the G.C.A. as the Indian Country Crimes Act. *See id.* at 840.

179. *See id.*

180. *See id.*

181. *See id.* at 840-41 (citing United States v. Blue, 722 F.2d 383, 384-86 (8th Cir. 1983); United States v. White, 508 F.2d 453, 454-55 (8th Cir. 1974); Stone v. United States, 506 F.2d 561, 563 (8th Cir. 1974)).

182. *See id.* at 841.

183. *See id.* (citing decisions from the Sixth and Ninth Circuits, as well as the writings of Felix Cohen and the Supreme Court's *Wheeler* decision).

184. *See id.*

185. *Id.*

186. *See id.* at 841-42 (citing Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116-17 (1960)).

187. *See id.* at 842.

a situs crime.[188] Finally, the *Wadena* court found that, although the federal government has traditionally expressed broad respect for the tribes on internal matters, the court did not regard tribal interests as paramount to the federal interests implicated by the crimes charged against the defendants.[189] Based on these five reasons, the court found federal jurisdiction over intra-tribal offenses for generally applicable federal crimes.

The Ninth Circuit similarly supported federal jurisdiction in its most recent ruling on the issue, *United States v. Begay*,[190] which involved conspiracy to commit assault and kidnapping. The conviction related to an uprising on the Navajo Reservation in Arizona that resulted from an intra-tribal rivalry over administration of the tribal council.[191]

The appellants argued that because the M.C.A. does not specifically mention conspiracy, the tribal court had exclusive jurisdiction over the charges.[192] The court rejected this claim, holding that the district court had jurisdiction over the conspiracy charges.[193] The court stated that Congress passed two acts, the G.C.A. and the M.C.A., infringing on tribal sovereignty.[194] Like the Eighth Circuit, the *Begay* court found that the M.C.A. only dealt with the application of federal enclave law (situs laws) to Indians and had no bearing on federal laws of nationwide applicability that make actions criminal wherever committed.[195] As such, the exclusions from jurisdiction explicit in the G.C.A. (not permitting prosecution for intra-tribal crimes) and implied in the M.C.A. (not permitting prosecution for at least some non-enumerated offenses) have no application to federal criminal laws that do not contain situs as an element of the offense.

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188. *Id.* at 842 n.18 (citing "Certain Offenses in the Territories," ch. 13, § 316, 7 Fed. Stat. 968 (1916)). The crime had to be committed at "any place within the exclusive jurisdiction of the United States." *Id.*

189. *See id.* at 842. The court believed "[f]ederal jurisdiction over the offenses committed here is imperative for the protection of all Native Americans who are U.S. citizens living on Indian reservations." *Id.*

190. United States v. Begay, 42 F.3d 486 (9th Cir. 1994).

191. *See id.* at 489-97.

192. *See id.* at 497-98.

193. *See id.* at 500.

194. *See id.* at 498.

195. *See id.* at 498-99.

According to the court, Indians stand exempt from generally applicable federal crimes only if exempted by treaty.[196]

The court also rejected defendants' arguments based on the "peculiarly Federal" model used by the Second Circuit, stating that it did not believe that the precedent cited in *Markiewicz*[197] supported the conclusion drawn by that court.[198] The *Begay* court found that the district court had jurisdiction, as Ninth Circuit precedent clearly allowed it for non-enumerated offenses.[199]

Although the Eighth and Ninth Circuits have developed the most precedent dealing with this issue, an examination of their case law origins reveals no greater claim to validity than those of the pro-tribal circuits. The Eighth Circuit's initial ruling on the issue concluded that the exemption for intra-tribal crimes "does not encompass the laws of the United States that make actions criminal wherever committed."[200] It based its ruling on *Head v. Hunter*,[201] a 1944 Tenth Circuit case that held generally applicable criminal laws governed Indians because neither Congress nor any court had stated otherwise.[202] This logic ignored the underlying tenet that only specific

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196. *See id.* at 499 (citing United States v. Burns, 529 F.2d 114, 117 (9th Cir. 1975)). As discussed earlier, the possibility of a defendant successfully making such a claim is extremely remote. *See supra* note 20.

197. In that case, the Second Circuit acknowledged that its opinion differed from the Ninth's. *See* United States v. Markiewicz, 978 F.2d 786, 799 (2d Cir. 1992).

198. *See Begay*, 42 F.3d at 500 & n.20. Specifically, the court disagreed with the Second Circuit's reading of footnotes 30 and 32 of *Wheeler* as recognizing jurisdiction only over crimes which involved a peculiar federal interest. *See supra* note 146. The pertinent language read: "Federal jurisdiction also extends to crimes . . . over which there is federal jurisdiction regardless of whether an Indian is involved, such as assaulting a federal officer." United States v. Wheeler, 435 U.S. 313, 330 n.30 (1978) (citations omitted). This language could plausibly be read either to extend jurisdiction of all generally applicable federal crimes, or just to extend it for those peculiarly federal in nature, as suggested by Congress two years prior to the *Wheeler* court's decision. *See supra* note 90 and accompanying text. Given these two plausible readings, the Ninth Circuit did not see how the Second Circuit had conclusively extracted from these footnotes that general laws required a showing of a "peculiarly federal" interest to bring intra-tribal crimes within the federal government's jurisdiction. *See Begay*, 42 F.3d at 500.

199. *See Begay*, 42 F.3d at 500. The court stated that the law of the Ninth Circuit "clearly allows Indians to be charged under federal criminal statutes of nationwide applicability if the charge is not otherwise affected by federal enclave law, or if Indians have not been particularly excluded, either expressly or impliedly, from the statute's application." *Id.*

200. Stone v. United States, 506 F.2d 561, 563 (8th Cir. 1974).

201. Head v. Hunter, 141 F.2d 449 (10th Cir. 1944). As noted *supra*, the Tenth Circuit has not directly addressed the issue since this ruling and is therefore not considered separately in the analysis. *See supra* note 19.

