

Summer 2000

Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever be Made into a Right

Daniel Twetten

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Daniel Twetten, Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever be Made into a Right, 90 J. Crim. L. & Criminology 1317 (1999-2000)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

PUBLIC LAW 280 AND THE INDIAN GAMING REGULATORY ACT: COULD TWO WRONGS EVER BE MADE INTO A RIGHT?

DANIEL TWETTEN*

As central North America gradually became the United States and the United States gradually became a world military and political leader, Indians were marginalized, killed, and cheated.¹ Yet the United States recognized in its Constitution the unique position of tribes.² Within sixty years of the birth of the United States, its highest court pronounced tribes "distinct communit[ies], occupying [their] own territory"³ and named the federal government caretakers of the natives it had displaced and brutalized.⁴

* J.D. candidate Northwestern University School of Law, 2001. The author would like to thank Adam Hellegers and Livia McCammon Kiser for their perceptive editing.

¹ See HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 1-21; 124-146 (1995). Professor Zinn illustrates the brutal treatment of Indians both during colonial times and during the first century of the United States' existence.

² U.S. CONST. art. I, § 8, cl. 3. This is the "Indian Commerce Clause," which serves two functions—it provides Congress with power to regulate Indian affairs and it recognizes tribes as political entities distinct from state and federal governments.

³ *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

⁴ *Id.* This trust responsibility has two features. The first feature is the autonomy between tribes and the federal government. One author describes the federal government's original trust responsibility as "a special legal relationship between an Indian tribe and the federal government, in which the tribe is legally separate and independent from state and local political entities." *ENCYCLOPEDIA OF AMERICAN INDIAN CIVIL RIGHTS* 352-53 (James Olson ed.) (1997). This trust responsibility eroded in the second half of the 19th century, but was reborn in the 1930s when "the tribes regained their statutory authority as trustees of the federal government who were free from the powers of state and local governmental entities." *Id.* at 353. The second aspect of the trust responsibility is that it is the burden of the federal government to care for the tribes and the tribes' resources; that is, the tribes are like children to be protected by the United States. See *Worcester*, 31 U.S. 515. This "trust

In discharging its duty to care for the tribes, the federal government struck a balance with tribes regarding tribal justice systems. After the passage of the Major Crimes Act in 1885,⁵ the Bureau of Indian Affairs, through the Courts of Indian Offenses,⁶ maintained jurisdiction over major crimes committed on Indian lands. Tribes retained exclusive jurisdiction over lesser crimes and exercised concurrent jurisdiction over many of the major crimes.⁷ However, Congress wiped out this arrangement in 1953 when it passed Public Law 280,⁸ granting to six states exclusive jurisdiction over all crimes committed in Indian country in those states.⁹

Public Law 280 created many problems for tribal justice systems, ultimately resulting in higher crime rates for tribes in Public Law 280 states than for tribes in non-Public Law 280 states.¹⁰ As Carol Goldberg-Ambrose, a leading scholar on Public Law 280, puts it: "Tribes had not exactly thrived under the prior regime of federal authority and responsibility. But when the states took over, with their alternating antagonism and neglect of native peoples, tribes had to struggle even harder to sustain their governing structures, economies, and cultures."¹¹

Any reform of current laws governing jurisdiction over Indian lands must come from Congress, which has long held plenary power over matters concerning Indian lands.¹² Congress'

responsibility" has been used by the federal government to promote its agenda in the face of Indian interests at least as often as the federal government has actually promoted Indian welfare. *THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION* 345-46 (Bruce Johansen ed.) (1998).

⁵ 18 U.S.C. § 1153 (1994). The crimes embraced by this statute include murder, attempted murder, aggravated assault, rape, arson, burglary, and larceny. *Id.*

⁶ See *infra* notes 101-104 and accompanying text for a description of Courts of Indian Offenses.

⁷ See CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* 20 (1997).

⁸ 18 U.S.C. § 1162 (1994).

⁹ *Id.*

¹⁰ See *infra* notes 55-82 and accompanying text for a discussion of the effects of Public Law 280.

¹¹ See GOLDBERG-AMBROSE, *supra* note 7 at x.

¹² The phrase "plenary power"

appears to be used as a summary of the congressional powers over Indians. The power over Indian affairs is unusual in our federal system because it includes general federal authority to legislate over health, safety, and morals. Examples of the rare instances in

plenary power allows federal management of nearly all Indian concerns.¹³ Congress' plenary power flows from the Indian Commerce Clause,¹⁴ which the Supreme Court has interpreted to give Congress the exclusive right to govern Indian affairs and to deny the states any power to regulate Indian lands.¹⁵

Congress exercised this power in 1988 when it passed the Indian Gaming Regulatory Act ("IGRA") in response to the steady growth of Indian gaming (*e.g.*, gambling) throughout the previous decade.¹⁶ State concerns were well represented in IGRA, presumably because state interests are better represented than Indian interests in Congress. Despite significant erosion by federal courts,¹⁷ IGRA continues to govern Indian gaming today. Indian gaming generates around \$7 billion in annual revenues.¹⁸ The rampant poverty on many Indian reservations¹⁹ is mitigated somewhat by this cash flow.

The potential stream of revenue from IGRA is currently cramped, however. Federal courts interpreted IGRA in such a manner that tribes have struggled to open new gaming facilities.²⁰ Lifting court-imposed restrictions on Indian gaming growth could potentially result in greater revenues for tribes, which in turn could facilitate tribal development.

Congress should amend IGRA to direct money generated by Indian gaming toward tribal justice development, and amend Public Law 280 to return criminal jurisdiction to tribes. Doing

which Congress exercises similar powers include the administration and government of territories and possessions, the District of Columbia, and federal enclaves.

FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 219 (1982 ed.).

¹³ See *id.* at 220.

¹⁴ U.S. CONST. art. I, § 8, cl. 3.

¹⁵ The Indian Commerce Clause is "the legal taproot of the plenary power ascribed by U.S. federal courts to Congress." Johansen, *supra* note 4, at 69. For a definition of plenary power, see *supra* note 12.

¹⁶ 18 U.S.C. §§ 1166-1168 (1994), 25 U.S.C. §§ 2701-2721 (1994).

¹⁷ See *infra* notes 198-214 and accompanying text for a discussion of courts' treatment of IGRA.

¹⁸ See NATIONAL GAMBLING IMPACT STUDY COMMISSION, NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT 6-2 (1999) [hereinafter "Commission Report"].

¹⁹ See *infra* note 158 and accompanying text for a discussion of poverty in Indian tribes.

²⁰ See *infra* note 209 and accompanying text for a discussion of how court decisions have impacted IGRA.

so would allow tribes to fund their own tribal justice systems, rather than rely upon conditional funding, and therefore significantly enhance tribal sovereignty. By amending Public Law 280 and IGRA, Congress could fulfill its Constitutional responsibility toward Indians by creating something for and among Indians. Such a policy would stand in stark contrast to the sad history of degradation and racism perpetrated upon Indians by the United States.²¹

This Comment is presented in four parts. Part I details the Congressional motivation behind Public Law 280, the law's design, and its effects. Part II examines the structure of tribal courts, their role in tribal sovereignty, and their relationship to tribal cultures. Part III describes Indian gaming in general, IGRA, and IGRA's destruction by federal courts. Finally, Part IV discusses a plan to combat the raging crime rate on reservations in Public Law 280 states. This plan centers around Congressional amendments to both Public Law 280 and IGRA, the combination of which would produce a return of criminal jurisdiction over crimes committed on Indian lands to the tribes and provide a source of funding for tribal justice systems that is independent of any non-tribal government.

I. PUBLIC LAW 280—ITS PURPOSES, DESIGN, AND EFFECTS

The United States Congress enacted Public Law 280 in 1953.²² The law mandated that five states (not including Alaska, which was added later) assume jurisdiction for all criminal offenses committed on Indian land in those states.²³ Public Law

²¹ The fact that white settlers displaced Indians does not by itself create a shameful history for the United States. Rather, as one Native American author puts it,

it's a sad history not because of the influx of settlers—after all, Indians had encroached upon each other for thousands of years. It's a sad history because of the shabby way the new people dealt with tribal Americans: not just the lies, but the utter unwillingness to share an enormous land.

WILLIAM LEAST HEAT-MOON, *BLUE HIGHWAYS: A JOURNEY INTO AMERICA* 104 (paperback ed. 1999).

²² 18 U.S.C. § 1162 (1994).

²³ It is important to note that Public Law 280 did not grant states plenary jurisdiction. For example, there were limits on state jurisdiction in the realms of "water rights, taxation of trust property, regulatory control over trust property . . . [and] tribal activity otherwise protected by treaty or statute, and federally protected hunting, trapping, and fishing rights." JACK UTTER, *AMERICAN INDIANS: ANSWERS TO TODAY'S QUESTIONS* 155 (1993).

