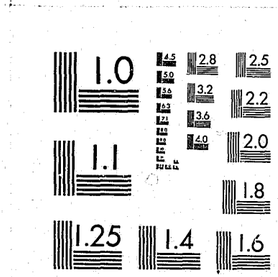

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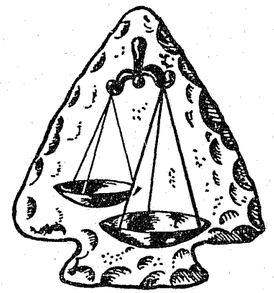

John W. Milne
Ralph W. Johnson

Published by the National American Indian Court Judges Association, Inc.

CRIMINAL LAW FOR INDIAN COURTS

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and

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Court Judges Association, Inc.

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INTRODUCTION

This text has been developed for use in the National American Indian Court Judges Association's Criminal Law and Procedure Training Program to instruct Indian court judges on their responsibilities and function. The National American Indian Court Judges Association (NAICJA) was founded in 1968 with the following objectives:

1.) to improve the American Indian court system throughout the United States of America;

2.) to provide for the upgrading of the court system through research, professional advancement and continuing education;

3.) to further tribal and public knowledge and understanding of the American Indian court system;

4.) to maintain and improve the integrity and capability of the American Indian court system in providing equal protection to all persons before any Indian court; and

5.) to conduct any and all research and educational activities for the purpose of promoting the affairs and achieving the objectives of Indian courts and of the Association and to secure financial assistance for the advancement of the purposes of the Association.

The existence and effective operation of Indian courts are essential ingredients of the right of tribal self-government. In recognizing this fact, tribes are rapidly developing new court systems and adding to the responsibilities of their existing courts. Indian court assumption of criminal jurisdiction over Indian country is one of these expanding responsibilities.

Criminal Law for Tribal Courts addresses the substantive criminal law of jurisdiction, evidence, the warrant process, juvenile justice, and the elements of a crime. This text incorporates a minimum of material from a prior NAICJA publication, Basic Criminal Law, and presents an in-depth explanation of criminal jurisdiction, which was reshaped by the landmark Oliphant v. Suquamish Tribe decision. The presentation

and explanation of the Indian Child Welfare Act of 1978 in the juvenile justice chapter is particularly significant. The Appendix presents a summary of federal statutes affecting Indians, a Glossary of Terms, and legal forms for Chapter IV.

This text may also be used in conjunction with the new NAICJA publication, Criminal Procedure for Indian Courts, on trial and appellate court procedure.

The authors thank those who contributed to this book and hope it will assist the Indian people of this country in the effective administration of justice.

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CHAPTER I. CRIMINAL JURISDICTION IN INDIAN COUNTRY

Section 1. Introduction

A. Jurisdiction Generally

Jurisdiction is best defined as the power or authority of a court over a particular person, area, or subject matter. In the criminal case it is the power of the court to try and to punish the accused for an offense, a violation of the law. The jurisdiction, or power, of the tribal court over Indian matters will accordingly depend not only on the territorial location of events but also on the race of the parties or the subject matter of the offense.

Territorial Jurisdiction. The tribal court must have jurisdiction over the territory, or area, where the offense was committed. The crime must have been committed within the boundaries of the governing body, which for the tribal court will be "Indian country" as defined in later discussion.

Subject Matter Jurisdiction. The tribal court must also have jurisdiction over three other factors to have subject matter jurisdiction in a criminal case. These three factors will concern (1) criminal (as compared to civil) jurisdiction, (2) the race of the parties, and (3) the particular offense.

First, the tribal court must have criminal jurisdictional power before it can consider criminal matters. Criminal jurisdiction should be contrasted with civil jurisdiction which concerns such things as contracts, family matters, land questions, and probate.

Second, the court must also have jurisdiction over the

accused, the one who allegedly committed the crime. Tribal courts have criminal jurisdiction over "Indians," as that term will be defined in later discussion. But tribal courts do not have criminal jurisdiction over non-Indians, as held by the United States Supreme court in the recent case of Oliphant v. Suquamish Indian Tribe, 191 U.S. 435 (1978). Thus the racial classification of the accused must be considered before the court can have subject matter criminal jurisdiction.

And third, the court must also have jurisdiction over the offense, that is, the actual crime committed. This means the court must have authority to try the accused for a particular crime. For example, the tribe can punish Indians for crimes defined by the tribal code and committed within the territorial jurisdiction of the court. If the tribal code had no provision for the offense of assault, the tribal court would lack subject matter jurisdiction to try the accused for this crime, unless under the code it had jurisdiction over common law crimes.

Personal Jurisdiction. And, finally, the tribal court must obtain personal jurisdiction over the accused. Personal jurisdiction concerns the process by which the accused is notified of the criminal charge and the command to appear before the court. This notification procedure has already been discussed in "The Summoning Process" in Chapter II. The tribal court must also be concerned about the "fairness" of requiring the accused to appear before the court. For example, if the accused lives outside the territorial jurisdiction of the court, the tribal court must consider the "fairness" of compelling the accused

to appear before the court depending on the nature and gravity of the alleged offense. Can a tribal court in Arizona obtain personal jurisdiction over an individual living in South Dakota and compel appearance for a petty theft or other minor charge which allegedly occurred in Arizona? A tribal court may conceivably face a question like this when it's personal jurisdiction over the accused is challenged. Again, the test of such an exercise of tribal court jurisdiction, aside from particular restrictions in the tribal code, will be the fairness of compelling the accused to appear before the court.

B. Historical Background of Criminal Jurisdiction in Indian Country

Historically, Indian tribes were treated as sovereign nations with inherent jurisdictional power over everything occurring within their territory. Following colonization, they were considered domestic dependent nations with continuing inherent jurisdiction over internal affairs. The Federal government was given power over Indian affairs by the constitution, to the exclusion of the states. Congress was given the power to regulate commerce with the tribes in Article 1, Section 8, par. 3, and the President was given the power to make treaties. Tribal sovereignty and exclusive federal jurisdiction were judicially recognized by the United States Supreme Court in Worcester v. Georgia, 6 Pet. 515, 561 (1832):

> The Cherokee nation, then, is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force. . .

Professor Robert Clinton of the University of Iowa Law

School documents the further development of criminal jurisdiction in Indian country:

> As contact increased between Indian and non-Indian populations, Congress increasingly regulated those interchanges. In the Trade and Intercourse Acts of 1790, and later, Congress addressed crimes committed by non-Indians against Indians. In 1817, federal jurisdiction was extended by applying federal criminal law to crimes by both Indians and non-Indians in Indian country, with the important exception of crimes by Indians against Indians. Treaties still often permitted tribes to punish non-Indians for crimes within Indian country, but federal jurisdiction tended to become primary in such cases.
>
> This pattern, emphasizing federal jurisdiction over crimes between Indians and non-Indians and exclusive tribal jurisdiction over all-Indian crimes, continued into the 1880's. It was confirmed in Ex Parte Crow Dog, 109 U.S. 556 (1883). Congress reacted to that decision by passing the Major Crimes Act, now 18 U.S.C. §1153, making certain major crimes by Indians against anyone subject to federal jurisdiction.
>
> Throughout most of this period, there was no state criminal jurisdiction within Indian country. But a significant change occurred with the decisions in United States v. McBratney, 104 U.S. 621 (1881), and Draper v. United States, 164 U.S. 240 (1896). Those cases held that crimes by non-Indians against non-Indians within Indian country were not within federal jurisdiction and could be governed by the states. This state jurisdiction was deemed essential to statehood, but also came to be justified by the fact that essential tribal interests were not involved in such cases. The important thing about the decisions is that they made it impossible ever after to view questions of state jurisdiction as purely geographical.

Criminal jurisdiction in Indian country today may still be approached from the principle of inherent tribal jurisdiction over internal affairs tempered by federal preemption or limitation of that jurisdiction. Apart from the judicially-created state jurisdiction in Indian country of McBratney and Draper, the federal government can and has expanded state jurisdiction by legislation. Because of conflicting assertions of criminal jurisdiction between the tribal, state and federal governments,

the following general principles will be helpful in understanding the current status of criminal jurisdiction in Indian country today.

C. General Principles

The current status of criminal jurisdiction in Indian country today is shaped by two major propositions and several general principles:

1. Indian tribes generally have complete sovereignty or governmental powers within the borders of their reservations unless those powers have been diminished by Congress or reduced by inherent limitations as interpreted by the Supreme Court.

2. State law does not generally apply over an Indian reservation unless Congress has specifically consented to it's application.

There are qualifications to these two basic rules as have already been briefly discussed. But, most importantly, Congress rather than the states, has power to determine the jurisdiction of Indian tribal courts and governments. Worcester. And Congress also has power to impose federal law on Indian country, in spite of Indian tribal sovereignty or treaty rights. U.S. v. Kagama, 118 U.S. 375 (1886). Indeed, Congress has the power to abrogate Indian treaties. Lone Wolf v. Hitchcock, 187 U.S. §3 (1903). But just compensation must be paid if valuable Indian treaty or property rights are taken. U.S. v. Creek Nation, 295 U.S. 103 (1935). Congress can even apply state law to Indian country, as where a reservation has been

disestablished or "terminated." Maltz v. Arnet, 412 U.S. 481 (1973).

Jurisdiction of Indian tribes comes primarily from the tribe's own sovereignty. But, because federal law can both limit and allocate tribal jurisdiction, the scope of federal jurisdiction will be considered first in the following discussion.

Section 2. Federal Criminal Jurisdiction in Indian Country

A. Generally

The federal courts have historically been given special criminal jurisdiction over offenses committed in Indian country. A number of sections of the federal criminal code, which will be discussed shortly, apply only in Indian country.

B. Indian Country Defined: 18 U.S.C. § 1151

Federal criminal jurisdictional statutes are applicable to certain offenses occurring in "Indian country." Section 1151 of title 18 in the United States Code defines the term "Indian country" as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Thus, by the language of part (a) of §1151, the entire reservation, including state or federal highways, non-Indian fee patent land, or even state incorporated towns, is Indian country. Part (b) acknowledges the simple ownership of lands

by a federally-recognized, dependent Indian tribe, such as communal Pueblos, as Indian Country. Part (c) recognizes that all allotments owned by Indians are Indian country whether on or off reservation land.

A determination that the land where an alleged offense occurred is Indian country will have great jurisdictional significance. The general result will be exclusive tribal and federal jurisdiction excluding state jurisdiction.

C. Who is an Indian?

Professor Robert Clinton, in his article "Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze," 18 Ariz. L. Rev. 503, 513 (1976), points out that, not only are federal Indian jurisdictional statutes limited to "Indian country," jurisdiction also depends on whether the victim or accused is Indian. Tribal courts do not have criminal jurisdiction over non-Indians but, most unusually, an "Indian" has never been defined by statute or case law (like Oliphant) for the purposes of federal criminal jurisdiction. This situation raises perplexing questions: can a Mexican or Canadian Indian be an Indian within the scope of the federal statutes; is an Indian, not a member of any tribe, an "Indian"; is an Indian who is a member of a tribe which has not been federally recognized an "Indian"; and, finally, is an Indian who is a member of a terminated tribe an "Indian"?

There is no universal answer to the question of "who is an Indian?" But case law suggests that an individual must have at least some Indian blood and be considered an Indian in the

community. Tribal membership has never been required for Indian status for criminal jurisdiction and, at this time, federal recognition of a tribe has no effect on being an Indian. But, in United States v. Heath, 509 F.2d 16 (9th cir. 1974), the court held that a member of a "terminated" tribe is no longer considered an Indian for jurisdictional purposes.

D. Federal Jurisdictional Statutes

i. Generally

Federal criminal jurisdiction over Indian country is applied by basically two types of statutes. First, federal statutes defining certain federal crimes are applicable anywhere, including Indian country. An example of this would be the federal statute defining the offense of assaulting a federal officer, which, if committed by anyone, would be a crime on or off the reservation. Second, other federal statutes specifically define certain crimes occurring in Indian country. This second type of statute will be most important for the purposes of this book. These statutes can be found in Title 18 of the United States Code.

ii. The General Crimes Act: 18 U.S.C. § 1152

The government through Congress made the general criminal laws of the United States applicable to certain offenses occurring in Indian country in Section 1152 of the United States Code. However, this section does not apply to

> . . . offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

The general federal law applied is the body of federally defined crimes which Congress has enacted for other areas within exclusive federal jurisdiction, such as military bases or national parks. Where this general federal criminal code is silent as to a certain offense, Congress has provided by statute that the particular state law defining that offense can be utilized to provide the statutory offense for federal jurisdiction. This statute is called the Assimilative Crimes Act, 18 U.S.C. § 13, and is thus one of the general federal criminal laws applied to Indian country by § 1152.

There are three important exceptions to exclusive federal jurisdiction in § 1152. Two are expressly mentioned in the statute: (1) crimes by an Indian against an Indian, or (2) where the tribe has already punished the Indian offender. The third is the judicially-created exception of crimes by non-Indians against non-Indians committed in Indian country. In the McBratney and Draper cases, already mentioned, the Supreme Court held such crimes to be within the exclusive jurisdiction of the state. But crimes by non-Indians against Indians are still subject to federal jurisdiction under § 1152.

The victimless crime situation poses a special problem under § 1152. It has been held that victimless or consensual crimes committed by Indians are subject to exclusive tribal jurisdiction. United States v. Quiver, 241 U.S. 602 (1916). But federal jurisdiction might come into play if, according to § 1152, the accused has not been punished by the local law of the tribes. Victimless crimes by non-Indians would be

subject to federal jurisdiction under a literal reading of § 1152. But the state would probably have concurrent jurisdiction in such a case.

iii. The Major Crimes Act: 18 U.S.C. § 1153

Under the Major Crimes Act, 18 U.S.C., Section 1153, the federal government has jurisdiction over certain enumerated crimes committed by an Indian against either another Indian or a non-Indian in Indian country. This section was first enacted in 1885 and represented the first significant intrusion into the federal government's policy of allowing tribes complete sovereignty over internal affairs such as crimes committed by an Indian against another Indian. Section 1153 now includes 14 enumerated crimes that fall within federal jurisdiction and states:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.
>
> In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Like the jurisdcition given the federal government under § 1152, the federal jurisdiction granted under § 1153 is exclusive of state jurisdiction. But, unlike federal jurisdiction under § 1152, federal jurisdiction under § 1153 is not dependent on the Indian status of the victim because § 1153 applies to Indian offenses against the person or property of "another Indian or other person."

Most of the major crimes listed in § 1153 are defined by the federal criminal code. But note that, according to the statute, burglary and incest are defined and punished according to the laws of the state where the offense is committed.

It is also important to note that the Major Crimes Act does not violate the equal protection concept as expressed in the 5th Amendment to the U.S. Constitution. U.S. v. Antelope, 430 U.S. 641 (1977). The equal protection clause of the 5th Amendment basically requires that all people be treated equally under the federal laws regardless of such classifications as race or sex. Special racial classifications, such as Indian or non-Indian status present in §§ 1152 and 1153, are normally suspect and might be considered unconstitutional. But the Supreme Court in Antelope held that the special federal trust relation in regard to Indians requires jurisdictional statutes to be drawn along racial lines and are therefore constitutionally permitted.

iv. Exceptions to Federal Criminal Jurisdiction

Sections 1152 and 1153 present federal criminal jurisdiction in Indian country. But several exceptions exist to their coverage which are not presented in the language of

these sections which generally result in state criminal jurisdiction. The two most important exceptions to exclusive federal jurisdiction (excluding state jurisdiction) are embodied in two major federal legislative acts which were passed in the 1950's.

The first, Public Law 280, codified at 18 U.S.C. § 1162, conferred criminal and civil jurisdiction in Indian country to certain named states. The law also gave federal consent to a number of other states to assume jurisdiction over Indian country by state legislation or state constitutional amendment. According to Public Law 280, federal jurisdiction over crimes described in §§ 1152 and 1153 would not apply in those states which were given criminal jurisdiction or assumed it by state legislation or constitutional amendment.

The second federal legislation excluding federal jurisdiction was embodied in the tribal termination acts. During the early 1950's, congressional policy favored termination of the special federal relationship toward Indian tribes. Following the passage of this legislation, approximately 109 tribes and bands were terminated, resulting in the imposition of state jurisdiction in place of the terminated federal jurisdiction.

