JURISDICTIONAL AMBIGUITIES AMONG SOVEREIGNS: THE IMPACT OF THE INDIAN GAMING REGULATORY ACT ON CRIMINAL JURISDICTION ON TRIBAL LANDS

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I. INTRODUCTION

At first blush, it seems the Indian Gaming Regulatory Act (IGRA) succeeded in providing enormous economic opportunities for tribal governments to further their aspirations as self-governing, self-sufficient autonomous bodies. Closer inspection, however, reveals that IGRA was a reactionary response by Congress that did little to carry forward ideals of federalism, instead creating greater ambiguity in the relationship between tribal sovereigns, the state, and the federal government. For example, the general absence of enforcement and accountability in criminal jurisdiction associated with Indian gaming reflects a serious policy problem and legislative gap. In light of the scale of the Indian gaming economy (billions of dollars), the idea that Congress would not envision policies intended to restore the legitimacy and right of tribal governments within the federal landscape is contradictory and counter-productive to the doctrine of tribal sovereignty itself.[1]

This note examines the legal and policy framework of IGRA in relation to the role of tribal governments during its first twenty years of existence (1987-2007). Specifically, discussion focuses on the structure and shortcomings of IGRA as a statute that was designed to satisfy competing interests: (1) the balance between state and tribal sovereigns, and (2) the federal government's desire to alleviate its fiduciary obligation to tribal nations through the strengthening of tribal self-sufficiency. Within this balance of contrary interests, Congress attempted to construct a mechanism that officially promulgated Indian gaming, while also regulating its use and impact on tribes and within States. One area of regulatory impact governed by IGRA is criminal jurisdiction. This note analyzes IGRA through the lens of criminal jurisdiction because of the unique ambiguities of authority and enforcement created by the Act as reflected in the continuing conflicts between tribal nations, States, and the federal government to define whose law applies in relation to gaming on tribal lands.

This note is divided into four parts. In Part One, the Act itself is explained, focusing on the events that prompted the creation of IGRA, the Act's content, and the legislative structure it imposes on tribal sovereigns. Part Two

1. Special thanks to Professor James C. Hopkins for helping to flesh out the core concepts of my note topic—and giving me the legal framework and methodological guidance to build the article. My greatest appreciation to Professors Barbara Atwood, Robert Williams, Kevin Washburn, G. Jack Chin, and Marc Miller for their comments in shaping the writing of this publication.

presents the specific criminal jurisdictional issues and contradictions emerging from the Act, particularly the overlap between IGRA jurisdiction and other jurisdictional rights created by previous congressional legislation or federal law. Part Three explores how gaming and the implementation of IGRA has affected life and self-governance on reservations. This section describes the context of Indian gaming, and IGRA's application, as it is expressed through the economic, social, and criminal realities experienced on the reservations where gaming exists. Part Three is essential, in this author's opinion, to understanding the social actualities emerging for tribes due to the jurisdictional ambiguities arising from IGRA. Also, consideration of the complex socio-economic factors produced by Tribal gaming businesses is fundamental to devising effective policy solutions to the jurisdictional difficulties created by the Act. Part Four discusses the interaction between IGRA, tribal sovereignty, and the problem of criminal jurisdiction; that is, how this legislative action has impacted tribal sovereignty and some possible solutions to the maze of criminal jurisdiction created by IGRA that may help advance the Act's intention toward tribal self-determination and self-sufficiency.

II. THE ORIGINS AND FRAMEWORK OF IGRA

A. The Road to Federal Regulation of Gaming on Indian Lands

Although Indian gaming had been the subject of much congressional discussion for several years,[2] no legislation was passed until problems of jurisdiction became imminent. In the end, IGRA was authored as Congress' solution to jurisdictional conflicts arising between state and tribal governments evolving from the growing gaming industries in Indian country.[3] The need for legislation such as IGRA came to light as a result of a California case regarding the State's desire to subject bingo and poker gaming operated by the Cabazon Band of Mission Indians Reservation to statutory regulation under state law.[4] The Cabazon Tribe, "pursuant to an ordinance approved by the Secretary of the Interior," conducted bingo games on its reservation and had opened a "card club at which draw poker and other card games" were played.[5] The games were open to the public and played predominantly by non-Indian persons coming onto the reservation.[6] These gaming endeavors were "a major source of employment for

2. S. REP. NO. 100-446, at 1-2 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3071-72.

3. *See* Joshua L. Sohn, Note & Comment, *The Double-Edged Sword of Indian Gaming*, 42 TULSA L. REV. 139, 142 (2006).

4. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 204-05 (1987).

5. *Id.* at 205.

6. *Id.*

tribal members, and the profits [were] the [Tribe's] sole source of income" at the time.[7] The State of California, itself, and on behalf of Riverside County (where the Cabazon reservation is geographically located) sought to enforce one statutory provision and two local ordinances against the tribe for its gaming practices.[8] California argued that the tribe violated a state statute prohibiting bingo games unless operated and staffed by a charitable organization that was not paid for its services, and wherein the prizes did not exceed $250 per game.[9] Additionally, California alleged that the Cabazon Tribe violated two local county ordinances regulating bingo and prohibiting the playing of draw poker and other card games.[10]

In response to these actions, the Cabazon Tribe sued Riverside County in federal district court, seeking a declaratory judgment that the county had no authority to apply or enforce regulatory laws inside the reservation.[11] The state intervened, and the district court granted the tribe's motion for summary judgment on the matter and the Ninth Circuit affirmed the decision that "neither the State nor the county had any authority to enforce its gambling laws within the reservation[.]"[12] In *California v. Cabazon Band of Mission Indians*, the U.S. Supreme Court subsequently affirmed the declaratory judgment indicating that Indian gaming could exist free from State regulation.[13]

However, to fully understand the meaning of the *Cabazon* decision regarding the states' jurisdiction over Indian gaming one must have knowledge of the pre-existing statutory regime permitting the enforcement of state law on tribal lands. In 1953, Congress enacted Public Law 83-280 (commonly known as PL 280), a statute that delegated limited criminal and civil jurisdiction over Indian country[14] within their borders to identified states.[15] Other states had the option of accepting the same jurisdictional responsibilities as the originally named states,

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7. *Id.*

8. *Id.* at 205-06.

9. *Id.* at 205 (citing CAL. PENAL CODE § 326.5 (West Supp. 1987)).

10. *Cabazon*, 480 U.S. at 206; Riverside, Cal., Ordinance 558 (Jan. 13, 1976) (regulating bingo); Riverside, Cal., Ordinance 331 (Sept. 29, 1947) (prohibiting the playing of draw poker and other card games).

11. *Cabazon*, 480 U.S. at 206.

12. *Id.*

13. *Id.* at 222.

14. Indian country is defined as: (1) all land within the limits of any Indian reservation under the jurisdiction of the United States Government (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (3) all Indian allotments, the Indian titles to which have not been extinguished. 18 U.S.C. § 1151 (2006). Under the original text of PL 280, Indian Country is listed in particular form for each state. 18 U.S.C. § 1162 (1996) (codifying PL 280).

15. Those states are California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. 18 U.S.C. § 1162. *See also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 544 & nn.305-06 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN].

but no state accepted full jurisdiction under this statute subsequent to the original drafting.[16] In 1968, an amendment to PL 280 made Indian consent a requirement to imposed state jurisdiction.[17]

PL 280 "grants states 'jurisdiction over offenses' and 'civil causes of action' and provides that state 'criminal laws' and 'civil laws that are of general application to private persons or private property' have the same force and effect in Indian country as they have elsewhere within the state."[18] However, PL 280 limited the state's jurisdiction over some regulatory areas. For example, the statute "expressly precludes" state taxation on Indian lands and "jurisdiction over federally protected Indian hunting and fishing rights."[19] The Supreme Court also interpreted the language of the statute to mean that state courts only have jurisdiction over "private civil actions and claims that are prohibitory in nature," but do not have jurisdiction "over state laws that are regulatory in nature."[20] For example, a state's laws may apply over actions that are prohibited, such as the operation of an illegal industry on tribal lands. However, if the action was allowed on tribal lands and the state wanted to regulate it (i.e. license), jurisdiction is not supported.

The decision in the *Cabazon* case turned on the Supreme Court's application and analysis of PL 280.[21] As noted above, PL 280, a federal statute, gave several states criminal and civil jurisdiction in Indian country.[22] California is a PL 280 state.[23] The extent of jurisdictional authority in PL 280 states was

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16. *See* COHEN, *supra* note 15, at 544-45. This author was unable to find any instance in which a tribe consented generally to the state having jurisdiction over it either civilly or criminally. However, the Flathead Indians in Montana consented to state assumption of criminal jurisdiction on their tribal lands under a PL 280 type of arrangement. *See* Kennerly v. District Court, 466 P.2d 85, 88-89 (Mont. 1970) (citing Chapter 81, Laws of 1963, §§ 83-801 to 83-806, RCM 1947). Also, several tribes have consented to some form of state jurisdiction as a result of gaming compacts, but these are outside the auspices of a PL 280 arrangement, in which the state assumes full jurisdiction. The tribal-state compacts are not intended to compromise tribal jurisdiction on Indian lands in general. *See* S. REP. NO. 100-446, at 3, 1988 U.S.C.C.A.N. at 3073. For a most extreme example in which gaming would not be allowed without imposition of state jurisdiction, see Proclamation by California Governor Arnold Schwarzenegger, May 18, 2005, *available at* http://gov.ca.gov/index.php/proclamation/1909/.

17. *See* COHEN, *supra* note 15, at 545.

18. *Id.* at 546 (quoting 18 U.S.C. § 1162(a); 25 U.S.C. §§ 1321(a), 1322(a); 28 U.S.C. § 1360(a)).

19. *See id.* at 546-47.

20. *See id.* at 553.

21. Pub. L. No. 83-280, 67 Stat. 588 (1953), *available at* http://www.tribal-institute.org/lists/pl_280.htm.

22. *Id.* Named states included: California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was added to the list in 1958.