280 has harmed tribes in many ways in the nearly half-century since its passage. One of its most significant effects has been higher crime rates for tribes in Public Law 280 states than for tribes in non-Public Law 280 states.²⁴

A. PURPOSES

Congress enacted Public Law 280 for three purposes—to reduce lawlessness on Indian lands, to lower federal expenditures, and to further the then-popular policy of assimilating Indians into the general American society.²⁵

Congress focused primarily on tribal crime problems when passing Public Law 280.²⁶ The House of Representatives originally introduced Public Law 280 as a mechanism for combating tribal crime in California.²⁷ The Senate eventually expanded the scope of the bill upon finding that “the enforcement of law and order among the Indians in the Indian country had been left largely to the Indian groups [and] tribes [were] not adequately organized to perform that function.”²⁸

²⁴ See *infra* notes 55-70 and accompanying text for a discussion of Public Law 280's effect on crime rates.

²⁵ See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 488 (1979) (detailing the Congressional motivations behind Public Law 280).

²⁶ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (stating that Public Law 280's chief goal was to “combat lawlessness”). It is important to recognize that crime reduction was the primary goal for Public Law 280 because crime has actually increased in tribes in Public Law 280 states. Thus, the statute has failed even on its own terms.

²⁷ See H.R. 1063, 83d Cong. (1st Sess. 1953).

²⁸ S. REP. NO. 83-699, at 5 (1953). Compare this finding with Congressional and Presidential declarations in the past ten years that tribes are the most efficient and best enforcers of tribal law. Such a shift in policy regarding who is best suited to fight tribal crime suggests further that Public Law 280 should be amended. See *infra* note 108 and accompanying text for a more thorough discussion of Congress' changing policy toward Indians. See also John Fredericks III, *America's First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL'Y 347, 403-406 (1999) (discussing the tension between recent Supreme Court decisions that have eroded tribal sovereignty and Congress' recent embrace of policies favoring strong, independent tribal governments).

A secondary Congressional motivation in passing Public Law 280 was the reduction of federal expenditures,²⁹ manifested in a refusal to provide funding to the states onto which Public Law 280 forced criminal jurisdiction over Indian lands. Congress' concern for thrift impacted tribes in Public Law 280 states by eliminating virtually all criminal justice funding for tribes, as the federal government was now out of the business and the state governments did not want to commit resources without federal reimbursement.³⁰

Congress' third motivation in passing Public Law 280 was to further the existing federal goal of Indian assimilation.³¹ This motivation is both implicit and explicit within Public Law 280. Looming over the law's passage were two important federal documents relating to Indian policy. First, in 1949, a report prepared by the Truman Administration recommended that the "Indian problem" would be best solved by the "gradual integration of all Indians into the general population and economy."³² Four years later, in 1953, the House passed House Concurrent Resolution 108, which deemed it "the policy of Congress" to make Indians "subject to the same laws and entitled to the same privileges and responsibilities" as all citizens.³³ This policy of assimilation appears explicitly in the discussion surrounding Public Law 280. One senator noted that Public Law 280 was appropriate because Indians had "reached a state of accultura-

²⁹ See 99 CONG. REC. 9263 (1953) (Rep. Harrison indicating that the Federal government had spent \$2 billion on tribal law enforcement since 1791 and that Congress should allow the Bureau of Indian Affairs ("B.I.A.") to "begin going out of business in an orderly manner.").

³⁰ See *infra* notes 71-82 and accompanying text for a discussion of the effect of funding problems for Public Law 280 tribes.

³¹ Understanding that Congress managed Indian affairs in light of a goal of assimilation is important because Federal policy has shifted 180 degrees in the years since Public Law 280, which further indicates why Public Law 280 needs Congressional attention today. See *infra* note 133 and accompanying text for a discussion of current Congressional policy toward Indians.

³² COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV'T, INDIAN AFFAIRS, H.R. DOC. NO. 81-129, at 60 (1949). This report was part of a series of investigations designed to streamline the federal government.

³³ H.R. Con. Res. 108, 83d Cong. (1953).

tion and development" allowing for a smooth transition into society at large.³⁴

B. DESIGN

Public Law 280's design is relatively straightforward.³⁵ Initially, Public Law 280 transferred all criminal jurisdiction over tribes in California, Minnesota, Nebraska, Oregon, and Wisconsin to those states.³⁶ Congress added Alaska shortly thereafter.³⁷ These six states are collectively known as the "mandatory Public Law 280" states, as their assumption of jurisdiction was dictated by Congress.³⁸

Public Law 280 offered every other state the option of assuming criminal jurisdiction over crimes on Indian lands.³⁹ Ten states opted to accept some sort of jurisdiction via Public Law 280.⁴⁰ Eight of these ten states merely assumed limited jurisdiction over particular subject matters.⁴¹ For example, Arizona accepted jurisdiction over pollution,⁴² Montana assumed criminal jurisdiction over only one reservation,⁴³ and Iowa assumed civil jurisdiction over only one reservation.⁴⁴ Washington assumed

³⁴ S. Rep. No. 83-699, at 5 (1953).

³⁵ This article addresses Public Law 280 only as it relates to criminal jurisdiction. Public Law 280 also foisted civil jurisdiction onto certain states and this jurisdictional delegation also had far-reaching effects. See Cohen, *supra* note 12, at 361-72 for a thorough discussion of the impact of Public Law 280's civil jurisdiction transfer.

³⁶ 18 U.S.C. § 1162.

³⁷ Act of Aug. 8, 1958, Pub. L. No. 85-615 (codified as 18 U.S.C. § 1162(a)). Congress never made clear its method of selecting states for automatic inclusion in the Public Law 280 scheme. Based on the circumstantial evidence, it appears that Congress simply selected the states with the largest populations of Indians.

³⁸ *Id.*

³⁹ 25 U.S.C. §§ 1321-1322, 1324 (1994).

⁴⁰ See Cohen, *supra* note 12, at 368-70.

⁴¹ See *id.*

⁴² ARIZ. REV. STAT. ANN. §§ 36-1801, 36-1865 (1974) (renumbered as § 49-561 by Laws 1986, Ch. 368 § 39, eff. July 1, 1987 (1997)).

⁴³ MONT. REV. CODES. ANN. §§ 83-801 to 83-806 (1966) (assuming criminal jurisdiction over only the Flathead reservation) (repealed).

⁴⁴ IOWA CODE ANN. §§ 1.12-1.14 (1995) (assuming civil jurisdiction over the Sac and Fox Reservation).

full jurisdiction over most judicial matters on reservations.⁴⁵ Florida is the only state that has opted to assume full Public Law 280 jurisdiction on the same level as the mandatory Public Law 280 states.⁴⁶

Congress amended Public Law 280 in 1968 to require tribal consent for further state assumptions of jurisdiction.⁴⁷ No state has assumed further jurisdiction over crimes committed in Indian country since this amendment.

The 1968 amendments also allowed states to retrocede jurisdiction back to tribes.⁴⁸ Five states have returned jurisdiction to certain tribes pursuant to this amendment. Minnesota,⁴⁹ Wisconsin,⁵⁰ and Nebraska⁵¹ each returned complete jurisdiction over crimes on one reservation to the federal government. In addition, Washington returned jurisdiction to two tribes,⁵² and Nevada returned jurisdiction to nearly all tribes.⁵³

In practice, this meant that tribes received jurisdiction over minor crimes, as the federal government merely reclaimed criminal jurisdiction over major crimes while returning jurisdic-

⁴⁵ WASH. REV. CODE ANN. §§ 37.12.010-37.12.070 (1991) (assuming full Public Law 280 jurisdiction over non-trust land and over eight major subject areas on trust land).

⁴⁶ FLA. STAT. ANN. §285.16 (1999).

⁴⁷ 25 U.S.C. § 1326 (1994). Since this amendment, only Utah has passed legislation enabling further jurisdictional assumptions. No tribe in Utah has consented to further state assumptions of jurisdiction.

⁴⁸ 25 U.S.C. § 1323 (1994).

⁴⁹ 40 Fed. Reg. 4026 (1975) (retroceding jurisdiction to the Nett Lake Reservation).

⁵⁰ 41 Fed. Reg. 8516 (1976) (retroceding jurisdiction to the Menominee Reservation).

⁵¹ 35 Fed. Reg. 16,598 (1970) (retroceding jurisdiction to the Omaha Reservation).

⁵² 37 Fed. Reg. 7353 (1972) (retroceding jurisdiction to the Port Madison Reservation); 34 Fed. Reg. 14,228 (1969) (retroceding jurisdiction to the Quinalt Reservation).

⁵³ 40 Fed. Reg. 27501 (1975). This legislative retrocession concluded Nevada's strange relationship with Public Law 280. Nevada initially opted in 1968 for full Public Law 280 jurisdiction, but allowed counties to opt out if desired. Three years later, Nevada began to require tribal consent for assuming jurisdiction. In 1975, Nevada then provided for retrocession except for tribes explicitly consenting to continued state jurisdiction. *Id.*

tion over minor crimes to the tribes.⁵⁴ This essentially returned the jurisdictional division on those tribes to the way it had been prior to Public Law 280.

Congress has not amended Public Law 280 since 1968.