Because both Public Law 280 and the termination acts result in state jurisdiction over Indian country, these acts will be discussed to a greater extent in the later discussion of state jurisdiction over Indian lands.

Section 3. Tribal Criminal Jurisdiction in Indian Country

A. Generally

The jurisdiction of Indian tribes is absolute except to

the extent it is limited by tribal dependent status, by treaty, or by federal laws, as just discussed.

There are basically three types of tribal courts. (These are noted in footnote 7 in the landmark jurisdictional case of Oliphant v. Suquamish Indian Tribe, 191 U.S. 435 (1978).) At the time of the Oliphant decision, of the 127 courts operating on Indian reservations, 16 were "traditional" courts, 30 were "CFR" courts, and the remainder were "tribal" courts. The traditional courts are courts of the New Mexico Pueblos which enforce unwritten tribal custom in a very informal setting. "CFR" courts are courts created by federal regulation, 25 Code of Federal Regulations §§ 11.1-11.37 CA, in the absence of any tribal judicial mechanism. Federal regulations further provide an Indian criminal code defining crimes in the absence of a tribal code for these "CFR" courts. These regulations also encourage tribes to set up their own courts, accounting for the small number of "CFR" courts remaining today. And, finally, tribal courts, established and functioning pursuant to tribal legislative powers, are the most numerous. The tribal courts generally enforce written tribal codes which are usually subject to approval by the Secretary of the Interior.

B. Tribal Court Jurisdiction

i. General Principles

The general extent of tribal court criminal jurisdiction has already been mentioned in the discussion of federal law. Because of the general proposition that Indian tribes have complete sovereignty within the borders of their reservations

unless those powers have been diminished by Congress, tribal courts probably retain concurrent jurisdiction with the federal government over major crimes. U.S. v. Wheeler, 435 U.S. 313 (1978).

Most significantly, tribal courts lack criminal jurisdiction over non-Indians, as held by the Supreme Court in Oliphant.

While the Oliphant case does not deal with "CFR" courts, the CFR criminal code itself limits these courts to jurisdiction over "Indians." Presumably tribal court civil penalties can still be assessed against non-Indians. And Indian police probably still have the power of apprehension and arrest over non-Indians in Indian country.

It is also important to note that tribal courts may have criminal jurisdiction over certain types of offenses occurring outside of Indian country. For example, some tribal courts have jurisdiction over treaty protected off-reservation fishing sites. U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), Aff'd, 520 F.2d 676 (9th Cir. 1975), Cert. den., 423 U.S. 1086 (1976).

ii. The General Crimes Act: 18 U.S.C. § 1152

Title 18 of the United States Code § 1152 confirms that tribes have exclusive jurisdiction over minor crimes (misdemeanors) committed by one Indian against another Indian in Indian country, or by an Indian against a non-Indian where the tribe chooses to proceed with the prosecution, and thus excludes federal prosecution under the terms of the act.

As previously discussed, the victimless crime situation

may pose a special problem under § 1152 for tribal court jurisdiction. Adultery or narcotic offenses are examples of victimless crimes. However, in U.S. v. Quiver, 241 U.S. 602 (1916), the Supreme Court held that victimless or consensual crimes committed by Indians are subject to exclusive tribal jurisdiction. This is a sound decision because of the absence of any special federal interest and the need to promote the sovereignty of the tribal court over internal matters.

iii. The Major Crimes Act: 18 U.S.C. § 1153

As previously discussed, under § 1153, the federal government has jurisdiction over certain enumerated crimes committed by an Indian against either another Indian or a non-Indian. These major enumerated crimes should be contrasted to the minor crimes referred to in § 1152, which are exclusively within tribal court jurisdiction.

But, under § 1153, it is not clear whether the tribes share concurrent jurisdiction with the federal government over these major enumerated crimes. Given the basic proposition that Indian tribes have complete sovereignty within the borders of their reservations unless those powers have been diminished by Congress, tribal courts probably retain concurrent jurisdiction over major crimes because that jurisdiction has never been expressly terminated. U.S. v. Wheeler, 435 U.S. 313 (1978). Indeed, many tribes exercise jurisdiction over certain crimes such as larceny under their tribal code provision which are also crimes covered by the Major Crimes Act. No challenge as of yet has been made to this exercise of concurrent jurisdiction.

But a tribal court can only exercise jurisdiction over major crimes if the tribal legal code so provides. And, as will be discussed later, the tribal court penalty cannot, under the Indian Civil Rights Act of 1968, exceed a $500.00 fine and/or six months' imprisonment.

iv. Tribal Court Jurisdiction and the Indian Civil Rights Act of 1968

The procedural requirements of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, impose additional limitations on tribal court actions. The Indian Civil Rights Act extends most of the protections of the federal Bill of Rights to persons, either Indians or non-Indians, in their relations with tribal governments. This legislation was enacted because the federal constitution, including the Bill of Rights, does not apply to Indian tribes and thus does not constrain tribal governments. The ICRA was designed to remedy alleged abuses of tribal courts and tribal governments in denying due process and other rights to Indians and others.

The Act guarantees freedom from unreasonable searchs and seizures, the privilege against self-incrimination, immunity from double-jeopardy, the rights to confrontation and against cruel and unusual punishment, equal protection and due process, and the right to trial by jury of not less than six persons for offenses punishable by imprisonment.

The only federal court review of the enforcement of these rights is through a writ of habeas corpus to the federal courts. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). However,

the Supreme Court has made it clear that the ICRA applies to tribal courts, and should be enforced by those courts, even where no federal court review is possible.

Section 4. State Criminal Jurisdiction in Indian Country

A. Generally

State jurisdiction is shaped by the major proposition that state law generally does not apply over an Indian reservation unless Congress has specifically consented to it's application. Otherwise federal laws, including treaties, preempt state laws. It must still be noted that states have continuing jurisdiction over crimes committed by or against Indians outside of Indian country.

But, as developed in the following sections, in several instances the federal government has consented to state jurisdiction over crimes committed in Indian country.

B. State Court Jurisdiction

i. The General Crimes Act: 18 U.S.C. § 1152

As previously discussed, § 1152 applies general federal criminal laws to offenses occurring in Indian country, excluding state jurisdiction. But, as also mentioned, there is a judicially-created exception to this federal coverage where a crime in Indian country is committed by a non-Indian against another non-Indian. In this instance, as recognized by the Supreme Court decisions in United States v. McBratney, 104 U.S. 621 (1881), and Draper v. United States, 164 U.S. 240 (1896), the states have exclusive jurisdiction. It was held that no federal governmental interest existed in it's special relation

with the tribes to justify exclusive criminal jurisdiction over crimes by non-Indians against non-Indians within Indian country. Victimless crimes by non-Indians would also be subject to federal jurisdiction under a literal reading of § 1152 but the state probably have concurrent jurisdiction under the McBratney-Draper reasoning.

ii. Public Law 280: 18 U.S.C. 1162

In several instances, as previously mentioned, the federal government has consented to state jurisdiction in Indian country. The Congress enacted Public Law 280, 18 U.S.C. 1162, in 1953 conferring criminal and civil jurisdiction in Indian country to certain named states and giving congressional consent to a number of other states to assume jurisdiction by state action. Thus, according to Public Law 280, federal jurisdiction over crimes described in §§ 1152, 1153, and other federal statutes would not apply in those states which were given criminal jurisdiction or assumed it by state legislation. The states automatically given jurisdiction over Indian country within their borders were Alaska, California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin.

For those states that were authorized to assume jurisdiction over Indian lands by an affirmative act, the Supreme Court has held that this could be done by either state constitutional amendment or by state legislation. Confederated Bands and Tribes of Yakima Indian Nation v. Washington, 99 S.Ct. 740 (1979). These states took the following actions:

States with "constitutional disclaimers". Congress assumed these states would have to amend their Constitutions to assert jurisdiction over reservations within their borders. These states took the following legislative action:

Arizona - assumed jurisdiction over air and water pollution, by state legislation.
Montana - assumed concurrent criminal jurisdiction over Flathead Reservation by statute.
New Mexico - 1969 disclaimer constitutional amendment rejected by voters.
North Dakota - Constitution amended. However, no tribes consented to state jurisdiction and none was assumed over tribes, although some individual Indians consented to be under state jurisdiction.
Oklahoma - no action taken.
South Dakota - Constitutional amendment rejected by voters.
Utah - 1971 statute, authorized jurisdiction with Indian consent.
Washington - 1957 statute, authorized state jurisdiction with Indian consent. 1963 statute imposing partial subject matter and territorial jurisdiction and continuing the option of state jurisdiction with Indian consent.

Statutory States. These states assumed jurisdiction by direct legislation:

Florida - criminal and civil jurisdiction - all reservations.
Idaho - concurrent jurisdiction, civil and criminal, over 7 subjects.
Nevada - state jurisdiction, but counties can petition out. Several did.

Professor Robert Clinton has provided a thorough analysis of the extent and nature of state criminal jurisdiction over Indian country in his article, "Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze," 18 Ariz. L. Rev. 503 (1976) at pages 577-583.

In 1968, the Indian Civil Rights Act added a provision that the consent of the affected tribes must be obtained at a special election in order for the state to assume jurisdiction

over any reservation under P.L. 280. (25 U.S.C. § 1321, 1322)

As indicated above, few states have assumed Public Law 280 jurisdiction at all. But it is obvious that in those states where Public Law 280 jurisdiction has been taken to varying degrees, the allocation of jurisdiction between tribal, federal and state governments will be radically altered. Normally state Public Law 280 jurisdiction will totally exclude federal jurisdiction and may affect tribal jurisdiction.

iii. Retrocession: 25 U.S.C. § 1323

As enacted in 1953, Public Law 280 made no provision for retrocession, or the return of all or any portion of jurisdiction to the federal government assumed by any state under Public Law 280. Such a provision was enacted as part of the Indian Civil Rights Act of 1968 in 25 U.S.C. § 1323. Retrocession is now possible with concurrence of the Secretary of the Interior and the state, resulting in the resumption of federal criminal jurisdiction and once again excluding state law. Retrocession has occurred on a number of reservations.

iv. Termination Acts

Federal tribal termination acts also basically gave congressional consent to state jurisdiction in Indian country. During the 1950's, congressional policy favored termination of the special federal relationship toward Indian tribes, replacing federal jurisdiction upon tribal jurisdiction with state jurisdiction. House Concurrent Resolution 108 (1953). Numerous tribes and bands were terminated during this period by special acts of Congress.

Section 5. An Analytical Approach to Jurisdiction

The preceding discussion of the allocation of tribal, state and federal criminal jurisdiction depending on federal statutes and treaties, judicially-created state jurisdiction, Public Law 280, retrocession, and termination acts illustrate the jurisdictional maze in determining tribal court criminal jurisdiction. Because exceptions to the general rule of exclusive tribal and federal jurisdiction creating state jurisdiction will vary according to each state and even particular reservations, the problem of determining tribal criminal jurisdiction can be analyzed by answering the following questions, as presented by Getches, Rosenfelt and Wilkinson in "Federal Indian Law" (p. 387):

(1) Does Public Law 280 apply (resulting in state jurisdiction excluding federal jurisdiction)?
(2) Is it a major or minor crime by an Indian against an Indian?
(3) Is it a major or minor crime by an Indian against a non-Indian?
(4) Is it a crime by a non-Indian against an Indian?
(5) Is it a crime by a non-Indian against a non-Indian?
(6) Is it a victimless or consensual crime by an Indian?
(7) Is it a victimless or consensual crime by a non-Indian?

The answers to these questions will determine the extent of tribal, state, and federal criminal jurisdiction over the Indian country where a particular offense occurred.

Section 6. Jurisdictional Summary

The chart at the end of this chapter presents a general guide to the different jurisdictions which have the power to try and punish an offender for a crime occurring in Indian

country. As shown by the preceding questions, the Indian/non-Indian status of the offender and victim, the severity of the crime (minor versus major), the victimless crime situation, and Public Law 280 will all be factors in determining jurisdiction.

Section 7. Recommendations

Many practical problems result in the confusing overlap of tribal, state, and federal jurisdiction. As the NAICJA Report (as presented in Chapter I) states, "Crimes going unpunished because no one knows who has jurisdiction or because the tribe lacks authority to exert jurisdiction contributes to a lack of respect by those under the tribal court's authority." (p. 113) To remedy these practical problems, the Report makes the following recommendations:

1. Jurisdiction of the courts and the tribe should be clearly and simply defined.
   a. Territorial limits of jurisdiction, both on and off the reservation, should be published and available to those enforcing or subject to tribal law.
   b. The tribal jurisdiction statute should not exclude any subject area in which the tribe could and might wish to assert jurisdiction. This will guarantee the jurisdictional authority necessary to meet the need for expanded jurisdiction.
      (1) The tribe should remove any impediments which may exist in its constitution or laws to exertion of jurisdiction over non-members.
      (2) The tribe should state and clearly express its jurisdiction so that it may be exerted over any crime as the need arises.
      (3) The tribe should state its jurisdiction so that it may be exerted over any civil cause of action, administrative or regulatory problem as the need arises.
2. Those tribes whose constitutions require BIA approval before an ordinance becomes effective should consider amending the constitutions to remove the approval requirement.

Section 8. Questions

(1.) The United States Congress does not have the power to limit tribal court jurisdiction within the reservation.

True False Probably, but unsettled

(2.) The United States Congress may make state law applicable on the reservation.

True False Probably, but unsettled

(3.) The term "Indian Country" as defined in 18 United States Code Section 1151 includes public highways.

True False Probably, but unsettled

(4.) A Tribal Court would probably have jurisdiction over an offense committed by an Indian at an off-reservation treaty protected fishing site.

True False Probably, but unsettled

(5.) The McBratney rule states that federal criminal law applies to a crime committed by a Non-Indian against a Non-Indian on the reservation.

True False Probably, but unsettled

(6.) Tribal courts retain concurrent jurisdiction over crimes covered by the Major Crimes Act.

True False Probably, but unsettled

(7.) A Tribal court can exercise jurisdiction over any crime identified in federal or state law, whether or not it is covered by the tribal code.

True False Probably, but unsettled

(8.) Under the Assimilative Crimes Act, 18 U.S.C.A., Section 1152, federal law applies to a Non-Indian committing a crime against an Indian in Indian Country.

True False Probably, but unsettled

(9.) The Oliphant case held that a Tribal court does not have jurisdiction to try a Non-Indian for a crime under the tribal code.

True False Probably, but unsettled

(10.) A Tribal Court has jurisdiction to try a non-member for a crime against the tribal code.

True False Probably, but unsettled

(11.) Under the Martinez case the Indian Civil Rights Act no longer applies to Tribal Courts.

True False Probably, but unsettled

(12.) Under the Indian Civil Rights Act of 1968, a tribe must consent before state jurisdiction may be imposed on the reservation.

True False Probably, but unsettled

(13.) Indian Tribes retain concurrent jurisdiction even if a state has jurisdiction over the Reservation under P.L. 280.

True False Probably, but unsettled

(14.) CFR courts are bound by Federal law, but Tribal Courts are not. Tribal Courts are bound only by Tribal Constitutions and laws.

True False Probably, but unsettled

Offender	Victim	Degree of Crime or Circumstance	Jurisdiction
Indian	Indian	Minor	Tribal
Indian	Non-Indian	Minor	Tribal, and Federal if the accused has not been punished by the local law of the tribe (§ 1152)
Indian	Indian	Major	Tribal* and Federal (§ 1153)
Indian	Non-Indian	Major	Tribal* and Federal (§ 1153)
Indian	No Victim	Not Applicable	Tribal, and Federal* if the accused has not been punished by the local law of the tribe (§ 1152)
Indian	Indian or Non-Indian	Public Law 280 State	Tribal* and State (P.L. 280)
Non-Indian	Non-Indian	Not Applicable	State (Draper-McBratney)
Non-Indian	No Victim	Not Applicable	Federal and/or State (§ 1152 & Draper - McBratney)
Non-Indian	Indian	Not Applicable	Federal (§ 1152)
Non-Indian	Indian	Public Law 280 State	State (P.L. 280)

[the asterisk (*) denotes probable jurisdiction)

CHAPTER II. THE LAW OF EVIDENCE

Section 1. Introduction

A. Evidence Defined

The American Heritage Dictionary defines evidence as: "(1) the data on which a judgment or conclusion may be based, or by which proof or probability may be established; (2) that which serves to indicate or suggest; (3) law: the documentary or verbal statements and the material objects admissible as testimony in a court of law." Thus, by this definition, we see that evidence can be either statements (normally referred to as testimonial evidence) or material objects (normally referred to as tangible evidence) offered by either the plaintiff or defendant in court to prove or disprove in the mind of either the judge or the jury a matter of importance to the trial proceeding.

