Kathryn M. Buder Center
for American Indian Studies

Brown School

Criminal Jurisdiction in Indian Country

Kathryn M. Buder Center for American Indian Studies
Brown School

2021 | REPORT

Marissa Mathieson

Washington University in St. Louis

A Legal Summary of Criminal Jurisdiction in Indian Country

Throughout history, in addition to an array of United States (U.S.) laws and treaties, Native American tribes have used various governing methods to develop and direct their members. As a result, the intertwining nature of both U.S. federal law, state law, and tribal law creates a complex system of who and what body has jurisdiction in criminal cases.

Jurisdiction is defined as the "power of a court to adjudicate cases and issue orders (Cornell, n.d.). Meanwhile, criminal jurisdiction is the ability of a court to specifically hear criminal cases. Criminal Jurisdiction occurs in three special situations:

- To regulate a state relationship with the federal government or another state;
- To regulate the relationship between a federation state domestic court and the federal courts and;
- Individual cases deemed "criminal" under the law of criminal procedure (Yale Law Journal, 1972).

Crimes such as arson, rape, murder, and assault would result in criminal jurisdiction. Meanwhile, civil jurisdiction and law only pertain to an individual suing a business, agency, or another individual. Property damage, a divorce case, or eviction cases are all civil and therefore tried in civil court. Both criminal and civil courts are very different in how they sentence. While criminal courts can send an individual to jail for breaking state or federal law, civil courts may mandate fines or determinations about family and home life (Legal Aid Society of Northeastern New York, n.d.).

Tribes are sovereign nations and self-governing entities. Federal law continues to describe them as "domestic dependent nations," subjecting the tribes to U.S. plenary power.

Plenary Power

"Power to take action on a specific issue that is complete and absolute, with no limitations (Legal Information Institute, n.d.).

As sovereign nations, tribes have the power to determine their form of government, define citizenship, enforce and make their own laws through tribal police and courts, collect taxes, and regulate property use. Although they are "distinct independent political communities," Justice Marshall in the 1831 Cherokee Nation v. Georgia decision, described tribes as "domestic dependent nations" (Tribal Sovereignty, 2019). The General Crimes Act, the Major Crimes Act, and Public Law 280 (all of which will be described later in this report), have also impacted how court authority is determined.

The following steps establish which court, federal, tribal, or state, the case goes to.

STEP 1

Specify the origin of the crime and if it took place on Indian lands.

STEP 2

Identify the victim and defendant as "Indian" or "non-Indian" — terms that are used to indicate Native American status in legal documents and treaties.

STEP 3

Ascertain the crime in question and distinguish its status as a felony or a misdemeanor (Slotnick, 2017). (See infographic on next page)

(Infographic by Marissa Mathieson, information from National Crime Victim Law Institute, 2012)

Such limited tribal authority over all cases affects all aspects of federal Indian law, such as gaming, fishing, local and state regulation, criminal law, tribal land claims, lawsuit immunity, and more (Federal Judicial Center, n.d.). When the federal government takes jurisdiction over a large amount of tribal affairs and Indian crimes, it severely limits the tribal governments' ability to maintain criminal justice.

"Indian Country" is used as a term to encompass the geographical, legal, and cultural concept of American Indians. Indian Country is land within an Indian reservation or federal trust land — land that is held in trust by the federal government for a tribe or tribal member (Native Law, n.d.). There are numerous types of Indian country, as recognized by U.S. law, including reservations, informal reservations, dependent Indian communities, allotments, and special designations and other areas, such as cities with high Native American

Indian Country

The U.S. federal government defines "Indian Country" as land that meets one of three criteria outlined by codes 18 U.S.C. § 1151 and 40 C.F.R. § 171.3. 1. Land that is within the limits of Indian reservation under U.S. jurisdiction, including reservation areas with a patent or right-of-way. 2) All dependent Indian communities in the borders of the U.S., both within or without the limits of a state and acquired territory. 3) All Indian allotments, including those with rights-of-way, however, not including those with extinguished Indian titles.

populations. Reservations, created through a treaty with the federal government, were established through the transferring of traditional Native land to the U.S. federal government, but "reserving" part of the land for the tribe. Later, congressional enactments and presidential executive orders gave way to more reservations. Informal reservations are disestablished reservations or reservations with unclear legal existence, making them trust lands set aside for Indian use. Dependent Indian communities are to be considered land that is federally supervised and is set aside for the use of Indians, as modeled in the U.S. v. McGowan or U.S. v. Sandoval case. Allotments are specific parcels of tribal trust land assigned to a particular Indian person or family, primarily present during the allotment period, by the federal government. Even though many of these pieces of land are not within a reservation, they are still considered "Indian country." Lastly, special designations refer to congress's ability to designate a specific piece of land as Indian Country for jurisdiction purposes, regardless of if the lands fall within one of the categories above (Native.Law, n.d.).