23. *Id.*

delineated in *Bryan v. Itasca County*.[24] There, the Supreme Court held that PL 280 granted states broad authority to enforce state criminal law on Indian country.[25] However, state civil jurisdiction was restricted to private litigation, without general regulatory authority over Indian country.[26] Thus, in the *Cabazon* case, the issue became whether California, as a PL 280 state, could apply its gambling laws against the tribe.[27] Essentially, if California's gambling laws were "criminal/prohibitory" then the state had jurisdiction; conversely, if the state's laws on gambling were "civil/regulatory" in nature, then state jurisdiction would not apply, thus deferring to tribal jurisdiction.[28] In applying these categories to *Cabazon*, the Supreme Court affirmed that the intent of California's existing gambling laws were of the "civil/regulatory" type; therefore, PL 280 did not authorize the state to apply its gambling laws against the tribe.[29]

The Supreme Court further held that tribal gaming was not subject to state regulation as a matter of federal common law.[30] In its reasoning, the Court applied the preemption test of *New Mexico v. Mescalero Apache Tribe* holding that state regulation in Indian country is preempted if the proposed state regulation "is incompatible with federal and tribal interests . . . unless the state interests at stake are sufficient to justify the assertion of state authority."[31] In *Cabazon*, the Court applied its balancing test and found that the federal government encouraged Indian gaming as a matter of policy because the federal government provided funding assistance and approved gaming ordinances.[32] On the opposite side of the balancing test, the Court determined that California did not produce evidence that the State's interest in preventing the infiltration of organized crime was relevant to the gaming found at the tribe's facilities.[33] Thus, the Supreme Court held that California's State interest in regulating the Cabazon Band's gaming operations was outweighed by the federal and tribal interests in promoting such operations, and California's gambling laws were preempted.[34] The Court also noted that in

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24. Bryan v. Itasca County, 426 U.S. 373 (1976).
25. *Id.* at 380 & n.6.
26. *Id.*
27. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 211-12 (1987). Civil/regulatory jurisdiction under PL 280 is limited. The state only has jurisdiction over private civil actions, but not areas such as taxation, hunting and fishing rights, or general regulatory actions (i.e. traffic violations, local ordinance, etc.) on tribal lands. PL 280 does allow full criminal jurisdiction on reservations, however. Hence, if the law in question is criminal the state would have jurisdiction but if the law is regulatory and not a private action then the state is without jurisdiction over tribal action. *Id.* at 208-09.
28. *Id.* at 209.
29. *Id.* at 210-12.
30. *Id.* at 221.
31. *Id.* at 216-21 (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-34 (1983)).
32. *Cabazon*, 480 U.S. at 217-18.
33. *Id.* at 221-22.
34. *Id.*

general only Congress, under the authority granted through the Constitution's Indian Commerce Clause,[35] could give states jurisdiction over Indian gaming.[36]

In light of *Cabazon*, Congress became "the only non-Indian actor that could effectively place limits on the Indian gaming industry."[37] Within a year of the *Cabazon* decision, Congress passed IGRA,[38] and President Ronald Reagan signed it into law on October 17, 1988.[39] Generally, IGRA represents a compromise solution to issues and tensions arising out of Indian gaming activities wherein Congress attempted to balance competing interests and satisfy both tribal needs and state concerns.[40]

B. The Purpose and Intent of IGRA

IGRA has three stated purposes. These are:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
> (2) to provide . . . for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.[41]

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35. U.S. CONST. art. I, § 8, cl. 3.

36. *Cabazon*, 480 U.S. at 214-15 (citing McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 170-71 (1973)). The Court, implicitly balancing the State's interest against the burden imposed on tribal members, also noted that "certain circumstances," such as the collection of state sales taxes, could allow a State to assert jurisdiction over the activities of "nonmembers" on reservations and, "in exceptional circumstances," over the activities of tribal members. *Id.* at 215-16.

37. *See* Sohn, *supra* note 3, at 142.

38. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168 (2000)).

39. *See* Sohn, *supra* note 3, at 142.

40. *See* Deborah F. Buckman, *Validity of the Indian Gaming Regulation Act*, 200 A.L.R. FED. 367, § 2[a] (2005).

41. 25 U.S.C. § 2702.

A plain meaning interpretation of IGRA indicates that Congress intended it as a vehicle to regulate Indian gaming and to create a broad administrative plan for the enterprise. Congress delineated, very generally, the elements of gaming governance such as establishing federal authority over Indian gaming, making Federal standards for Indian gaming, and creating a formal administrative body to govern Indian gaming policy. However, Congress goes further in its language, and makes clear that one of IGRA's primary intents is to relieve the Federal government of some of its fiduciary obligation to Indian tribes.[42] Specifically, a principal motivation as stated in IGRA is to promote "tribal economic development, self-sufficiency, and strong tribal governments."[43] Congress intended for IGRA to be an act of federalism, encouraging tribal sovereign representation and separation, both politically and economically. This aspiration towards federalism, as described later in this note, has not been an actual outcome of IGRA, especially with regard to criminal jurisdiction issues.

C. What Does IGRA Regulate

IGRA divided Indian gaming into three classes, each having separate regulatory rules.[44] Class I gaming is limited to social games conducted for nominal prizes and traditional games of chance which are played in conjunction with tribal ceremonies.[45] The regulation of Class I gaming is under the sole discretion of the tribes.[46] Class II gaming includes bingo, games similar to bingo, non-banking card games not illegal under the laws of the state, and card games allowed in the state prior to the enactment of IGRA.[47] Class II gaming is jointly regulated by individual tribes and IGRA-created National Indian Gaming Commission (NIGC).[48] Class II gaming is permitted if the state in which the tribe resides already allows this type of gambling (i.e., bingo or bingo-like gaming).[49] Also, procedurally, for Class II gaming to be permitted the Indian tribe must adopt an ordinance or resolution permitting such gaming on its lands subject to approval by the Chairman of the NIGC.[50] Class III gaming comprises all gaming not

42. *See id.*
43. *Id.* § 2702(1).
44. *Id.* § 2703(6)-(8).
45. *Id.* § 2703(6).
46. *Id.* § 2710(a)(1).
47. *Id.* § 2703(7). Non-banked card games are games where players compete against each other and not the house.
48. *Id.* § 2710(b).
49. *Id.* § 2710(b)(1)(A).
50. *Id.* § 2710(b)(1)(B).

encompassed by Class I and Class II.[51] Class III games include slot machines, casino games, banking card games (against the house), dog racing, and lotteries.[52]

The Class III category of gaming is subject to all the restrictions of Class II gaming with the additional requirement that the tribes negotiate a gaming compact with the state.[53] IGRA precludes Class III gaming unless: (1) it is authorized by an ordinance or resolution adopted by the Indian tribe; (2) it satisfies certain statutory requirements; (3) it is approved by the NIGC; (4) it is "located in a state that permits . . . gaming for any purpose by any person, organization, or entity," and; (5) it is conducted in conformance with a Tribal-State compact.[54] As evident from these requirements, Class III gaming is the most heavily regulated,[55] incorporating both federal and state interests in jurisdictional power.

Tribes interested in opening or continuing Class III gaming establishments on their reservations must formally request a compact with the affected state.[56] A state has a statutory duty to bargain in good faith for a mutually agreeable gaming compact.[57] IGRA provides that any tribal-state compact "may include provisions relating to the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to . . . the licensing and regulation of [Class III gaming]."[58] In addition, compact provisions may include: (1) an allocation of criminal and civil jurisdiction between tribe and state; (2) state assessments of sufficient money to defray the costs of state regulation; (3) taxation by the tribe "in amounts comparable to amounts assessed by the State for comparable activities;" (4) "remedies for breach of contract;" (5) "standards for the operation . . . and maintenance of . . . gaming facilit[ies];" (6) "any other subjects . . . directly related to the operation of gaming activities"—such as the enforcement of relevant laws and regulations.[59] Once a tribal-state compact is satisfactorily negotiated, the Secretary of the Interior may "disapprove" the compact only if it is inconsistent with federal law; if the Secretary does not disapprove within forty-five days, the compact is treated as "approved" to the extent that it is consistent with federal law.[60]

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51. *Id.* § 2703(8).
52. *See* Sohn, *supra* note 3, at 143.
53. 25 U.S.C. § 2710(d)(1)(A)-(C).
54. *Id.* § 2710(b), (d)(1)(A)(i)-(ii), (d)(1)(C).
55. *See* Elizabeth D. Lauzon, *Jurisdiction Issues Arising Under the Indian Gaming Regulatory Act*, 197 A.L.R. FED. 459, § 2(a) (2004).
56. 25 U.S.C. § 2710(d)(3)(A).
57. *Id.*
58. *Id.* § 2710(d)(3)(C)(i).
59. *Id.* § 2710(d)(3)(C)(ii)-(vii).
60. *Id.* § 2710(d)(8).

D. Legal Relationship Between Tribes and States Under IGRA

IGRA allows a tribe to sue a state in federal court if the state is not willing to bargain in good faith toward a Class III gaming compact.[61] IGRA sets forth guidelines to aid in determining whether a state has negotiated in good faith.[62] Under the guidelines, a court may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities within the state.[63] Additionally, the court "shall consider any demand by the state for direct taxation of the Indian tribe or of any Indian lands as evidence that the state has not negotiated in good faith."[64] If the district court agrees that the state has not bargained in good faith and negotiations do not resume, the court could appoint a mediator to accept and evaluate compact drafts from both parties (state and tribe).[65] The mediator determines which version of the proposed compacts is most appropriate.[66] If the parties do not agree to the mediator's choice of compact, the matter is referred to the Secretary of the Interior and the Secretary will review and enforce the gaming regulations prescribed by the mediator's compact.[67]

By the mid-1990s some states began to challenge the IGRA-created right of tribes to bring a cause of action against a state. Specifically, states asserted that the sovereign immunity status created by the Eleventh Amendment precluded tribes from suing a state in a federal court without the state's consent.[68] The Supreme Court upheld the states' position in 1996, in *Seminole Tribe v. Florida*.[69] The effect of the *Seminole Tribe* decision was to "allow states to short-circuit IGRA's elaborate lawsuit provision by invoking [the states'] Eleventh Amendment immunity from suit."[70] *Seminole Tribe* essentially abrogated § 2710(d)(7) of IGRA, upholding the states' immunity from suit by tribes.[71] Therefore, tribes had no protection to "guard against the possibility that states might choose not to negotiate, or to negotiate in bad faith" when formulating a tribal-state compact for Class III gaming under IGRA.[72]

Soon after the *Seminole Tribe* decision by the Supreme Court, a Ninth Circuit case arose, *U.S. v. Spokane Tribe of Indians*, challenging whether the

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61. *Id.* § 2710(d)(7)(A). This section was later ruled unconstitutional. *See infra* notes 69-71 and accompanying text.
62. 25 U.S.C.A. § 2710(d)(7)(B)(iii).
63. *Id.*
64. *Id.*
65. *Id.* § 2710(d)(7)(B)(iv) .
66. *Id.*
67. *Id.* § 2710(d)(7)(B)(vii).
68. U.S. CONST. amend. XI.
69. Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996).
70. *See* Sohn, *supra* note 3, at 144.
71. Buckman, *supra* note 40, § 3.
72. United States v. Spokane Tribe, 139 F.3d. 1297, 1298 (9th Cir. 1998).