"Evidence" might be offered in many forms. It might be the testimony of a witness; a document of some type, such as a letter or a will; an object, such as a gun or a bottle; a demonstration, such as reenactment of a certain event, or a picture chart or graph, or scale model of an object; or a recording of some type, such as a photograph or tape recording.

B. The Law of Evidence

The law of evidence refers to all of the rules and principles which regulate the admissibility, relevancy, weight, and sufficiency of evidence in a trial or hearing. In other words, these are rules which help the judge decide whether evidence should be heard or seen by the judge and jury.

The law of evidence which applies to an Indian court might be found in the following sources:

1) Tribal ordinances;
2) Federal statutes;
3) the Code of Federal Regulations;
4) prior decisions of the Tribe's court; and
5) Tribal customs and traditions.

If none of these sources exist or apply, a judge could also turn to:

1) the statutes of the state in which the court is located;
2) the judicial opinions of other courts in the jurisdiction in which the tribal court is located, particularly the appellate or Supreme courts; or
3) rules written by the Supreme Court of the jurisdiction.

C. The Law of Evidence and the Tribal Court

During a trial in an Indian court, the law and rules of evidence are followed to insure that: 1) the case is presented in an orderly manner; 2) waste of time and confusion is avoided by limiting the evidence to issues before the court; 3) the evidence has a certain amount of truthfulness before the jury is allowed to see or hear it; and 4) to insure that certain communications between persons, such as attorney-client conversations, cannot be exposed in a trial, if the Tribe has decided that those particular communications should be protected and not disclosed. It is the responsibility of the judge to understand the rules of evidence and to insure that they are followed in your courtroom.

The Indian Civil Rights Act of 1968 extended almost all of the protections of the Bill of Rights of the United States

Constitution to persons on reservations. It is now the fundamental right of all persons to have the full equal protection and due process of law in all Indian courts. It is the duty of the tribal court judge to protect these rights which are often times protected by the rules of evidence. Failure to follow these rules can result in the Indian trial judge's decision being overruled by an Indian appellate court or Federal court.

The rules of evidence were developed over centuries of trial experiences. In studying the following principles, you should be especially aware of the reason behind each rule of evidence. You will find that the reason behind each rule is supported by common sense and thus they should be followed.

D. The Importance of Fact-Questions in Trial Procedure

The outcome of trial proceedings is determined by two factors: 1) propositions of law; and 2) questions of fact. The statement that "the taking of property not your own with the purpose of depriving the owner of the property constitutes the crime of theft" is a proposition of law. This is a legal rule defining the offense of theft. The question, "Did Spotted Tail take Yellow Eagle's fishing net with the purpose to deprive Yellow Eagle of the net?" is a question of fact. In most trial proceedings, the proposition of law will not be at issue, i.e., the parties agree that the definition of the charge of theft is proper. But, in this instance, it is the fact question of whether the crime of theft was actually committed that will greatly affect the trial's outcome. The rules of evidence

govern what materials can be used by a fact-finder in resolving these fact questions. In trial proceedings conducted only by a judge, the judge decides what law to apply and resolves all questions of fact. In this instance, it is easier for the judge to decide what evidence is admissible and which to exclude as irrelevant or prejudicial. But, in the case of a jury trial, the judge still decides what propositions of law are to be applied, but the jury's function is to resolve all questions of fact. In this case, the judge must be more careful in applying the rules of evidence to govern what materials can be used by the jury as the fact finder in resolving fact questions. The judge's primary concern will be what matters and materials should be admitted into evidence for the fact-finder to consider.

Section 2. The Types and Forms of Evidence

A. Types of Evidence

There are two basic types of evidence: 1) direct evidence; and 2) indirect evidence. These two types of evidence should be distinguished from forms of evidence which will be discussed shortly.

1) Direct evidence is evidence that proves a proposition or issue directly rather than by inference. A good example of direct evidence is the eyewitness testimony that "I saw him stab Yellow Bear."

2) Indirect evidence proves a proposition circumstantially where direct evidence is absent. Indirect evidence depends on inferences for its relationship to the proposition or issue

to be proved. It does not prove that proposition directly; it is indirect evidence. An example of indirect evidence is testimony by Snowbird that she saw Black Elk with a bloody knife in his hand standing over Yellow Bear's body. This is only circumstantial evidence, as opposed to direct evidence, offered to prove the ultimate inference that Black Elk stabbed Yellow Bear.

Most of the rules concerning the relevance of evidence, to be discussed later, relate to indirect evidence rather than direct evidence, since indirect evidence raises more questions about reliability and truthfulness. Direct evidence, such as eye-witness accounts, is almost always admissible because it poses fewer problems of relevance and reliability.

B. Forms of Evidence

The two basic types of evidence, direct and indirect, come in three basic forms: 1) testimonial evidence; 2) tangible evidence; or 3) evidence subject to judicial notice.

1) Testimonial evidence is oral testimony given by a witness in court under oath in response to questionning.

2) Tangible evidence - material objects - may be classified as real evidence or demonstrative evidence. Real evidence is the actual murder weapon in the case or the actual fishing net which was stolen. This is contrasted to a mere example of a weapon or fishing net of the type said to have been used or taken in the crime. Demonstrative evidence is not the real thing, but merely a material object used for explanatory or illustrative purposes only. Examples of

demonstrative evidence might be a chart, a map, a diagram or a film.

3) The third basic form of evidence is evidence which is subject to judicial notice. Some matters, because subject to common knowledge in the community or subject to certain proof through reference to a highly reliable source such as a calendar or math table, need not be proved in the usual manner. These facts do not have to be proved because they are not subject to dispute. This saves time and expense when the court judicially - notices these facts or matters. Examples of facts subject to judicial notice which thus become a form of evidence might be dates, geographic locations, or statistical facts which can be verified by resort to calendars, dictionaries, or maps.

Section 3. Burden of Proof

Before discussion of the basic rules of evidence, it is important to understand the degree of proof that is necessary in order to support a criminal conviction.

A. Burden of Proof Defined

The term, "burden of proof," has two meanings. In the strictest sense, it refers to the duty of one of the parties to establish the truth of a given fact or proposition with the amount of evidence that the law demands in the case in which the issue arises. In a second sense, the term means the duty of a party to answer a prima facie case against him by presenting evidence, or to present evidence at any stage in the trial in order to make out a prima facie case. The term

"prima facie" will be discussed later in this section. For now, you might like to turn to the glossary and look at the definition of the term. In the second sense, the term burden of proof simply means that a party has to present his side by introducing evidence.

B. The Burden of Going Forward with the Evidence

The "burden of going forward with the evidence" is the duty of one of the parties to first present evidence on the facts or other propositions which he asserts in the case. This means that the other party may simply sit by and wait for the party with the burden of going forward with the evidence to present some evidence. If the party with the burden of going forward with the evidence does not present any evidence, then the other party doesn't have anything to disprove or rebut, and therefore, has no burden of proof and should not do anything more than move for a verdict in his favor. As an example, in a criminal case, the Tribe has the initial burden of going forward with the evidence. If it does not present evidence to prove a prima facie case of the crime charged, then the defendant doesn't have to present any evidence, and the case should simply be dismissed.

i. Does the burden of proof shift from one party to another?

The burden of proof does not shift. Those who think that the burden of proof shifts during a trial are confusing the burden of proof with the burden of going forward with the evidence. The burden of proof is set at the beginning of the trial, and does not shift or change. Each party must prove,

by the amount of proof that the law requires in the particular case, each and every fact or proposition upon which that party hopes to rely in gaining a verdict in his favor.

ii. Does the burden of going forward with the evidence shift?

Many times the burden of going forward with the evidence during a trial will shift repeatedly. Let us take a criminal trial for example. As mentioned above, the Tribe has the burden of going forward with the evidence in a criminal trial. Let us suppose that the Tribe proves a prima facie case of battery. A prima facie case of battery usually consists of proof that there was an unlawful, intentional touching or application of force to the body of another person, done in a rude or angry manner. Once the Tribe has met the burden of going forward with the evidence by proving this prima facie case, then the burden of going forward with the evidence shifts to the defendant. He must try to disprove the case presented by the Tribe, or prove that there were circumstances which excuse his conduct. As will be discussed later, there is a presumption of sanity. This presumption stands until evidence is produced to disprove it. Let us suppose in this case that the defendant puts on psychiatrists to testify that at the time of the battery, the defendant was temporarily insane. By presenting relevant, material, and competent evidence of his insanity, the defendant has proven a prima facie case of insanity. The burden of going forward with the evidence now shifts back to the Tribe, to prove that the defendant was not insane. Suppose in this case, that the Tribe puts on

psychiatrists to testify that at the time of the battery, the defendant was sane. It is then left for the judge or the jury to decide whether the defendant is guilty, or not guilty, or not guilty by reason of insanity. As you can see, the burden of going forward with the evidence shifted back and forth between the parties in the case.

C. The Measure of the Burden of Proof

In a criminal case, the burden of proof is that the judge or jury must be convinced of the facts "beyond a reasonable doubt." This does not mean that there must be no other possible explanation of what happened except the defendant's guilt. It only means that the "trier of fact" (as the judge and/or jury are sometimes known) no longer has any reasonable doubts about the defendant's guilt. Beyond a reasonable doubt is best described as proof of such high quality and probability that you can depend on it in the most grave and serious things in life. The reason for such high proof is the seriousness of punishment that can result in criminal cases. Here, if the scales of justice were in equal balance and proof beyond reasonable doubt were placed on the scale against the opposition's evidence and proof, the proof beyond a reasonable doubt would have to completely outweigh the other.

If a party fails to produce enough evidence to meet the requirements above as to one of the facts or propositions upon which the party hopes to rely, then the jury need not consider that fact as proven. If the fact is essential to the party's prima facie case, then the party has failed to

prove his prima facie case, and he must lose. As an example, in the battery case described above, suppose the Tribe failed to convince the judge or jury by failing to prove beyond a reasonable doubt that the touching was intentional. Intent is an important element of a prima facie case of assault. Therefore, the Tribe has failed to carry it's burden of proof, and the case must be dismissed, or the defendant declared "not guilty."

The concept of a "prima facie" case should be further defined at this point. A prima facie case is one which a party has presented evidence to prove all of the required elements which are needed in order to win a law suit. Once a prima facie case is proven, then the other party must present evidence to disprove or rebut the prima facie case, or he will automatically lose the law suit. As an example of a prima facie case in a misdemeanor, a prima facie case of speeding consists of proof of the following elements: 1) that the Tribal court has jurisdiction over the crime and the defendant; 2) that the defendant was exceeding a posted speed limit; and 3) how fast the defendant was going.

D. Uncontradicted Evidence

Uncontradicted evidence is evidence which stands unchallenged, undenied, and unrebutted by the opposing party in a law suit. The rule in most courts is that if uncontradicted evidence is clear, positive, direct, not improbable or contradictory, and given by witnesses who have not been impeached, then the judge and the jury should assume that the evidence

is true, and act accordingly. An example of a situation where there are reasonable grounds for the judge or jury not to accept at face value uncontradicted evidence is where the witness has a financial or personal interest in the outcome of the case. In situations like this, even though the evidence may be uncontradicted, the judge or jury may, if they so desire, assume that the witness is biased because of his interest in the outcome of the case, and therefore not necessarily telling the truth.

E. The Burden of Proof and the Verdict

As we saw earlier, the burden of proof is fixed at the time the trial begins, and does not shift. Therefore, where a party has a burden of proof to prove a certain fact or proposition, then he must do so by a sufficient weight of evidence to carry that burden of proof. If he fails to do so, then the verdict must be against him. Generally, where the evidence is evenly balanced on a particular point, then the person with the burden of proof on that point will not be said to have carried his burden of proof, and the court may decide against him on that point.

Section 4. Presumptions and Inferences

A. Presumptions

A presumption is a rule of law which requires a judge or jury to draw a certain conclusion from particular evidence or charges, unless and until those conclusions are disproved by other evidence. A presumption may cause the court to assume that a fact is untrue. Some presumptions are presumptions of

fact. These presumptions are usually based on reasoning and logic, drawn from everyday human experience. Other presumptions are presumptions of law, and are created as a matter of policy to support a goal of the law.

Legal presumptions may be "rebuttable" or "irrebuttable." A rebuttable presumption has effect only so long as no evidence has been presented to disprove that presumption. The opposing attorney may introduce evidence to rebut the presumption, but the amount of evidence required differs according to the particular presumption involved. An "irrebuttable presumption" is created by law in certain instances, and no amount of evidence to the contrary will overcome the effect of such a presumption. This will be discussed more fully later in this section.

B. Inferences

An inference is similar to a presumption. It is a conclusion which is drawn from facts proven by the evidence in the trial. Normally, it should be left to the judge or jury to draw inferences from the evidence. For example, if the evidence in the trial proves that $50.00 was stolen from Sam's store; that the thief had on green pants and an orange shirt; and that Phillip was captured by the police minutes after the robbery, with $50.00 in cash, and wearing green pants and an orange shirt, near the location of Sam's store; then, the judge, or the jury, may draw the "inference" that Phillip was the robber. There was no direct evidence that Phillip was the robber, such as an eye-witness identification. There was

only circumstantial evidence. But, the trier of fact, meaning either the judge or the jury, may draw "inferences" from circumstantial evidence in arriving at a verdict. Convincing circumstantial evidence may support a conviction.

Generally speaking, the major difference between a "presumption" and an "inference" is that a presumption must be made, because the law requires it to be made, while an inference may be made, and is not required to be made.

C. Presumptions as Evidence

As we have seen, there are two types of presumptions. One type is based on logic and reasoning, and is drawn from certain facts which are proved by evidence. These presumptions are evidence and if no contradicting evidence is offered to disprove them, they control the verdict in the case. Even if evidence is offered to disprove these presumptions, the facts upon which these presumptions rest are still evidence in the case, and it is left to the judge or jury to decide whether the new evidence has disproved the presumption, or if the presumption still exists.

The other type of presumption is one which is created as a matter of policy by the law, in order to accomplish some goal of the law. As an example, there is a presumption that all people are familiar with the laws which are in effect in their jurisdiction. But there is probably no person who knows all of the laws which are in effect in the jurisdiction in which he lives. This presumption is based on the policy of the law that we cannot excuse people from disobeying the law

simply because they do not know the law. It is the duty of every citizen to find out what the law is before he acts. By the time a person reaches adulthood, he generally has a pretty good idea of what is legal and illegal. But, when in doubt, a person should find out what the law is, rather than just making some assumptions. If we could all act according to what we thought the law should be, then everyone would be living by a different set of laws, and confusion would be everywhere.

When a presumption which is rebuttable is established as a matter of public policy, and evidence is presented to disprove that presumption, then the presumption no longer has any effect, as if it had never existed. However, if no evidence is presented to disprove such a presumption, or if the law says that such a presumption is irrebuttable, it has the same effect as evidence, and controls the verdict in the case. Remember that the presumptions established as a matter of public policy are usually written in the statutes or court opinions, and may be rebuttable or irrebuttable; if rebuttable, they are no longer effective when evidence of sufficient weight is introduced to disprove them; if irrebuttable, they cannot be disproved by any evidence and influence the verdict in the case.

D. Examples of Presumptions

The following presumptions are usually followed in courts using the statutory rules of evidence; some may or may not be of any use to the Indian trial judge, but are included here

simply to familiarize you with them, in case you run across one of them in the course of one of your trials.

i. Presumptions in a Criminal Case

(a) Presumption of innocence (required)

There is a rebuttable presumption that a defendant in a criminal case is innocent. This presumption stands until the defendant is proven guilty, which means that the tribe must prove all of the essential elements of the crime with which the defendant is charged, and must prove that the defendant is guilty beyond a reasonable doubt. This means that the Tribe must prove every element of the crime, beyond a reasonable doubt, to overcome the presumption of innocence. The defendant may rely completely on this presumption, if he wishes to do so, and not offer any evidence on his own behalf, but merely wait for the Tribe to prove his guilt, or fail to prove his guilt. In other words, the defendant may rest his case after the Tribal Prosecutor has presented the Tribe's evidence and allow the judge or jury to decide the case from that evidence and the innocence presumption. If the tribe fails to prove every element of the crime beyond a reasonable doubt, then the presumption of the defendant's innocence will prevail, and the defendant must be declared not guilty. Once the Tribe presents evidence which proves the elements of the crime beyond a reasonable doubt, then the presumption of the defendant's innocence disappears, and the defendant must present evidence of his innocence, or be

found guilty.