Recently, the population of Indian Country has been skyrocketing. Between the years of 2000 and 2018, American residents who identified as at least partially Native American vastly increased at a rate of 39%. In addition, as of 2018, 5.7 million Americans identified as "American Indian or Alaska Native," representing less than 2% of the total US population (Norris et al., 2012). Of those at least partially identifying as "American Indian" or "Alaska Native", 34% lived in three states: California, Arizona, and Oklahoma. With the largest American Indian population, 167,000 people, living on the Navajo Nation, in states such as Arizona, New Mexico, and Utah (USAFacts, 2020). In total, the Bureau of Indian Affairs accounted for 574 Indian entities as "federally recognized tribes" (Indian Affairs, n.d.). However, it is noteworthy to mention that there are many tribes who have not achieved federal recognition.

Indian

There is no single legal definition of "Indian", even in the Title 25 of the US Code entitled Indians (Duhaime, n.d.). Thus, both the federal government and tribes have different criteria for program, service, and membership eligibility. Determining who is "Indian" for purposes of jurisdiction is determined through case and tribal law rather than by a code or statute. In most cases, an Indian is defined as someone who is enrolled in a tribe that has been recognized by the federal government or someone with a specific quantum of Indian blood. Tribal enrollment is determined by the Indian tribe, and member records of who is enrolled may or may not be held by the tribe. Such enrollment may determine a person's status as Indian. If the court or tribe recognizes the person as an Indian, that person may be legally considered Indian possibly qualifying them for certain benefits provided by the federal government (National Crime Victim Law Institute, 2012).

In the course of human history, American Indians have encountered an abundance of challenges with federal and state governments. Such challenges can be represented through a simplified series of timeframes that are described by the National Congress of American Indians. Beginning with the colonial period, with European colonies beginning to dominate America's East Coast, they began to increasingly acquire Indian lands under signed treaties and the "Doctrine of Discovery." After the Revolutionary war, the U.S. began to work with tribal nations on a government-to-government basis. This started the removal, reservation, and treaty period. The U.S. government, as a result of an increased U.S. population and military strength, forced Native people to relocate tribal nations to reservations.

This, however, required tribal nations to trade extreme amounts of land in order to have protection of the U.S. and the right of self-governance. Next, the allotment and assimilation period began, where European settlers', mainly done through the general Allotment Act of 1887, forced Native people to assimilate to their perception of an "American life." The act, which is also referenced as the Dawes Act, gave 90 million acres — ⅔ of tribal land — to settlers, without compensation to the tribes. In addition, the act divided communal tribal lands into small segments of land for individual Native ownership — a process that was greatly against the traditions of tribal communities and peoples. The Indian reorganization period started with the passage of the Indian reorganization Act of 1934, thereby ending the federal policy of allotment. From then on, tribal land began to be restored, the federal government created programs to rehabilitate reservation economies, and the federal government sought to reform tribal governments. Thus began the termination period, where Congress halted recognition and assistance of more than 100 tribal nations, resulting in loss of land, resources, sales, and welfare. Additionally, in 1953, Public Law 280 passed, which gave criminal and civil jurisdiction to a handful of states. The federal government used such policies during this time to enforce relocation of American Indians from their reservations to urban areas. However, tribal involvement in federal policy resurged, the termination period ended and the self-determination period began. Acts such as self-determination and self-governance gave Indian tribes the power to manage how federal programs were managed and made available to their people (NCAI, 2020).

By 2000, tribal governments began to progress in their quest to gain self-governance; prompting the nation-to-nation period. As a result of the health services provided by the Indian Health Service to 75 tribal nations, and President Clinton's executive order (13175) to strengthen the relationship with tribes, self-governance began to increase. By 2011, the Department of Interior identified 260 tribal nations and the Department of Health and Human Services identified 332 tribal nations. President Obama, aware of the tribes' growing independence from the federal government, sought to aid the US government nation-to-nation relationship by convening the first annual white house tribal nations summit in 2009. Although American Indians have many more rights today than they did previously, they still face a litany of challenges associated with their identity and the resources available to them (NCAI, 2020).