202. There is nothing in the legislation to indicate, or from which it can be inferred that the jurisdiction of the United States was restricted in respect to crimes which are generally applicable throughout the United States to all

Congressional action removes tribal sovereignty.[203] The Ninth Circuit's line has similarly assailable logical origins in *Walks on Top v. United States*.[204] There, the court simply concluded, with little explanation and no citation of authority, that the intra-tribal crimes exemption in the G.C.A. only applies to federal enclave law and not to generally applicable federal criminal statutes.[205]

The Sixth Circuit relied heavily on precedent from the Eighth and Ninth Circuits in determining that the federal government has jurisdiction over non-enumerated crimes. It faced the issue directly in *United States v. Yannott*,[206] a case involving an Indian defendant who became intoxicated at a party on tribal lands and pulled a sawed-off shotgun on an Indian woman attending the party.[207] Another attendee took the gun from the defendant and delivered it to tribal police, who arrested the defendant for possession of a firearm almost three weeks later.[208] Tribal police eventually turned the gun over to the Bureau of Alcohol, Tobacco and Firearms, which arrested, tried, and convicted the defendant in federal court.[209] On appeal, he claimed that the district court lacked jurisdiction for two reasons: first, he had already been punished by the tribal courts as required by the G.C.A.'s grant of intra-tribal jurisdiction, and, second, the offenses were not enumerated in the M.C.A.[210]

The Sixth Circuit dismissed both argnments. First, the court, relying on interpretations by the Eighth Circuit, found that the intra-tribal exclusions under the G.C.A. apply only to situs crimes,[211] which

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> persons. We are cited no Act, and find none, indicating an intention to except [Indians] . . . .

Head, 141 F.2d at 451.

203. *See supra* note 75 and accompanying text.

204. Walks on Top v. United States, 372 F.2d 422 (9th Cir. 1967).

205. *Id.* at 425. The totality of the court's discussion of the issue was as follows: "This argument completely lacks merit as the exception granted to Indians who abuse other Indians is, by the terms of the statute, only an exception from federal enclave law and not from the general law of the United States . . ." *Id.*

206. United States v. Yannott, 42 F.3d 999 (6th Cir. 1994).

207. *See id.* at 1001.

208. *See id.*

209. *See id.* at 1001-02.

210. *See id.* at 1003.

211. *See id.* at 1003-04. This section's exception clearly applies only to situs crimes, but it is not at all clear that this was the full extent of the exclusion intended by Congress, especially considering the Supreme Court's ruling in *Quiver* that Congress impliedly excluded all non-enumerated intra-tribal crimes from federal jurisdiction. *See supra* Part III.A.

possession of firearms is not.[212] Next, the court perfunctorily dismissed the argument that since possession of a firearm is a non-enumerated crime, it laid outside federal jurisdiction. The court stated that the M.C.A. "does not strip the federal courts of jurisdiction of those crimes not enumerated therein; in fact, federal courts retain jurisdiction over violations of federal laws of general, non-territorial applicability."[213] For this fairly broad and controversial proposition, the court cited only the Ninth Circuit's ruling in *United States v. Young*,[214] and then declared that since the crimes charged were not enumerated in the M.C.A., it had no bearing on the outcome of the case.[215] The court never considered whether the M.C.A.'s specific treatment of intra-tribal crimes implicitly creates a special category of criminal activity not covered by the jurisdiction of federal courts over federal crimes. Although the Sixth Circuit inadequately addressed the pivotal issue facing it in this case,[216] it undoubtedly believes the federal government has power to prosecute any generally applicable federal offense regardless of whether it occurred on tribal lands between Indians.

C. Comparing and Contrasting the Different Approaches

The circuits all agree that Congress can change the extent of federal jurisdiction whenever it desires, following the holding of *Kagama*. Each also maintains that the prohibition on prosecution of unenumerated intra-tribal crimes in the G.C.A. applies to crimes for which location is a required element. They all agree that the United States has the right to prosecute an intra-tribal crime as long as the offense appears in the M.C.A. Finally, all the circuit courts accept that the tribes have a limited degree of sovereignty, apart from the federal government.

Despite this agreement on some basic principles and the universal recognition that Congress has unlimited power to set jurisdiction in this area, the courts disagree over whether it has done so for

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212. *See id.*
213. *Id.* at 1004.
214. United States v. Young, 936 F.2d 1050 (9th Cir. 1991).
215. *Yannott*, 42 F.3d at 1004.
216. Namely, whether the federal courts should have jurisdiction over crimes which are non-enumerated. It is clear the court missed the issue because of its complete lack of discussion and its focus on the less complicated issue of whether this was a situs crime.

offenses not enumerated in the M.C.A. The circuits also have not agreed whether the prohibition contained in the G.C.A. was intended to apply only to situs crimes, or was implicitly extended to all federal criminal offenses perpetrated by Indians against Indians on tribal land. Consequently, they disagree over whether the tribes have maintained any sovereignty in the area of criminal law beyond minor crimes and misdemeanors.