C. EFFECTS

Despite Congress' stated intention to "reduc[e] lawlessness" on Indian lands,⁵⁵ crime on Indian reservations has actually increased during the tenure of Public Law 280.⁵⁶ The federal government recognized as much by 1975.⁵⁷ In a revealing report, a Department of Justice task force documented the near-total breakdown of internal law enforcement among tribes, especially those in Public Law 280 states.⁵⁸ The inescapable conclusion was that neither the states nor the tribes effectively enforced laws (either traditional tribal laws or American constitutional laws) in Indian country in the six Public Law 280 states.⁵⁹ In addition, the Justice Department report calculated that the rate of violent crime on Indian reservations in the Public Law 280 states was 50 percent higher than in rural America as a whole.⁶⁰

A 1999 Justice Department report confirms that crime rates within tribes in Public Law 280 states remain much higher than within tribes in non-Public Law 280 states.⁶¹ Using statistics

⁵⁴ See Major Crimes Act, 18 U.S.C. §§ 1153, 3242 (1994), which regulates the division of criminal jurisdiction between tribes and the federal government.

⁵⁵ S. REP. NO. 83-699, at 5 (1953).

⁵⁶ See DORIS MEISSNER, U.S. DEPT. OF JUSTICE, REPORT ON THE TASK FORCE ON INDIAN MATTERS 23 (1975) (hereinafter "Meissner Report"), and LAWRENCE A. GREENFIELD & STEVEN K. SMITH, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME 20 (1999) (hereinafter "1999 D.O.J. Report"). The impact of Public Law 280 should not be dismissed because it covers only six states. Of the nearly 500 federally-recognized tribes and Native Villages, 359 are within the borders of the six "mandatory" Public Law 280 states. UTTER, *supra* note 23, at 155.

⁵⁷ See Meissner Report, *supra* note 56, at 23.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ *Id.* Unfortunately, there are no reliable figures for tribal crime before Public Law 280's passage, therefore making a comparison to pre-PL 280 conditions impossible.

⁶¹ 1999 D.O.J. Report, *supra* note 56, at 20.

from the Federal Bureau of Investigation's Uniform Crime Reports and the Bureau of the Census, the findings of the report "reveal a disturbing picture of American Indian involvement in crime as both victims and offenders."⁶² The report, while illustrating the generally high crime rate on Indian lands, documents the especially troubled crime rates in tribes in Public Law 280 states.⁶³

Clear examples of this phenomenon are the murder rates for Indians in the states with the ten highest reservation populations.⁶⁴ Of these states, five maintain criminal jurisdiction over Indian lands via Public Law 280.⁶⁵ In these five Public Law 280 states, Indian murder rates are markedly disproportionate to the percentage of Indians in the resident population. In Minnesota, for example, 7.4% of all murder victims between 1976 and 1996 were Indians, while only 1.2% of the population was Indian.⁶⁶ Oregon presents similar numbers (2.7% of murder victims, 1.4% of population),⁶⁷ as does Alaska (28.0% of murder victims, 15.5% of population).⁶⁸

The relative murder and population rates of tribes in non-Public Law 280 states are in direct contrast to tribes in Public Law 280 states. The same study indicates that Oklahoma Indians made up only 6.2% of murder victims, though they constituted 8.1% of the state's population.⁶⁹ Studies of Arizona (4.1% of murder victims, 5.8% of population)⁷⁰ and New Mexico (7.5% of murder victims, 8.9% of population)⁷¹ yield similar results.

⁶² *Id.* at iii.

⁶³ *Id.* at 20.

⁶⁴ *Id.* at 20, tbl. 26.

⁶⁵ These five are California, Alaska, Minnesota, Oregon, and Washington. The first four listed are "mandatory" Public Law 280 states. Washington opted into Public Law 280 in 1964 for nearly total criminal jurisdiction over most reservations.

⁶⁶ See 1999 D.O.J. Report, *supra* note 56, at 20, tbl. 26.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *id.*

The crime problems for tribes in Public Law 280 states stem both from a lack of funding for law enforcement and from the breakdown of tribal justice systems. Congress drastically reduced funding for tribal law enforcement when it handed the states jurisdiction for crimes committed on Indian lands but did not appropriate any money for the exercise of such jurisdiction.⁷² Prior to the enactment of Public Law 280, the federal government, through the Bureau of Indian Affairs ("B.I.A."), provided law enforcement for tribes.⁷³ After Public Law 280's passage, the B.I.A. abandoned its police role, and the states generally refused to pick up the law-enforcement slack.⁷⁴ Public Law 280 states also declined to provide tribes with money to develop their own law enforcement agencies.⁷⁵ Furthermore, Public Law 280 states either refused to significantly supplement their own police forces for tribal patrol and enforcement, or believed that Public Law 280 prevented state entrance into particular tribal problems.⁷⁶ A particularly egregious example occurred in California in the 1970s,⁷⁷ when the Torres Martinez tribe suffered environmental pollution due to local companies' dumping of industrial sludge onto tribal lands. Local authorities failed to respond to this criminal act, despite awareness of the problem.⁷⁸ Federal authorities, with no duty to act in this situation, dragged their feet for so long before intervening that significant damage was done to tribal lands.⁷⁹

⁷² See *supra* notes 28-29, 71-87 and accompanying text for a discussion of Congress' financial motivations in passing Public Law 280 and the result this produced.

⁷³ See GOLDBERG-AMBROSE, *supra* note 7, at 20.

⁷⁴ See *id.* at 20-22.

⁷⁵ See *id.* at 11-12.

⁷⁶ See *id.* at 11-17 (explaining that Public Law 280 specifically prevented states from exercising jurisdiction over the fate of the land held in trust for tribes by the federal government).

⁷⁷ See *id.* at 12-20.

⁷⁸ See *id.* While this particular problem was directly caused by a state's *failure* to exercise authority, the problem was precipitated by Public Law 280's *granting* of state jurisdiction. Because the tribe involved stopped receiving federal funding and support for its justice system per Public Law 280, the tribe became entirely dependent upon state intervention, which in this case produced an enforcement vacuum.

⁷⁹ See GOLDBERG-AMBROSE, *supra* note 7, at 12-20; see also Terry L. Colvin, 5 *Indian Tribes Plan Joint Effort Against Crime, Drugs*, SAN DIEGO TRIB., Feb. 20, 1988, at B-8 (quoting Rick Mazetti, tribal administrator for the Rincon Indians near Valley Center,

Not only did tribes suffer a lack of law enforcement, but tribes also abandoned their independent, traditional forms of tribal justice. Perhaps this is explained by the states' view that Public Law 280 granted them *exclusive* jurisdiction over crimes on Indian lands.⁸⁰ For whatever reason, tribal courts in Public Law 280 states lost the funding that previously came from the federal government,⁸¹ and the state governments did not fill that funding void.⁸² Ultimately, the tribal practice of traditional law fell precipitously in Public Law 280 states.⁸³

The early 1990s brought signs that the damage wrought by Public Law 280 would be addressed, and possibly combated. Congress passed the Indian Tribal Justice Act ("ITJA") in 1993,⁸⁴ which called for \$58.4 million in annual appropriations specifically for the development of tribal justice systems.⁸⁵ The act stated that "tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation."⁸⁶ Furthermore, the Clinton Administration adopted the position that the appropriate regulators of tribal justice are the tribes themselves.⁸⁷

However, the failed implementation of ITJA over the past four years largely eclipsed the Act's promise of change for tribes under Public Law 280.⁸⁸ The money earmarked by the ITJA never reached tribes in Public Law 280 states.⁸⁹ The Act

California, saying his tribe was "caught between the federal government, which, by law, can't provide police protection, and the sheriff's office, which doesn't have the manpower for more assistance").

⁸⁰ See John J. Harte, *Validity of a State Court's Exercise of Concurrent Jurisdiction Over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court*, 21 AM. INDIAN L. REV. 63, 65 (1997).

⁸¹ See GOLDBERG-AMBROSE, *supra* note 7, at 48-56.

⁸² See *id.*

⁸³ See *id.* at 55-61.

⁸⁴ 25 U.S.C. §§ 3601-3621 (1993).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 113 (1995).

⁸⁸ See Joseph A. Myers & Elbridge Cochise, *Development of Tribal Courts: Past, Present, and Future*, 79 JUDICATURE 147, 148-49 (1995).

⁸⁹ See *id.*

granted that \$58.4 million to the B.I.A., not to the tribes themselves.⁹⁰ The B.I.A., inexplicably, never took a very large slice out of that pie. In 1996, for example, the B.I.A. requested only \$5 million of the \$58.4 million available.⁹¹ Thus, the ITJA failed to deliver money to the tribes for the development of tribal law enforcement and adjudication.