Seminole Tribe decision invalidated all parts of IGRA, or only the specific right of tribes to sue states.[73] In the *Spokane Tribe* case, the United States sought an injunction against the tribe for Class III gaming on the reservation without a tribal-state compact in place (a violation of IGRA).[74] Indeed, the tribe had attempted to negotiate a compact with Washington State for two years, but when negotiations broke down, the tribe sued the state under the "good faith" negotiation provision of IGRA.[75] The tribe also sought help from the Department of the Interior multiple times to no avail.[76] Given the Supreme Court's decision in *Seminole Tribe* allowing states to avoid suit under the Eleventh Amendment, the Spokane Tribe was pre-empted from pursuing its suit against the state in order to obtain a compact of Class III gaming.[77] The district court, therefore, granted the injunction prohibiting the Spokane Tribe from maintaining its Class III gaming--which the tribe had continued while awaiting litigation of its suit against the state.[78] The Spokane Tribe appealed the injunction.[79]

With specific attention to the facts of this case, the Ninth Circuit Court of Appeals found that the injunction against the Spokane Tribe could not stand because IGRA was still valid despite the tribe's inability to sue a state without state consent.[80] Circuit Judge Kozinski wrote for the court:

> We are left, then, with a tribe that believes it has followed IGRA faithfully and has no legal recourse against a state that . . . hasn't bargained in good faith. Congress did not intentionally create this situation and would not have countenanced it had it known then what we know now. Under the circumstances, IGRA's provisions governing class III gaming may not be enforced against the Tribe.[81]

The court expressly enumerated some possible solutions to the tribes' lack of protection against states that did not or would not negotiate in good faith.[82] The court specifically suggested that "several Executive Branch agencies may be able to patch up the situation," including the Department of the Interior or the Department of Justice.[83]

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73. *Id.* at 1299.
74. *Id.* at 1298.
75. *Id.*
76. *Id.* at 1301.
77. *Id.*
78. *Id.* at 1298.
79. *Id.*
80. *Id.* at 1302.
81. *Id.*
82. *Id.*
83. *Id.*

The practical effect of the Ninth Circuit's decision in *Spokane Tribe* was that this tribe and other tribes in that court's jurisdiction were allowed to continue Class III gaming if they had complied with all the requirements of IGRA and the State was acting in bad faith against forming a compact.[84] Under this decision, an injunction against gaming on tribal lands would be invalidated if the state frustrated the compacting process by raising immunity protection against a tribal lawsuit.[85] In response to this decision, some states in the Ninth Circuit district prospectively waived their Constitutional immunity protections from tribal lawsuits under IGRA.[86] Specifically, states such as California are presumed to have waived their Eleventh Amendment immunity because they feared the possibility that tribes might initiate Class III gaming without sufficiently bargaining with state governments before seeking recourse through the *Spokane Tribe* decision.[87] Thus, the states' interests might not be considered at all. By waiving immunity, the states preserved IGRA's requirement that no tribe offer Class III gaming without including the state's interest in negotiating a tribal-state compact.[88]

Another reaction to *Spokane Tribe* came at the Executive Branch level, as suggested by the Ninth Circuit panel.[89] The court invited the Secretary of the Interior, among others, to find a solution for enforcement of the "good faith" negotiation requirement among the states.[90] Congress prompted the Secretary of the Interior to adopt a set of regulations to be applied when a state asserted its immunity against a tribal lawsuit under IGRA.[91] Under these new regulations, when a state asserts its Eleventh Amendment right, the Secretary of the Interior is authorized "to perform the judicial functions that IGRA had originally entrusted to the federal district court[s]."[92] Thus, IGRA challenges to good faith negotiations are now evaluated by the office of the Secretary of the Interior rather than through the judiciary.

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84. *See id.* at 1301.
85. *See id.*
86. *See generally* California Model Tribal-State Gaming Compact § 9.4 *available at* http://www.cgcc.ca.gov/enabling/tsc.pdf (Sept. 10, 1999).
87. *See* Sohn, *supra* note 3, at 144.
88. *See id.*
89. *Spokane Tribe*, 139 F.3d at 1302.
90. *Id.*
91. *See generally* 25 C.F.R. § 291 (2004).
92. *See* Sohn, *supra* note 3, at 144.

III. JURISDICTIONAL ISSUES RELATED TO IGRA

A. Jurisdictions Created Directly by IGRA

1. Gaming Regulation and Permissible Causes of Action

As discussed above, each class of gaming implicates an additional layer of regulation.[93] Class I gaming is only subject to tribal authority, but subsequent classes of gaming require regulation in accordance with state and federal guidelines.[94] Generally, federal district courts have jurisdiction over causes of action arising from IGRA tribal-state compact negotiations.[95] After the *Spokane Tribe* decision, a state asserting Eleventh Amendment immunity is subject to a finding of "bad faith" under IGRA compact negotiation requirements, provided that the Indian tribe has followed the procedural requirements set forth by IGRA.[96]

2. IGRA's Treatment of Criminal Enforcement Jurisdiction

One of the purposes of IGRA is to provide regulation of Indian gaming "adequate to shield it from organized crime and other corrupting influences," as well as "to ensure that the tribe is the primary beneficiary" of gaming revenues and that Indian gaming is fair and honest.[97] Indeed, criminal enforcement was a major issue in the legislative discussions surrounding IGRA.[98] To account for the regulatory needs related to criminal activity, Congress crafted IGRA to create the National Indian Gaming Commission (NIGC), headed by a three chairperson board (one is appointed by the President and two are appointed by the Secretary of the Interior).[99] The NIGC has a total of five members, three of whom must be members of federally recognized tribes.[100] In its role of investigating regulatory matters, the NIGC has depended on the Federal Bureau of Investigations, the U.S. Attorney General, and other federal agencies to investigate allegations of criminal activity in Indian gaming establishments.[101]

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93. 25 U.S.C. §§ 2701-2721 (2000).
94. *Id.* § 2710.
95. *Id.* § 2710(d)(7)(A).
96. *See* United States v. Spokane Tribe, 139 F.3d. 1297, 1301 (9th Cir. 1998).
97. 25 U.S.C. § 2702(2).
98. S. REP. NO. 100-446, at 5-6, 1988 U.S.C.C.A.N. at 3075-76. Interestingly, the Justice Department was opposed to federal criminal jurisdiction over gaming and proposed state agencies could better enforce gaming activity on tribal lands.
99. 25 U.S.C § 2704(a)-(b)(1)(B).
100. S. REP. NO. 100-446, at 7, 1988 U.S.C.C.A.N. at 3077.
101. *See* CHUCK CHONEY, NIGC REPORT: INDIAN GAMING WORKING GROUP SUCCESSES, http:/www.indiangaming.com/regulatory/view/?id=9 (last visited Nov. 2, 2007).

To provide investigation and regulation of Indian gaming, the NIGC and FBI created the Indian Gaming Working Group (IGWG) in February 2003.[102] The IGWG is an FBI-led, multi-agency taskforce formed to protect tribal casinos from theft, embezzlement, fraud, organized crime, and corrupting influences.[103] The member agencies of the IGWG are the NIGC, the FBI, the Bureau of Indian Affairs (Office of Law Enforcement Services), the Internal Revenue Service (Office of Tribal Government), the Department of the Interior (Office of the Inspector General), the Department of the Treasury (Financial Crimes Enforcement Network), and the Department of Justice (U.S. Attorney's Sub-Committee on Indian Affairs).[104]

The need for a group such as the IGWG emerged in response to the exponential growth of Indian gaming over a 15 year period from approximately 100 tribes in a $100 million a year industry to a 220 tribe industry generating $15-$16 billion in revenue annually.[105] In early 2003, Region Directors from the NIGC's six regions reported to NIGC commissioners that illegal activities at Indian casinos were not being aggressively prosecuted at the federal level.[106] An overriding problem was that the dollar amounts involved in the alleged criminal activities did not meet the threshold amount for prosecution, whether from employee theft, embezzlement, employee or patron scam, or vendor fraud.[107] A contributing factor was that federal prosecutors had generally assigned a low priority to Indian casino matters.[108] Lastly, federal investigative agencies were lacking resources and expertise in gaming issues.[109] Cumulatively, these factors lead to an adverse effect on the Indian gaming industry nationally because casino enterprises were not being adequately protected from criminal activity.[110]

In response to these reports by the NIGC Region Directors, the Secretary of the Interior authorized the NIGC to negotiate a solution to the problem in partnership with the FBI, resulting in the formation of the IGWG.[111] The IGWG's purpose was to identify resources to better address criminal violations in the area of Indian gaming.[112] The IGWG had some success in reducing the threshold amounts necessary for federal prosecution, as well as training and organizing local

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102. Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 106 (2004).

103. *Id*.

104. CHONEY, *supra* note 101.

105. McCarthy, *supra* note 102, at 106.

106. NAT'L INDIAN GAMING COMM'N BULLETIN, No. 04-2 (2004), http://www.nigc.gov/ReadingRoom/Bulletins/BulletinNo20042/tabid/213/Default.aspx [hereinafter NIGC Bulletin].

107. *Id*.

108. *Id*.

109. *Id. See also* S. REP. NO. 100-446, at 29; 1988 U.S.C.C.A.N. at 3099.

110. NIGC Bulletin, *supra* note 106.

111. *Id.*

112. *See id.*

federal investigative units in seven states (California, Oklahoma, Connecticut, New Mexico, Arizona, Wisconsin, and Minnesota).[113]

Though regulation has become more local, the IGWG's efforts continue to focus on large-scale operations involving equally large money transactions, and not smaller crimes related to Indian gaming.[114] For example, between 1992 and 2000, 225 cases relating to Indian gaming were referred to the FBI for investigation, of these seventy were prosecuted—primarily for theft.[115] Details regarding these prosecutions are not readily available, but the IGWG focuses on criminal activity that is of "priority" to the federal government, including gambling fraud, embezzlement, and organized corruption.[116] IGRA is silent regarding jurisdiction over criminal activity not determined to be "priority" by the IGWG such as drug distribution, assault, or other crimes that may be associated with gambling or occur at gaming facilities.

B. Overlapping Federal Criminal Jurisdictions Implicit in IGRA

As with all tribal statutory law, IGRA was implemented within a network of pre-existing statutory law that also governs tribal lands. Among the relevant statutory laws in place that had competing criminal jurisdiction were the Indian Major Crimes Act,[117] the Assimilative Crimes Act,[118] and the codification of PL 280 in 18 U.S.C.A. § 1162 and in 25 U.S.C.A. § 1321 and § 1322. The interaction between these co-existing criminal statutes and IGRA creates ambiguity as to which criminal violations should be charged and prosecuted under federal, state, or tribal jurisdiction.

1. Indian Major Crimes Act (1885)

The Indian Major Crimes Act confers jurisdiction to federal courts in cases where Indians are prosecuted for specific enumerated offenses.[119] The enumerated offenses subject to jurisdiction under the Act include: murder, manslaughter, kidnapping, maiming, a felony under chapter 109A (sexual abuse), incest, assault with intent to commit murder, assault with a dangerous weapon,

113. CHONEY, *supra* note 101.

114. *See generally* Press Release, Dep't of Justice, Nineteen Indicted for Conspiracy to Commit Racketeering, Money Laundering, and Related Offenses (May 24, 2007), *available at* http://216.109.157.86/press_release/DoJ-05242007.pdf.

115. REVIEW OF INDIAN GAMING CRIMES, U.S. DEP'T OF JUSTICE REP. NO. I-2001-06, *available at* http://www.usdoj.gov/oig/reports/plus/e0106/app1.htm.

116. McCarthy, *supra* note 102, at 106.

117. Major Crimes Act, 18 U.S.C. § 1153 (2006).

118. Assimilative Crimes Act, 18 U.S.C. § 13 (2006).

119. 18 U.S.C. § 1153(a).

assault resulting in serious bodily injury, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under § 661 (theft of property valued over $1,000).[120] The Major Crimes Act applies against an Indian defendant regardless of whether the victim was an Indian or a non-Indian.[121] In addition to the specific preceding crimes, federal jurisdiction will only be granted if the following three elements are met: (1) the accused is a Native American; (2) the offense occurred within the boundaries of Indian Country; and (3) the offense occurred against a person or against the property of a person.[122] An offense against the property of a governmental agency is not subject to federal jurisdiction under the Major Crimes Act.[123] Nor does this Act apply when another federal statute has conferred jurisdiction on state authorities to prosecute Indians for conduct that would otherwise have been punishable in federal court.[124]

2. The Assimilative Crimes Act

The Assimilative Crimes Act (ACA) (18 USCA § 1153) was designed to adopt "the entire state criminal law [code] into any appropriate federal enclave," including tribal lands.[125] However, in the case of Indian nations, such assimilation is subject to tribal consent.[126] Under ACA, state laws are adopted in charging a crime that is not otherwise punishable under federal law; ACA creates a federal offense relying on the state's statutes to define the offense and its penalty.[127] Federal laws regarding search and seizure cannot be superseded by the incorporation of state law.[128] The ACA "assimilates those state and local laws in force at the *time of the act or omission* in question."[129] It does not matter whether the state or local law was in existence at the time of, or subsequent to, the

120. *Id.*

121. Hon. Gaylen L. Box, *Crow Dog: Tribal Sovereignty and Criminal Jurisdiction in Indian Country*, 50 ADVOC. 13, 15 (2007).