These conflicts spawned three different approaches to jurisdiction over intra-tribal crimes. The Fourth Circuit simply takes at face value the Supreme Court's century-old statement that tribes have exclusive jurisdiction over intra-tribal Crimes.[217] The "peculiar federal interest" doctrine advanced by the Second and Seventh Circuits, though more progressive and flexible, may prove to be difficult to maintain.[218] Finally, the Sixth, Eighth, and Ninth Circuits recognize complete federal jurisdiction for generally applicable federal crimes, reasoning that the G.C.A. and M.C.A. were designed to deal only with enclave crimes, and therefore crimes without a situs requirement apply to any U.S. citizen, including Indians.[219]

Each of these positions has serious weaknesses. The Fourth Circuit, which correctly cites Supreme Court case law, considers the decisions in *United States v. Antelope*[220] and *United States v. Wheeler*[221] more clear than those cases warrant.[222] It also completely ignores various arguments offered by the other circuit courts, undermining the strength of its bold statement by not addressing these legitimate points.[223] The greatest weakness of the Second Circuit's conclusion is the difficulty in applying its standard, given that any criminal law passed by Congress presumably protects a "peculiarly Federal" interest. Additionally, although its position is well supported by legal history, its reliance on the *Wheeler* footnotes is questionable. The Seventh Circuit's malleable law illustrates the pitfalls

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217. *See supra* notes 118-26 and accompanying text.
218. *See supra* notes 127-72 and accompanying text.
219. *See supra* Part III.B.
220. United States v. Antelope, 430 U.S. 641 (1977).
221. United States v. Wheeler, 435 U.S. 313 (1978).
222. *See* United States v. Welch, 822 F.2d 460, 464-65 (4th Cir. 1987).
223. For instance, the decision does not address the fact that tribes may have no judicial structure to prosecute crimes, which could leave serious crimes unpunished and unpunishable, a concern implicit in many of the pro-federal jurisdiction decisions. *See, e.g.*, United States v. Wadena, 152 F.3d 831, 842 (8th Cir. 1998); United States v. Begay, 42 F.3d 486, 498-500 (9th Cir. 1994).

of the moderate position, with its last decision drawing on a broad concept of a federal interest while also employing the language of the Eighth and Ninth Circuits regarding expanded federal jurisdiction.[224]

The pro-federal side suffers from no less problematic flaws in its logic. The Sixth Circuit missed the issue altogether, relying on the precedent of the Ninth Circuit without doing any real analysis of its own.[225] The Eighth Circuit made three very strong points in support of its resolution of the issue.[226] Yet, the court used several weak arguments to bolster its decision.[227] The logic underlying the Ninth Circuit's decision is also infirm because it relies on a reading of §§ 1152 and 1153 together, with the result that intra-tribal crimes are only exempt if they have situs as an element and are not covered by the M.C.A.[228] Critically, the pro-federal decisions ignore the history of this problem and the principle underlying *Crow Dog*, as later interpreted by the Supreme Court in *Keeble*, that the tribes retained sovereiguty over their internal affairs until Congress explicitly took jurisdiction away.[229] The pro-federal decisions instead apparently start from an assumption of federal government preeminence.[230]

Because each circuit has made valid arguments but still suffers from oversights or deficiencies in its approach, proper resolution of this issue requires synthesis of all the relevant factors. A fresh, more comprehensive interpretative model that can encapsulate the rich history of this issue and all its nuances will provide the best solution to such a difficult problem.

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224. *See* United States v. Funmaker, 10 F.3d 1327, 1331-32 (7th Cir. 1993).

225. *See* United States v. Yannott, 42 F.3d 999, 1004 (6th Cir. 1994).

226. Namely that (1) the "peculiarly federal" model was very difficult to apply, (2) the since-discarded assumption made at the time of the M.C.A. was that only federal enclave laws applied to the Indians, and (3) the conviction in *Quiver* was based on a situs crime. *See Wadena*, 152 F.3d at 841-42.

227. The court stated that (1) other courts had taken a similar position, (2) the language of the U.S. Code showed that the exception applied only to situs crimes, and (3) the government simply had to have jurisdiction over these unenumerated crimes in order to protect the Indians (presumably from the repercussions of their own sovereignty). *See id.*

228. *See Begay*, 42 F.3d at 498-500.

229. Cohen describes this premise in his treatise on Federal Indian Law, which until recently was the only definitive work on the subject. As he noted, "Perhaps the most basic principle of all Indian law . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not . . . delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*" COHEN, *supra* note 1, at 122 (emphasis in original).

230. Relying on the origins of their precedent does not help their position, as those cases involved perfunctory conclusions of federal jurisdiction with little or no real examination of the problem. *See supra* notes 200-05 and accompanying text.

IV. MODEL FOR DYNAMIC STATUTORY INTERPRETATION

The muddled statutory interpretation performed by the circuits demands a more logical, comprehensive, and informed examination of the Indian criminal statutes, one revealed by using the comprehensive framework outlined by William Eskridge in his book *Dynamic Statutory Interpretation.*[231] This model best confronts the problem at hand because it focuses on understanding "a text created in the past and applying it to a present problem."[232] The foundation of the circuit split at hand lies in a law originally passed over 110 years ago and readopted by subsequent congresses without substantive changes. In that time, the courts and Congress have had a number of opportunities to reconsider the meaning and application of the law. Traditional statutory interpretation, insofar as it does not consider all the intricacies and history of this legal issue, is simply inadequate. The pragmatic dynamism model of dynamic statutory interpretation, which considers the many factors that influence a court's decision, provides the best framework within which to analyze the problem.[233] This section discusses the foundations of Eskridge's model and lays out the framework for interpreting the statutory problem of jurisdiction over intra-tribal crimes.

The nature of the political and judicial processes requires using dynamic statutory interpretation to maintain a statute's individual vitality over time. Because statutes are relatively difficult to pass, they are often intentionally general and abstract, even though courts must apply them to specific instances of fact.[234] Since application of the statute is always separated in time from passage, applica-

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231. ESKRIDGE, *supra* note 30. Although Eskridge performs a broad normative survey of statutory interpretation in his text, this Note employs the pragmatic dynamism portion of his reasoning, as that part most easily transforms into a positive analysis.

232. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 616 (1988). This approach is not without criticism, most notably leveled by Justice Antonin Scalia. The Eskridge model respects and incorporates Scalia's mode of interpretation, but Scalia finds fault in Eskridge's additional considerations, such as imaginative reconstruction. *See* William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO.WASH. L. REV. 1301, 1314 n.76 (1998).