The reason for this presumption is to protect every citizen from being mistakenly convicted of a crime. The law, as a matter of policy, has set up this presumption as a shield to avoid convicting an innocent person. The effect of this presumption is merely to force the Tribe to prove beyond a reasonable doubt that a man is guilty of every element of a particular crime, before that person may lose his life, liberty, or property as a punishment for that crime.

(b) Circumstances which create a presumption or inference of guilt:

(1) Mere presence at the scene of a crime does not create a presumption or inference of guilt unless it can be also proven that the defendant was actually encouraging or approving what was done.

(2) False statements made by the accused, or false statements made by another person at the request of the accused, which are made as an explanation or defense, raise a presumption of guilt.

(3) If the accused person runs away or hides himself after he has been accused of a crime, there is a weak presumption or inference of guilt, or an inference from which the jury may conclude that the defendant had a guilty intent. If a defendant flees or hides himself before being accused of a crime, no presumption of inference of guilt arises. Mere departure from the scene of a crime does not

give rise to a presumption of guilt. In order for a presumption of guilt to arise, there must be evidence that the fleeing or hiding was done with an awareness of guilt, and in an effort to escape prosecution for the crime. Any such presumption of guilt disappears when the defendant voluntarily turns himself in to the police.

(4) When a defendant is found in possession of recently stolen property, where the evidence indicates that the property came into the possession of the defendant by his own act, or with his approval, there is a weak presumption or inference of theft or guilty possession.

(5) Generally, evidence that the defendant committed other crimes does not create any presumption of guilt of the crime with which the defendant is presently charged, unless there is a common method or scheme used in the previous crimes and the crime with which the defendant is charged. These common methods and schemes are sometimes called the "modus operandi." For example, if a defendant has committed several previous crimes in which he used a blonde wig, green sun glasses, and dynamite; robbed banks at night, in a certain distinct manner, such as climbing down the chimney at 2:00 a.m., and blowing up the safe, then climbing back out through the chimney; and is now accused of committing another robbery in which the same methods and schemes were used, then a presumption may arise that the defendant committed the present crime.

But, keep in mind that before a "modus operandi"

presumption can arise, there must be a clear and distinct pattern established by the previous crimes committed by the defendant, and that pattern must be followed in the crime with which the defendant is presently charged.

(6) Presumptions of knowledge of the law

Generally, there is a presumption that everyone knows the laws which govern their lives, or the laws of the jurisdiction in which they live. To an Indian living on a reservation, this would mean that he is presumed to know the Tribal laws, and the laws of the United States which apply to him. Once the Indian goes off the reservation, then he is also presumed to know the laws of the city, county, and state in which he is located. The reason for this presumption is as follows: If people were excused for breaking the law simply because they said they did not know what the law was, then nobody would ever be convicted of any crime, since all he would have to do is to claim that he did not know that what he was doing was a crime. There are certain crimes, however, which require a "willful" violation of a specific statute. In that case, if the person was not aware of the statute, then he could not have willfully violated it, and therefore no presumption of knowledge of the law exists.

ii. Presumptions about the Individual

Generally, it is presumed that a person is sane rather than insane; competent rather than incompetent; is in average normal health rather than sick; and is sober rather than drunk. It

is presumed that a person understands and intends the natural result of his actions. These presumptions stand until evidence to the contrary is introduced.

iii. Presumptions about Communications

Once it has been proven that a letter was mailed, it is presumed that it was received. Of course, the letter must be proved to have been properly addressed and covered by a sufficient amount of postage. Furthermore, once these elements are proven, then it is presumed that the letter was recieved in the normal number of days after mailing. These presumptions stand until evidence is introduced to the contrary. A similar presumption of receipt arises when a telegram is proven to have been properly sent. It is presumed that the person who answers a telephone call at the place of business of the person called for is the agent of the person called for, and is authorized to speak for the person called for on matters relating to the general business carried on by the person called for at that business. Also, it is presumed that a letter received through the mail, in response to a letter sent by the person receiving the letter, was actually signed by the person whose name is written on the letter. Again, these presumptions stand until evidence is introduced to the contrary. At that time, the presumption disappears, and the trier of fact must decide whether the fact was true or not, by balancing the evidence presented by both sides.

iv. Presumptions about the Evidence and the Parties during Trial

If a person introduces false evidence, it is presumed that his case is without merit. If a party intentionally spoils or destroys evidence, it is presumed that the evidence would have been prejudicial to the person. Generally, however, there must also be some indication that the destruction was done in fraud and with the intent to suppress the truth. If a person withholds evidence in a case where it would be in his best interests to produce it if it were favorable to him, and no satisfactory explanation for the withholding is given, then the presumption arises that the evidence would have been unfavorable to the person. This rule applies to all sorts of evidence, including books, papers, and other documents. A similar presumption arises when a person fails to call a witness to testify, where the witness is under the control of that person, and the witness would ordinarily be able to testify on a relevant issue in the case. The presumption is that the testimony of the witness would have been unfavorable. The same sort of issue arises when a person calls a witness, but fails to examine that witness on a particular point which the witness has knowledge of, and which is relevant to the case. Generally, in a civil case, if a party refuses to take the stand on his own behalf, where he has relevant knowledge of the case, and his testimony would be expected to be favorable to him, then a presumption arises that the testimony would have been unfavorable. However, in a criminal case, under the

Fifth Amendment of the U.S. Constitution, and under the 1968 Indian Bill of Rights, a person is not required to testify in his own behalf. No inference should be drawn from the exercise of this constitutional right.

Section 5. Relevancy and Exceptions

A. Relevancy Defined

Before evidence is admissible, it must be relevant. A particular piece of evidence is relevant if it proves, or helps to prove, that a particular fact or proposition related to the issues in the case is true. For example, Bill is accused of an armed robbery of Joe's Gas Station. Would the testimony of Joe, who was robbed, be relevant? Yes. The issue in the case is whether or not Bill robbed Joe. Since Joe is the person who was robbed, his testimony will help to either prove or disprove that Bill robbed him. Sam saw the robbery. Is Sam's testimony relevant? Yes, because it helps to prove or disprove Bill's guilt. Taylor didn't see the robbery, but heard about it later on the radio. Is Taylor's testimony relevant? No. Taylor doesn't know anything more about the robbery than the general public does. His testimony will not help to prove or disprove the issue in the case, Bill's guilt or innocence.

The term, competency, which you may have heard, simply refers to the ability of a witness to testify on the basis of personal knowledge, and to express his personal knowledge. For example, if a person has no personal knowledge of the facts about which he testifies, then he is incompetent to testify

about those facts. Slight exceptions to this rule occur in the case of expert witnesses. Similarly, if a person has personal knowledge of the facts, but is unable to express those facts to the court, due to some disability, such as insanity, or very young age, then he would be incompetent as a witness.

You may also have heard the term, materiality, which refers to the importance of the evidence in relation to the issues in the case. The concept of materiality is similar to relevancy, but the two terms do not mean the same, and you should keep that in mind. Relevancy refers to the logical relationship between the evidence and the issues in the case. Materiality refers to the importance of the evidence to the case.

B. Legal Relevancy

In the first part of this section, you learned what the word "relevant" means. The definition you learned is very general, and is sometimes referred to as logical relevancy. Logical relevancy refers to any evidence which helps to prove or disprove a fact or proposition which is related to an issue in the case. The term, legal relevancy, refers only to that part of "logically relevant" evidence which is admissible under the Rules of Evidence. Although a certain piece of evidence might be logically relevant, there may be a rule of evidence which makes the piece of evidence inadmissible. A piece of evidence must be legally relevant before it is admissible.

C. Exceptions to Relevancy

In some situations, certain evidence is inadmissible, even though it appears to be legally relevant. In these situations, the evidence involved is either unimportant, misleading or confusing, unduly prejudicial, or unduly surprising. Here are some examples of such situations:

i. Evidence which is inadmissible, although legally relevant, because it is unimportant

Certain kinds of evidence are of very slight value, because they prove very little, and take up a great deal of the court's time. This kind of evidence, although it may appear to be legally relevant, is inadmissible.

ii. Evidence that is inadmissible because it is misleading or confusing

Often, when a lawyer can find no other defense for his client, he will try to mislead and confuse the jury, hoping to win the case in that way. This should not be allowed in your court.

iii. Unduly prejudicial

There are certain pieces of evidence which, if presented to a jury, will undoubtedly cause a strong emotional response and cause the jury to become strongly prejudiced against one of the parties in the case. A huge color photograph of a bloody corpse, for example, may have such an effect, and should not be admitted unless it is absolutely necessary to prove a party's case.

iv. Unduly surprising

A similar rule applies to evidence which takes the opposing party by great surprise. The rules of criminal and civil procedure of most courts allow each party in a case to "discover" what evidence the other party has before the trial. The reason for such rules is that justice is best served by an open, honest, and fair hearing, rather than a dramatic show, full of surprises and tricks. Therefore, the general rule is that where one of the parties has been unduly surprised by the evidence of the other party, such evidence will not be admissible, even though it may otherwise appear to be legally relevant. Instead, a continuance or recess should be granted to allow the party enough time to prepare his answer to the surprise evidence.

D. Classification of Evidence

The rules discussed above seem fairly simple, but are very difficult to apply. In a few cases, the rules obviously apply, and the judge has no difficulty in classifying the evidence. But, more often, it is very hard to classify evidence under the rules given above. About the only reasonable way to clear these matters up for you is to give a series of examples of situations in which the courts have applied these rules. For situations not covered in these rules, you must use your own best judgment.

i. Negative testimony

"Negative" testimony, or evidence, is evidence presented to prove that a certain event or condition did not happen or

exist. Whether such evidence is admissible or not depends on how strongly it proves what it is meant to prove. If it provides only very weak evidence that a fact is not true, then it is often said to be inadmissible because it is too "remote." This brings such evidence under the exceptions of being "unimportant," and "misleading or confusing," discussed above. As an example, Sonny's drug store is being sued for negligence. Sonny failed to clear the ice off of the front step of his drug store, as a result of which Mike slipped and broke his hip. Sonny wishes to present evidence that several other customers entered the store without slipping or falling on the step. This would be "negative" evidence in the sense that it attempts to prove that a fact or condition did not exist. But consider the "weight" of the evidence. How strongly does it prove that Sonny was not negligent? Does it prove, for example, that Mike didn't fall because of ice on the step? No. At most, it might prove that some of Sonny's customers were luckier, or more careful, or more experienced at walking on ice than Mike, but that is not the issue in the case. So long as Mike exercises a reasonable amount of care, and did not contribute to his own accident, then Sonny is responsible.

ii. Evidence which is excluded on the grounds of unfairness

Some evidence is excluded on the grounds that it would be unfair to admit it into evidence, because it raises too many indirect issues about dealings between one of the parties to the law suit and persons other than those involved in the law suit. Such evidence is inadmissible, even though it appears

to be logically relevant. As an example, Bill was held in the Tribal jail for 5 days. During that time, he claims that his civil rights were violated, and that he was treated in a cruel and inhumane manner. To prove this, he wishes to introduce evidence about the treatment of other prisoners at the jail, who were confined at the jail at various times prior to the time when Bill was held there. Should this sort of evidence be admitted? It appears to be logically relevant, because it would tend to prove how the Tribal jailers treat prisoners. However, that is not the issue in this case. The only issue in this case is the treatment which Bill received while he was jailed. To allow evidence about how other prisoners were treated in the past would raise too many indirect issues, would greatly lengthen and confuse the trial, and is inadmissible. This sort of an exception would fall under the general rules against "unimportant," "misleading and confusing," and "unduly prejudicial" evidence, discussed above.

iii. Proof of method or course of dealing

The exception discussed above, in part ii, does not apply when the issue in the case is a party's method or course of dealing. The term, "method or course of dealing," simply refers to the way in which a person usually conducts his business or transactions with other people. Suppose in the example given above, about Bill and the Tribal jail, that instead of a trial, it was an administrative hearing, to determine whether the jail was being properly run. The issue would then be how all prisoners are treated at the jail, rather than just how Bill was

treated at the jail. In that situation, evidence about the dealings between the jail and its past prisoners would be admissible.

Section 6. The Hearsay Rule and Exceptions

A. Hearsay Defined

Hearsay is perhaps the most difficult concept to master in the law of evidence. Generally, hearsay is "second-hand" evidence. Often, it is testimony by a witness about what he heard another person say. But hearsay may also be in written form. The important feature is this: hearsay is testimony, either spoken or written, about something that another person, other than the witness, supposedly said or wrote in the past. When hearsay evidence is presented, it is not the honesty or accuracy of the witness at the trial that comes into question, but it is the honesty and accuracy of the person who originally made the statement or writing that is to be questioned. Another way of defining hearsay is to say that it is any statement, either spoken or written, made outside of the court, by a person other than the person who is now reporting it to the court. For example, Bill tells Arnold that he saw Jim hit Betty. Now, Arnold testifies in court that Bill told him that he saw Jim hit Betty. Arnold's testimony is hearsay. If Bill were to testify that he saw Jim hit Betty, it would not be hearsay, because Bill has first-hand knowledge of the facts.

The Federal Rules of Evidence, Rule 801(c), defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to

prove the truth of the matter asserted." Each of the components of this definition should be further defined. The following analysis is synthesized from an outline of evidence compiled by Professor Robert H. Aronson of the University of Washington Law School.

1) Statement: an oral or written assertion, or conduct if it was intended by the actor as an assertion (for example, a motion of the head to mean "yes" or "no") Rule 801(a).

2) Declarant: the person who made the out-of-court statement. Rule 801(b). A statement is hearsay even if the witness and declarant are the same, since the statement was still made out of court. Very importantly, as will be explained shortly, this out of court statement was not subject to oath or cross-examination.

3) Offered to prove the truth of the matter asserted: out-of-court statements are normally relevant only to prove that matters contained in the statement are true. However, if the mere fact that the statement was made is itself relevant regardless of the statement's truth or falsity, it is not barred by the hearsay rule, which will be presented shortly. Examples of statements not offered to prove the truth of the matter asserted (and hence admissible for the stated purpose) include:

a) statements which are indirect evidence of a mental state (e.g., "Joe is a dirty rat" to show the declarant's dislike for Joe);

b) statements offered for the purpose of proving that the

hearer had notice of the matter stated (e.g., "You must leave the premises" shows the hearer had notice);

c) statements tending to prove that the hearer was under duress (e.g., "Smith said he would kill me if I didn't drive the getaway car"); and

d) statements that have legal effect of their own, independent of the sincerity or accuracy of the declarant (e.g., statements which show intent to make a gift, offer and acceptance in the making of a contract).

Two classes of statements that technically can be defined as hearsay, but normally are not classified as hearsay, are:

1) Prior statements by the witness: although the declarant was not subject to cross-examination at the time of the statement, he is subject to oath and cross-examination when he repeats the statement while testifying in court.

2) Admissions by a party-opponent: words or acts of a party, normally the defendant in a criminal case, or words or acts of a person authorized to speak or act for a party are exempted from hearsay treatment. People normally don't admit things which would help establish criminal guilt unless they were probably true and for this reason such admissions are exempted from the hearsay rule. The Federal Rules list five specific classes of admissions in 801(d)(2):

1) the party's (the defendant in a criminal matter) own statements;

2) adoptive admissions, which normally means that someone else said something that the defendant agreed with which

implicated the defendant. For example, Bill might tell Smith, in the presence of Spotted Tail, that Spotted Tail robbed the gas station. Spotted Tail's silence in not denying the statement would constitute an adoptive admission;

3) admissions by persons authorized by a party to make statements on the subject;

4) admissions by agents acting within the scope of their authority to make the statements for the party; and

5) statements by a co-conspirator of a party during the course and in furtherance of a conspiracy.