122. *Id.*

123. *See id.*

124. Brian L. Proto, *Validity Construction and Application of Indian Major Crimes Act*, 184 A.L.R. FED. 107, § 2(a) (2003).

125. United States v. Robinson, 495 F.2d 30, 33 (4th Cir. 1974).

126. Assimilative Crimes Act, 18 U.S.C. § 13 (2006).

127. *See* Smayda v. United States, 352 F.2d 251, 253, 257 (9th Cir. 1976) (still good for Fourth Amendment purposes).

128. *See id.*

129. 8A FED. PROC. L. ED. § 22:18 (citing 18 U.S.C. § 13(a) (emphasis in original)).

enactment of the ACA.[130] State or local law, when it applies, is assimilated regardless of when it became effective.[131]

The ACA adopts, or assimilates, the law of the state, territory, possession, or district in which the federal enclave is located.[132] The specific laws adopted include (1) criminal statutes if the offense is defined and the punishment delineated[133] and (2) "common-law principles providing for the punishment of common-law offenses recognized in that jurisdiction."[134] ACA does not allow the adoption of any state laws that provide a penalty for conduct that is not criminal.[135] Nor does ACA incorporate any state laws or rules of prosecution governing (1) federal procedural rules, (2) federal rules of evidence, (3) the right to jury trial, or (4) statutes of limitations based in federal law.[136] Under the ACA, federal courts are not required to follow specific provisions of state law that go beyond establishing the elements of an offense and the range of punishment.[137] In the Ninth Circuit, only criminal laws that are "prohibitory," where the intent of the state law is to prohibit certain conduct, can be assimilated.[138] Regulatory criminal laws, providing oversight of permitted conduct within the state, cannot be adopted into federal law in the district.[139] Thus, IGRA is not subject to the ACA as a regulatory statute but other crimes associated with gaming may be subject to prosecution under ACA.

Many states incorporate laws regarding gambling crimes under their victimless crime statutes.[140] State law governing these crimes can be assimilated into the federal law governing federal enclaves under ACA.[141] If the IGWG does not determine that a specific gambling-related crime is worthy of prosecution under IGRA, then federal prosecution still can move forward under the auspices of the ACA if the tribe has consented to such incorporation of state law on its land.[142] However, under some tribal-state compacts, there may be a partial

130. Evans v. Cornman, 398 U.S. 419, 424 (1970) (citing United States v. Sharpnack, 355 U.S. 286, 287 (1958)).

131. 18 U.S.C. § 13.

132. *Id.*

133. *See Smayda*, 352 F.2d at 253.

134. *See* 8A FED. PROC. L. ED. § 22:18 (Sept. 2007).

135. *Id.* (citing W.U. Tel. Co. v. Chiles, 214 U.S. 274 (1909)).

136. *See id.* (collecting cases).

137. United States v. Johnston, 699 F. Supp. 226 (N.D. Cal. 1988).

138. United States v. Clark, 4 F.Supp. 2d 940, 943 (C.D. Cal. 1998).

139. *Id.*

140. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, TITLE 9: CRIMINAL RESOURCE MANUAL § 683, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00683.htm.

141. Assimilative Crimes Act, 18 U.S.C. § 13 (2006).

142. *See* U.S. DEP'T OF JUSTICE, *supra* note 140, § 683.

integration of state law on tribal land.[143] Under these circumstances, the state law may apply for prosecution—at the discretion of the county attorney—regardless of the ACA.

3. Other Title 18 Considerations

Only three sections of Title 18 of the United States Code pertain specifically to gambling or Indian gaming: § 1166 (gambling in Indian country), § 1167 (theft from gambling establishments) and § 1168 (theft by officers or employees of gambling establishments).[144] Technically, these crimes belong within the same statutory family as the Major Crimes Act and the Assimilative Crimes Act. The overlap between these sections of Title 18 creates not only jurisdictional questions but also adjudication questions regarding how a criminal action will be charged. For example, the burglary or robbery of a casino can be prosecuted under any of the gambling-specific statutory sections or under the Major Crimes Act. However, such crimes may be prosecuted through IGRA as well.[145]

4. Codification of Public Law 280

As noted earlier in this note, PL 280 may provide states with jurisdiction to prosecute Indians who commit crimes on reservations.[146] On its surface, PL 280 subjects tribes to the "unilateral assumption of jurisdiction by states."[147] Functionally, state and tribal courts can have concurrent jurisdiction over several areas of law.[148] For example, in Idaho, under application of PL 280 and state statute, jurisdiction is shared over seven areas of law: compulsory school attendance, juvenile delinquency, abused and neglected children, insanity and mental illness, public assistance, domestic relations, and operation of motor vehicles on highways and roads maintained by county, state, or political subdivisions.[149]

PL 280 was originally limited to six states.[150] Subsequently, the jurisdictional privileges given to the states over tribal lands under PL 280 were

143. *See* Oklahoma Model Tribal Gaming Compact, pt. 2, cl. 7, *available at* http://www.ok.gov/OGC/documents/Model%20Compact.pdf; Arizona Model Tribal Gaming Compact Sect. 8-9, *available at* http://www.gm.state.az.us/compact.final.pdf.

144. REVIEW OF INDIAN GAMING CRIMES, *supra* note 115.

145. *Id.*

146. Box, *supra* note 121, at 15.

147. *Id.*

148. *Id.*

149. *Id.*

150. Pub. L. No. 83-280.

codified into the United States Code. The original PL 280 text was adopted under 18 U.S.C.A. § 1162.[151] This statute grants state jurisdiction over offenses committed by or against Indians in the Indian country of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.[152] PL 280 limits state jurisdiction by prohibiting "the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States."[153]

Other elements of PL 280 were codified as 25 U.S.C. § 1321[154] and 25 U.S.C. § 1322.[155] Under 25 U.S.C. § 1321, the federal government gives consent to:

> any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within the State to assume . . . such measure of jurisdiction over any or all of such offenses committed within such Indian country…as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State . . . [156]

That is, the federal government delegates general criminal jurisdiction to a state over all Indian lands within that state's borders; criminal jurisdiction under PL 280 is not limited to enumerated crimes. However, certain limits are applied to this delegated general jurisdiction under PL 280: (1) the affected tribe must also consent to the imposed jurisdictional authority;[157] and (2) the statute does not allow "alienation, encumbrance or taxation" by the state imposing jurisdiction on the tribal reservation.[158]

Federal statute 25 U.S.C.A. § 1322 provides for states to have jurisdiction over "civil causes of action between Indians or to which Indians are parties."[159] In addition to a tribal consent limitation and restrictions concerning "alienation, encumbrance, or taxation," this statute applies two other limitations on state jurisdiction in tribal civil matters.[160] First, the statute only gives the state license to exert jurisdiction over civil causes of action that are "of general

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151. 18 U.S.C. § 1162 (2006) (Giving the State jurisdiction over offenses committed by or against Indians in Indian country).

152. *Id.* § 1162(a).

153. *Id.* § 1162(b).

154. 25 U.S.C. § 1321 (assumption by state of criminal jurisdiction).

155. *Id.* § 1322 (assumption by state of civil jurisdiction).

156. *Id.* § 1321(a).

157. *Id.*

158. *Id.* § 1321(b).

159. *Id.* § 1322(a).

160. *Id.* § 1322(a), (c).

application to private persons or private property."[161] Second, § 1322(c) provides that any tribal ordinance or custom that is "not inconsistent" with any applicable civil law of the state will be given "full force and effect in the determination of civil causes of action."[162]

"Although IGRA does not mention Public Law 280, [it technically] operates to [supersede] state jurisdiction . . . because it is a more recent statute asserting exclusive federal control" over violations of Indian gaming.[163] Whether the violations are based on federal law or state law does not matter.[164] Although IGRA was written to ensure that tribes were not subject to state jurisdiction, it also creates a caveat for delegated state jurisdiction.[165] Because tribal participation in Class III gaming requires a compact with the resident state, IGRA provides that compacts may include a provision concerning "the application of criminal and civil laws and regulations of the Indian tribe or the state."[166] Also, IGRA permits "'the allocation of criminal and civil jurisdiction between the state and the Indian tribe' [as] necessary to enforce such laws and regulations, remedies for breach of contract, and other gaming-related matters."[167] Given this, "a Class III gaming compact may [assign] state jurisdiction that otherwise would be preempted."[168] Theoretically, PL 280, as codified in 18 U.S.C.A. § 1162, 25 U.S.C.A. § 1321 and 25 U.S.C.A. § 1322, may still allow a state to prosecute criminal or civil actions arising out of Indian gaming.

C. Federal Common Law and Limitations on Tribal Criminal Jurisdiction

Jurisdictional rights over criminal violations on tribal lands, whether related to gaming or not, are further complicated by common law decisions made by federal district courts. Over the last several decades federal district courts have been very active in creating the parameters of criminal jurisdiction as related to Indian tribal law. Jurisdictional issues in federal common law have concentrated in three areas: (1) concurrent jurisdiction over tribal members; (2) jurisdiction over non-Indians; and (3) jurisdiction over non-member Indians.

161. *Id.* § 1322(a).
162. *Id.* § 1322(c).
163. COHEN, *supra* note 15, at 572.
164. *Id.*
165. S. REP. NO. 100-446, at 6, 1988 U.S.C.C.A.N., at 3075-76.
166. 25 U.S.C. § 2710(d)(3)(C)(i) (2006).
167. COHEN, *supra* note 15, at 572 (quoting 25 U.S.C. § 2710 (d)(3)(C)).
168. *Id.*

1. Concurrent Jurisdiction Over Tribal Members

As sovereigns, tribes possess the power to exercise general criminal jurisdiction over their lands. Nevertheless, because Indian nations are sovereigns within a larger sovereign (the U.S. as a nation) criminal jurisdiction can be held either solely by the tribe or concurrently with federal government.[169] Tribes hold "exclusive jurisdiction over all crimes committed by an Indian in Indian country not listed . . . in the Major Crimes Act," except as conceded by the tribe's assimilation of state criminal law.[170] The Supreme Court has "made it clear that . . . the authority of tribal courts to try defendants accused of criminal offenses is based on membership of the defendant in [a recognized] tribe."[171] Generally, as further explored below, tribes lack jurisdiction over persons who are not Indians.[172] That is, for any given crime, where the perpetrator is a non-Indian, the tribe has no jurisdictional right to prosecute.

2. Jurisdiction over Non-Indians[173]

In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court denied that there is inherent tribal jurisdiction over non-Indians.[174] This case involved two non-Indian residents living on the reservation.[175] During a tribal ceremony, the defendant was accused of committing several offenses including assaulting an officer and resisting arrest.[176] At that time, "[t]he terms of the tribe's Law and Order Code extended tribal criminal jurisdiction over both Indians and non-

169. *Id.* at 756 (citing United States v. Wheeler, 435 U.S. 313, 328-29 (1978)).