Public Law 280 may have affected states as well as tribes,⁹² though the evidence regarding its effect on states is unclear.⁹³ In the 1980s, states recognized that Public Law 280 was "politically ineffective, expensive, and unpopular with both Indians and non-Indians."⁹⁴ This led some states to request that the federal government and/or the tribes reassume jurisdiction.⁹⁵

States no doubt also felt the economic cost of Public Law 280. Since Public Law 280 attached no funds to the jurisdiction forced onto states,⁹⁶ the result was obviously increased cost to states with no offsetting increase in revenues. Thus, Congress disregarded state fiscal concerns.⁹⁷ Some observers recognized as much even before Congress passed Public Law 280. During the floor debate on Public Law 280, Congressman Young asserted, "[s]o far as my State is concerned, it would be a large burden on existing costs of judicial procedure. I think it is only

⁹⁰ *See id.*

⁹¹ *See id.* at 148.

⁹² *See* VINE DELORIA, JR. & CLIFFORD LYLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 176 (1983) (describing Public Law 280's effect on tribes as "devastating").

⁹³ This is partly because scholarship regarding Public Law 280's effect on state interests has yet to develop.

⁹⁴ *THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION* 258 (Bruce Johansen ed. 1998).

⁹⁵ *See id.* *See supra* notes 47-53 and accompanying text for a discussion of which states requested retrocession of criminal jurisdiction. Note that most of these states returned jurisdiction to the federal government, not to the tribe. Note also that the federal laws governing jurisdiction during this era only allowed *states* to request that their criminal jurisdiction be returned; the tribes themselves had no power to request return of jurisdiction over intra-tribal crimes.

⁹⁶ 18 U.S.C. § 1162 (1994) (provides for no extra funding pursuant to the assumption of jurisdiction and does not alter Indians tax-exempt status regarding income taxes).

⁹⁷ *See* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 551 (1975) (setting the framework for the jurisdictional clashes regarding Public Law 280 that have occurred in the last 25 years).

right that the Federal Government should make some contribution for that."⁹⁸ Not only did Public Law 280 impact states' bottom line directly, states also suffered when crime rose on Indian lands. Increases in crime such as those resulting from Public Law 280 create significant social, transactional, and economic costs.⁹⁹

II. TRIBAL COURTS—HOW THEY WORK AND THEIR RELATION TO CRIME AND SOVEREIGNTY.

Public Law 280's deleterious effects on tribes are largely tied to the law's impact on tribal courts. Public Law 280 either entirely decimated or significantly eroded the justice systems in place within most tribes in Public Law 280 states.¹⁰⁰ To determine the source and effects of this breakdown, it is necessary to examine what kind of courts exist in tribes, how they function, their value to tribes, and their effect on tribal crime rates.

A. STRUCTURE OF TRIBAL COURTS

While the diversity of Indian tribes makes neat categorization of tribal justice systems impossible,¹⁰¹ some generalizations can be made from historical and anecdotal evidence.

Many of the modern tribal courts originated in the Courts of Indian Offenses.¹⁰² The federal government imposed these

⁹⁸ *Bryan v. Itasca County*, 426 U.S. 373, 383 (1976) (recounting the debate regarding Public Law 280 within the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (1953)).

⁹⁹ See *supra* notes 55-70 and accompanying text for a discussion of Public Law 280's effect on crime rates.

¹⁰⁰ See BRADFORD W. MORSE, *INDIAN TRIBAL COURTS IN THE UNITED STATES: A MODEL FOR CANADA?* 12 (1980) (noting that "the effect of Public Law 280 . . . was to emasculate the tribal courts in those particular states to such an extent that most have disappeared").

¹⁰¹ See Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 137 (1995) ("there are more than 535 potentially identifiable discreet systems of [tribal] adjudication, each of which must account for cultures in their midst that are in volatile transition").

¹⁰² Courts of Indian Offenses were created by the Bureau of Indian Affairs in 1883 to enforce the Major Crimes Act. The B.I.A. used these courts to "fill the void caused by declines in traditional authority and to reduce the remaining power of traditional

courts on Indians during the late 19th century.¹⁰³ The Courts of Indian Offenses were, as one commentator notes, "tools of colonialism imposed . . . to keep order on Indian reservations while educating tribal people in the dominant culture's norms."¹⁰⁴ The Indian Reorganization Act of 1934 abolished the Courts of Indian Offenses and encouraged tribes to adopt their own versions of the Anglo-American justice system.¹⁰⁵ The development of Anglo-American-style tribal justice systems accelerated with the 1975 passage of the Indian Self Determination and Education Assistance Act, which provided Indians with more discretion in the administration of federal programs.¹⁰⁶

While the workings of tribal courts vary widely, they share certain procedural and jurisdictional notions. Thanks to the Indian Civil Rights Act of 1968,¹⁰⁷ modern tribal courts observe the same due process rights that state and federal courts observe, even where due process rights are at odds with tribal customs.¹⁰⁸ The criminal jurisdiction of tribal courts in non-Public Law 280 states is exclusive¹⁰⁹ over crimes not covered by the Major Crimes Act and concurrent with federal courts over crimes covered by the Major Crimes Act if the offender is an Indian. Tribal courts have no jurisdiction over crimes covered by the Major Crimes Act if the offender is a non-Indian.¹¹⁰ In Public Law 280 states, tribal courts' jurisdiction varies, depending on how vigorously the state enforces its exclusive criminal jurisdiction.¹¹¹

chiefs . . . Congress never expressly authorized these courts." Cohen, *supra* note 12, at 333.

¹⁰³ See Johansen, *supra* note 4, at 70.

¹⁰⁴ See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 291 (1998).

¹⁰⁵ 25 U.S.C. §§ 461-479 (1994).

¹⁰⁶ 25 U.S.C. § 450 (1994). This act had no impact on justice systems in Public Law 280 states, however, as no federal money flowed to tribal justice systems in Public Law 280 states.

¹⁰⁷ 25 U.S.C. § 1301 (1994).

¹⁰⁸ See Johansen, *supra* note 4, at 138.

¹⁰⁹ The *civil* jurisdiction of tribes is a matter of enough complexity in its own right to warrant a separate examination.

¹¹⁰ See GILBERT L. HALL, AN INTRODUCTION TO CRIMINAL JURISDICTION IN INDIAN COUNTRY app. at 46-47 (1981).

¹¹¹ See *id.*

Today, many tribal courts employ a combination of Anglo-American and traditional tribal justice notions.¹¹² However, tribal courts vary in the extent to which traditional notions of community and punishment play a role in courts.¹¹³ The tribal courts that combine American and traditional notions typically are two-tiered.¹¹⁴ That is, most systems have both trial and appellate courts. Interestingly, the appellate courts often cover multiple tribes.¹¹⁵ These developed tribal justice systems mirror, to a limited extent, those found on the state and federal levels, embracing forms of the adversarial system of litigation.¹¹⁶

Modern tribal courts have also followed the Anglo-American model of specialization.¹¹⁷ Thus, in the 1990s, many tribes developed courts that deal exclusively with gaming, small claims, and administrative issues.¹¹⁸

While this type of system is generally favored by outside observers, tribal courts built on Anglo-American principles often struggle for legitimacy among tribal members.¹¹⁹ Part of the reason that tribal courts face an uphill battle in gaining tribal acceptance is that these courts must withstand the scrutiny of federal and state governments.¹²⁰ Federal and state governments possess the power to erode tribal court authority and willingly exercise that power.¹²¹ Consequently, in order to retain

¹¹² See Vicenti, *supra* note 101, at 140 (classifying developing tribal courts into five categories, with "the hybrid American-traditional model far outnumber[ing] the others).

¹¹³ See ROBERT D. COOTER & WOLFGANG FIKENTSCHER, IS THERE INDIAN COMMON LAW? THE ROLE OF CUSTOM IN AMERICAN TRIBAL COURTS 20-33 (1994).

¹¹⁴ See Newton, *supra* note 104, at 294.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See generally *id.*

¹¹⁸ See *id.* at 294.

¹¹⁹ See *id.*

¹²⁰ See Newton, *supra* note 104, at 294. See also Frank Pommersheim, "Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. COLO. L. REV. 123, 130-44 (2000).

¹²¹ See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (denying tribes the right to prosecute non-Indians); *State v. Perank*, 858 P.2d 927, 934 (Utah 1992) (holding that the Uintah Indian Reservation was smaller than the Indian defendant claimed).

authority, tribal courts must adopt certain characteristics that satisfy requirements imposed by external governments.¹²²

This is not to suggest that tribal justice systems routinely fail to account for tribal norms and customs, however. For example, the Apache tribe embraces its history of creating sentencing strategies that aim to develop the offender's contrition and remorse.¹²³ Apache legal disputes, therefore, often focus on creating a remedy that promotes reintegration of the offender into society, as well as restoring the reputation of the victim.¹²⁴

Another example of how modern tribal courts embrace tribal custom is found on the Navajo reservation. A pair of legal anthropologists¹²⁵ studying the Navajo court system in the 1980s found that "the enforcement of social norms pervades tribal courts. [The Navajo Chief Judge] uses Navajo common law daily to decide cases."¹²⁶ In fact, the Navajo code provides courts with criteria for situations where custom is determinative¹²⁷ and states that "[w]here any doubts arise as to the customs and usages of the Navajo Nation the court may request the advice of counselors familiar with these customs and usages."¹²⁸

¹²² See COOTER & FIKENTSCHER, *supra* note 113, at 23-28 (discussing how tribal court justices feel pressure to take no part in the executive administration of the tribe, despite the custom that judges also help make and enforce rules in certain tribes, in order to appear independent and thereby receive funding).