233. Eskridge describes how he thinks statutory interpretation works: the conscious process of interpreting follows the pragmatic dynamism model, but one must also recognize the roles of the interpreter's biases (hermeneutic dynamism) and procedure (institutional dynamism). Since this Note resolves only the positive aspects of the problem, without predicting all the factors which will influence an actual adjudication of the issue, the second two dynamics are of little value to the analysis. *See* ESKRIDGE, *supra* note 30, at 50-80.

234. *See* ESKRIDGE, *supra* note 30, at 50.

tion must go beyond the drafters' often narrow expectations. To solve the problems of application, Eskridge suggests that, instead of employing a single mode of analysis, the interpreter should look at the issue from a number of different angles to reach a solution.[235] The interpreter must remember that the drafters designed the statute to solve a specific problem and thus should apply it to advance these goals.[236] However, changes in societal expectations and the legal system necessitate some type of dynamic statutory interpretation for statutes to remain reasonable vehicles for addressing the problems they were designed to counter.[237]

The fundamental premise of dynamic statutory interpretation is a recognition that interpretation of statutes may change as the context changes. The current interpreter's understanding will involve reconciliation of three perspectives that fluctuate in importance depending on the context.[238] The perspectives are controlled by: (1) the statutory text, which remains the formal focus of interpretation and a constraint on the range of interpretive options available (textual perspective); (2) the original legislative expectations surrounding the statute's creation, including compromises reached (historical perspective); and (3) the evolution of the statute and its present context, especially the ways in which the social and legal environments have materially changed over time (evolutionary perspective).[239]

Where the language of the statute is clear, the textual perspective serves as the critical component. When ambiguous language stands amid societal norms that have changed a great deal since passage of the law, the evolutionary perspective becomes more important than the other two.[240] The historical perspective will play a role when the statute's text is unclear because it helps explain what the text meant to its authors.[241]

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235. *See id.* at 48.

236. *See id.* at 51. Although application should be easy for most statutes, three circumstances could make application difficult: first, the legislative process might not have resolved all the issues involved in the statute; second, the legislature might have overlooked some particular problems; and third, the statute's implementation might meet with substantial social resistance. *See id.* All three of these difficulties emerge in the Indian criminal statutes' case.

237. *See id.* at 52-55.

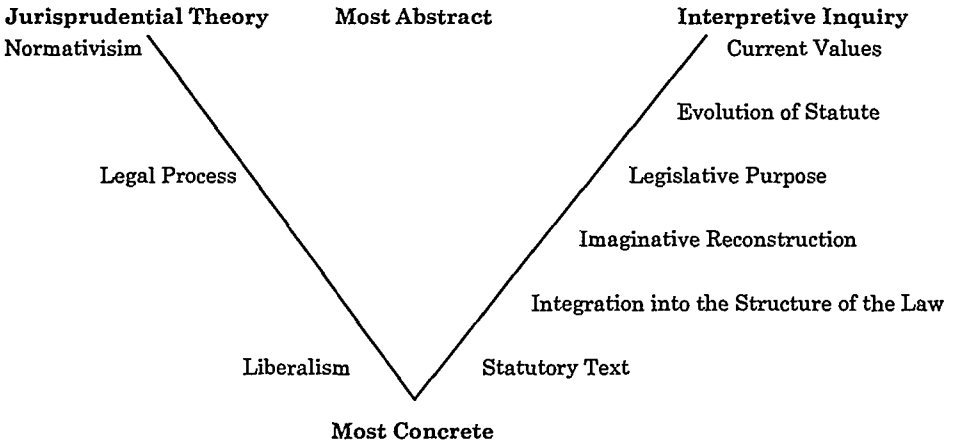
238. *See* ESKRIDGE & FRICKEY, *supra* note 232, at 616.

239. *See id.*

240. *See id.*

241. *See id.*

Eskridge has observed these three perspectives in the rulings of the Supreme Court, and after extensive study of high court decisions, has been able to construct a model describing the Court's reasoning when dealing with problems of statutory stagnancy in the face of changing contexts.[242] The pragmatic dynamism model (which he constructs as a "funnel of abstraction") takes the spectrum of insights the Court uses and arranges them in their general hierarchical order along the funnel. The model, as designed, looks like this:



This model suggests courts use an amorphous process in which the interpreter thinks about the various sources of statutory meaning. As Eskridge describes it, the interpreter will "slide up and down the funnel . . . rethinking each [factor] in light of the others, and weighing them against one another along the conventional criteria."[243] The most concrete consideration is the statute's text (at the bottom of the funnel), with the legislature's intent and its purpose further up.[244] Current values are the most abstract consideration, least determinative of a judicial decision in proportion to their size.[245] In total, the model suggests that when a court considers a clear text which does not yield unreasonable results, it will give the text more weight in its deliberations than legislative history.[246] By the same token, legisla-

242. *See* ESKRIDGE, *supra* note 30, at 55-57.
243. *Id.* at 56.
244. *See id.*
245. *See id.*
246. *See id.*

tive history will carry more weight relative to a current philosophy or value.[247] The more concrete the consideration, the greater relative weight it carries in the final interpretation.

The advantage of this model is its use of several different approaches instead of relying strictly on one. As described by Eskridge, the interpreter does not use a linear and deductive thought process but spiral and inductive reasoning.[248] The interpreter employs society's "web of beliefs," allowing a number of interconnected yet distinct ideas to influence the decision.[249] A court weighs the strengths of a number of values in the particular context when reaching a decision, as opposed to adopting the same approach every time, which could result in less than optimal results in a given situation, depending on a law's unique history and circumstances.[250] This model still allows the interpreter to satisfactorily apply the statute to situations that the text clearly addresses while enabling the interpreter to meet unanticipated circumstances with intelligent responses and adaptations.[251]

V. APPLICATION OF THE MODEL TO THE PROBLEM OF INTRA-TRIBAL CRIMES

This section identifies and analyzes the factors as they appear on the "funnel" described in the previous section, then combines the factors, giving each due weight, in order to determine the best interpretation of the reach of federal and tribal jurisdiction.