170. *Id.* at 756-57.

171. *See* Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 18 (1993). *See also id.* at 18-43 (discussing relevant cases).

172. COHEN, *supra* note 15, at 757.

173. For purposes of this Note, non-Indians are persons who are not members of a recognized Indian tribe.

174. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). This decision is interesting because of the Supreme Court's controversial reasoning. The Court based its decision to restrict tribal jurisdiction of non-Indians saying that (1) there was an "unspoken assumption" that Indian tribes did not have criminal jurisdiction over non-Indians, absent a congressional statute or treaty term providing for such jurisdiction, and (2) there was concern that the non-Indian defendants may be unfairly treated because of "racial" differences. *Id.* at 203, 208-11. Most of the Court's reasoning has been subsequently rejected, but the jurisdictional holding stands. *See* Elizabeth Ann Kronk, *The Emerging Problem of Methamphetamine: A Threat Signaling the Need to Reform Criminal Jurisdiction in Indian Country*, 82 N.D. L. REV. 1249, 1265-67 (2006).

175. *Oliphant*, 435 U.S. at 194.

176. *Id.*

Indians" on reservation lands.[177] The tribe prosecuted, and the defendant appealed to the federal courts but was denied by both the district court and the Ninth Circuit.[178] The Supreme Court eventually granted certiorari.[179] Contrary to upholding tribal sovereignty, the Supreme Court, in a majority ruling, held that tribes do not have criminal jurisdiction over non-Indians, unless granted such jurisdiction by a treaty or by Congress.[180]

The practical effect of the Court's decision in *Oliphant* was a rejection of the geographically-based view of tribal sovereignty with respect to criminal jurisdiction.[181] "Under a geographically-based view of sovereignty, a tribe would have jurisdiction with respect to all crime committed within the boundaries of the reservation, regardless of the identity of the defendants and the victims."[182] "[N]on-Indians would be treated as having submitted themselves to the tribe's jurisdiction" just "by their physical presence."[183] This sort of jurisdiction is usually granted to most sovereigns (e.g. foreign nations)—unless modified by treaty or statute. In effect, tribes do not have the power to enforce their own laws upon outside persons on their lands, unless such power is directly granted to the tribe by Congress. Thus, the prosecution of non-Indian persons who commit crimes on Indian land is left to the discretion of federal and state law agencies.[184]

3. Jurisdiction over Non-member Indians[185]

Although the Supreme Court had established the jurisdictional authority (or lack thereof) that Indian tribes had over non-Indians, the question of tribal jurisdiction over non-member Indians was left open.[186] This question was finally resolved in *Duro v. Reina*.[187] In that case, Duro, a member of the Torres-Martinez Band of Cahuilla Mission Indians residing on the Salt River Reservation in Arizona, was charged with killing a 14-year-old member of the nearby Gila River Indian Tribe of Arizona.[188] Duro was arrested for murder by federal agents and

177. Dussias, *supra* note 171, at 26 & n.108 (citing *Oliphant*, 435 U.S. at 193-94).
178. *Oliphant*, 435 U.S. at 194-95.
179. *Id.* at 195.
180. *Id.* at 212.
181. Dussias, *supra* note 171, at 29.
182. *Id.* at 29-30.
183. *Id.* at 30.
184. *See* Judith V. Royster, *Oliphant and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL'Y 59, 61-62 (2003).
185. For purposes of this Note, non-member Indians are persons who are members of a federally recognized tribe but are living on Indian land belonging to another tribe.
186. Dussias, *supra* note 171, at 32.
187. Duro v. Reina, 495 U.S. 676 (1990).
188. *Id.* at 679.

charged in federal district court, but the indictment was later dismissed without prejudice.[189] In response, the Salt River Tribe charged Duro with the illegal firing of a weapon on the reservation.[190] After the Ninth Circuit vacated Duro's original petition for habeas corpus relief, the Supreme Court granted certiorari on the matter.[191] The Supreme Court reasoned that tribal sovereignty exists in terms of retained tribal power over members of the tribe, and that this "retained" power is the power necessary to "control . . . [the tribe's] own internal relations, and to preserve their own unique customs and social order."[192] The Supreme Court held that "the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership."[193] In essence, the tribe was left without recourse or jurisdiction to prosecute Duro for a crime committed on its land against one of its tribal members.

To the Court's credit, it recognized that *Duro v. Reina* created a potential jurisdictional void.[194] The Court suggested several solutions, including (1) that tribes consent to state jurisdiction on the reservation, (2) that tribes enter into reciprocal jurisdiction agreements with each other, or (3) that the tribes appeal to Congress for a legislative solution to reservation law enforcement problems such as the issue presented in the *Duro* case.[195] Ultimately, in reaction to *Duro*, Congress reestablished tribal criminal jurisdiction over non-member Indians in 1991.[196] The jurisdictional reinstatement was codified as 25 U.S.C. § 1301 (Supp. III 1991).[197]

IV. CORRELATIONS BETWEEN GAMING AND CRIMINAL CONDUCT ON TRIBAL LAND

The effects of gaming on tribes generate a complex and complicated inquiry involving the consideration of several economic, social, and political factors. Such examination requires a thorough analysis of the current status of gaming, as well as how gaming has affected relevant systems—such as the tribal justice system, social and education systems, and economic development. However, before engaging in an analysis of the actual effects of Indian gaming, this article considers the "perceived" effects of the phenomenon because these factors influence policy making as well.

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189. *Id.* at 679-80.
190. *Id.* at 681.
191. *Id.* at 682-84.
192. *Id.* at 685-86.
193. *Id.* at 679.
194. *Id.* at 696-98.
195. *Id.* at 697-98.
196. Dussias, *supra* note 171, at 36.
197. *See id.* at 36-37 nn.155-56.

The last decade has witnessed an increase in social scientific studies examining how Native American Gaming (also known as NAG) affects communities—both communities that are geographically proximate to the gaming and communities on the reservation.[198] In 2002, researchers published results from a survey of 406 non-urban residents in Kansas affected by NAG due to their geographic proximity to Indian reservations where Class III gaming was permitted.[199] Findings from this study indicate that residents who had more contact with NAG (12 or more visits) expressed significantly more positive perceptions of Indian gaming in regards to improved quality of life in the county, increased entertainment opportunities, more social opportunities, and greater income benefits as compared to residents who visited less (0 to 7 times).[200] However, these same residents who indicated increased contact with local Indian gaming also perceived a significant increase in illegal drug activity that they attributed to the tourist influx created by the casino.[201] Respondents also noted that the large number of tourists visiting local Indian casinos caused environmental, social, and economic problems, such as overcrowding.[202]

Another study, published in 2004, offered a longitudinal[203] analysis of perceptions held by community leaders in a small, rural Midwestern community affected by local Indian gaming activity.[204] Although the study used a small sample of only eight community leaders, its importance lies in that the researchers examined changes in perception over a five year span representing a period of planned expansion in the local Indian gaming facility.[205] The eight study participants were selected because they held key positions in the community.[206] Participants included the Police Chief, the Director of Public Safety, a Municipal Judge, the Chamber of Commerce Executive Director, the City Manager, the Convention and Visitor Bureau Executive Director, the Director of Social Services and the Executive Director of Economic Development.[207] The gaming

198. *See generally*, Patricia L. Janes & Jim Collison, *Community Leader Perceptions of Social and Economic Impacts of Indian Gaming*, 8 UNLV GAMING RES. & REV. J., Issue 1, 13 (2004); Daniel L. Spears & Carl A. Boger, Jr., *Residents' Perceptions and Attitudes Towards Native American Gaming (NAG) in Kansas: Proximity and Number of Trips to NAG Activity*, 6 UNLV GAMING RES. & REV. J., Issue 2, 13 (2002).

199. *See* Spears & Boger, Jr., *supra* note 198, at 17 (2002).

200. *Id.* at 22.

201. *Id.*

202. *Id.* at 24.

203. Longitudinal studies use a methodology that explores change over time. In this case, the study spanned over the five years in which the local Indian casino was being expanded. Janes & Collison, *supra* note 198, at 18.

204. *Id.* It should be noted that participants in studies regarding Indian gaming are typically non-Indians because tribes historically do not freely permit social science data gathering on reservations.

205. *Id.*

206. *Id.*

207. *Id.* at 19.

expansion planned on the local Indian reservation included a size increase from a 20,000 square foot facility to a 200,000 square foot facility and the addition of more slot machines, seating for bingo, and various card and table games.[208] With the completion of the expansion, the average daily attendance of visitors to the casino ranged from a few thousand to 15,000 people.[209] The researchers interviewed the community leaders before the opening of the expanded casino and five years after it had been in operation.[210]

This time-comparison study indicated that the participating community leaders had both positive and negative perceptions regarding Indian gaming and its local effects.[211] The leaders expressed a generally positive opinion of the economic gain brought by the gaming operation on the reservation.[212] They indicated that, though they had been concerned with the logistics and administration of the gaming compact (which included a condition that the tribe would pay 2% of "net win" from electronic games of chance to the local community), good planning and strategy had allowed the community to benefit directly (through the purchase of a new fire truck and police vehicles), as well as to adapt to subsequent infrastructure needs.[213] For example, when the 2% "net win" monies were not sufficient to cover the operational costs associated with the expansion and the increased number of visitors to the community, the leadership was able to propose and enact a local employment tax to offset these funding issues.[214] Also, the local community was able to negotiate with the state and the tribe, in subsequent compact renewals, to have greater representation on the "local revenue sharing board" which determined the allocation of funds given to the community from tribal gaming.[215] The community leaders sampled in the study also indicated that the casino expansion brought positive results in the form of increased employment opportunities and increased property values to the local community.[216] All agreed that the gaming expansion had a positive impact on the tribe, bringing added educational, health, social, and recreational services, as well as a financial base, to the reservation.[217]

In contrast, the community leaders perceived that problem gambling and criminal activity had increased over the five year time frame.[218] Also, some of the leaders felt that not all local businesses benefited from tourism because many of the visitors limited their patronage to the gaming facility rather than attending

208. *Id.* at 18.
209. *Id.*
210. *Id.* at 19.
211. *Id.* at 20-26.
212. *Id.* at 20.
213. *Id.*
214. *Id.* at 21.
215. *Id.*
216. *Id*. Such allocations have generally, but not always, been honored.
217. *Id.* at 25.
218. *Id.* at 22-23.

other community activities and businesses.[219] Other perceived negative effects not directly associated to the expansion included increases in child protection and child neglect cases in the local community.[220]

The above social science investigations provide insight to the perceptions that local communities and leaders have regarding how Indian gaming affects their environment and quality of life. These perceptions undoubtedly affect how local and state governments shape policy in reaction to Indian gaming and the problems that are perceived to go with such an industry. But, how well do these perceptions match the objective realities that gaming creates for Indian sovereigns? Are these perceptions reflecting an accurate picture of Indian gaming, and leading to effective policy? Or are these perceptions creating reactionary policies through which local and state governments will want to impose order where they believe tribes are not doing so? The next several sections of this note consider such questions from an objective point of view, with special attention to the economic, social, and criminal issues related to the introduction or expansion of gaming in Indian country.