¹²³ See Vicenti, *supra* note 101, at 138.

¹²⁴ See *id.*

¹²⁵ Note the joke that the typical Navajo family consists of a husband, wife, children, grandparents, an uncle or two, and an anthropologist. The joke may be funny, but some Indian intellectuals bristle at the thought of so much poking and prodding of Indian culture.

¹²⁶ See COOTER & FIKENTSCHER, *supra* note 113, at 8.

¹²⁷ See *id.* at 29 (quoting the Navajo code as stating that "[i]n all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation.")

¹²⁸ *Id.*

B. INDIAN JUSTICE SYSTEMS AND SOVEREIGNTY

In the early years of the United States, federal courts recognized Indian tribes as sovereign nations.¹²⁹ The courts said this sovereignty was subject to restriction by Congress, however.¹³⁰ Therefore, the baseline assumption, as developed by federal common law, is that tribes are sovereign and that sovereignty is only restricted by explicit acts of Congress. A leading authority on federal Indian law even goes so far as to argue that tribal sovereignty was not created by the federal government, but existed before and independent of the United States.¹³¹

Whatever the source of tribal sovereignty, well-developed Indian justice systems create stronger tribal sovereigns. President Clinton and his Administration's Department of Justice believe that Indian justice systems should balance Anglo-American ideals with traditional tribal problem-solving methods, as sovereignty is strengthened most if tribal courts can both articulate tribal customs and earn the respect of federal and state governments.¹³²

Sovereignty is directly related to legal processes. At least one governmental scholar argues that "sovereignty, or acting like a government, centers around questions of jurisdiction and the ability to tax and zone."¹³³ Congress' recent positions on Indian affairs illustrate this point. Since the mid-1970s, Congress has promulgated a policy of self-determination for Indians that ultimately seeks stronger Indian sovereigns.¹³⁴ At the same

¹²⁹ See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

¹³⁰ *Id.*

¹³¹ COHEN, *supra* note 12, at 229.

¹³² See Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 114 (1995) (stating that tribal courts "can act to preserve tribal culture and customs. Tribal values are affirmed not only in decisions about such issues as children, contract disputes, and sentencing, but also in the process by which the decisions are made, the way disputes are resolved, and the manner in which justice is done"). Of course, tribes desire stronger tribal sovereignty as well. See Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 133 (1995).

¹³³ LINDA MEDCALF, *LAW AND IDENTITY* 61 (1978).

¹³⁴ For example, Congress passed the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 (1994), which outlined the removal of federal

time, Congress passed the Indian Tribal Justice Act in 1993, which stated that tribal courts are "the appropriate forums for the adjudication of disputes affecting personal and property rights" and they are "essential to the maintenance of the culture and identity of Indian tribes."¹³⁵ Tribal culture and identity are often at odds with the norms enforced by Anglo-American legal systems.¹³⁶ One Indian law scholar notes the differences between customs embraced by tribal law and norms enforced by American law: tribal law focuses on "communal rights" while American law focuses on individual rights; tribal law emphasizes trusting relationships rather than adversarial relationships; and apology and forgiveness are paramount in tribal law, whereas American law stresses "vindication to society."¹³⁷

For Indians, therefore, sovereignty means the ability to operate a justice system that takes into account the goals and traditions of tribal societies, without direct regard for Anglo-American ideals. These goals include maintaining a complete society.¹³⁸ Indian justice systems are often guided by a "holistic philosophy"¹³⁹ that involves a complex series of relationships from the very beginning of a legal dispute.¹⁴⁰ It is the unimpeded expression of these norms, made possible with a strong justice system, that indicates and develops sovereignty.

domination of programs for Indians. Congress also passed the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1994), which limited the power of state courts to hear Indian child custody cases. Also, Congress passed the Indian Gaming Regulation Act in 1988, 18 U.S.C. § 1166, 25 U.S.C. §§ 2701-2721 (1994), which stated that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(1994).

¹³⁵ Indian Tribal Justice Support Act, 25 U.S.C. § 3601(5), (7) (1993).

¹³⁶ See Melton, *supra* note 132, at 126 (noting that tribal justice systems generally focus on restoration while the American system focuses on retribution).

¹³⁷ *Id.*

¹³⁸ *Id.* at 126-27.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

C. SOVEREIGNTY AND CRIME

Stronger tribal sovereigns maintain lower crime rates when sovereignty includes the ability to enforce tribal norms through justice mechanisms.¹⁴¹

An anthropological study of tribal courts in the early 1970s¹⁴² illustrates the connection between sovereignty and crime.¹⁴³ This study considered the tribal justice systems of three reservations: the Standing Rock tribe (small in population and resources, located in North Dakota);¹⁴⁴ the Blackfeet tribe (also small in population and resources, located in Montana);¹⁴⁵ and the Navajo reservation (large in population and resources, located primarily in northeast Arizona).¹⁴⁶ The two smaller tribes reported crime rates much higher than in the Navajo reservation.¹⁴⁷ The study depicts the Standing Rock tribe as employing very little "white man's law." That is, the Standing

¹⁴¹ It is also noted that those tribes with the most developed court systems—the ones that embrace both tribal customs and American procedures—are exclusively in non-Public Law 280 states. The question remains, however: What has caused the drop in crime rates in these states? Is the drop a result of greater sovereignty or merely not being subject to state criminal jurisdiction? The answer is impossibly unclear, because sovereignty and jurisdiction are so intricately related.

¹⁴² This study actually is one of the most recent studies of crime on specific Indian tribes. Scholarship and empirical studies in this area are desperately needed if a true understanding of tribal crime is ever to be arrived at.

¹⁴³ See SAMUEL J. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS* (1978). This study provides one of the only trustworthy sources of crime statistics for Indian lands. However, the author's view of tribal courts is clearly one of disdain ("All steps taken to preserve the tribal courts or the reservation system can only be rearguard actions. The reservations, with their courts and other institutions, are destined to disappear in time The time appears to be ripe to expose the temporary, psychological purposes of these institutions and to inform the Indians of more permanent, functional alternatives." *Id.* at 101-102.). This view renders the conclusions in the study less valuable than the hard evidence presented.

¹⁴⁴ *Id.* at 56-57.

¹⁴⁵ *Id.* at 67-69.

¹⁴⁶ *Id.* at 79-81.

¹⁴⁷ See *id.* at 28-33. In the Standing Rock reservation in 1972, 1,626 offenses were charged in a population of 4,460, yielding a rate of 36 percent of the population. The rate on the Blackfeet reservation for 1973 was 55 percent (3,319 offenses, population just over 6,000). The rate on the Navajo reservation for 1974 was 26 percent (about 26,000 offenses in a population around 100,000).

Rock courts administer justice very informally and exclusively through Indians trained in neither Anglo-American nor Indian law.¹⁴⁸ The Blackfeet courts, by contrast, closely mirrored Anglo-American justice systems.¹⁴⁹ However, their judges were not trained and their justice system was not well-funded.¹⁵⁰

So, even though the Blackfeet and Standing Rock tribes employed opposite approaches to tribal justice, both suffered from high crime rates.¹⁵¹ The Navajo reservation, on the other hand, had a much lower crime rate than either of the other tribes.¹⁵² The Navajo courts are characterized in the study as run by people trained in both American and tribal law.¹⁵³ The decisions handed down by these courts embrace much of American legal procedure but maintain a unique application of Indian norms.¹⁵⁴ This is the hallmark of the well-developed tribal justice system, and it represents an example of what a tribal court can be when provided with adequate funding.¹⁵⁵

III. INDIAN GAMING

Indian reservations have struggled economically since created by the federal government in the mid-19th century. In the early 1990s, thirty-nine percent of Indians were jobless and forty percent lived below the poverty line.¹⁵⁶ The last twenty-five years have seen Indian reservations make an economic impact

¹⁴⁸ See *id.* at 56-67.

¹⁴⁹ See BRAKEL, *supra* note 143, at 67-68 (noting that the Blackfeet court "has the reputation of being a 'good' court among white 'Indian experts,' who are apologetic about the shape of the Standing Rock tribal court specifically, but sold on the tribal court *concept*." *Id.* at 69 (emphasis in original)).

¹⁵⁰ See *id.* at 78.

¹⁵¹ See *id.* at 56-67.

¹⁵² *Id.*

¹⁵³ See BRAKEL, *supra* note 143, at 81-82 (noting the facilities and decorum of Navajo courts).

¹⁵⁴ See *id.* at 80-87 (describing resolutions focused on reparation and reintroduction into society).

¹⁵⁵ See generally Reno, *supra* note 132 (suggesting that the ideal tribal court should embrace American procedures and certain individual rights while applying uniquely tribal norms and customs).