Indian Country, tribal population, historical policies and time periods, culture and sovereignty all interact to inform tribal justice systems. Within Indian country, there are about 400 tribal justice systems, which are partially funded by Public Law 638 Tribal Priority Allocations (TPA). Tribes retained the power to enforce tribal laws and justice codes in their own court systems in 1934 as a direct result of the federal government giving them the authority to enact and govern their own tribal laws (Jones, 2000). For tribes that do not have their own tribal justice system, tribal members may go to one of five regional Court of Indian Offenses (CFR) courts (Cornell Law School, n.d.). The Bureau of Indian Affairs is mandated to provide funding, technical support, and training to tribal courts as well as CFR courts only when such resources are available. The Tribal Justice support Directorate aids in respecting tribal justice systems and coordinating between tribal, federal, and state courts (Jones, 2000). Each tribal justice system is unique in how they approach justice — while some are more traditional, following more traditional historical practices, laws, customs and traditions, others are more contemporary, closer to the U.S. federal and state justice system (Jones, 2000), or a combination of the two approaches may be integrated (New Mexico Courts, n.d.). In some cases, tribal courts utilize juries, prosecutors, defense counsel, or other individuals to determine a proper verdict for the defendant. Many people

often appear in tribal court without an attorney. However, if there is an attorney, they must meet tribal standards in order to address the tribal court. Take the Navajo Nation as an example; they require attorneys to pass their own bar exam to qualify and represent clients. Meanwhile other tribes may require the attorney to speak the tribal language.

Regardless of the tribe's ability to operate their own courts, many statutes and acts affect the way criminal jurisdiction works in Indian Country. The Major Crimes Act (MCA), for example, extends federal jurisdiction over an Indian who commits any of the major crimes against any individual, Indian or non-Indian (Skibine, 2016). Such crimes include, murder, manslaughter, kidnapping, maiming, a chapter 109A felony, incest, a section 113 felony assault, an assault against an individual under the age of 16, felony child abuse or neglect, arson, burglary, robbery, and a section 661 within Indian country. The crimes referred to above that have not been defined by federal law, will directly go to state jurisdiction in accordance with the state laws in which the offence was committed (Cornell Law School, n.d.). The Indian Country Crimes Act (ICCA), also known as the General Crimes Act, extended U.S. general criminal laws to any offense that was committed in Indian Country. However, there are some exceptions to the General Crimes Act, including:

1. It does not apply to offenses committed by an Indian on another Indian.
2. It does not apply to Indians who have been punished by the local law of the tribe if committed in Indian country.
3. It does not apply to cases specifically under Indian tribes jurisdiction through treaty stipulations (Skibine, 2016).

Meanwhile, the Indian Civil Rights Act (ICRA) prevents tribal governments from passing or enforcing laws that violate certain individual rights. It is like the U.S. Constitution's Bill of Rights, guaranteeing personal freedoms against federal government actions. There are many differences from the Bill of rights however (Bill of Rights Institute, 1791) ICRA's guarantee of free exercise of religion does not stop a tribe from establishing a religion. Many tribes do not separate religion from government and other areas of life. The ICRA guarantees a criminal defendant the right to a lawyer at the defendant's own expense, but a tribe does not have to provide a lawyer for a defendant who cannot afford one. There is no right to a jury trial in civil cases under the ICRA (Northwest Justice Project, 2018).

Next, Public Law 280 (PL 280) mandated shifting Federal criminal jurisdiction over offenses involving Indians in Indian Country to certain states and gave other states an option to assume such jurisdiction in the future. State jurisdiction over Indians outside Indian country was unchanged (Gonzales et al., 2005). In some states, tribes do not operate court systems or they may operate court systems that hear very limited types of cases, such as violations of a tribe's hunting and fishing code or cases that arise under the Indian Child Welfare Act (Jones, 2000). First, on the reservations to which PL 280 applied, it took away the federal government's authority to prosecute Indian country crimes based on 18 USC 1152 (the Indian Country General Crimes Act) and 18 USC 1153 (the Major Crimes Act). Second, PL 280 authorized the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin to prosecute most crimes that occurred in Indian Country. Exceptions were set forth for a few topic areas and on a few reservations, but the main result of PL 280 is that for most reservations in the six named states, federal criminal jurisdiction became extremely limited while state jurisdiction was greatly expanded (Merrefield, 2021).