B. The Hearsay Rule

Once the difficult concept of hearsay is understood, the hearsay rule can be mastered easily. The hearsay rule, or the rule against hearsay as it is sometimes referred to, basically prohibits the admission of out-of-court statements, spoken or written, which constitute hearsay made by a person who is not a party to the law suit or who is not in court as a witness in the law suit. (The law suit in this instance would be a criminal action.)

The hearsay rule is best understood when the rule's basic purpose is kept in mind. That basic purpose is to insure the reliability and truthfulness of any statements which are admitted as evidence in court. The dangers of not knowing the honesty or the accuracy of statements made by a person who is not in court to explain those statements have already been presented. But, hearsay is generally inadmissable because:

1) the statement was not made under oath. Normally,

before testimony is given in court, a witness is sworn by oath to tell the truth. If the witness violates this oath, he or she is subject to criminal penalties. A statement made by a person out-of-court who does not have to testify in court does not have the same guarantee of truthfulness.

2) the statement was not made in court so that the judge or jury could observe the declarant's physical demeanor. This means that the judge or jury was not able to see whether the person who made the statement was joking or was telling an obvious lie.

3) the person who made the statement was not subject to cross-examination by the opposing party. The opportunity to cross-examine the declarant is believed to be the most important check on the four dangers of hearsay:

a) faulty perception (was the declarant in a position to see what she thinks she saw?);

b) faulty memory (is the declarant certain that the burglar's hair was gray?);

c) insincerity (was the declarant lying?); and

d) faulty mode of expression ("He's real sharp." - does that mean smart or sneaky?).

If the person was subject to cross-examination, he or she could perhaps be shown to have some of the deficiencies mentioned above. Indeed, the Indian Civil Rights Act requires that the accused have the right to be confronted with the witnesses against him or her. (25 U.S.C. § 1302(6)) When hearsay is allowed in court, the accused is denied the right

to challenge it's truthfulness and accuracy.

C. Exceptions to the Hearsay Rule

There are several exceptions to the hearsay rule where hearsay is admitted into evidence. Each exception to the rule is based on the reasoning that there are substitute indicators of truthfulness and accuracy because of the particular circumstances under which the hearsay statement was made. These particular circumstances compensate for the loss of the safeguards like oath, demeanor and cross-examination when a person is testifying in court. These exceptions can be divided into two groups: 1) hearsay exceptions requiring that the declarant must be unavailable; and 2) hearsay exceptions for which the declarant's availability does not matter.

i. Hearsay exceptions for which the declarant must be unavailable

A person who made an out-of-court statement may have died prior to trial or may have become physically unable to testify at the time of trial. Or, someone who wants to use his statement may not be able to locate the person for testimony at trial. In these instances, the declarant is deemed unavailable and the following types of statements are not excluded by the hearsay rule:

1) former testimony: this exception is applied primarily with respect to retrials following reversal. Since oath and the opportunity to cross-examine were required, truthfulness and accuracy could have been tested.

2) dying declaration: this exception is based on the

belief that someone who is about to die will tell the truth.

3) statement against interest: this exception is based on the fact that people have a very strong incentive to protect themselves from criminal liability; therefore they would not make a statement that subjects them to such liability unless they strongly believed the statement to be true. The statement must be clearly against the declarant's monetary, property or criminal interest before admission under this exception.

ii. Hearsay exceptions for which the declarant's availability does not matter

These are exceptions for which certain circumstances, not depending on later availability of the declarant to testify, are present to insure the truthfulness and accuracy of hearsay statements. Thus, the following statements are admissable as evidence at trial even though technically hearsay and even if the declarant is available as a witness.

1) Present Sense Impression: A present sense impression would be a statement such as "Bill is stealing the car." The exception is based on the reasoning that the spontaneity of seeing the event guards against faulty memory and untruthfulness.

2) Excited Utterance: This exception is based on the tendency of shock or excitement during a startling event to guarantee the honesty of any statement made while observing the event.

3) Statement of Mental or Physical Condition: This exception is based on the belief that there is no memory or

perception problem when describing mental or physical conditions as they occur. As an example, Bill states that "I'm really mad and I'm going to get him." This statement show's Bill's state of mind at the time of the utterance.

4) Statement for Purposes of Medical Diagnosis or Treatment: This exception is based on the same factors of honesty as the mental state exception above where the declarant expresses present pain or physical sensation. For example, a statement made to an ambulance driver or doctor regarding pain would not be excluded as hearsay because there are no memory or perception problems.

5) Recorded Recollection: This exception is based on the belief that a statement, written down when the matters perceived were fresh in the declarant's mind and which he is willing to testify was accurate when made, is both truthful and necessary because the witness can no longer remember the underlying facts. This might happen, for example, where a witness wrote down the description of a burglar but could no longer remember the description while testifying in court.

6) Records of Regularly Conducted Activity: Normally referred to as the "business records exception," this exception is based on the belief that spontaneity insures accurate memory, and honesty and perception are insured by the fact that businesses or other activities rely on the accuracy of their records in making decisions. For example, a clerk's written description of a business transaction would not be excluded as hearsay if the description was a regularly

required duty. Accuracy is also guaranteed because the declarant, the clerk in the above example, may be fired if his writings are not reliable.

7) Public Records and Reports: The basis for this exception is the same as that for the business records exception. Police accident records are public records which, although written hearsay, are admissable as evidence because of the need for accuracy and reliability.

D. Summary

In sum, hearsay is a statement, either spoken or written, about something that another person, other than the witness testifying in court, supposedly said or wrote offered to prove or disprove a matter of importance at trial. The rule against hearsay excludes the statement because the person who made the statement is not subject to oath, to examination by the court for demeanor, or to cross-examination by the opposing party. Thus, the honesty or accuracy of the person who originally made the statement is not subject to these tests to insure reliability. But we have seen that there are numerous exceptions to the hearsay rule based on certain conditions which guarantee the reliability of statements where the declarant may not be subject to oath or cross-examination.

The concept of hearsay is unquestionably difficult to master. You will also have to consider many instances where evidence, even though technically hearsay and subject to exclusion, should be heard by the judge or jury as finder of fact to assist the court in seeking the truth and rendering

justice. It is impossible to formulate guidelines for these instances but a judge will have to use common sense in judging the reliability of hearsay evidence depending on the given factual circumstances.

Section 7. Character Evidence

A. Character Evidence Defined

The word character means all of the moral qualities that a person has, for good or for bad. That includes: his tendency to tell the truth, or his tendency to lie; his tendency to steal, or not to steal; his tendency to fight or cause trouble; his tendency to be careful, or his carelessness and neglect; and any other characteristics of his personality. Character evidence is simply any evidence which proves what the features of a person's personality are.

B. Admissibility of Character Evidence

i. The Rule in Civil Cases

Generally, character evidence cannot be used to prove or disprove that a person did a particular act. This rule applies mostly to civil cases. (A different rule, which applies to criminal cases, will be discussed shortly.) The reason for this rule is that if witnesses were allowed, in every case, to testify about the character of the parties in the case, then the real issues in the case might be forgotten, and the trial would simply turn into a popularity contest between the parties. The court and jury should not be concerned with which of the parties is the best liked in the community, or who has the most friends, or who has the most powerful friends. The court

and the jury should only be concerned with fairness and a just decision in settling the differences between the parties, or in deciding the guilt or innocence of a person.

For example, Arnold is accused of being negligent in the way he pens up his pigs. His pigs escaped and ruined Ted's garden. Ted sues Arnold, claiming that Arnold was careless when he built his pig pens, so that the pig pens easily fell apart, and the pigs escaped. Arnold wants to introduce character evidence to prove that he is a very good man. He wants to show that he goes to church every Sunday, that he is generally a very careful person. Should Arnold be allowed to present any of this character evidence? No. First, whether or not he goes to church has nothing to do with how he built the pig pens. Neither does the fact that he never steals. Even the fact that he is generally a very careful person has nothing to do with how he built these particular pig pens. The only issue in the case is whether these particular pig pens were well built. This refers to actual facts about actions by Arnold, and not to any characteristics of his personality.

ii. The Rule in Criminal Cases

In criminal cases, unless the defendant makes his own character an issue in the case, then no character evidence is admissible. That means that if the defendant does not present any evidence about his own character, then the Tribal prosecutor cannot present any evidence about the defendant's character. But once the defendant presents evidence about

his character, he is said to have "opened the door," and the Tribal prosecutor may also present evidence about the defendant's character.

For example, Calvin is charged with robbery. Calvin doesn't offer any evidence about his own character, either good or bad, but simply bases his defense on an alibi that he was at a party when the robbery took place. May the Tribal Prosecutor present evidence that Calvin has the character of a dishonest thief? No. The law will not hold a defendant's past acts or personality against him in a criminal trial, unless the defendant, by his own choice, makes his past acts or personality an issue in the case. This insures that each defendant will get as fair a trial as possible.

Suppose that Calvin's alibi is proven false by the Tribal Prosecutor. Calvin then presents character evidence, in the form of testimony by his friends and family, that he is an honest man and is not believed to be a thief. Can the Tribal Prosecutor now introduce character evidence, such as testimony by other members of the community, that Calvin is considered to be a liar and a thief? Yes, because Calvin has "opened the door."

C. Character as a Factual Issue

In some law suits, the character of a person is an issue in the case. For example, suppose that Freddie is suing Fritz for libel and slander because Fritz told Beatrice that Freddie was a "jerk." Freddie claims that this statement by Fritz has damaged Freddie's reputation in the community. But, if Freddie

already has a bad reputation in the community, then Fritz could not have damaged Freddie's reputation. Therefore, Freddie's reputation in the community, or his character, becomes an issue in the case. In a case like this, character is said to be a "fact in issue," and character evidence is admissible. You should keep in mind that character does not mean the same thing as reputation in the community; however, if a person's character is bad, and if it is known in the community to be bad, then his reputation in the community is likely to be bad, too.

A person suing another for breach of promise to marry is another example. The person who breached the promise may claim as a defense, that the other party turned out to be of bad character because of alcoholism, or sexual permissiveness, or other reasons. If it could be proven that the other person did show these elements of bad character before the promise to marry was made, then this would be a good defense against a lawsuit for breach of promise to marry. Therefore, the character of the other person becomes a "fact in issue," and character evidence is admissible.

Another exception to the general rule against character evidence is similar to the exception just discussed, where character is a fact in issue. Character is an evidential fact when it is not a main issue in the case, but is merely one of the facts of evidence that apply to the issues in the case. For example, in a rape case, one of the main issues is whether the person who claims to have been raped consented to have sexual intercourse. If Molly claims she was raped by Joe,

then the Tribal Prosecutor will have to prove, among other things, that Molly did not consent to have intercourse with Joe. But suppose Molly has a very bad character, and is sexually permissive with a large number of men in the community. This would be a fact of evidence which would have some bearing on the issue of consent.

D. The Character of the Witness for Telling the Truth

Any time a witness takes the stand, an issue might arise as to whether or not that witness is telling the truth. Therefore, every witness's character for telling the truth, sometimes called her "veracity," may be attacked by character evidence by the opposing party in the lawsuit. Keep in mind, however, that only the witness's character for telling the truth may be attacked. The opposing party cannot present evidence to show that the witness has a violent character, or has a sexually permissive character, or any traits of character, except those traits which have a direct influence on the witness' character for telling the truth. For example, Bob has been called to the witness stand to testify for the Tribe. May the defendant, then, introduce character evidence about Bob to show that Bob beats up little children? No. Even though this would show a terrible character for violence and cruelty, it has nothing to do with whether or not Bob tells the truth. May the defendant present character evidence about Bob to show that Bob forges signatures on credit cards? Probably so, because forgery is merely a written form of a lie, and this has a bearing on Bob's character for telling, or not

telling, the truth.

In this case, the Tribe could then present testimony by other witnesses to show that Bob has a reputation for telling the truth. However, the party who first calls a witness may not present testimony by other persons that the witness has a reputation for good character or for telling the truth, unless and until the opposing party presents persons to testify that the witness has a reputation for bad character or for lying.

E. Proof of Character

i. Procedure

In all of the examples or exceptions discussed above, where character evidence is admissible, character is generally proven by testimony about the person's general reputation in the community. Here, the word, "community," refers not only to the community in which the person lives, but also to the community in which the person works, or among the person's social friends. For example, a person might live in one town, commute to work in another town, and spend his recreation time in a resort at another town. He would then have three communities in which he lived. As we already know, "character" and "reputation in the community" are not the same thing. However, the courts generally use a person's reputation in the community as a good measuring stick to decide what the person's character actually is. Therefore, to present evidence about a person's character, either good or bad, the usual procedure is the following:

(a) A witness is called to the stand, and asked if he is familiar with the reputation of a certain person in the community.

(b) If he says yes, then he is asked what that reputation is.

(c) The witness may then tell what the person's reputation is in the community. For example, he may say, "He has a reputation for being a very violent person." Or, he may say, "He has a very good reputation."

The opposing party, of course, may ask this witness questions to determine if the witness is really familiar with the person's reputation in the community or not. For example, if the witness just moved into the community, or has been away from the community for years, then he probably doesn't really know what anybody's reputation in the community is.

ii. Specific Acts

Generally, evidence about things that a person did in the past are not admissible to prove what that person's character is. The reason for this rule is that if such evidence were admissible, it would simply open the trial up to unlimited issues which have nothing to do with the real issues in the case. But suppose we did not have this rule, and that the parties could present evidence about past actions by persons to prove what that person's character is. John call Fred as a witness. Pete, the opposing party, then calls a witness to testify that Fred lied to his boss one time. John then calls a witness to testify that Fred did not lie to his boss that

time. Pete then calls a witness to testify that Fred lied to his wife one time. John then calls a witness to testify that Fred did not lie to his wife that time. It could go on and on, and the court would never get around to deciding the original case that it was hearing.

iii. Opinion Testimony

A witness is not allowed to testify about what he things the character of a person actually is, rather than testifying about what that person's reputation for character is in the community. For example, Bill cannot testify that he thinks that Mary has a good character for telling the truth. This would simply be an opinion on Bill's part, since he cannot look into Mary's mind, and he has no way of knowing what Mary's character is really like. The only knowledge Bill has of Mary's character is gotten from watching her activities in the community. And, as we saw above, it could easily become too complicated and take up too much time if courts allowed a person's character to be proven by specific acts of the person. So, all that Bill can testify about, with any certainty, is Mary's reputation for character in the community.

iv. Lack of Character Evidence

Suppose a person has lived in a community for many years, going about his business, and bothering nobody. This person might not have any close friends, and therefore, there may be nobody in the community who really knows this person. Suppose that nobody ever talks about this person's character. If the person's character has no reputation in the community, how can

his character be proven?

In some cases, the mere fact that a person has no reputation for a certain character trait is admissible to show that the person has good character. For example, suppose Pat is the kind of quiet person described above. His character has no reputation, good or bad, in the community. Now, suppose he is accused of assault and battery. Can he defend himself by calling a witness to testify that he has no character reputation in the community? Yes. If he were a violent type of person, who frequently got into fights, surely he would have some reputation for that in his community. The fact that he has no reputation at all indicates that he probably is not a violent person.

Section 8. Privileges

A. Privilege Defined

As discussed in Part C of Section 1 of this chapter, "The Law of Evidence and the Tribal Court," the rules of evidence are followed to insure that certain communications between persons, such as attorney-client conversations, cannot be exposed at trial if the Tribe has decided that those particular communications should be protected and not disclosed. Such a conversation is considered a privileged communication not subject to disclosure. The following analysis of privilege is synthesized from an outline of evidence compiled by Professor Robert H. Aronson of the University of Washington Law School.

i. Protected Relationships

Such conversations obviously might provide useful evidence at trial but the rules of privilege prohibit their disclosure to foster certain types of relationships. Within limits, participants in these protected relationships are assured that their confidential communications will not be revealed in court. It is thought that people will be less than candid and truthful when seeking legal or medical advice if everything they tell their lawyer or doctor may be used in court.

ii. Waiver of the Privilege

Since the privilege attaches only to those communications, made within a protected relationship, that are confidential, there is no privilege when a communication is made in the presence of a third person. For example, if Fred discussed his legal problems with his attorney in a crowded tavern, he would have waived the privilege by his actions. A person could also waive the privilege by failing to assert it when in a position, for example at trial, to do so.

iii. Assertion of the Privilege

The claim of privilege must be made immediately when disclosure of a particular communication is sought. Timely assertion of the privilege is very important because the privilege cannot be redeemed once it is waived.

iv. Burden of Proof

The burden of proof falls on the party asserting that certain communications are privileged. The usual rule is that the judge may not look to the substance of the communication

to determine the existence of a privilege.