A. Providing a Context: The Effects of IGRA on Tribal Life

1. Economic Effects of Gaming

The National Indian Gaming Administration (NIGA) completed its fourth economic impact report documenting the effects of gaming on Indian land nationally in 2006.[221] Nationwide, 225 Indian tribes in twenty-eight states generated $25.7 billion gross revenue from Indian gaming.[222] However, a relatively small number of gaming operations (fifteen) account for the majority (37%) of the total revenue generated by Indian casinos.[223] Gaming-related hospitality and entertainment services, such as resorts, restaurants, and hotels, generated another $3.2 billion in gross revenue.[224] Indian gaming was responsible for directly (on reservation) or indirectly (suppliers, support services, etc.) creating 670,000 jobs.[225] In 2006, Indian gaming resulted in $8.6 billion in

219. *Id.* at 25.

220. *Id.* at 27.

221. *See generally* NATIONAL INDIAN GAMING ASSOCIATION, THE ECONOMIC IMPACT OF INDIAN GAMING IN 2006, *available at* http://www.indiangaming.org/info/pr/press-releases-2007/NIGA_econ_impact_2006.pdf [hereinafter ECONOMIC IMPACT REPORT].

222. *Id.* at 1.

223. ERIC C. HENSON, ET AL., HARVARD PROJECT ON AMERICAN INDIAN ECON. DEV., THE STATE OF NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 145-49 (2008).

224. *Id.*

225. *Id.*

Federal taxes and revenue savings.[226] That same year, Indian gaming contributed some $2.4 billion to state governments in the form of state taxes, revenue sharing, and regulatory payments.[227] Tribes also made payments to local governments of more than $100 million in 2006.[228]

IGRA makes explicit what uses are appropriate for gaming revenue. Specifically, IGRA enumerates five areas for revenue investment: (1) to fund tribal government services, operations, and programs; (2) to promote tribal general welfare; (3) to promote tribal economic development; (4) to make charitable donations; and (5) to help fund local government agencies.[229] NIGA's 2006 Economic Impact Report indicates that 20% of gaming revenues went to the funding of education, child and elder programs, cultural programs, and charity.[230] Nineteen percent of revenues went to economic development on the reservations.[231] Healthcare and fire/police protection each received 17% of revenues.[232] Sixteen percent of revenues went to infrastructure development for the tribe and gaming industry.[233] And, 11% of revenues were used to improve or provide housing on the reservation.[234]

2. Social Effects of Gaming on Tribal Life

Although gaming can be considered a successful economic endeavor for tribes, the exponential increase in tribal revenue has made a lesser impact on the socio-political development of the residents on reservations.[235] The average median household income for American Indians remains at only 73% of the average household income nationally ($33,627 for American Indians versus $46,037 on average nationally in 2005).[236] The poverty rate among Indians is 25.3% as compared to 12.6% nationally.[237] Unemployment for Indians remains 4.2% above the national average (9.3% as opposed to 5.1% nationally).[238]

226. *Id.*
227. *Id.*
228. ECONOMIC IMPACT REPORT, *supra* note 221, at 3.
229. *Id.* at 8.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. Not all tribes have gaming. The statistics provided here are from national averages. Although not representing exclusively gaming tribes, this data reflects the general principal that gaming is lucrative but may only have a lukewarm effect on tribal life in general.
236. ECONOMIC IMPACT REPORT, *supra* note 221, at 30.
237. *Id.*
238. *Id.*

Housing in tribal areas is twice as likely to be overcrowded (6.9% as opposed to 3.1% nationally) and five times as likely to lack complete plumbing facilities (2.6% versus 0.42% nationally).[239] High school drop-out rates are 50.6% greater among American Indians than the current national average.[240] Similarly, long-standing public health issues persist among tribal members. These health issues include disproportionate affliction of alcoholism, diabetes, infant mortality, and suicide among Indians when compared to the national rate for these public health problems.[241]

3. Indian Criminal Incidence Rates[242]

Congress anticipated an increase in criminal activity when it originally crafted IGRA.[243] Although Congress' concern centered on organized crime,[244] gambling has been associated with several other high risk behaviors. Per the U.S. Department of Justice and the National Institute of Justice, compulsive gamblers are three to five times more likely to be arrested than the general population.[245] Compulsive gamblers are significantly more likely to have sold drugs than other types of gamblers.[246] Casino counties have notably higher crime rates than non-casino counties, with the effect on crime rates being low shortly after a casino opens but increasing to statistical significance within two or three years.[247]

239. *Id.*

240. *Id.*

241. *Id.*

242. Rates of criminal incidence are generally underestimated on Indian lands because of high rates of declination by the U.S. Justice Department. Declination means that, although a crime has occurred, the Justice Department chooses not to prosecute. Thus, there is a gap between rates of crime that has occurred and the rates of crime that are prosecuted. *See* Mary Clare Jalonick, *Justice Department Refuses to Release Indian Crime Data*, REZNET, Sept. 19, 2008, http://www.reznetnews.org/article/justice-dept-wont-provide-indian-crime-data-20990.

243. S. REP. NO. 100-446, at 1, *as reprinted in* 1988 U.S.C.C.A.N. at 3071.

244. *Id.* at 5, 1988 U.S.C.C.A.N. at 3075.

245. RICHARD C. MCCORKLE, U.S. DEP'T OF JUSTICE, GAMBLING AND CRIME AMONG ARRESTEES: EXPLORING THE LINK (2004), http://www.ncjrs.gov/pdffiles1/nij/203197.pdf.

246. *Id.*

247. Earl L. Grinols & David B. Mustard, *Casinos, Crime and Community Costs*, 88 REV. ECON. & STAT. 28, 42-43 (2006), *available at* http://www.uspact.org/Grinols-Crime2004.pdf; William N. Thompson, Ricardo Gazel & Dan Rickman, *Casinos and Crime in Wisconsin: What is the Connection?*, 9 WIS. POL'Y RES. INST. REP., Nov. 1996, *available at* http://www.wpri.org/Reports/Volume9/Vol9no9.pdf.

Compulsive gambling is associated with substance abuse or dependence disorder and with increased incidences of violence among intimate partners.[248]

In addition to crimes associated with gambling activities, general statistics indicate that Indians are at greater risk for several crimes. American Indians are two times more likely to be victims of violent crimes than the general U.S. population.[249] The likelihood of death by homicide is 32% higher for Indians as compared to national rates for non-Indians.[250] In the majority of cases where Indians were victims of robbery, the offender was a stranger; overall, 60% of Indians who were victims of violence described the offender as white.[251] According to the Department of Justice, between 1992 and 2002, one out of every four suspects investigated by the U.S. Attorney's Office for violent crimes were from Indian country, though not all suspects were Indians.[252] Nearly 75% of the cases investigated by the U.S. Attorney's Office were for violent crimes.[253] Among violent crimes suffered by Indians, the majority were simple assaults (60%), followed by aggravated assaults (about 25%), robberies (about 9%) and sexual assaults (about 6%).[254] Although violent crimes were the most prosecuted by the U.S. Attorney in Indian country, 27% of Indian country suspects were charged with property, drug, or other offenses (in fiscal year 2000).[255]

Another area of particular concern to tribal justice systems is the increasing incidence of methamphetamine use on tribal lands.[256] The introduction of methamphetamine use to Indian reservations in the late 1990s has been attributed specifically to drug dealers seeking to take advantage of jurisdictional loopholes and lack of law enforcement in Indian country.[257] Indians are disproportionately impacted by methamphetamine use, having a substantially higher rate of use in comparison to other ethnic groups in the U.S.[258] Increased use of the drug has been particularly dramatic among residents living in Indian country.[259] A recent study commissioned by the Bureau of Indian Affairs (BIA)

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248. Lorne M. Korman, Jane Collins, Don Dutton, Bramilee Dhayananthan, Nina Littman-Sharp & Wayne Skinner, *Problem Gambling and Intimate Partner Violence*, 24 J. GAMBLING STUD. 13, 18 (2008).

249. ECONOMIC IMPACT REPORT, *supra* note 221, at 30.

250. *Id.*

251. STEVEN W. PERRY, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 (NCJ 203097, Dec. 2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. Kronk, *supra* note 174, at 1250.

257. *Id.*

258. *Id.* at 1252. 1.7% of American Indians have used methamphetamine in the last year as compared to rates of 0.1% for African Americans, 0.2% for Asians, 0.5% of Hispanics, and 0.7% for Caucasians. *Id.*

259. *Id.*

showed that 74% of the ninety-six Indian law enforcement agencies surveyed nationwide for the study considered methamphetamine to be the "greatest threat to the members of the communities they serviced."[260] The trouble with methamphetamine use on tribal lands is not limited to addiction, but also includes increased incidences of domestic violence, assault and battery, burglary, child abuse/neglect, armed robbery, and weapons violations associated with or complicated by the drug.[261]

Although there is no causal link between gaming and methamphetamine use, as indicated above compulsive gambling is associated with increased likelihood of substance abuse. Also, personality profiles associated with problem gambling are similar to profiles associated with substance abuse.[262] Thus, gambling, especially compulsive gambling, and methamphetamine use ostensibly share common factors related to risk behavior and increased crime rates.[263] Both share a common element of "addiction" risk. Also, gaming introduces thousands of outsiders to the tribal community. These "outsiders" can serve both as providers of and clients for illegal activities on tribal lands. Furthermore, Indian casinos are a center for entertainment, and much like other entertainment centers (i.e., Las Vegas, Laughlin), they may attract a self-selected set of visitors with greater risk-taking attitudes, including substance use.

However, methamphetamine use and gaming on Indian reservations have a peculiar similarity in that they share common jurisdictional follies. As discussed earlier in this note, IGRA has created a jurisdictional maze in which crimes associated with Indian gaming may or may not be prosecuted under federal, state, or tribal authority depending on who committed the crime, whether the crime is a priority, and whether resources are available for adjudication.[264] In the case of methamphetamine use, jurisdictional issues center on a tribe's inability to prosecute non-Indian offenders and that this crime does not fall under the auspices of the Major Crimes Act or other areas of criminal activity under Title 18.[265] Furthermore, even when the offenders are tribal members, tribal courts are severely limited in the sanctions they can administer on tribal members.[266] Under the Indian Civil Rights Act, tribal courts can only issue penalties up to $5,000 in

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260. NEW MEXICO INVESTIGATIVE SUPPORT CENTER, NATIONAL METHAMPHETAMINE INITIATIVE SURVEY: THE STATUS OF METHAMPHETAMINE THREAT AND IMPACT ON INDIAN LANDS 4 (2006), http://www.ncai.org/ncai/met/BIA_MethSurvey.pdf.

261. *Id.* at 9.

262. Wendy S. Slutske, Avshalom Caspi, Terrie E. Moffitt & Richie Poulton, *Personality and Problem Gambling: A Prospective Study of a Birth Cohort of Young Adults*, 62 ARCHIVES OF GEN. PSYCHIATRY 769, 772 (2005).

263. *See generally* Janes & Collison, *supra* note 198, at 23 (post expansion, the crime rates for fraud and embezzlement within the gaming county increased); NEW MEXICO INVESTIGATIVE SUPPORT CENTER, *supra* note 260, at 9.

264. *See generally* Lauzon, *supra* note 55; CHONEY, *supra* note 101.

265. *See* Kronk, *supra* note 174, at 1256-58.