¹⁵⁶ 138 CONG. REC. S3425-S3426 (daily ed. Mar. 12, 1992).

in one area, however: gambling.¹⁵⁷ Gaming brought economic opportunities to tribes on a scale never before seen in Indian country.¹⁵⁸ As might be expected, though, as the amount of money flowing onto tribal lands via gaming increased, so too did governmental interest in Indian gaming. This interplay of Indian, state, and federal interests regarding Indian gaming profoundly affects tribes today. Ultimately, Indian gaming revenues stand as a potential balm for the ills of tribal justice systems in Public Law 280 states.¹⁵⁹

The recent history of Indian gaming can be divided into three stages—(1) before and shortly after *California v. Cabazon Band of Mission Indians*,¹⁶⁰ (2) the first ten years of the Indian Gaming Regulatory Act;¹⁶¹ and (3) the current state of Indian gaming, which is dictated largely by *Seminole Tribe of Florida v. Florida*.¹⁶²

A. CABAZON AND THE CREATION OF MODERN INDIAN GAMING

Contemporary Indian gaming started in 1979 when the Seminole Tribe of Florida opened a modern bingo hall¹⁶³ in contravention of existing Florida law.¹⁶⁴ A county sheriff stated that he would enforce the Florida statute prohibiting non-

¹⁵⁷ Commission Report, *supra* note 18, at 6-2.

¹⁵⁸ See Carole Goldberg-Ambrose, *Pursuing Tribal Economic Development at The Bingo Palace*, 29 ARIZ. ST. L.J. 97 (1997).

¹⁵⁹ Indian gaming obviously also looms as vitally important for tribes in non-Public Law 280 states. After all, a recent Congressional study concluded that "major federal expenditures on behalf of Native Americans have declined during the period FY 1975 through FY 1999 (in constant dollars)." Commission Report, *supra* note 18, at 6-6. However, the blight of crime on reservations in non-Public Law 280 states—while it is significant—is not the concern of this paper.

¹⁶⁰ 480 U.S. 202 (1987).

¹⁶¹ 18 U.S.C. §§ 1166-1168 (1988), 25 U.S.C. §§ 2701-2721 (1994).

¹⁶² 115 S. Ct. 932 (1995).

¹⁶³ See *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 311 (5th Cir. 1981).

¹⁶⁴ FLA. STAT. ANN. § 849.093(2), (3) (West 1979) (repealed 1991).

charitable bingo;¹⁶⁵ the tribe went to federal court to obtain an injunction.¹⁶⁶

In resolving this case, the Fifth Circuit introduced a concept that is still central to Indian gaming laws today. The court asked "whether the state statute in question represents an exercise of the state's regulatory or prohibiting authority."¹⁶⁷ In framing the question this way, the Fifth Circuit embraced established Supreme Court doctrine allowing state interference with tribes when gaming is generally prohibited rather than merely regulated.¹⁶⁸ Put simply, if Florida picked and chose when and where bingo could take place, then the state could not regulate Indian bingo.¹⁶⁹ On the other hand, if the state outlawed bingo across the board, then it could enforce the prohibition against the tribe.¹⁷⁰ In this case, the Fifth Circuit held that Florida's bingo statute was regulatory because it allowed charitable and civic bingo.¹⁷¹

Other federal courts followed the Fifth Circuit's lead on this issue and analyzed attempted state interference with Indian bingo under the regulation/prohibition dichotomy.¹⁷² Because most states exempted charities from their anti-bingo statutes, these bingo laws were deemed regulation rather than prohibition.¹⁷³ More tribes opened bingo halls. Gross revenues from

¹⁶⁵ See *Seminole Tribe of Florida*, 658 F.2d at 311.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.* at 313.

¹⁶⁸ See *Bryan v. Itasca County*, 426 U.S. 373 (1976). At least one scholar has criticized Bryan's criminal/regulatory distinction because "under [Bryan's] rationale, tribal sovereignty is a separate question from whether the general intent of a statute is criminal or regulatory." Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. REV. 1333, 1361 (1999).

¹⁶⁹ See *Seminole Tribe of Florida*, 658 F.2d at 313.

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 315.

¹⁷² *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712, 712 (W.D. Wis. 1981) (tribe in Wisconsin won the right to open a bingo hall). See also *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1185 (9th Cir. 1982) (tribe in California won the right to open bingo hall without state interference).

¹⁷³ See *Oneida Tribe of Indians*, 518 F. Supp. at 712; *Barona Group of Capitan Grande Band of Mission Indians*, 694 F.2d at 1185.

more than 100 Indian gaming facilities across the country topped \$100 million by 1986.¹⁷⁴

As the victories in federal court for tribal gaming accumulated, the governors and law enforcement officials in states in which Indian gambling blossomed came to resent the growing revenue streams.¹⁷⁵ The states took their grievances to the Supreme Court in 1987 in *California v. Cabazon*.¹⁷⁶

Though it was the leading Supreme Court opinion on Indian gaming at the time it was made, the *Cabazon* opinion was surprisingly simple and enjoyed only a short life as the law of the land. The Court employed the same rationale as had lower courts in the previous five years, resting its analysis on the regulation/prohibition distinction.¹⁷⁷ In this case, the Court affirmed the Ninth Circuit's ruling that California merely regulated, and did not prohibit, "gambling in general and bingo in particular."¹⁷⁸ California, therefore, could not enforce its local ordinances against the tribe for holding bingo and card games on Indian land.¹⁷⁹

Cabazon capped a decade of significant victories in federal court for Indians hoping to catch the gaming gravy train. Congress took control of that train, however, in the year following *Cabazon* when it passed the Indian Gaming Regulatory Act (IGRA).¹⁸⁰ IGRA comprehensively regulated the creation and operation of Indian gaming facilities. The general federal regulation of Indian gaming did not necessarily pose any problems for gaming tribes. However, the particular provision of IGRA

¹⁷⁴ S. REP. NO. 99-493, at 2 (1986).

¹⁷⁵ States have a long history of attempting to remove wealth from Indian lands. The historian Howard Zinn illustrates this pattern during colonial times. See ZINN, *supra* note 1, at 78-94. Professor Zinn notes instances of colonists massacring Indians north of Boston merely for a piece of land slightly more valuable than their own. *Id.* at 87. This pattern is also evidenced by Georgia's acts that precipitated the *Worcester* decision. Georgia's entire motivation in dominating Indian land was that gold had recently been discovered on land that was previously thought worthless. See Ronald A. Berutti, *The Cherokee Cases: The Fight to Save the Supreme Court and the Cherokee Indians*, 17 AM. INDIAN L. REV. 291, 296 (1992).

¹⁷⁶ 480 U.S. 202 (1987).

¹⁷⁷ See *id.* at 211.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 121.

¹⁸⁰ 18 U.S.C. §§ 1166-1168 (1988); 25 U.S.C. §§ 2701-2721 (1994).

that required tribes to work with states in order to open a gaming facility *did* create large-scale impediments for gaming-desirous tribes.

B. IGRA

IGRA created three classes of Indian gaming and a federal body to regulate the operation of these classes.¹⁸¹ Class I games consist of traditional tribal games of chance, often those used in tribal ceremonies and celebrations.¹⁸² Tribes maintain exclusive control over this class of activities.

Class II games are bingo and card games that state laws allow at least some entities to operate.¹⁸³ Class II does not include blackjack or baccarat. A tribe can operate Class II games free from state and federal supervision, so long as neither state nor federal law prohibits the operation of the game.¹⁸⁴ IGRA also requires the tribe to enact a local ordinance governing the Class II gaming enterprise.¹⁸⁵ The Chairman of the National Indian Gaming Commission must approve this ordinance.¹⁸⁶

Finally, Indians retain much less control in deciding when and where to operate Class III games. All games not explicitly covered by either Class I or Class II are Class III games.¹⁸⁷ These include blackjack, slot machines, roulette and other highly sophisticated games.¹⁸⁸ Creating a Class III gaming facility requires two main steps: a tribe must first satisfy all of the demands for opening a Class II operation,¹⁸⁹ then negotiate an

¹⁸¹ *Id.* at §§ 2701-2721.

¹⁸² *Id.* at § 2703(6).

¹⁸³ *Id.* at § 2703(7).

¹⁸⁴ *Id.* at § 2710(b)(1)(A).

¹⁸⁵ *Id.* at § 2710(b)(1)(B).

¹⁸⁶ 25 U.S.C. § 2710 (b)(1)(B) (1994). The National Indian Gaming Commission is made up of three members, with the President selecting the Chairman and the Secretary of the Interior picking the other two members. *Id.* at § 2704(b)(1). The Chairman alone approves tribal ordinances creating Class II or Class III gaming facilities; the whole Commission has the power to levy civil fines, issue subpoenas, monitor gaming operations, and issue reports. *Id.* at §§ 2705-2706.

¹⁸⁷ *Id.* at § 2703(8).