B. Specific Privileges

i. Attorney-Client: Communications with an attorney or advice from the attorney in the course of professional employment are privileged. But the privilege does not extend to communications made in furtherance of a crime or fraud.

ii. Doctor-Patient: Communications with a doctor for treatment or medical advice are also privileged and not subject to disclosure. The fact of treatment for drug or alcohol abuse is especially protected. When the privilege applies, all information acquired in attending the patient, including x-rays and doctors' reports in hospital records, is protected. The reporting of child abuse or the attempt to obtain controlled substances like narcotics are normally exceptions to the doctor-patient privilege.

iii. Other Relationships: The attorney-client and doctor-patient relationship are the two most important relationships where the privilege of confidentiality will arise. Other relationships which also might provide the basis for a claim of privilege are the psychologist-client, priest-penitent, and husband-wife relationships.

Section 9. Evidence and the Right of the Accused to Remain Silent

A. Right Against Self-Incrimination

The right of the defendant in a criminal case to remain silent, or to not incriminate himself, has been held to be protected by the Constitution of the United States. This rule against self-incrimination is obligatory upon the states

and is implemented by the Fifth and Fourteenth Amendments to the Constitution. This same guarantee that a defendant doesn't have to testify against herself and can remain silent has been specifically provided in Title II of the 1968 Civil Rights Act. Section 1302(4) says: "No Indian tribe in exercising powers of self-government shall...compel any person in any criminal case to be a witness against himself."

Actually the privilege against self-incrimination is two-fold, that is, the privilege extends to the defendant and to an ordinary witness. However, we are concerned here only with the defendant's right to remain silent. Most states have a statute on this privilege.

The defendant in a criminal prosecution has the right not to be called or sworn as a witness at the opposition's instance. The accused has the privilege to stay off the stand entirely. When we speak of "the accused" we mean one against whom a punitive criminal proceeding has been specifically directed, as by an indictment, an information upon which a criminal trial can be based, or contempt proceedings where the purpose is primarily punitive. So, an investigation into circumstances of an alleged crime to see if a prosecution should be started is not itself a criminal prosecution. Also a grand jury investigation, a coroner's inquest, or a preliminary hearing by a magistrate where no information has been filed on which a trial could be based, is not a prosecution. There is no accused and so no privilege to stay off the stand in these proceedings.

The defendant cannot be forced, coerced, or defrauded into testifying or giving evidence. The most common time this might happen is in the investigation and questioning of a defendant. If evidence is obtained from the defendant by any of these methods it is grounds for reversal on appeal and discharge of the proceedings.

So the main point of the defendant's right to remain silent is that he cannot be forced to take the stand to testify and he cannot be forced into confessing or giving evidence.

B. The Miranda Warnings

One of the main protections the defendant has against being made to testify and give evidence is the rules that came out of the case of Miranda v. Arizona, 384 U.S. 436 (1966). This case extends the protection against self-incrimination to the time when a person is taken into custody. Under the present status of the law, unless the defendant has been given the Miranda warning and has voluntarily and intelligently waived his rights, incriminating confessions solicited by questions in a custodial situation are not admissible as evidence against him.

It is not sufficient for an officer simply to give the warnings and then proceed to question the suspect. The prisoner must say that he understands his rights and is willing to answer the questions without counsel. Only then will a court find that a prisoner has given up his constitutional rights to silence. A waiver of rights is not to be inferred simply from the fact that, after being given the warning, a prisoner

answers questions.

Certain essential points must be covered by the police when they give the warning to a suspect. The officer should be able to testify in court as to exactly what was said and that the warning he gave covered all of the essential points. The essential elements of the warning that must be given to the suspect are:

1) the accused has the unqualified right to remain silent;
2) anything he says can and will be used against him;
3) if he wishes to remain silent, questioning must cease;
4) he must be clearly informed that he has the right to consult with an attorney;
5) under the Fifth and Sixth Amendments, he has the right to have counsel present during the interrogation;
6) if the accused indicates that he wants an attorney at his own expense, then all questioning must cease until one is present or he has conferred with his attorney;
7) if he cannot afford an attorney, one will be appointed for him before any questions are asked if provided for in the tribal code;
8) the right to counsel can be waived only after the warning has been given and waiver is made voluntarily;
9) he must clearly understand what his constitutional rights are, and he must have knowingly and intelligently waived those rights before he makes any statement.

In some jurisdictions, the advice is given orally, and the

police officer or investigator reads a warning from a card, but a written form signed by the suspect is better evidence of a waiver. This does not constitute an absolute waiver. A court may have to make additional inquiry to insure that the privilege against self-incrimination is closely guarded. The burden lies with the prosecution to demonstrate that the defendant knowingly and intelligently waived the privilege. These decisions of the United States Supreme Court are applicable to the state courts through the due process clause of the Fourteenth Amendment. They are unquestionably applicable to cases involving felonies. Their applicability to minor criminal offenses, such as ordinances and tribal code violations, is much less certain. Some have applied Miranda, some have not. If the Miranda limitations are applied in the municipal courts and those that don't handle felonies, there are times when the warnings are not applicable:

1) no warnings are required in the case of persons who volunteer statements. If a person approaches a police officer and tells him he just assaulted his neighbor, the officer does not have to interrupt him and give the warning;
2) the warnings do not have to be given when the officer is not asking a prisoner for incriminating testimony. The officer does not have to give the warning when he asks the driver to submit to a blood alcohol test, walk a straight line, put on some particular clothing or do some act not requiring speaking;

3) the warnings do not have to be given so long as the person is not in custody or has not been deprived of his freedom of action in any significant way. The witnesses at the scene of the crime do not have to be given the warning before they are questioned.

It is possible for the accused who has the privilege of not taking the stand, and thereby not incriminating himself, to waive his privilege of silence. If the accused volunteers to take the stand, he volunteers to answer all relevant inquiries about the charge against him. He has made himself available and is held to give relevant evidence in all the ways the ordinary witness may be called on to furnish. He also must now agree to produce objects, bodily exhibition or to pronounce words or give specimens of handwriting. However, he has not waived his privilege to remain silent on other crimes he may have committed, but only the privilege as to the crime for which he is on trial and crimes relevant to the issue on trial. It must be remembered, that for the waiver to be good it must be voluntary. Also, by taking the stand at a preliminary hearing or before the grand jury, or at a previous trial, the accused does not waive his right to remain silent at the present trial. However, his testimony at the earlier trial may be used against him at this later trial.

Section 10. Weighing the Evidence

There is a general rule that in a criminal prosecution before a jury, the sufficiency of evidence to prove the main fact of guilt is a matter for the jury. Juries are allowed

full power to determine those facts which are proved and those which are not. After all the evidence has been placed before the jury, it is for them to weight the evidence, that is, decide how much credence should be given to it. The credibility of witnesses and the weight to be given their testimony is for the jury to determine. The testimony of the defendant is to be considered and weighed by the jury. The fact that the defendant does not take the stand does not raise a presumption of guilt against him. In non-jury trials this weighing of the evidence is the function of the court.

It is well established that the guilt of a person accused of a crime can be established and proven by circumstantial evidence. Where circumstantial evidence is relied upon in a criminal prosecution, proof of a few facts or a multitude of facts which are merely consistent with the supposition of guilt, is not sufficient to warrant a verdict of guilty. In order to warrant the verdict of guilty upon circumstantial evidence, it is necessary that the evidence excludes every reasonable hypothesis of innocence, not every possibility of innocence, but every reasonable hypothesis except the defendant's guilt. However, if any of the facts or circumstances established are absolutely inconsistent with the hypothesis of guilt, that hypothesis cannot be true. Facts proven must be consistent with each other and the main fact sought to be proved. A reasonable doubt must be resolved in favor of the accused where a material fact or circumstance is susceptible of two interpretations, only one of which is consistent with

guilt. Circumstantial evidence alone or in connection with other evidence may justify a conviction provided it is of such compelling force as to enable the jury to say the defendant is guilty beyond a reasonable doubt. The weight of circumstantial evidence is a question for the jury to determine just as with direct evidence. Whether such evidence excludes every other reasonable hypothesis than that of guilty is for the jury to decide. This applies only where the evidence is sufficient to take the case to the jury.

Section 11. Questions

1) Why is it important that the rules of evidence are followed in an Indian tribal court? Why should tradition and custom always be considered in applying the rules of evidence?

2) Standing Elk testified that he saw the defendant running from the scene of the theft. What type of evidence is this testimony?

3) Does the prosecutor have to show that a defendant committed a crime by a "preponderance of the evidence," or some other measure of proof?

4) During trial, the judge ruled that the defendant was presumed guilty unle.s she met her burden of going forward with the evidence to prove her innocence. What were the two errors the judge made in his ruling?

5) The witness testified that he had heard that the defendant, who was being prosecuted for reckless use of a firearm, had once hunted wild boar in Africa. The prosecutor objected to this testimony on the grounds that it lacked "relevance" and was "hearsay." What do these terms mean? Should the motion to exclude the evidence have been granted?

6) If an officer who was testifying in a burglary prosecution could not recall from memory the factual situation and description of the alleged burglar, would it be permissible for him to consult his notebook?

CHAPTER III. SUBSTANTIVE CRIMINAL LAW

Section 1. Introduction

A. The Structure of Criminal Law and the Elements of a Crime

Substantive criminal law consists of rules that define offenses and rules that defeat or reduce guilt. Rules that define specific crimes present the elements of a crime that must be proven to sustain a criminal conviction. There are two elements in almost every crime: 1) a particular act, and 2) a certain mental state. These two elements will be developed further in the following section, but it is important to remember that both must be present for a crime to exist. Either element alone is insufficient to support the conviction of a crime.

The acts described in rules defining offenses always consist of certain conduct, circumstances or results which occurred during the commission of a crime.

The mental states referred to in rules defining crimes always relate to the defendant's intent, knowledge, recklessness, or negligence. These mental states will be further developed in the following section.

Defenses to criminal charges always defeat or reduce the defendant's guilt by disproving (negating), justifying, or excusing the offense. Guilt is negated by a defense that seeks to prove that the defendant did not do the acts or did not have the mental state required by the definition of the crime. Justification ("I did it but what I did was necessary and proper.") also defeats or reduces the defendant's guilt where

a crime is committed. For example, self-defense might be a justification for the use of force against another person which would ordinarily be a crime. Excuses ("I did it but because of the circumstances I should not be held responsible.") also reduces or defeats guilt. For example, insanity, duress, or entrapment might excuse an act normally considered a crime.

What are the elements of the following crime of assault and battery taken from § 6 of the Suquamish Law and Order Code?

> Assault and Battery. Any person who shall willfully strike another person or otherwise inflict bodily injury on another person, or who shall cause another to harm himself, shall be guilty of assault and battery...

What is the act required to constitute the offense? What is the mental state required with the act to constitute the offense? Diagram your answers to these questions. The term "willfully" will be explained in Section 2 (B).

B. Burden of Proof in Criminal Law

The section on the burden of proof in criminal law in Chapter V on Evidence already discussed the responsibility placed on the prosecution to prove the commission of a specific crime. But, because of it's importance, the rule on the allocation of the burden of proof in criminal matters bears repeating. The burden of proving each element of a crime beyond a reasonable doubt must always remain on the prosecution. Each element of the crime charged, both an act and a certain mental state, must be established in the mind of the trier of fact, whether it's the judge or the jury, beyond a reasonable doubt. Even if the defendant presented no

evidence, if the prosecution fails to prove either or both elements of the crime, the charges must be dismissed.

Section 2. Elements of a Crime

A. Acts

The two elements which must be present in almost every crime to sustain a conviction are 1) a particular act, and 2) a certain mental state. The element of an act in a criminal offense can be of three types:

i. Physical acts: Striking someone or stealing property are physical acts which might be prohibited by tribal ordinance.

ii. Verbal acts: Threatening someone with bodily harm or slandering someone's reputation are verbal acts that also might be prohibited by tribal ordinance.

iii. Failure to act: Failing to act where a duty to act is imposed by law might also be prohibited by ordinance. For example, failing to support a child or to report employment by a person receiving welfare are violations of the duty to act.

B. Mental States

The following are definitions of mental states commonly used in the definition of criminal offenses. These definitions have been synthesized from an outline on the structure of criminal law prepared for NAICJA by Professor John M. Junker of the University of Washington Law School. Each definition is followed by an actual criminal offense taken from various Tribal codes that requires that mental state with a certain

act to sustain a conviction.

i. Purposely

A person acts purposely with respect to a material element of an offense when:

(1) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(2) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

Assisting Suicide (§ 8-5.01 Law and Order Code of the Coeur D'Alene Tribe of Indians):

> Any person who shall purposely or recklessly aid another to commit suicide shall be guilty of an offense...

ii. Knowingly

A person acts knowingly with respect to a material element of an offense when:

(1) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(2) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Resisting Arrest (§ 5.1.21 Law and Order Code of the Port Gamble Klallam Tribe):

> Any person who shall willfully and knowingly by force or violence resist or assist another person to resist any arrest by a bona fide police officer...shall be deemed guilty of an offense...

iii. Recklessly

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Reckless Driving (§ 32-2143 (40) Tribal Ordinances of the Confederated Salish and Kootenai Tribes):

> Any person who drives any vehicle in wilful or wanton disregard for the safety of persons or property is guilty of reckless driving.

iv. Negligently

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that would be exercised by a reasonable man in his situation.

Vehicular Homocide (§ 5.1.04 Criminal Code of the Makah Indian Nation):

> Any person who shall, while under the influence of an alcoholic beverage or controlled substance or drug to a degree which renders the person incapable of safely driving a vehicle, cause the death of another by operating a motor vehicle in a reckless, negligent or careless manner shall be deemed guilty of vehicular homocide.

v. Willfully

The mental state of acting willfully is sometimes used in place of the mental states of acting purposely, knowingly, or recklessly. There are slight degrees of difference between these three mental states but they are basically similar in requiring that the person committing an act be consciously aware of the risk or consequences from his act. Thus, the general mental state of acting willfully may sometimes be used in place of these three more specific mental states in defining the mental state of a crime where, because of the lesser nature of the crime, the more specific degrees of awareness of risk are not necessary. For example, § 12.01 of the Quinault Tribal Code provides:

> Abduction. Any person who shall willfully take away or detain another person against his will...shall be guilty of abduction...

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> The mental state of acting with awareness of the risk involved in conduct, as required in the mental states of acting willfully, purposely, knowingly, or recklessly, should be contrasted to the mental state of acting negligently. The mental state of acting negligently has no general requirement that the person committing an act be aware of the risk of harm from his conduct. Thus, the mental state of acting willfully, requiring awareness of risk, can never be used in place of the mental state of acting negligently, which has no such requirement.

C. Strict Liability and Implied Mental States

Sometimes particular Tribal criminal ordinances make no mention of a required mental state as an element in the definition of a given crime. All that seems necessary to prove the commission of the crime is the proof of the completion of the prohibited act. For example, § 5.1.07 of the Makah Tribal Law and Order Code provides, in part:

> Rape. Any person who...has sexual intercourse with a person less than fifteen years old, shall be guilty of rape...

This absence of a special mental state can mean one of two things: 1) either proof of a mental state is not required to sustain the conviction of the particular offense, normally referred to as a strict liability crime; or 2) there is an implied mental state in the ordinance that requires the prosecution to show purpose, knowledge, recklessness, or negligence to prove a commission of the crime.

The Tribe, in drafting criminal ordinances that have no explicit requirement of a particular mental state, may have consciously made the offense a strict liability crime requiring no mental state of criminal intent or may have inadvertently omitted the required mental state. The defendant bears the burden in this instance to persuade the court that the Tribe

intended a required mental state as part of the definition of the offense. If the court so finds, then the prosecution must also prove the existence or absence of the implied mental state, depending on the type of crime, besides the act required to sustain a conviction of the offense. For example, § 23 of the Confederated Salish and Kootenai Tribal Ordinances provides:

> Any Indian who shall have sexual intercourse with another person, either of such persons being married to a third person, shall be guilty of adultery...