A. Textual Interpretation

As the text of any statute serves as the most concrete indicator of the law—and has the most weight—an interpreter must consider it first. Although both sides of this argument claim clear support in the text,[252] that the debate persists shows that the text does not prescribe a particular result. The Fourth Circuit, relying on the Supreme Court's early interpretation, has found that the explicit enumeration

247. *See id.*
248. *See id.* at 55.
249. *Id.*
250. *See id.* at 56.
251. *See id.* at 57.
252. *See supra* notes 123-24, 137, 178-79, 187, 194-96 and accompanying text.

of some crimes implicitly excludes others from federal jurisdiction, invoking a well-known canon of statutory interpretation.[253] The Eighth and Ninth Circuits, by looking at the text of the M.C.A. and G.C.A. as a unit, argue that no intra-tribal exemption from federal jurisdiction exists outside of the context of situs crimes.[254] Such a reading automatically grants federal jurisdiction over non-enumerated generally applicable federal crimes by each statute's own language (applying the law to all citizens of the U.S.). Both interpretations of the text present plausible alternatives, leading to the inescapable conclusion that the text alone cannot resolve this issue.[255]

B. Integration of the Bill into Law's General Structure

Originally passed as a free-standing provision, the M.C.A. has no surrounding text to offer help in determining its application. The M.C.A.'s placement in the U.S. Code is equally unhelpful, as the Code does not discernibly separate generally applicable provisions and ones dealing with situs crimes.[256] However, both the pro-federal and the pro-tribal jurisdiction camps have other structural arguments to make.

The pro-federal jurisdiction camp could argue that passage of the M.C.A. was a direct response to problems with the G.C.A., which dealt with situs crimes only. As such, any exemption for intra-tribal crimes that might be implied by lack of enumeration in the M.C.A. arguably applies only to situs crimes, with no exemption for crimes of general applicability. However, the Eighth Circuit potentially diminished the strength of this argument by noting that conventional wis-

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253. *See* United States v. Welch, 822 F.2d 460, 463-64 (4th Cir. 1987).

254. *See* United States v. Wadena, 152 F.3d 831, 841 (8th Cir. 1998); United States v. Begay, 42 F.3d 486, 498-99 (9th Cir. 1994).

255. At least one commentator argues that "[i]t is an elementary principle of Indian law that statutory ambiguities are to be resolved in favor of the Indians." Vollmann, *supra* note 9, at 391 n.34 (citing Squire v. Capoeman, 351 U.S. 1, 6 (1956)). Even assuming this principle's accuracy, resolving the ambiguity here in favor of the tribes is also problematic. Protection of tribal sovereignty, the intuitive response, removes federal jurisdiction, which might not actually be in the individual Indian's best interest if no viable tribal court system is in place. *See supra* notes 99,109 and accompanying text. Ultimately, the best-interest question turns on whose best interest is considered and what conception of it predominates: the individual seeking legal protections while sacrificing tribal sovereignty or the community's interest in tribal identity and sovereignty for its own sake.

256. For instance, kidnapping, 18 U.S.C. §§ 1201-02 (1994), a situs crime, is followed immediately by transportation of strikebreakers, 18 U.S.C. § 1231 (1994), a federal criminal law of general applicability.

dom at the time of the M.C.A.'s passage presumed that only situs laws applied to the tribes.[257] If true, it is entirely plausible that Congress assumed it was granting an implicit blanket exemption for any non-enumerated intra-tribal offense by listing in the text of the M.C.A. the only intra-tribal crimes within federal jurisdiction.

The pro-tribal jurisdiction camp could argue that the default rule for jurisdiction favors the tribes.[258] When reading this statute in light of the general structure of the law, Congress, in its ambiguity, let stand the default position of tribal jurisdiction.[259] At least one commentator, citing the rejection of unlimited federal authority during the original congressional debates, has argued that the enumeration of certain offenses was not an accident but a deliberate attempt to maintain exclusive tribal jurisdiction over the non-enumerated offenses.[260] Years of consistent recognition of tribal sovereignty by both the Supreme Court and Congress[261] supports the pro-tribal position, but this broadly conceived policy alone cannot answer the question.

C. Imaginative Reconstruction

Imaginative reconstruction considers, essentially, what law Congress would have enacted if it had addressed this precise question.[262] The history of the M.C.A.'s enactment is, of course, vitally important to this reconstruction.[263] As described in Part II of this

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257. *See supra* note 186 and accompanying text.

258. *See supra* note 124 and accompanying text.

259. The Supreme Court's declaration that Congress must explicitly state when it intends to make any changes in the law that would encroach on tribal sovereignty strengthens this position. *See supra* note 75.

260. "[T]he often ignored reason for this listing of crimes was the deliberate effort to preserve exclusive tribal court jurisdiction over lesser offenses not covered by [the M.C.A.]. A House amendment . . . was rejected in 1884 by the Senate before [the M.C.A.] was passed because it would have extended total federal jurisdiction to Indian Crimes." Clinton, *supra* note 9, at 540 n.173 (citing 15 CONG. REC. 5802-03 (1884)).

261. *See supra* notes 2-3 and accompanying text.

262. *See* ESKRIDGE, *supra* note 30, at 56.