Lastly, the Self-Determination and Education Assistance Act works to give tribes ownership over the resources granted to them from Secretary

of the Interior Contracts. Essentially, the act gives tribes the autonomy to direct federal government resources to specific areas in their own communities (U.S. Department of the Interior, n.d.).

In addition to such acts, Supreme Court decisions have heavily influenced the way tribes operate and tribal criminal jurisdiction. Beginning in 1832, through the Worcester v. Georgia case the Supreme Court helped tribal autonomy by banning states from imposing regulations on Native American land (Britannica, n.d.). In 1882, in U.S. v. McBratney, it was decided that when a non-Indian commits a criminal offense upon another non-Indian within an Indian reservation, the federal courts do not have jurisdiction, rather, the state does (Murphy, 1975). Next, Oliphant v. Suquamish Tribe in 1978 withheld tribes from having jurisdiction over non-Indians who have committed crimes in Indian Country (EagleWoman, n.d.). Shortly after that was decided, in 1990, the Supreme Court also held that, in addition to non-Indians, tribes do not have jurisdiction over non-member Indians in the Duro v. Reina case (EagleWoman, n.d.). This case eventually led to legislation (Amendment to the Indian Civil Rights Act) (EagleWoman, n.d.) that is known as the "Duro Fix," which worked to recognize tribal sovereignty over all Indians in Indian Country. In 2004, the Duro Fix was upheld by congress in U.S. v. Lara, acknowledging that there is no double jeopardy for the same crimes in Tribal Court and federal court when there is Indian prosecution (EagleWoman, n.d.). More recently, the Supreme Court held that reserved tribal lands are considered Indian Country under the MCA. Thus, the state does not have jurisdiction over such citizens (Merrefield, 2021). As of this year, on June 1, 2021, the court, in the case U.S. v. Cooley, held that a non-Indian traveling through Indian territory on a public right-of-way can be searched and temporarily detained by an Indian police officer (Ballotpedia, n.d.). Regardless of the date decided, all Supreme Court cases have and will continue to have a profound impact on Indian criminal jurisdiction.

As shown above, criminal jurisdiction in Indian Country is extremely complex and varies depending on the situation. Most jurisdictions — whether it be federal, state, or tribal — ultimately depend on the perpetrators qualification as an "Indian" under federal law. Although there are federal laws (of which are defined above) to help determine criminal jurisdiction in Indian Country, there is no one specific definition of who is and is not an "Indian," although enrollment in a federally recognized tribe is a common baseline. Consequently, this makes the classification of "Indian" very murky, even among different circuits and jurists, as there are no distinct definitions by which courts can follow. This confusion of the classification of who is "Indian" has called many jurists to urge courts to use strict scrutiny because of the racial nature of "Indian" (Skibine, 2016). Ultimately jurisdiction depends on the status of the perpetrator (Indian or non-Indian), the status of the victim (Indian or non-Indian), and the type of offense involved (reference infographic below). Each factor is considered and can dramatically change the outcome.

REFERENCES

Ballotpedia (n.d.) *United States v. Lopez*. https://ballotpedia.org/United_States_v._Lopez

Bill of Rights Institute. (1791). *Bill of Rights.* https://billofrightsinstitute.org/primary-sources

Cornell Law School. (2020). S*UPREME court of the United States. McGIRT v. OKLAHOMA*. https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf

Cornell Law School. (n.d.). 1*8 U.S. Code § 1153, Offenses committed within Indian Country.* Legal Information Institute. https://www.law.cornell.edu/uscode/text/18/1153

Duhaime. (n.d.) Indian definition. Duhaime.org. Indian Definition (duhaime.org)

EagleWoman, A.T. (n.d.). *Jurisdiction and Courts in Indian Country.* FRBSF.org. https://www.frbsf.org/community-development/files/Jurisdiction-and-Courts-in-Indian-Country-EagleWoman.pdf

Encyclopædia Britannica, Inc. (n.d.). *Worcester v. Georgia.* Encyclopædia Britannica. https://www.britannica.com/topic/Worcester-v-Georgia.