This ordinance makes no mention of a requirement of knowledge that either person was married. A defendant, charged with adultery, claims that she believed that the man was single because he told her that he was not married. As a defense to her prosecution, she is claiming that there is an implied mental state requirement of knowledge that the other person was married. It would seem unfair to convict a person in this instance for the act of adultery without a required mental state of knowledge. Again, because the ordinance makes no mention of a required mental state, the defendant bears the burden to persuade the court that such knowledge of married status is part of the offense. If the court so finds, the prosecution must prove the presence of such knowledge beyond a reasonable doubt to support a conviction of the offense of adultery.

Section 3. Attempting the Commission of a Crime

A. Attempt Defined

All systems of criminal law punish attempted crimes as well as completed crimes. Although very few Tribal codes

contain a general "attempt" provision, it seems unlikely that a defendant who had done all he could to break into, burn down, or steal from another's house could not be convicted of "attempted" breaking and entering, arson, or theft.

Traditionally, attempted crimes require (1) that the defendant "intend" to commit the offense (the mental state), and (2) take a "substantial step" toward the commission of the offense (the act).

B. A Sample Statute

Section 12.72 of the Quinault Tribal Code provides:

> Attempts.(a) An act done with the intent to commit any offense defined by this Code, tending to but failing to accomplish such offense, is defined as an attempt, and, unless otherwise specified in this code, shall be punishable by sentence or fine not to exceed, as a maximum, one-half of the maximum provided herein for the offense itself.

Your Tribal code should be reviewed to see if it has an "attempt" provision. If not, one should be drafted and added to the code to define this crime explicitly.

Section 4. Specific Crimes

The definition and elements of the following crimes of assault, theft, and driving while under the influence of intoxicating liquor or drugs, are presented here to illustrate the act and mental state requirements of a crime. Each general definition is followed by actual criminal offenses taken from various Tribal codes. These three crimes were selected because of their frequent occurence on reservation land. It is important to remember that the prosecution bears the burden of proving each element of each offense beyond a reasonable

doubt in the mind of the trier of fact to sustain of conviction.

A. Assault and Battery

i. Assault and Battery Defined

An assault and battery is generally defined as an act or failure to act, committed with the intent to injure, which results in harm to the victim. The "harm" can include any "offensive touching" or injury. The requisite intent could include an intent to kill but, of course, if a death results the charge would be murder. An assault and battery may be committed even if there is no actual physical injury, or even if only the victim's clothing is touched. A battery may also be committed indirectly, as in the case where the defendant kicks a ladder out from under the victim, causing the victim to fall and be injured. For example, § 10.01.11 of the Yakima Indian Nation Law and Order Code provides, in part:

> Assault and Battery. Any person who shall willfully strike another person or otherwise intentionally inflict bodily injury on another person or who shall cause another person to harm himself shall be guilty of assault and battery...

ii. Assault Defined

An assault may be defined in one of two ways:

(1) An assault can be either an "attempted battery," in which case it is often required that the defendant have a "present ability" to commit the battery which failed (swinging and missing), or a "verbal battery," in which case the defendant threatens the victim in some way ("I'm going to get you") with the intent to injure or frighten the victim resulting in

the victim's reasonable apprehension of bodily harm. For example, § 10.01.09 of the above-mentioned Yakima Indian Nation Law and Order Code provides, in part:

> Assault. Any person who shall attempt or threaten bodily harm to another person through use of unlawful force or violence or verbal threats shall be guilty of an assault...

(2) An assault can also be the general statutory crime for a combination of both "assault," as defined above in (1), and "assault and battery," as defined in section i. above. In combining both of these definitions into the one crime of "assault," there is no longer an offense referred to as a "battery." Section 9A.36.010 of the Revised Criminal Code of the state of Washington, entitled "Assault," is an example of this combination in including three separate types of acts: (a) the attempt to commit an assault; (b) intentionally causing fear of an assault; and (c) an actual assault.

You will have to review your own Tribal Code to determine how an assault and battery is defined, given the possibilities just discussed.

B. Theft

The crime of theft is generally defined as the taking of property, not your own, without permission of the owner, with intent to deprive the owner of the property. Historically, the three crimes of "larceny," "embezzlement," and "false pretenses," which deal with certain aspects of the general crime of "theft," were treated separately. But there were only technical and confusing distinctions between these crimes and the clear trend today is toward the enactment of the single

offense of "theft." Many Indian Criminal Codes contain only this one, comprehensive offense.

In general, if an Indian Law and Order Code defines "theft" broadly enough, then anyone found guilty of the acts described as "embezzlement" would automatically be guilty of "theft." For example, § 6 of the Confederated Salish and Kootenai Tribal Ordinances provides:

> Embezzlement: Any Indian who shall, having lawful custody of property not his own, appropriate the same to his own use with intent to deprive the owner thereof, shall be deemed guilty of embezzlement and upon conviction thereof, shall be sentenced to labor for a period not to exceed six months, and/or a fine not to exceed $300.00.

Some Tribal Codes still draw a distinction between "theft" and "embezzlement". For example, note the following sections of the Coeur D'Alene Tribal Law and Order Code:

> 10-1.01 Petty Theft:
> Any person who shall take personal property of another person having a value of $100.00 or less, with intent to steal, shall be deemed guilty of petty theft and upon conviction thereof shall be sentenced to a period of confinement not to exceed sixty days or ordered to pay a fine of not to exceed $200.00, or both jail sentence and fine, and costs.
>
> 10-1.02 Grand Theft:
> Any person who shall take personal property of another person having a value of more than $100.00, with intent to steal, shall be deemed guilty of grand theft and upon conviction thereof shall be sentenced to a period of confinement not to exceed six months or ordered to pay a fine of not to exceed $500.00, or both jail sentence and fine, and costs.
>
> 10-2.01 Embezzlement:
> Any person who shall, having lawful custody of property not his own, appropriate the same to his own use with intent to deprive the owner thereof, shall be deemed guilty of embezzlement and upon conviction thereof shall be sentenced to a period of confinement not to exceed six months or ordered to pay a fine of not to exceed $500.00, or both jail sentence and fine, and costs.

Some Tribal Codes also draw a distinction between the degree of theft depending on the value of the property taken, as shown by §§ 10-1.01 and 10-1.02 above. The more modern comprehensive definition of "theft" in § 12.64 of the Quinault Tribal Code tailors the sentence to the value of the property taken:

> Theft. Any person who shall take, or exercise unlawful control over, moveable property not his own or under his control with the purpose to deprive the owner thereof, or who lawfully tranfers immovable property not his own or any interest therein with the purpose to benefit himself or another not entitled thereto shall be guilty of an offense and shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $300.00 or both, with costs, if the value of such property is less than $50.00 and shall be sentenced to confinement at labor for a period of not more than six (6) months or to pay a fine of not more than $500.00 or both, with costs, if the value of the property is $50.00 or over.

Review your own Tribal Code to determine how the concept of "theft" is defined, given the possibilities just discussed.

C. Driving while Under the Influence of Intoxicating Liquor or Drugs (DWI)

The statutory definition of driving while under the influence of intoxicating liquor or drugs usually contains the following elements:

(1) a definition of the crime itself, that it is unlawful for any person who is under the influence of intoxicating liquor or drugs to drive or be in actual physical control of a vehicle within the territorial jurisdiction of the tribal court;

(2) presumptions at trial that may exist depending on the amount of alcohol in the person's blood at the time of the alleged offense;

(3) the procedure for chemical analysis of the person's blood charged with the offense;

(4) the penalties for conviction of the offense of driving while under the influence; and

(5) the procedure to appeal the conviction of driving while under the influence because of the severity of the penalties normally.

Tribes may draft their own motor vehicle code defining driving while under the influence, as illustrated by the following sections of the Yakima Indian Nation Motor Vehicle Code. Or, Tribes sometimes adopt sections from the state motor vehicle laws defining driving while under the influence, as illustrated by the Coeur D'Alene Tribal Traffic Violations Code. The following Yakima definition of driving while under the influence is a very thorough model of that offense:

> 50.21.03 Persons under influence of intoxicating liquor - Presumptions - Evidence - Chemical tests - Information concerning tests.
>
> (1) It is unlawful for any person who is under the influence of or affected by the use of intoxicating liquor or of any narcotic drug to drive or be in actual physical control of a vehicle within this state.
>
> (2) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of his blood, breath or other bodily substance shall give rise to the following presumptions:
>
> (a) If there was at that time 0.05 percent or less by weight of alcohol in the person's blood, it shall be presumed that he was not under the influence of intoxicating liquor.
>
> (b) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

(c) If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that he was under the influence of intoxicating liquor.

(d) Percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

(e) The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor.

(3) Chemical analysis of the person's blood or breath to be considered valid under the provisions of this section shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

(4) When a blood test is administered the withdrawal of blood for the purpose of determining its alcoholic content may be performed only by a physician, a registered nurse, or a qualified technician. This limitation shall not apply to the taking of breath specimens.

(5) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

(6) Upon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or his attorney.

50.21.05 Persons under the influence of drugs. It is unlawful and punishable as provided in 50.21.09 for any person who is an habitual user of or under the influence of any narcotic drug or who is under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle to drive a vehicle within this state. The fact that any person charged with a violation of this section is or has been entitled to use such drugs under the laws of this state shall not constitute a defense against any charge of violating this section.

50.21.07 Driving while under the influence of intoxicating liquor or drugs - Penalties - Suspension or revocation of license - Appeal.

(1) Every person who is convicted of a violation of (a) driving a motor vehicle while under the influence of intoxicating liquor or (b) driving a motor vehicle while under the influence of a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle shall be punished by imprisonment for not more than six months by a fine of not more than five hundred dollars, or both, with costs.

On a second or subsequent conviction of either offense within a five-year period he shall be punished by imprisonment for not less than six months and by a fine not more than five hundred dollars, and neither the jail sentence nor the fine shall be suspended: Provided, that the court may, for a defendant who has not previously had a jail sentence suspended on such second or subsequent conviction, suspend such sentence and/or fine only on the condition that the defendant participate in and successfully complete a court approved alcohol treatment program: Provided, further, that the suspension shall be set aside upon the failure of the defendant to provide proof of successful completion of said treatment program within a time certain to be established by the court. If such person at the time of a second or subsequent conviction is without a state license or permit because of a previous suspension or revocation, the minimum mandatory sentence shall be ninety days in jail and a two hundred fifty dollar fine. The penalty so imposed shall not be suspended.

(2) The license or permit to drive or any nonresident privilege of any person convicted of either of the offenses named in subsection (1) above shall be recommended for suspension by the Yakima Tribal court, as follows:

(a) Be suspended by the Department of Motor Vehicles for not less than thirty days;

(b) On a second conviction under either such offense within a five-year period, be suspended by the Department of Motor Vehicles for not less than

sixty days after the termination of such person's jail sentence;

(c) On a third or subsequent conviction under either such offense within a five-year period, be revoked by the Department of Motor Vehicles.

(3) In any case provided for in this section, where the Tribal court recommended a driver's license is to be revoked or suspended, such revocation or suspension shall be stayed and shall not take effect until after the determination of any appeal from the conviction which may lawfully be taken, but in case such conviction is sustained on appeal such revocation or suspension shall take effect as of the date that the conviction becomes effective for other purposes.

The following section of the Coeur D'Alene Tribal Code incorporates the definition of driving while under the influence from the Idaho Motor Vehicle Laws:

15-9.01 Traffic Offenses

The sections from the Idaho Motor Vehicle Laws listed below are hereby made a part of this Code. Inasmuch as the primary souce of such laws is the Idaho Motor Vehicle Laws, which may be amended from time to time, and inasmuch as the Idaho Motor Vehicle Laws may be obtained in convenient form from the Department of Licenses, Boise, Idaho, the content of each section has been briefly summarized below. The law itself, and not the summaries below, shall govern. It shall be unlawful to:

. . .

10. Unlawful to drive vehicle under influence of or affected by intoxicating liquor and/or drugs.

. . .

Section 5. Questions

(1) To be convicted of a criminal offense, a person must usually be shown to have committed an act while having a certain mental state.

True False

(2) Which of the following is not a mental state relevant to criminal law?

a. knowledge
b. negligence
c. recklessness
d. boredom

(3) Which side normally has the burden of proof in criminal law?

a. the prosecution
b. the defense

(4) Joe swung at Bill while yelling, "I'll knock you on your queester!" but missed. Was a crime committed, and, if so, which one?

(5) A Tribal ordinance provides that: "An Indian who knowingly buys stolen property from another Indian shall be guilty of the offense of receiving stolen property." In a trial for this offense, what are the elements of the crime that the prosecution must prove?

a. _____

and b. _____

(6) Assume the ordinance in question (5) is in force. A calls B, his cousin, and tells him he bought a new TV and would like to sell his old one. B comes and looks at the old TV, and then buys it. While carrying it home in his truck B is arrested by tribal police who recognize the TV as one that was recently stolen. If you were B's lawyer, what would you argue at trial?

CHAPTER IV. ARREST AND SEARCH WARRANTS

Section 1. Introduction

A. The Indian Civil Rights Act

Section 1302 of the Indian Civil Rights Act states that, "No Indian tribe in exercising powers of self-government shall (2) violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." As previously discussed in Chapter II, a warrant is a written order issued by a judge directed to a police officer commanding the officer to perform a specified act. Usually, a warrant directs the police officer to either: (1) arrest a specified person or (2) search a specified dwelling or area. In order for the judge to issue a warrant he must have reason to believe that there is "probable cause" to justify issuing the warrant.

B. Probable Cause

Just what will suffice to satisfy the requirement of probable cause is not well defined in the law but certain minimum standards must be complied with. First, the judge must have some information from which he can decide that is more probable than not that the decision he is asked to make is correct. Second, the type of information he can rely on to come to a decision must be more than a mere rumor in the community but he can use any information considered to be reliable. The

evidence to support a warrant need not be admissible as evidence at trial to be found to be reliable by the judge. A good way for the judge to determine if the requirement of probable cause is met in any situation is to be reasonably sure of: (1) the accuracy of any information he receives, and (2) the relevancy of such information to the reasons stated for obtaining the warrant. It is advisable for the judge to have the officer requesting the warrant and supplying the information present to question him about the information the warrant is based on. Probable cause can be thought of as a decision by a judge that a person should be arrested or a search made because there is enough reliable evidence available to lead a reasonable man to believe the statements contained in the documents presented to the judge are probably true. In most instances the decision a judge makes that there is probably cause to issue a warrant will be the first decision he makes in a process with many such steps or determination. But, we have been talking about probable cause to issue a warrant. Be careful to distinguish the "probability" that the facts necessary to issue the warrant exist from the "possibility" these facts exist. For example, if you are presented with a complaint which alleges: (1) the officer saw the person named run from a store, (2) the store owner tells the officer of a theft at the time the person was seen leaving the scene and (3) the person named failed to stop when asked to do so by the officer, you should find that probable cause to issue the arrest warrant does exist. However, if you are presented with a complaint

which alleges: (1) an officer was told by the store owner someone stole an item from his store in the last few days and (2) that three days ago the named person was in the store, the judge should dismiss the complaint as being insufficient to establish the required probability that the defendant committed the alleged offense even though there is a "possibility" the defendant committed the offense.

Section 2. Arrest Warrants

An arrest can be made by a police officer or a private citizen and can be made either with or without a warrant. When looking at the legality of an arrest, usually first at the arraignment and possibly later during a trial, the judge must be able to determine that the person making the arrest had probable cause to arrest. Just what is needed to establish probable cause sometimes depends on whether the arrest was made with or without an arrest warrant.

A. Arrest With Warrant

Probable cause must be satisfied before the judge determines an arrest warrant should be issued.