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at § 2710(7)(B).

agreement with the state in which the gaming operation resides.¹⁹⁰

C. IGRA ERODED BY COURTS

IGRA's requirements for establishing a Class III gaming facility caused great complications for tribes desiring to open gaming halls.¹⁹¹ States and tribes—never good friends, especially in a contest for valuable resources¹⁹²—fought in federal court over the bilateral agreements required by IGRA before a tribe can operate a Class III gaming facility.¹⁹³

When tribes sued states in federal court, alleging that states refused to negotiate in good faith, as required by IGRA, states defended on grounds of sovereign immunity.¹⁹⁴ The Eighth,¹⁹⁵ Ninth,¹⁹⁶ Tenth,¹⁹⁷ and Eleventh¹⁹⁸ Circuits addressed the issue of whether states were subject to suit in federal court under IGRA. Of these decisions, only the Eleventh Circuit upheld a state's claim of immunity from suit under IGRA.¹⁹⁹

¹⁹⁰ *Id.* at § 2710(d)(1)(C).

¹⁹¹ See *infra* notes 196-211 and accompanying text.

¹⁹² See *supra* note 177 for discussion of history of states' attempts to secure wealth from Indian lands.

¹⁹³ See, e.g., *infra* notes 196-203.

¹⁹⁴ *Id.*

¹⁹⁵ *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 280-81 (8th Cir. 1993) (holding that Congress abrogated the states' traditional Eleventh Amendment immunity with the passage of IGRA. This holding extended to the Indian Commerce Clause the idea that Commerce Clause gives Congress power to abrogate the Eleventh Amendment. See *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989)).

¹⁹⁶ *Spokane Tribe of Indians v. Washington*, 23 F.3d 991, 998 (9th Cir. 1994) (following *Cheyenne River* and holding that tribes can take states to court under IGRA to force states to negotiate in good faith).

¹⁹⁷ *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1432 (10th Cir. 1994) (holding states' Eleventh Amendment immunity abrogated by IGRA and states are therefore subject to suit).

¹⁹⁸ *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1026-29 (11th Cir. 1994) (holding that the Indian Commerce Clause does not allow Congress to abrogate states' Eleventh Amendment immunity from suit. Thus, the Seminole tribe could not sue Florida).

¹⁹⁹ See *id.* at 1026-29.

Despite the Circuit Courts' generally Indian-friendly interpretations of IGRA, the Supreme Court decimated IGRA in 1996 when it decided *Seminole Indian Tribe of Florida v. Florida*,²⁰⁰ the appeal of the lone Circuit Court decision holding states immune from suit under IGRA.²⁰¹

Chief Justice Rehnquist authored the majority opinion in *Seminole* for a sharply divided court.²⁰² The opinion for the 5-4 majority first paid lip service to the importance of tribes and Congress' authority to regulate Indian affairs.²⁰³ The Court recounted a pair of fundamental notions of tribal sovereignty: (1) that tribes enjoyed political status prior to the existence of the United States; and (2) that tribes are distinct from states and the United States.²⁰⁴ Rehnquist's opinion also recognized that the Indian Commerce Clause "accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."²⁰⁵

Ultimately, however, the *Seminole* Court concluded that tribal sovereignty must defer to states' rights.²⁰⁶ So limited was Congress' power to abrogate state sovereign immunity, the Court concluded, that "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."²⁰⁷ With these words, the Court effectively denied Indians their only opportunity to enforce IGRA. Since then, Indians have not been able to confront states unwilling to negotiate the licensing of

²⁰⁰ 517 U.S. 44 (1996) (Souter, J., dissenting).

²⁰¹ *Id.*

²⁰² *Id.* at 47.

²⁰³ *See id.* at 48-51, 54.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 62.

²⁰⁶ *See Seminole Indian Tribe*, 517 U.S. at 63-76.

²⁰⁷ *Id.* at 72.

Class III gaming facilities.²⁰⁸ Congressional regulation of Indian gaming is, therefore, currently in a state of flux.²⁰⁹

D. SCOPE OF INDIAN GAMING AND ITS EFFECT ON TRIBES

Although *Seminole Tribe* effectively destroyed IGRA, Indian gaming has continued to grow since the decision. In the roughly ten years between the passage of IGRA and the *Seminole Tribe* decision, annual tribal gaming revenues grew from \$212 million to \$6.7 billion.²¹⁰ The growth of tribal gaming outpaced overall gaming growth in the same period.²¹¹

These vast sums are not shared equally by all Indians, however. The 20 largest Indian gaming facilities account for about half of all Indian gaming revenues;²¹² the next 85 largest account for only 41.2%.²¹³ Moreover, even though 146 tribes have Class III gaming operations, two-thirds of the 554 federally recognized tribes have no gaming at all.²¹⁴ Nevertheless, empirical evidence suggests that gaming has brought certain tribes economic benefits.²¹⁵

²⁰⁸ See Commission Report, *supra* note 18, at 6-10 (noting that the continuing effect of *Seminole Tribe* has frustrated efforts by some tribes to open Class III gaming facilities). This report was prepared pursuant to a Congressional resolution calling for a multi-year examination of gambling in the United States.

²⁰⁹ See *id.* at 6-24, recommendation 6.13 (calling for Congressional reconsideration of the mechanism for creating a Class III gaming facility).

²¹⁰ *Id.* at 6-1-6-2. Note that these numbers are in terms of absolute 1997 dollars. Thus, this thirty-fold increase does not include inflation.

²¹¹ *Id.* at 6-2. "For example, from 1996 to 1997, tribal gambling revenues increased by 16.5 percent, whereas commercial gambling revenues increased by 4.8 percent." *Id.*

²¹² *Id.*

²¹³ See Commission Report, *supra* note 18, at 6-2.

²¹⁴ *Id.*

²¹⁵ *Id.* at 6-16. The Report notes the reduction in unemployment among several tribes with gaming. For example, the Mille Lacs Band of Ojibwe—located in central Minnesota—reports a drop in the jobless rate from 60 percent to almost zero between 1991 and 1999. The tribe opened two Class III casinos in 1992, one of which now has a hotel, and is contemplating the building of a golf resort. This casino regularly attracts top entertainers, such as country and western musician Kenny Rogers.

Moreover, tribes have applied gaming profits to the development of critical social and municipal services.²¹⁶ Success on reservations with gaming is not only economic; the federal commission studying the subject found that "pride, optimism, hope, and opportunity have accompanied the revenues and programs generated by Indian gambling facilities."²¹⁷ Some reservations have decided via referendum *not* to engage in gaming,²¹⁸ concerned that operating gaming facilities would undermine the cultural integrity of tribes.²¹⁹ It is worth noting, though, that a recent Congressional study concluded that "the revenues from Indian gambling have had a significant—and generally positive—impact on a number of reservations."²²⁰

IV. PROPOSAL

Public Law 280 has failed to provide Indian reservations with adequate justice systems. Many commentators believe this.²²¹ Still, crafting a workable solution to the problem of inadequate justice systems depends upon a focused understanding of why Public Law 280 has failed. Thus, any solution must incorporate the fact that localized law enforcement and adjudication is best at fighting crime on Indian reservations,²²² and the fact that meaningful tribal sovereignty depends upon having a

²¹⁶ See Goldberg-Ambrose, *supra* note 158, at 107 (noting the building of an ultra-modern fire department by the Sycuan tribe in California). Another example is the sparkling museum of Indian history and culture built by the Mille Lacs Band of Ojibwe.

²¹⁷ Commission Report, *supra* note 18, at 6-16.

²¹⁸ *Id.* at 6-2. (The most significant example of this is the Navajo Nation, the nation's largest reservation, which rejected a proposal to negotiate the opening of a casino).

²¹⁹ Commission Report, *supra* note 18, at 6-3.

²²⁰ *Id.* at 6-14.

²²¹ See Vanessa J. Jimenez and Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U.L. REV. 1627, 1632 (1998) (arguing that Public Law 280 is "one of the most controversial and detrimental federal statutes affecting Indian tribes"). See also GOLDBERG-AMBROSE, *supra* note 7, at ix (arguing that "Public Law 280 brought hardship to the affected reservations in the form of state jurisdiction and a withdrawal of federal services").

²²² See *supra* notes 54-70, 141-155 and accompanying text for a discussion of the relationship between self-government and crime (detailing higher crime rates on tribes in Public Law 280 states).

justice system that is truly independent and has adequate resources.²²³

Any solution must also take into account the scope and basis of the relationships between tribes and federal and state governments. Tribes are wards of the federal government; thus, the federal government owes tribes a duty.²²⁴ Furthermore, the federal government has long recognized tribes as distinct governmental entities separate from state or federal governments.²²⁵ Moreover, there is no inherent relationship between tribes and states;²²⁶ such a relationship exists only to the extent that those two entities develop one or the federal government creates one. Congress is therefore charged with a duty to legislate for the benefit of the tribes and without concern for tribal-state relationships. Here, the interests of the tribes demand that Congress amend Public Law 280 and the Indian Gaming Regulatory Act. Both must be amended since the former caused increases in crime within tribes and the latter has been rendered unenforceable by the courts.