263. Although many scholars regard with skepticism the value of examining legislative history, it is necessary here to undertake the imaginative reconstruction Eskridge suggests. As noted before, dynamic statutory interpretation considers all viewpoints contained in society's' "web of beliefs." Legislative history naturally falls within that web. *See* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (containing language in which eight Justices sigued on to an opinion extolling the necessity of considering legislative history). When courts recognize the dangers of legislative history and exercise care in its use, it can be a valuable tool. *See* EVA H. HANKS ET AL., ELEMENTS OF LAW 372 (1994).

Note, Congress passed the M.C.A. in response to *Crow Dog*, reflecting a desire to grant the federal courts at least some jurisdiction over intra-tribal that crimes the general populace found truly atrocious.[264] The now century-old question is whether, in doing so, Congress intended the enumerated offenses to represent the full extent of the federal government's jurisdiction.

Although the legislative history shows that Congress thought the tribes needed some control, it did not take the easy step of extending federal control to all crimes between Indians on tribal lands, which it had power to do. Accordingly, it seems clear that Congress did not envision omnipresent federal control over intra-tribal crimes when it passed the M.C.A. Indeed, Congress continued to believe that the tribes retained some sovereignty.[265] Thus, a plausible pro-tribal construction has Congress stating that the federal government does not have jurisdiction over non-enumerated crimes, not even generally applicable federal crimes.[266]

The pro-federals would reconstruct the actions of Congress somewhat differently. They would concede that Congress clearly did not intend to wipe out all tribal sovereignty when it passed the M.C.A., but would maintain that Congress intended only an implicit exception for situs crimes. By including Indians in federal jurisdiction for 14 situs crimes, Congress meant to exclude Indians from federal jurisdiction for only those non-enumerated crimes that had to take place on land under exclusive federal control. In doing so, Congress never even considered the question of generally applicable federal criminal statutes, which by their own terms apply to all Americans, making no provision at all for Indians. Congress, if it considered this exact issue, would have allowed prosecution of generally applicable federal crimes, regardless of the fact that they occurred between Indians on tribal lands.

Recent legislative history in the reauthorization and amendment of the M.C.A. offers persuasive insights to this imaginative reconstruction problem.[267] Language found in recent committee reports on the M.C.A. gives the impression that if Congress faced the

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264. *See supra* Part II.B-C.

265. As noted by the Second Circuit, this was the conclusion drawn by the Supreme Court in *United States v. Quiver*. *See supra* notes 138-39 and accompanying text.

266. Such a conclusion would support the ruling of the Fourth Circuit. *See supra* notes 119-26 and accompanying text.

267. *See supra* Part II.D.

specific question of federal jurisdiction over generally applicable federal criminal laws, it would have decided (at least in recent reauthorizations) that the tribes maintain jurisdiction unless the crime is enumerated or "peculiarly Federal."[268]

D. Legislative Purpose

For the reasons shown above, discerning Congress's purpose regarding the breadth of federal jurisdiction from statutes that avoid the issue is difficult. The history of the M.C.A. clearly indicates that Congress's purpose was to control behavior on the reservations to some extent and grant federal authorities power to prosecute particularly troublesome crimes.[269] However, in extending federal jurisdiction in such a manner, the extent to which Congress desired to infringe on tribal sovereignty remained unclear. The pro-federal camp can argue that Congress sought to control all lawlessness on tribal lands that it found particularly threatening, and therefore did not limit jurisdiction to enumerated crimes.[270] The pro-tribal camp can argne—with significant legal authority—that the Congressional purpose sprang from a balancing act between traditional recognition of tribal sovereignty and the need to placate the public's concern that reservations not get out of control.[271] This camp can cite a number of Supreme Court rulings that declare the tribes maintain a level of sovereignty that can only be infringed upon by specific congressional mandate.[272] The pro-federal camp could counter that allowing Indians to retain autonomy over minor affairs did not mean that Congress intended to waive all control outside of the M.C.A.'s explicit reach. Although not completely clear which of these positions best represents congressional purpose in drawing the boundaries of federal jurisdiction, given the ambiguity of congressional statements and the default

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268. The 1976 reauthorization committee's report noted that the tribes had jurisdiction over crimes not specifically mentioned by the M.C.A., with two specific exceptions: (1) the reach of Public Law 280; and (2) the "overriding exception . . . for crimes that are peculiarly Federal." *See supra* notes 86-92 and accompanying text. This language appears again in the committee report on the amendment to the M.C.A. passed in 1986. *See supra* notes 96-98 and accompanying text. This position comports with the rulings of the Second and Seventh Circuits. *See supra* Part III.A.

269. *See supra* notes 62-66 and accompanying text.

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

271. *See* discussion *supra* Part III.A.

272. *See, e.g.*, United States v. Quiver, 241 U.S. 602, 605-06 (1916); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-61 (1832).

rule of tribal jurisdiction,[273] the pro-tribal arguments appear most convincing.

E. Evolution of the Statute

The language of this statute has changed remarkably little from its original form, though the list of enumerated crimes grows, a fact which arguably supports limited federal jurisdiction. Because the language has not changed much, considering the evolution of Indian policy in general since the M.C.A.'s enactment can prove helpful to determine what Congress intended in its subsequent reauthorizations of the law, thus informing interpreters what the language means today.

The federal government's overall policy towards the tribes, though always somewhat paternalistic, swings along the arc of a pendulum. From colonial times until the second half of the nineteenth century, the federal government did not exert much control over intra-tribal affairs.[274] Although it acted as a conquering power in many respects, it did not exert substantial control over relationships within the tribes. This pattern changed around the time of the M.C.A. "Advocates" of the Indians insisted that integration into Western society best served the tribes and their members.[275] With this pressure from advocates, the federal government began to interfere in tribal affairs, in many instances to eliminate traditional ways and facilitate integration. The B.I.A. carried out this policy, with criminal matters handled by the Courts of Indian Offenses.[276] Typical of the legislation of this period, Public Law 280 (passed in 1953) wrested control of tribal affairs in some states completely from the tribes and granted it to state governments.[277] This heavy-handed paternalism lasted through the 1950s, when the pendulum began swinging again toward tribal sovereignty. Over the last 30 years, an increasing number of academics and politicians have at least given lip

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273. "The central proposition governing criminal jurisdiction in Indian Country is that Indian tribes were once independent sovereign nations, that they retain vestiges of their original sovereign nations, and that they have residual authority to govern their own affairs." Vollmann, *supra* note 9, at 389.