266. *See id.* at 1256.

fines and imprisonment for one year.[267] Tribal courts have circumvented these limits to some degree by "stacking" penalties for crimes.[268] Thus, a tribal court may charge an individual for two related crimes (methamphetamine possession and theft for example) and apply separate sanctions, for a total jail time of two years rather than one year. However, despite the temporary resolution achieved through "stacking," the underlying problem of poorly articulated legislation and compromised tribal jurisdiction remain.[269]

Although less sensationalized than methamphetamine, the jurisdictional issues emerging from Indian gaming, and criminal conduct associated with it, create similar challenges to the effectiveness, self-determination, and sovereignty of tribal governments.

V. THE AMBIGUITIES CREATED BY IGRA REGARDING TRIBAL SOVEREIGNTY AND CRIMINAL JURISDICTION

Any discussion of jurisdiction between tribal governments and other entities inherently implicates an analysis of sovereignty. In context, is there any greater hallmark of self-determination than a people's ability to apply and enforce their civil and criminal authority?

> Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice. They necessarily are observed and protected by the federal government in accordance with a relationship designed to ensure continued viability of Indian self-government insofar as governing powers have not been limited or extinguished by lawful federal authority. Neither the passage of time nor the apparent assimilation of native peoples can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity.[270]

"Tribes have plenary and exclusive power over their members and their territory subject only to limitations imposed by federal law."[271] Since the 1960's, congressional legislation "has demonstrated consistent and strong support for tribal sovereignty" as illustrated by such statutes as the Indian Civil Rights Act,

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267. Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (2006).

268. Tova Indritz, *A Two-Legged Stool: Native Americans Need Funding for Criminal Defense in Tribal Courts*, CHAMPION MAGAZINE, Nov. 2007, at 59, *available at* http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/1a1f9bbb471d4db98525738e005fafec?OpenDocument.

269. *See* Kronk, *supra* note 174, at 1258.

270. COHEN, *supra* note 15, at 205-06.

271. *Id.* at 210.

the Indian Child Welfare Act, the Indian Financing Act, and the Indian Self-Determination Act.[272] Traditionally, tribal sovereignty has allowed Indians to have exclusive powers: (1) to determine their form of tribal government; (2) to determine membership; (3) to legislate and tax, unless preempted by federal law; (4) to administer justice; (5) to exclude persons from tribal territory; and (6) to exercise authority over both their members and their territory—including over non-members on their territory.[273] As presented in this note, most of these powers have been severely limited. Judicially created limitations have crippled tribal power over non-members on their land and the tribal courts' ability to administer justice on tribal land.[274] Congressional legislation has limited tribal sovereignty drastically as well, especially in terms of a tribe's authority over non-Indians on Indian land.[275]

IGRA and the jurisdictional challenges arising from it can be interpreted as another challenge to the sovereignty of Indian tribes. Nevertheless, to analyze this question exclusively in terms of deficits promotes even more degeneration of tribal sovereignty. Thus, this author proposes that there may be possible alternative propositions or solutions to make IGRA functional legislation.

Because the existing criminal jurisdictional scheme in Indian country is inadequate to fully address the emerging and overlapping legal issues grounded in Indian gaming, reforms to the existing scheme are necessary at both the federal and tribal level.[276] One model that may be helpful in reframing the problem is the Cornell/Kalt Nation Building Approach.[277] According to this approach, tribes possess three types of sovereignty: *de recto* based on moral principle or right; *de jure* based on legal decree or legislative act; and *de facto* based on practical sovereignty.[278] *De facto* sovereignty is most suited to a tribe's actual self-rule and successful economic development.[279] Given that gaming, as proposed by IGRA, is based on the federal government's trust relationship with Indian nations to ensure their best interests and self-determination, it is logical that solutions to the

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272. *Id.* at 210-11.

273. *Id.* at 212-20.

274. *Id.* at 224-28.

275. *Id.* at 245-46 (discussing 25 U.S.C. § 1301(2)).

276. Kronk, *supra* note 174, at 1259-64. This author borrowed suggestions for policy reformation evolving from the jurisdictional problems associated with methamphetamine production and use on tribal land.

277. *See* Stephen Cornell & Joseph Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J., 193 (1998).

278. Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, Faculty Research Working Papers, Kennedy School of Government, March 2004, at 6, *available at* http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP04-016/$File/rwp04_016_kalt.pdf.

279. *Id.*

issue of ambiguous criminal jurisdiction include both congressional reform to the act and increased tribal control. Possible solutions to the issue of criminal jurisdiction should include both *de jure* sovereignty, such as legislative change,[280] and *de facto* sovereignty such as government-to-government collaborative efforts.[281] Applying a combination of approaches to sovereignty may best suit the framework of the existing criminal jurisdictional scheme, which is already both legislative and local. Any solution to the issue would likely need to consider both these sources of jurisdictional authority. Also, the response to this issue cannot depend on a single actor (Congress), but rather must consist of collaborative efforts in which tribes are treated as equal players who are self-governing and inherently sovereign.

Proposed legislative reforms include amending IGRA and the Major Crimes Act to allow tribes to "opt-in" for criminal jurisdiction, amending the Indian Civil Rights Act to remove any limitations on sentencing by tribal courts, and adopting an "Oliphant fix" that would recognize tribal inherent authority over non-Indians committing crimes in Indian country.[282] Under the current criminal jurisdictional system in Indian country, the federal government has authority over all gaming related crimes[283] and over other related crimes which may be associated with the casino activities (drug possession/distribution, property crimes, theft etc.).[284] Furthermore, as previously noted, tribes only have jurisdiction over their own members.[285] This jurisdictional scheme creates a loophole, wherein many gaming-associated criminal activities remain un-prosecuted because these offenses are not a priority for the federal agencies charged with the enforcement of gaming law on Indian land.[286] Non-Indians essentially are free from liability for crimes committed on Indian lands under such a jurisdictional scheme.[287]

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280. *See* Kronk, *supra* note 174, at 1262-66. Again, extending solutions proposed in response to methamphetamine problem.

281. *Oversight of President's FY 2008 Budget Request for Tribal Programs: Hearing Before the Comm. on Indian Affairs*, 110th Cong. at 10-12 (2007) (statement of Regina A. Schofield, Assistant Attorney Gen., Office of Justice Programs), *available at* http://indian.senate.gov/public/_files/Schofield021507.pdf.

282. Kronk, *supra* note 174, at 1259.

283. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2006).

284. Major Crimes Act, 18 U.S.C. § 1153 (2006).

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

286. *See* CHONEY, *supra* note 101 (failure to mention prosecution of drug possession/distribution, and property crimes as priorities of the NIGC).

287. *See Oliphant*, 435 U.S. at 212. *See also*, Kronk, *supra* note 174, at 1250, 1267-68. Kronk, in her article, proposes that there is "evidence to suggest that the United States Supreme Court Justices who decided *Oliphant* never intended for the decision to extend beyond the facts of the case. The facts of *Oliphant* were not friendly to a decision favoring tribal jurisdiction over non-Indians." Most of the reservation was no longer under tribal ownership and the portion of the reservation that remained under tribal ownership was under long-term lease to a non-Indian corporation. The majority of persons living on the

In response, Congress may consider reforming IGRA and the Major Crimes Act to allow for tribal prosecution of crimes related to gaming, despite the tribal membership of the suspected perpetrator.[288] Tribes could "opt-in" to criminal jurisdiction over gaming and gaming-related crimes that the current system is not addressing effectively.[289] An opt-in system offers several advantages. First, an opt-in system does not impose jurisdictional responsibility on tribes that are not equipped to handle such an undertaking.[290] Only those tribes who desire the jurisdictional power and have the infrastructure to maintain it would foreseeably take advantage of this opportunity. Second, the possibility of an opt-in system is consistent with federalist ideals of tribal self-governance and inherent tribal sovereignty in general[291]—both being premises underlying the intent of the IGRA.[292] But most importantly, returning criminal jurisdiction to the tribes would increase the effectiveness of prosecution given geographical limits on federal enforcement agencies[293] and the fact that self-determination (local) initiatives tend to have greater long term success.[294]

> In the modern era, self-determination has taken hold in the mainstream of criminal justice . . . The 'community policing revolution' is premised on the notion that public safety improves when local communities are involved in the basic instruments and designed to provide criminal justice. [295]

Criminal justice is a justified and appropriate venue for self-determination among tribes,[296] especially in regard to gaming, because the purpose of gaming per IGRA

"reservation" were non-Indians (200 were Indians compared to 3,000 non-Indians). She indicates that Justice Blackmun's notes on the case show that several Justices were aware that the facts on which *Oliphant* was decided were "slanted" and that "the matter of tribal jurisdiction over non-Indians was a question better left to Congress."

288. Kronk, *supra* note 174, at 1262.

289. *Id.*

290. *Id.*

291. *Id.*

292. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2006).

293. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 782 (2006).

294. *Id.* at 847.

> In all other areas of federal Indian policy, self-determination initiatives seem to have improved delivery of services to Indian people, partially by making the providers of those services more directly accountable to tribal leadership and thus to the tribal community, and partially by insuring that delivery of services occurs in a culturally appropriate manner. In other words, if criminal justice and public safety are viewed as public goods that governments provide, we can conclude from existing studies that self-determination will facilitate the provision of such public goods.

295. *Id.* at 846.

296. *Id.*

is Indian self-sufficiency which naturally includes self-determination and control over conduct on tribal lands.

Another viable solution to the criminal jurisdictional problems arising from IGRA is congressional action removing limitations on penalties issued by tribal courts and legislation recognizing tribal authority over non-Indians committing crimes on Indian land. As previously discussed, the Indian Civil Rights Act caps the penalties that can be imposed by tribal courts—no more than one year of imprisonment and no more than $5,000 in fines.[297] These limitations have been criticized as having a reduced deterrent effect, as well as restricting the enforcement authority of tribal courts.[298] In *Oliphant v. Suquamish Indian Tribe*, the U.S. Supreme Court held that tribal courts lack inherent jurisdictional authority over non-Indians acting criminally on Indian lands.[299] As a direct result, non-Indians escape prosecution for crimes committed in Indian country if the federal government fails to prosecute.[300] The circumstances created by *Oliphant* are thought to present "perhaps the greatest obstacle to effective [law] enforcement in Indian country" and some legal scholars propose that the decision should be "unconditionally repealed" by Congress.[301] Indeed, in their 1991 report evaluating the Indian Civil Rights Act, the U.S. Commission on Civil Rights concluded that *Oliphant* should be repealed.[302] The limits imposed by *Oliphant* make tribal governments ineffective in enforcing laws on tribal lands over non-Indian persons who come onto tribal lands in order to participate in Indian gaming activities. Such a limitation is contradictory to the policy of tribal self-determination that IGRA is intended to advance; Indians are encouraged to develop self-sufficiency through gaming but not allowed to make equal advances toward self-preservation by protecting against crime on their own lands.[303]

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297. Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (2006).

298. Kronk, *supra* note 174, at 1264. These restrictions on tribal courts, seemingly based on a belief that such limitations were necessary to protect Eighth Amendment rights of persons convicted on Indian lands, seem outdated and no longer relevant given that many tribes have incorporated the Bill of Rights and tribal judges are no longer inexperienced, untrained, or uneducated in the fundamental rights of individuals. *Id.* at 1264-66.

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

300. *See Id.*

301. Kronk, *supra* note 174, at 1266.

302. *Id.* (citing U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, No. 005-908-00021-3 n.185 (June 1991)). Tribes generally accept that a complete repeal of *Oliphant* is unlikely. *See* Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 14 (2004). However, a limited repeal may be defensible in light of gaming and the practical legal consequences of having large numbers of non-Indians as transient visitors to Indian casinos. Thus, it may be reasonable for tribes to have jurisdiction of non-Indians within area surrounding casinos only.