Public Law 280 should be amended to return criminal jurisdiction to tribal courts. States need not have any criminal jurisdiction over crimes committed on Indian lands. In fact, state participation in this area historically has been bad for both tribes and states.²²⁷ The federal government's duty to Indians

²²³ See *supra* notes 141-155 and accompanying text for a discussion of this proposition.

²²⁴ See *supra* note 4 and accompanying text for a discussion of the federal trust responsibility and that doctrine's ramifications.

²²⁵ See *id.* The idea of tribes as entities dependent to the federal government should not be equated as placing the tribes into the American version of federalism. As dependent nations, tribes are not in a triangular relationship with the federal government; rather, tribes have a direct relationship with the federal government based on the idea that tribes are their own political entities. Tribes have no relationship with states.

²²⁶ See *Williams v. Lee*, 358 U.S. 217, 219-223 (1959). *Williams* held that the basic principle announced in *Worcester* survives today—"absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220.

²²⁷ See *supra* notes 54-90 and accompanying text for a discussion of effects of Public Law 280 on tribes. See *supra* notes 91-98 and accompanying text for a discussion of Public Law 280's effect on states.

demands that Congress restore the tribal justice and law enforcement systems.²²⁸

However, such restoration would require adequate funding. Proposals have ranged from increasing federal funding for these purposes to simply mandating the B.I.A. distribute the money available per the Indian Tribal Justice Act.²²⁹ Rather than give criminal jurisdiction to states without any corresponding funding (as under Public Law 280), Congress should guarantee the funding of tribal courts, as these courts—along with stronger tribal sovereignty—are best for tribes.

One possible (though still problematic) method of funding tribal courts is to revise IGRA. The IGRA was crippled by the states' regulatory role;²³⁰ an amended IGRA should not provide a state role in Indian gaming. Congress was never compelled to involve states in the Indian gaming decision-making process,²³¹ states have no authority over tribes and minimal interest in Indian gaming, and courts have rejected the argument that states can regulate Indian gaming under the guise of confronting organized crime.²³² Moreover, state claims to an overriding interest in preventing its citizens from gambling are largely unfounded. The states that operate lotteries, after all, reap far more money from state lotteries than tribes generate from Indian gaming.²³³ If a state challenged this proposed rendition of IGRA as lacking in concern for state interests, *Williams v. Lee* would control.²³⁴ Under *Williams*, absent a Congressional mandate or some agreement between the state and a tribe, a state

²²⁸ Many commentators have called for this. See, e.g., Foerster, *supra* note 168, at 1367 ("Congress should restore to tribes and the federal government sole criminal jurisdiction"); see also Jimenez and Song, *supra* note 222, at 1706 ("Indian tribes must have within their means the appropriate tools and support to mete out justice in their inherently community-based endeavors").

²²⁹ See Jimenez & Song, *supra* note 221, at 1697-1700; see also Foerster, *supra* note 168, at 1368-69.

²³⁰ See *supra* notes 194-209 and accompanying text for a discussion of federal courts' treatment of IGRA.

²³¹ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 57 (1996).

²³² See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222 (1987).

²³³ Commission Report, *supra* note 18, at 6-2.

²³⁴ *Williams v. Lee*, 358 U.S. 217 (1959).

has no concern with tribal activity.²³⁵ Thus, the challenge would be unsuccessful.

Congress clearly has the power to dictate broad restrictions in an amended IGRA. Their power over tribes is plenary,²³⁶ and gaming falls within the Indian Commerce Clause.²³⁷ It is this power that allows Congress to dictate the flow of Indian gaming revenues in the current statute. Section 2710 of the IGRA, for example, stipulates that net revenues from Indian gaming be distributed for limited purposes.²³⁸ The statute states that “net revenues from any tribal gaming are not to be used for purposes other than” funding “tribal government operations,” providing for the “general welfare” of tribal members, promoting “tribal economic development,” donating to charity, or helping to fund local non-Indian governmental operations.²³⁹ Since the economic benefits of Indian gaming may be directed toward socially beneficial goals, herein lies the answer to the problem of funding tribal courts.

Congress should amend IGRA to enhance section 2710 by dictating that a fixed percentage of gaming profits go toward the development of tribal justice systems.²⁴⁰ The current IGRA does not identify specific targets for Indian gaming revenue; rather, it creates five broad categories of permissible beneficiaries. Congress can—and should—earmark a portion of Indian

²³⁵ *Id.* at 219-22.

²³⁶ *See Seminole Tribe*, 517 U.S. at 147-149 (Souter, J., dissenting).

²³⁷ *Id.*

²³⁸ 25 U.S.C. § 2710 (1994).

²³⁹ *Id.*

²⁴⁰ The new IGRA should further enhance the efficacy of Indian self-determination by not allowing states to interfere with Indian gaming based on the regulatory/prohibitory distinction. Thus, the new IGRA should explicitly state that whether a state outlaws all forms of gambling is not determinative of whether a tribe can operate a gaming operation. Such a move would abrogate the traditional state argument that if a state's citizens can't do something anywhere else in the state, then tribes shouldn't be allowed to either. By allowing tribes to choose to operate gaming facilities, notwithstanding state law, Congress would reaffirm the fact that states and tribes do not have any relationship, although reservations happen to exist within a particular state.

gaming revenue *specifically* for the development of tribal justice systems.²⁴¹

Calling for an amended IGRA that would still not allow complete Indian autonomy is a recognition of political reality. Congress is unlikely to relinquish all control over Indian gaming; Congress has never in the past given tribes authority over a policy area that Congress at one time controlled. If an amended section 2710 of IGRA allowed Congressional control over the programs receiving gaming profits, then such an amendment would be more palatable to Congress. While such an arrangement is arguably less satisfying than complete Indian autonomy, it is a more realistic starting point for a productive discussion of what to do about crime on reservations in Public Law 280 states and IGRA.

The benefits of such a program would be twofold. First, and most obvious, such a move would provide a sorely needed revenue source for tribal justice development. Congress' findings regarding the Indian Tribal Justice Act acknowledge the problem: tribal justice systems are integral aspects of tribal government,²⁴² these systems "are inadequately funded," and "the lack of adequate funding impairs their obligation."²⁴³ Furthermore, Congress found that "tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals" of the statute.²⁴⁴

This proposal would increase tribal independence. Allowing tribes freedom from state regulation in opening gaming halls would promote autonomy and economic development. In addition, the corresponding funding increase for tribal justice systems would not only promote sovereignty, but lower crime rates.

That said, this proposal is not perfect in any respect. First, from a philosophical standpoint, a proposal granting complete

²⁴¹ This money could serve several purposes. It would allow greater training of judges and advocates; more legal periodicals could be purchased; a more thorough source of tribal court opinions could be developed; court reporters could be hired; police could be hired and provided with equipment; and detailed studies of tribal crime could be commissioned.

²⁴² 25 U.S.C. § 3601 (1994).

²⁴³ *Id.*

²⁴⁴ *Id.*

tribal autonomy in all affairs may be more appealing to some. Second, this proposal may result in more gaming in the United States;²⁴⁵ given that gaming generally operates as a regressive tax, this too could be viewed as a cost. Third, tying Indian development so closely to gaming could hurt those tribes located in very rural areas that could not attract non-Indians to gaming halls.²⁴⁶ Finally, Indian tribes that have chosen not to have gaming might feel compelled to offer it if alternate means of funding their tribal justice systems were not provided.

At the very least, however, this proposal presents a fresh alternative for significant change in areas (tribal justice and economic development) that have suffered for decades. The potential costs are outweighed by the chief benefits of the proposal: increased sovereignty for tribes, potentially lower crime rates, and increased opportunity for tribal economic development.

V. CONCLUSION

The early growth of the United States subjugated Indians and forced them from their homes. Congress and the Supreme Court, recognizing this problem, articulated legal standards that made Indians' well-being a Congressional concern.

In the middle of the 20th century, as the United States attained prominence on the international stage, Congress abandoned the theory that Indian reservations should remain independent nations. It was in this atmosphere that Congress enacted Public Law 280. During the past twenty years, however, Congress and the executive branch have once again recognized that tribes benefit from being both independent and strong. The penultimate benefit of this movement would be to return the exercise of justice to all tribes, while at the same time allowing tribes to engage unfettered in the most viable export in the history of reservations—gambling.²⁴⁷ Such a move would simul-

²⁴⁵ Gaming may increase as a whole because states would no longer be able to stifle tribes' attempts at creating gaming facilities.

²⁴⁶ However, an amended IGRA could require gaming tribes to pay a certain percentage into a fund that is then distributed to non-gaming tribes. Such a system would be similar to the current method the Federal Communications Commission employs to guarantee telephone service to poor and rural areas.

²⁴⁷ Indian gaming revenues now top \$8 billion. See Harold Henderson, CHICAGO READER, Dec. 8, 2000, at A1, A44. (discussing the battle over the construction of a

taneously restore adequate law enforcement and tribal justice systems and thereby begin to undo the harms wrought by Public Law 280.

Indians).