274. *See supra* notes 33-45 and accompanying text.

275. *See supra* note 62 and accompanying text.

276. *See* HARRING, *supra* note 39, at 182-89.

277. *See supra* Part II.F.

service to the idea that tribes need and deserve greater sovereignty.[278] Nonetheless, paternalism still permeates the treatment of the tribes in some laws, perhaps in recognition of the reality that many tribes cannot adequately govern themselves and remain inextricably part of the United States.[279] The Indian Civil Rights Act, which extended the Bill of Rights in statutory form to all tribes and their members, best summarizes this new attitude.[280] While this law recognized tribal sovereignty, it imposed on tribes the traditions and standards of the federal government. This suggests that the federal government will allow the tribes some judicial autonomy, but only if they abide by the generally accepted rules of the United States system.

Based on this evolution and the current state of all Indian law, the M.C.A. logically rests in the middle ground currently occupied by the Second and Seventh Circuits. Like much current Indian law, this compromise position recognizes the sovereignty that the tribes possess while still protecting vital federal interests through federal courts when the need arises.[281] Under this policy, the federal government should generally allow tribes to handle non-enumerated offenses but may step in when a situation threatens a peculiarly federal interest.[282] Reading the M.C.A. this way accurately captures the current state of Indian law after 200 years of evolution.

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278. For example, President Nixon sent a message to Congress in 1970, which stated, "Self determination among the Indian people can and must be encouraged without the threat of eventual termination." Federal policy sought "to strengthen the Indian's sense of autonomy without threatening his sense of community." H.R. Doc. No. 363, at 2-3 (1970). *See also*, Brakel, *supra* note 109, at 150 ("The present code words are 'self-determination' and 'retrocession' of . . . powers and rights taken from . . . the tribes in past contacts with white society.").

279. Some have even argued that Supreme Court rulings over the last 20 years have tended towards less tribal sovereignty and more federal control. *See* Erica Noonan, *American Indian activist challenges Navajo courts*, AP Newswire Release, Feb. 6, 1999, *available in* DIALOG.

280. *See supra* Part II.F.

281. This compromise has been recognized in the give and take between the courts and Congress. *See supra* note 90 and accompanying text.

282. This reading seems most in line with the intention of Congress in their recent reauthorizations of the M.C.A., as noted by the Second and Seventh Circuits. *See supra* Part II.D, III.A.

F. Current Societal Values

Society currently seems torn over the idea of tribal jurisdiction and sovereignty. Academic opinion appears generally united behind the belief that the tribes deserve more sovereignty.[283] Tribe members themselves are split over the issue, wanting more autonomy while recognizing the necessity for some federal assistance with crime control.[284] The federal courts see a need to maintain fairly tight control over crime on tribal lands, especially considering the rise of gaming activities and the corresponding increase in tribal affluence and corruption.[285] To resolve this issue solely on the perceived "fairness" of recognizing tribal sovereignty, as the only other article on this subject suggested, thus seems incredibly myopic.[286]

Consideration of current societal values should also look at the results of choosing one policy over another. If the tribes acquire more sovereignty, a functioning tribal judicial system still faces several significant obstacles.[287] The traditional tribal courts, where they exist, have suffered under centuries of repression and, even if still operative, may have difficulty being effective today. The modern tribal courts face a plethora of problems and are far from uniform in their ability or stability.[288] Even where tribal courts function relatively well, they still must contend with the corruption inherent in a developing system. With the influx of gaming onto the reservations, the most affluent members of the tribe often have the most incentive to act corruptly. If these individuals control the tribal councils and courts, and act opportunistically, they will compromise the tribes' ability to maintain internal order. On the flip side of this coin, tribal courts have a lot to offer. They give more autonomy to tribe members, which can spawn increased community pride and self-reliance, a

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283. *See generally, e.g.*, DELORIA, *supra* note 42; HARRING, *supra* note 39. Both of these texts, representative of recent Native American scholarship, base their conclusions on the presumption that the tribes deserve more control over their own governance, without any discussion of the premises of their arguments.

284. *See supra* note 99 and accompanying text.

285. For instance, the decisions supporting federal jurisdiction discussed above are all more recent than those supporting tribal sovereignty. *See* discussion *supra* Part III.

286. *Cf.* Garnett, *supra* note 15, at 472-74.

287. *See supra* Part II.E.

288. *See supra* notes 109 and accompanying text.

critical step in removing tribes from their historic economic funk.[289] Also, the tribal justice system has a much different approach than European justice, focusing not on retribution but restitution.[290] Such an arrangement might arguably work better for American society as a whole but certainly could not hurt tribal society.