Environmental Protection Agency. (n.d.). *Definition of Indian Country.* EPA. https://www.epa.gov/pesticide-applicator-certification-indian-country/definition-indian-country.

Federal Judicial Center. *Jurisdiction: Criminal | Federal Judicial Center.* (n.d.). https://www.fjc.gov/history/courts/jurisdiction-criminal

Gonzales, A. R., Schofield, R. B., & Schmitt, G. R. (2005). *Public Law 280 and Law Enforcement in Indian Country—Research Priorities*. U.S. Department of Justice Office of Justice Programs. https://www.ojp.gov/pdffiles1/nij/209839.pdf

Indian Affairs. (n.d.). *U.S. Department of the Interior*. https://www.bia.gov/

Jones, B. J. (2000, March). *Role of Indian tribal courts in the justice system*. http://www.icctc.org/Tribal%20Courts.pdf

Legal Aid Society of Northeastern New York. (n.d.). *The differences between criminal court and civil court.* lawhelp.org. https://www.lawhelp.org/resource/the-differences-between-criminal-court-and-ci

Legal Information Institute. (n.d.). *Jurisdiction.* https://www.law.cornell.edu/wex/jurisdiction

Legal Information Institute. (n.d.). *Plenary power.* Plenary power | Wex | US Law | LII / Legal Information Institute (cornell.edu)

Merrefield, C. (2021, July 21). M*cGirt v. Oklahoma: The importance of a Landmark tribal SOVEREIGNTY CASE.* The Journalist's Resource. https://journalistsresource.org/criminal-justice/mcgirt-tribal-sovereignty/

Murphy, J. (1975). *Jurisdiction: The McBratney Decisions: A pattern of inconsistency*. JSTOR. https://www.jstor.org/stable/20067875.

National Congress of American Indians. (2020). *Tribal nations and the United States: An introduction*. Washington, D.C., February 2020.

National Crime Victim Law Institute. (2012, April 6). *If a crime is committed against me on Indian lands in which COURT (state, federal OR tribal) will the case Proceed?* https://law.lclark.edu/live/news/15925-if-a-crime-is-committed-against-me-on-indian-lands

Native Law. (n.d.). *What Is Indian Country?*. https://tribaljurisdiction.tripod.com/id7.html

New Mexico Courts. (n.d.). *What you should know about Tribal Courts.* Tribal State Judicial Consortium. https://tribalstate.nmcourts.gov/what-you-should-know-about-tribal-courts/

Norris, T., Vines, P. L., & Hoeffel, E. M. (2012, January). *The American Indian and Alaska Native Population: 2010.* https://www.census.gov/history/pdf/c2010br-10.pdf

Northwest Justice Project. (2018). *Indian Civil Rights Act.* https://www.washingtonlawhelp.org/resource/indian-civil-rights-act/download/3928DFFE-A03E-7661-F42B-BDFE2C910E91.pdf

Our Government, Tribal Sovereignty. (2019). *Pauma Band of Luiseno Indians.* https://www.paumatribe.com/government/tribal-sovereignty/#:~:text=In%20defining%20tribal%20sovereign%20powers,powers%20of%20the%20United%20States

Piggyback jurisdiction in the proposed federal criminal code. (1972). The Yale Law Journal, 81(6), 1209. https://doi.org/10.2307/795225

Skibine, A. (2016). *Indians, Race, and Criminal Jurisdiction in Indian Country.* Utah Law Digital Commons. https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1042&context=scholarship

Slotnick. (2017). *Understanding tribal sovereignty.* Federal Bar Association. https://www.fedbar.org/blog/understanding-tribal-sovereignty/

U.S. Department of the Interior. (n.d.). *Tribal court systems.* Indian Affairs. https://www.bia.gov/CFRCourts/tribal-justice-support-directorate

USAFacts. (2020). *Native Americans and the US Census: How the count has changed.* https://usafacts.org/articles/native-americans-and-us-census-how-count-has-changed/

Kathryn M. Buder Center for American Indian Studies

Brown School

Kathryn M. Buder Center for American Indian Studies
Washington University in St. Louis
MSC 1196-251-46, One Brookings Drive, St. Louis, MO 63130
bcais@wustl.edu | **buder.wustl.edu**