303. *See* 25 U.S.C. § 2702 (2000).

Government-to-government solutions promise to be the most effective and practical response to the jurisdictional issues arising from IGRA. At least one federal district, the District of Arizona, has welcomed the opportunity to partner with state agencies and tribal governments to better address criminal issues associated with gaming.[304] The Arizona Department of Gaming, the U.S. Attorney's Office for the District of Arizona, and Arizona tribal leaders (representing 19 members of the Arizona Indian Gaming Association)[305] created an interagency memorandum of understanding with the intention to improve "criminal enforcement to protect tribal assets and the gaming public."[306] This partnership between federal, state, and tribal governments is the first of its kind in the nation.[307] A key element of the partnership was the creation of a federal prosecutor position "whose only job is to pursue criminals who defraud and rob gaming houses."[308] In a creative move toward resolution, Arizona's Department of Gaming, a state agency, funded the specialized federal prosecutor position.[309] Though the position and the collaboration between these agencies is yet to be tested, the effort seems promising in addressing issues of criminal jurisdiction in which all relevant parties have a voice. Indeed, the new prosecutor already has brought indictments against two casino employees charged with stealing almost $10,000 by creating fake jackpot slips.[310]

Although the District of Arizona should be applauded for its efforts to coordinate enforcement efforts between tribal, state, and federal governments, no other district has yet engaged in similar cooperative efforts.[311] Accordingly, without a unified, national initiative, the problems in defining and enforcing criminal jurisdiction related to gaming on Indian land will continue. In addition, though Arizona is making remarkable strides, its new policy still addresses criminal gaming activity in isolation. That is, the only focus of Arizona's policy is on crimes directly related to gambling or casino business, ignoring crimes derived from gaming as a system or a whole enterprise. Thus, as presented in an earlier section of this note, other risk-oriented criminal behavior associated with

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304. *See* Kathy Helms, *Arizona Beefs up Program to Prosecute Gaming Crimes*, INDEPENDENT, Nov. 29, 2007, *available at* http://www.gallupindependent.com/2007/november/112907kh_gmngcrms.html.

305. *Id.*

306. *Federal Prosecutor Focuses on Gaming-Related Crimes in Arizona Casinos*, THE WHITE MOUNTAIN INDEPENDENT, Jan. 15, 2008, *available at* http://www.wmicentral.com/site/news.cfm?newsid=19197253&BRD=2264&PAG=461&dept_id=505965&rfi=6.

307. Helms, *supra* note 304.

308. *New Prosecutor Will Tackle Casino Crime*, ARIZONA DAILY STAR, Dec. 2, 2007, *available at* http://www.azstarnet.com/sn/printDS/214401.

309. *See* Helms, *supra* note 304.

310. *New Prosecutor Will Tackle Casino Crime*, *supra* note 308.

311. *See Assistant US Attorney Targets Casino Crimes*, KIKO NEWS, Dec. 3, 2007, http://kikonews.blogspot.com/2007/12/assistant-us-attorney-targets-casino.html.

gaming (such as drug use/distribution, drunk driving, assault, etc.) is left unattended, with jurisdiction remaining undefined and judicially un-enforced.

There also has been some limited success in gaining tribal enforcement over crimes committed by non-tribal members through policing partnerships between federal, state, and tribal governments. The U.S. Department of Justice has established a Law Enforcement Coordinating Committee (LECC) for every district in the nation.[312] These LECCs focus on providing training opportunities and coordinating resources[313] to provide more effective law enforcement efforts across jurisdictions—state, federal, and tribal. Taking this idea a step further, some states, such as Arizona, have created programs to train tribal officers on the state's peace officer standards.[314] In these cases, the tribal police are cross-deputized[315] and are employed by the governing body of an Indian tribe as well as being certified by the Arizona Peace Officer Standards and Training Board.[316] In Arizona, the cross-deputization of tribal police is authorized by statute.

> While engaged in the conduct of his employment any Indian police officer who is appointed by the Bureau of Indian Affairs or the governing body of an Indian tribe as a law enforcement officer and who meets the qualifications and training standards . . . shall possess and exercise all law enforcement powers of peace officers in this state.[317]

Thus, under this statute, the officers have authority as peace officers in both tribal and state jurisdictions.[318] However, despite the statutory language, the exercise of such authority by tribal police has been challenged by non-Indians arrested by

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312. *See*, *e.g.*, U.S. Department of Justice, Law Enforcement Coordinating Committee, Western District of Virginia, http://www.usdoj.gov/usao/vaw/lecc/index.html (last visited Jan. 5, 2009). This site explains the history and function of LECC's in the Department of Justice. Also, see U.S. Department of Justice, Law Enforcement Coordinating Committee, District of Arizona, http://www.usdoj.gov/usao/az/lecc.html (last visited Jan. 5, 2009), for a list of advisory committees denoting areas of specific emphasis for the LECC in that district.

313. *See*, *e.g.*, DANIEL G. KNAUSS, U.S. ATTORNEY, INDIAN COUNTRY REPORT 2 (2007), *available at* http://www.usdoj.gov/usao/az/reports/2007_Report.pdf.

314. *See* PEACE OFFICER STANDARDS AND TRAINING BOARD, ACTIVE OFFICER REPORT (Jun. 13, 2003), *available at* http://www.checkpointusa.org/roadblock/misc/azPostAgencies.pdf (showing tribal police departments that have undergone training for certification as state peace officers).

315. See, for example, the jurisdictions allowed for the Fort McDowell Yavapai Nation Police, Welcome to the Fort McDowell Yavapai Nation Police Department, http://www.ftmcdowell.org/departments/police/index.htm (last visited Jan. 5, 2009).

316. *See* State v. Nelson, 90 P.3d 206, 209 (Ariz. Ct. App. 2004).

317. ARIZ. REV. STAT. ANN. § 13-3874(A) (2008).

318. *See Nelson*, 90 P.3d at 208, 211.

tribal police.[319] To date, the authority of tribal police to also act as state law enforcement has been upheld.[320]

The cross-jurisdictional authority granted to tribal police officers stands as an example of intergovernmental collaboration, and recognition of tribal sovereignty in regards to law enforcement power benefiting both governments involved. However, as in any jurisdiction, the power of law enforcement through policing is affected by the subsequent prosecution of crimes by local prosecutorial systems. For example, within any jurisdiction, a police officer may arrest a suspect, but it is the prosecutor's office that has discretion to seek adjudication depending on its evaluation of the facts and circumstances of the individual case. In the case of tribal police, if the crime involves felony charges, it is the discretion of the U.S. Attorney for the district to prosecute—because the tribal courts only have jurisdiction over misdemeanor crimes.[321] Or, if the crime involves a non-Indian person, tribal police may arrest, but pursuing charges is the discretion of the state—usually through the local county attorney. In essence, although the cross-deputization systems of states like Arizona should be commended, the actual effect of such programs on strengthening tribal sovereign authority in regards to exercising full law enforcement power remains subject to the priorities and policies of federal and state agencies. Again, a solution may be found in legislation or an "opt in" system allowing greater tribal jurisdiction and direct authority over non-Indians on tribal land. Granting tribal justice systems the power to enforce laws over their lands, regardless of the offender, may prove more effective for the long-term management of criminal behavior associated with gambling.

VI. CONCLUSION

IGRA was originally designed to reconcile two competing interests—tribal self-determination and the resolution of state/tribal conflicts over the regulation of gaming. IGRA was successful in encouraging tribal economic development, and did clarify some issues relevant to state versus tribal sovereignty in relation to the gaming industry. However, on closer inspection,

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319. *See id.* at 207. A brief has been filed with the Ninth Circuit Court of Appeals. Appellant Terrence Bressi's Opening Brief at 22, Bressi v. Ford, No. 07-15931 (9th Cir. Sept. 19, 2007), *available at* http://turtletalk.wordpress.com/2007/12/07/bressi-v-ford-civil-rights-complaint-against-tohono-oodham-law-enforcement/. In this case, plaintiff argues that, although tribal police could legally operate roadblocks for sobriety checkpoints, they did not have jurisdiction to set up roadblocks for general law enforcement purposes (Fourth Amendment violation). *Id.* at 27. The District Court for the District of Arizona had granted summary judgment in favor of the officers. *Id.* at 5.

320. *Nelson*, 90 P.3d at 211.

321. Major Crimes Act, 18 U.S.C. § 1153 (2006); Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (2006).

IGRA was found to be imperfectly drafted, and incomplete in its delineation of criminal jurisdictional authority. IGRA established general principles for criminal jurisdiction in stating that gaming crimes fell under federal law enforcement and the control of federal courts; but it did not account for other foreseeable problems. Thus, issues such as tribal enforcement of laws and conflicts between state and tribal authorities over criminal activity on reservations were not considered. Furthermore, gambling-related crimes not specifically within the categories identified in IGRA or prioritized by federal agencies were not considered during its formulation. As such, a gap in criminal jurisdiction has emerged, wherein crimes related to gaming activity, such as increased substance abuse and interpersonal violence, can go unprosecuted because it is unclear which sovereign, whether tribe, state, or federal, has authority or capacity of enforcement.

Social science research indicates that gaming on tribal lands has had more than just an economic impact. Casinos brought a series of issues to the surface, such as increased numbers of non-Indian persons on tribal lands and possible increased incidents of other crimes such as substance abuse and violence—issues not acknowledged within the parameters of IGRA or its jurisdictional plan. These deficiencies accentuate the need to resolve the ambiguities of criminal jurisdiction created by IGRA. And, in formulating responses to these issues, it is necessary to consider different approaches, especially those that accept the sovereign status of tribes and the essential requirement that tribes be equal partners in creating and helping enforce criminal law on their land and their casinos.

Resolutions to these criminal jurisdictional gaps in IGRA can take many forms. As presented in this note, viable responses to the problem may be legislative, judicial, and local. The most likely to be successful would be efforts that involve government-to-government solutions, giving proper recognition to tribal sovereignty and tribal jurisdictional authority. Inter-governmental solutions allow *de facto* sovereignty to flourish, encouraging increased self-rule for Indian nations. Such self-rule is positively correlated with successful economic development, furthering the intent of IGRA—tribal self-sufficiency. Furthermore, the economic, social, and legal independence of tribes relieves some of the federal government's obligation in supporting tribal programs and legal infrastructure, as well as the state's expense in prosecuting crimes committed on Indian lands.

However, these ideas of increased self-rule among tribes, although sensible, may need to ripen. The issue of true tribal sovereignty remains an ambivalent topic with both state and federal governments. Thus, though collaboration between governments is encouraged across state and federal systems, the actual removal of impediments to full tribal sovereign power over their own lands, especially with regards to criminal jurisdiction, remains restricted by congressional, federal, and state agencies. For example, federal law still prohibits tribes from enforcing laws against non-Indians on Indian land. Nevertheless, as IGRA approaches its twentieth year of implementation, new programs such as those emerging in the District of Arizona, may provide valuable

data regarding how government-to-government partnerships between federal, state, and tribal agencies can work more effectively. The legal conundrum of criminal jurisdiction remains an open field for legal and social scientific inquiry. It is an opportune time to test whether IGRA can be renovated to become more responsive toward its original intent of tribal self-determination, not only through self-sufficiency but also through self-rule.