Weighing all the opposing values of current society, the best solution strikes a middle ground. Today's values, in aggregate, support federal recognition of basic tribal sovereignty, with the hope of increasing tribal pride and reaffirming traditional values while still maintaining the ability to step in when needed to keep corruption in check and ensure that the United States' interests are not threatened. The Fourth Circuit's approach misses this balance by not allowing the federal government to protect peculiarly federal interests.[291] The Eighth and Ninth Circuits do not give enough recognition to tribal sovereignty and thus do not promote advancement through autonomy.[292] The Second and Seventh Circuits strike the appropriate balance, allowing for sovereignty while permitting the federal government to protect acute federal needs.[293]

G. Combination of Individual Factors and Conclusion of Analysis

The text, which could be determinative, offers no controlling solution. The structure of the law plausibly supports either position, but given the general recognition of tribal sovereignty by both Congress and the Supreme Court, the pro-tribal camp has a better legal argument. Imaginative reconstruction and legislative history, although varied, paint a picture of Congress wanting federal control but only when necessary to maintain order. Absent that, control should rest with the tribes. Legislative purpose, while inconclusive, does not, in its ambiguity, contravene the default rule of tribal sovereiguty. The evolution of Indian law over the past 200 years has seen the government go from indifference to paternalism, and, recently, towards autonomy for the tribes. This progression suggests that tribal

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289. *See* Teresa La Fromboise & Richard La Fromboise, *Critical Legal and Social Responsibilities Facing Native Americans*, *in* INDIANS AND CRIMINAL JUSTICE 147, 162 (Lawrence French ed., 1982).

290. *See supra* note 102 and accompanying text.

291. *See supra* notes 118-26 and accompanying text.

292. *See supra* Part III.B.

293. *See supra* notes 127-72 and accompanying text.

jurisdiction should be the rule, with the exception of federal interference arising only when the government clearly demonstrates necessity. Predominant modern values and the positive aspects of relying more on the tribes favor recognizing tribal courts as partially sovereign, with the federal government retaining the ability to control situations on reservations as the need arises or circumstances threaten a particular federal interest. In light of all these factors, the "peculiarly Federal" approach offers the best legal, ethical, and political conclusion, respecting tribal sovereignty but allowing the federal government some flexibility in control.

Implementing the Second Circuit's approach will have a number of positive results. It eliminates the hindrance posed to exclusive tribal jurisdiction by the penalty limits in the Indian Civil Rights Act by allowing the federal government to pursue prosecution when the crime so threatens society at large that it implicates a "peculiarly Federal" interest. Also, this approach allows tribes to develop better court systems, which in turn will strengthen tribal governments, allowing them to grow into effective organizations that give pride and purpose to the Indian community.[294] Finally, it strikes a sound balance between tribal sovereignty, which Supreme Court precedent demands, and discretionary federal government control when the tribes inadequately handle a particular problem, something bound to arise more frequently with the rise of Indian gaming.[295]

As noted, the Second Circuit's position involves some definitional problems as to what constitutes a "peculiarly Federal" interest.[296] This category potentially would encompass as far as the Eighth and Ninth Circuits' holdings, since any law passed by Congress ar-

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294. *See supra* note 289 and accompanying text.

295. Although gaming has inarguably increased tribal wealth, it has also brought a host of problems to tribal lands. One commentator has noted at least six negative effects of gaming on the tribes: (1) gambling addictions; (2) the high probability of theft, embezzlement, and criminal infiltration because the industry is cash based; (3) enormous profits undermining tribal cultural integrity; (4) exacerbated inequalities between rural and urban tribes; (5) gaming-industry employment requires only a low-skilled labor force, reducing the incentive for more education; and, (6) drawing money from established tribal businesses. *See* Gary C. Anders, *Indian Gaming: Financial and Regulatory Issues*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 104-05 (1998). In this Note alone, three out of the seven cases cited involved offenses related to control of gaming on tribal lands and crimes that resulted directly from the rise of gaming. *See generally* United States v. Wadena, 152 F.3d 831 (8th Cir. 1998); United States v. Funmaker, 10 F.3d 1327 (7th Cir. 1993); United States v. Markiewicz, 978 F.2d 786 (2d Cir. 1992).

296. *See supra* notes 184-85 and accompanying text. This is best illustrated by the evolution of the law in the Seventh Circuit.

guably addresses a "peculiarly Federal" interest. However, this framework recognizes tribal sovereiguty as the default position, abrogated only if Congress has clearly stated otherwise. This puts the burden of proof on the government to show that questionable cases involve a "pecuharly Federal" interest. Such a system comports with Supreme Court precedent and provides the courts some guidance, because doubt as to whether the interest is "peculiarly Federal" places jurisdiction with the tribes. Additionally, the legislative history—particularly the committee reports on the 1976 reauthorization and the 1986 amendments—gave examples of what Congress considered a "peculiarly Federal" offense.[297] Courts will be able to examine the facts before them and make reasoned decisions on whether the federal government has a real need and right to maintain jurisdiction. Again, the solution allows flexibility while creating a coherent and workable structure for the decision-making process.

Finally, this problem has a very simple alternative solution: a further statement by Congress. To eliminate the ambiguity, courts, while employing the Second Circuit compromise, should at every opportunity call for congressional action to answer this troubling legal question. Decisions restricting jurisdiction in debatable cases will, like *Ex parte Crow Dog*, serve as an implicit call for clarity. If Congress answers that jurisdiction only reaches "peculiarly Federal" offenses, courts should ask Congress to clearly annunciate the reaches of this limitation.

VI. CONCLUSION

Questions of tribal sovereiguty and the relationship between the tribes and the federal government continue to rage well over 200 years into our nation's existence. While the federal government clearly can exert its power over the tribes at will, in some instances it remains unclear how far that reach extends. A prime example is the question of federal jurisdiction over intra-tribal crimes that occur on tribal lands.

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297. Specifically, they noted that "there is Federal jurisdiction when the offense is one such as assaulting a Federal officer or defrauding the United States." H.R. REP. NO. 94-1038, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1125, 1127 (citations omitted).

The circuit courts have split on the question of federal jurisdiction over generally applicable federal criminal statutes as applied to intra-tribal crimes, when those crimes are not enumerated in the M.C.A. After considering the history and development of this law and applying the pragmatic dynamism model of dynamic statutory interpretation, the clear, logical solution to the problem is the middle ground adopted by the Second Circuit, allowing federal jurisdiction for non-enumerated crimes only if the offenses are "peculiarly Federal" in nature.

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