Before an arrest warrant can be issued the judge must be presented with a sworn complaint. If the judge can determine from the complaint and/or affidavits filed with the complaint that there is cause to believe that (1) there has probably been an offense committed and (2) that the defendant probably committed it, a warrant for the arrest of the defendant should be issued. When issuing arrest warrants, the judge should determine how the information in the complaint was obtained

to insure that it is accurate and relevant to the offense as stated in the complaint. The arrest will be held to be legal if the warrant is valid on its face and the person making the arrest had authority to act under the warrant. [See the sample "Warrant of Arrest" in the Appendix to this Chapter]

B. Arrest Without Warrant

Either the police or a private citizen can arrest without a warrant if: (1) a misdemeanor was committed in the presence of the arresting person and (2) the offense amounts to a breach of the peace. For example, if a person were causing a disturbance or destroying property, either a private citizen or police officer could arrest the person. If a person were committing an offense but there was no breach of the peace, neither the police officer nor a private citizen could arrest him. Also, if someone complains to the police that a certain individual or unknown person has committed a misdemeanor, neither the police nor a private citizen should be allowed to arrest the person. In such cases, that is, where there is no breach of the peace or the offense is already completed, the defendant should be summoned to appear in court rather than be arrested without a warrant. Any arrest by a private citizen is risky and should be discouraged. If a private citizen makes an improper arrest, he may be sued and can suffer personal loss.

C. The Summoning and Arrest Process

The most common type of case where a summons would be used is in traffic cases. For example, a person is seen speeding

by a police officer, the officer gives chase and stops the person, but instead of arresting the person he gives the person a summons and complaint, commonly called a "ticket." The form used by the officer should include the following information:

1. Commencement in name of prosecuting jurisdiction (For example, "ON BEHALF OF THE PEOPLE OF THE _____ TRIBE")
2. Date of the alleged offense;
3. Time of alleged offense;
4. Name and identification of accused;
5. Unlawful operation or parking of a motor vehicle;
6. Commission of offense on a public thoroughfare;
7. Approximate location of alleged offense;
8. Venue or place of offense;
9. Court and time of appearance;
10. Description of the alleged offense (identification of the code section by name and section number);
11. Conclusion (i.e., "against the peace and dignity of the, etc.");
12. Signature of the complainant (usually police officer);
13. Signature of the defendant (not absolutely necessary but advisable);
14. Warning to the defendant that should he fail to appear a warrant for his arrest will issue.

Additional spaces may be made available to include such information as the operator license number, and year, make, body type and color of car.

Besides traffic cases, the summons and complaint procedure should be used in all instances where there is no danger to the community or the accused if he is left at large rather than

being arrested. The form used in traffic cases can easily be modified to accommodate other offenses. The complaint may be signed by either an officer or private citizen and many complaints by private citizens in non-traffic cases can be handled by this procedure rather than by arresting the defendant. If the complaint is signed by a private citizen, it should be sworn. The "ticket" forms and summoning process should be developed with a view toward judicial application at the time of arraignment or trial. Fairness and justice are the prime objectives.

The determination of probable cause made in the arrest situations previously mentioned applies as well to defendants summoned to appear before the court. This determination is made when the person summoned appears to answer the charges made on the summons and complaint. From the complaint the judge should be able to determine if the person appearing is properly before the court, that is, was there probable cause to issue the summons and complaint?

In every instance, whether the person appears because of an arrest with or without a warrant or upon a summons and complaint, the judge must make certain the proper party is before the court. All significant, identifying information should be listed on any arrest warrant issued by a judge or by the complainant on a summons and complaint whether he be a private citizen or police officer. For example, if there are several persons in the community with the same name, for the description of the defendant on a warrant to be adequate, more

information than the subject's name needs to be included on the warrant. Such additional information might include the defendant's address, birthday, physical description (including weight, height, sex, etc.) and if appropriate, family description, or tribal roll number.

After a person has been arrested he must be charged with an offense. The police are not allowed to hold a person for longer than a few hours as prescribed by the Tribal Code without charging him with an offense. This problem will arise in situations where the defendant is arrested without an arrest warrant or being first summoned to appear in court. The standard now used by many courts in charging the defendant is that the defendant must be charged "without unreasonable delay." This means that as soon as arrangements can be made the defendant should be taken before the judge and the complaint should be filed with the court. Whether the delay is unreasonable depends on the basis for the delay as well as the length of the delay in time. For example, if the delay is to coerce a confession from a defendant, the delay should always be considered unreasonable. However, if the delay is because of factors that would not substantially prejudice the defendant in any manner, the delay would probably be thought of as being reasonable. If the judge is satisfied that probable cause to arrest existed, he should order the arresting person to file a complaint at once stating the offense the defendant allegedly committed. This means the complaint must be filed immediately. No excuses should be accepted by the court if the arresting person fails to make

out the complaint. If probable cause to arrest did not exist or if the person making the arrest fails to make out such a complaint, the defendant should be released from custody.

Every person who is arrested and charged with a crime or charged by a summons and complaint has a right to a speedy trial. Many states and tribes have laws providing the time length during which the person must be brought to trial after he is charged with an offense. A good rule to follow would be that if the person hasn't been brought to trial within three months of the date the charge was filed, the charge should be dismissed for lack of prosecution.

The judge has a further duty to perform at the arraignment session. The judge must compare the offense the defendant is charged with and the facts alleged in the complaint. As a result of this analysis the judge should make one of the following decisions:

(1) the offense charged is correct, the acts charged against the defendant are the same as the elements of the offense as stated in the Tribal Code;

(2) the offense is incorrect because an element of the offense charged is missing from the defendant's alleged actions. In this case the charge should be dismissed and the defendant either released or recharged with the proper offense if there is one;

(3) the defendant's actions contain all the elements for the offense charged plus other elements making defendant's actions a felony and therefore outside the jurisdiction of the Tribal Court unless referred back to the Tribal Court for prosecution as a lesser offense. Judge should familiarize themselves with the elements of all offenses.

Section 3. Search Warrants

A. In General

The first question to ask in regard to the Indian Bill of Right's requirement of warrants for searches and seizures is, "Does the provision apply at all?" The warrant requirement does not apply to abandoned property, things exposed to public view, or acts by private citizens.

The second general question to ask is, "Who can object to a search and seizure?" The following people would have "standing," or the legal right, to object to a search and seizure: the person possessing the thing seized; the person owning the thing seized; the person who owns or controls premises where the seizure occurred; or the person charged with possessing the thing seized.

B. Issuance of the Search Warrant

Prior to issuing a search warrant a judge must first be presented with a sworn affidavit. The affidavit may or may not be attached to a complaint whereas prior to issuing an arrest warrant there must be a sworn complaint. If the judge, upon examining the allegations of the affidavit, concludes that there is probable cause to believe the execution of the warrant will uncover the specified evidence of criminal activity, then a warrant should be issued. This means: (1) that the items sought are in fact seizable because of being connected with criminal activity (that the items are proper evidence of crime) and (2) that the items will be found in the place to be searched. The police should provide the judge with a list and

description of what exactly is to be searched for and where it might be found before the judge can properly issue the warrant. A warrant should never be issued unless there is a finding by the judge that the search will probably uncover evidence of criminal activity. [See the sample "Affidavit" and "Search Warrant" in the Appendix to this Chapter]

C. Execution of the Search Warrant

A officer executing a search warrant is normally required to give notice by knocking and announcing his purpose before entry can be forced. Force may then be used if admission is refused or there is a failure to respond after a reasonable time.

The scope of the search is restricted to places to be searched and things to be seized described in the warrant. Persons can be named as well as places. If things other than those described in the warrant are seized the seizure must be justified as an exception to the warrant requirement.

D. Exceptions to the Warrant Requirement

Searches may sometimes be permitted without a warrant. But these searches must be justified as exceptions to the warrant requirement in the Indian Bill of Rights.

(1) Exigent Circumstances: Certain factual situations require immediate action for personal safety or to prevent destruction of evidence before a warrant can be obtained. An officer may stop and frisk a suspect on the street if he has a "reasonable suspicion" that a crime may have been committed. No warrant is required if there is an

imminent danger of the destruction of the evidence. Warrantless searches may also be made when officers are in hot pursuit of a criminal where a violent crime has occurred, or where emergency assistance requires entry into a building where there is a reasonable basis to believe that the persons inside may need assistance. And, finally, automobiles, because they are easily moved, may sometimes be subject to warrantless searches in special circumstances.

(2) Plain View: Objects which are in the plain view of an officer who has a right to be in the position to have that view are also subject to seizure.

(3) Consent: Consent to a warrantless search is based on the fact that any right can be waived. The person subject to the search or even another who has joint control (ownership) over the premises to be searched can consent to the search. But the search is limited to the area covered by the consent.

(4) Incident to Arrest: A warrantless search is also permitted during the course of a lawful arrest.

E. Effect of an Illegal Search and Seizure

Evidence obtained as a result of an illegal search and seizure, usually a warrantless search not justified by any of the above exceptions, is not admissible against the person who's rights were violated. Known as the exclusionary rule, this ban extends to all of the evidence seized in the illegal search. This prohibition is known as the "fruit of the poisonous tree" doctrine. The prosecution bears the burden in this

instance to prove that any evidence can be separated and admissible from the initial illegal search and seizure.

Section 4. Questions

(1) How would you define the crucial requirement of "probable cause" in the warrant process? If an officer reported to you that if a person who had a bad reputation in the community had been seen in a gas station the day before it was burglarized, would this be sufficient probable cause to issue an arrest warrant?

(2) While patrolling a neighborhood, Officer White saw what he believed to be a motorcycle which had been reported stolen in He-Who-Run's back yard. Does Officer White need a warrant to seize the bike?

(3) Officer White seized the motorcycle without securing a warrant, and He-Who-Run's neighbor filed a motion in court objecting to the seizure because he doesn't like the tribal police on the neighborhood premises without permission. Can he do this?

(4) The tribal police obtain a warrant based on probable cause to search an apartment for narcotics. They proceeded to the apartment and, without more, burst through the door interrupting a family dinner. What did they do wrong?

(5) The tribal police searched X's house under a warrant which was later held to be invalid because the police had lied to the judge regarding the circumstances supporting the finding of probable cause. During the illegal search, the police found narcotics belonging to Y, who did not live at the residence. Can this evidence be used against Y or is it also subject to exclusion as the fruit of the illegal search?

CHAPTER V. JUVENILE JUSTICE AND THE INDIAN CHILD WELFARE ACT

Section 1. Introduction

A. The Importance of Juvenile Justice

Almost everywhere in the country there are special court proceedings, special rules of law, and special social workers for children. The adult community has a responsibility to children to create and administer a well-ordered and fair system of juvenile justice. Children cannot take care of their needs and grow into mature responsible adults without adult help and guidance. The tribal juvenile court is one of the institutions on the reservation to provide this guidance for the well-being of the Indian child and the community. The tribal juvenile court must be supported in providing guidance to juvenile offenders. The alternative is dealing with juveniles in tribal adult court which seldom provides the special guidance and support a juvenile needs in the maturing process to become a responsible adult in the Indian community. Because of the importance of tribal juvenile court, the following section will develop it's function, jurisdiction, and procedure.

B. The Indian Child Welfare Act of 1978

Following the discussion of aspects of the tribal juvenile court, the landmark federal legislation, the Indian Child Welfare Act, will be developed as it relates to Indian juveniles. This Act basically regulates Indian child adoption, foster care and custody proceedings between tribal and state courts and governmental agencies. Most significantly, the Act

requires that preference be given to Indian families, Indian foster care and group homes in the placement of Indian children by state and private social service agencies. To carry out this requirement, the Act provides for exclusive tribal jurisdiction in most instances, or, in those instances of state court proceedings, the tribal right to intervene in those proceedings for input in the disposition of custody, care, or adoption matters involving Indian children. The Act also requires state courts to give full recognition to tribal laws and tribal court orders in these matters. This extraordinary measure in recognizing tribal court jurisdiction beyond the boundaries of the reservation may perhaps open future doors to expand tribal court jurisdiction off-reservation in other areas.

Section 2. Juvenile Courts

A. Juvenile Court Function

Instead of simply deciding whether a child did or did not do some unlawful act, the special job of the juvenile court is to decide why the child acts the way he does, and to try to change the way he acts so that he becomes a good citizen and not a danger to himself or to other persons. In this job, the court often gets help from professional persons or persons experienced in helping children. The juvenile court is supposed to balance the best interests of the child with the best interests of the community concerning the child.

Some juvenile courts have a whole staff of special workers who have the job of taking care of children in trouble with

the law or about to get into trouble with the law. These workers may help the judge to decide why a child is getting into trouble, and to figure out how to guide the child into a better way of life. One child may be skipping school, and the judge may learn that the child cannot see well, or that his mother does not seem to care if the child goes to school. The judge could order that the child's eyes be tested, and glasses gotten for him, or he could have a court worker visit with the mother and help her to see that her child attends school regularly.

Another child may be beating up other children, and the judge may feel that the child is acting out a problem which a psychiatrist, a social worker, or an adult in the community could help the child to solve. Still another child might be caught running away from home, or his parents might not be able to control him. The judge could learn about the child and his home, and use the power of the court to improve the home, to remove the child from the home temporarily or permanently, or to put limits on the child's conduct as a good parent might do. Finally, a child may be beaten frequently by his father, or be taught at home to disobey the law. Again, the juvenile judge can learn all he can about the child and the family, and use his power to change a bad situation, often with the help of a trained worker, a foster home, or some other service outside the court.

Procedure in juvenile court is often very informal. The judge may hear the juvenile case in private. The idea has

been that the court can do the right thing for each child if there are few rules and few formal procedures to help the judge's finding out what is wrong and then going ahead to correct the situation. A juvenile court judge has wide powers over children in his court. An appeals court will allow the judge wide choice in regard to most decisions made in a juvenile matter.

However, in recent years it has been seen that the juvenile courts have taken on a very large and difficult responsibility in trying to diagnose and treat children differently from adults under the law. It is being remembered that the juvenile court is first a court of law, with legal responsibilities which come even before its responsibilities to help the child change the way he lives. Even though the same judge may hear adult and juvenile cases, he must be especially careful with children because they are less able than adults to take care of themselves in court as they are also in the community. Fairness is the most important part of the character of a juvenile court.

B. Juvenile Court Jurisdiction

A juvenile court is created by statute within a tribe. A tribe can pass an ordinance for a juvenile court for the children of that tribe. Then the juvenile court will have power to hear all cases which involve any juvenile members of the tribe and their conduct within the reservation. The juvenile court may even have a special judge who hears only juvenile and family matters, but this is not necessary.

The juvenile court may also be a "family" or "domestic relations" court. In that case, the judge will also hear cases concerning adults. For example, the court might hear divorces, adoptions, and cases involving paternity, failure to support dependents, failure to send children to school, contributing to the delinquency of a child, and abuse of children. In these cases, the court gives the adults all of their usual rights for a civil or criminal trial, whichever it may be, and any special rights or duties which may be required by tribal law.

Even though the juvenile court may get its power and rules under a tribal grant of authority, there are rights which children have guaranteed to them, to the same degree or, sometimes, to a lesser degree than to adults. In the last ten years, the United States Supreme Court has made decisions which set some constitutional rules for procedure in juvenile courts. A tribal juvenile judge must follow the rules set forth in the ICRA which are almost as strict. If there is no special tribal law for juveniles, then the juvenile must still get these rights, which will be set out in this section.

Each tribe can decide at what age a "child" becomes an "adult", so long as the classification is reasonable and is set forth in a special tribal law on juveniles. The age is usually 18 years. A person over that age cannot come before a juvenile judge except as may be provided in the Juvenile Code. A person under the age of 18 usually cannot be brought

before an adult court. If there is no special tribal law, then federal regulations set the age at 18.

At common law, a person under seven years of age could not be guilty of anything, and a person seven to 14 could be guilty only if the judge decided that the particular child had the experience and understanding to know his conduct was wrong, to see why, and to be able to benefit from being punished for it. When a child is charged with a very serious unlawful act, the juvenile court must use this test as a basis of consideration and may, in extreme cases "transfer" the child's case to the adult court. The judge will often do this when he believes that the child, although under 18 years of age, is very mature and is past being helped by the special rules of the juvenile court.

There are four kinds of charges that can be brought against a child in a juvenile court: (1) that a child has violated a tribal law, ordinance or regulation, or a lawful court order; (2) that a child has violated rules or laws which only a child can violate, such as school attendance and some curfew laws; (3) that a child is beyond the control of his parents or guardian, or that he is a runaway from his home; or (4) that a child, because of his conduct or his home situation, is in danger, is a danger to himself, or is a danger to other persons.

If the juvenile is a "child" under tribal or federal law, and if his conduct seems to fall in any of these four broad kinds of charges, then the juvenile court can take jurisdiction and hear the case. Any of these charges, if found by the court

to be true, would mean that the child is "delinquent," rather than "guilty" of "criminal" conduct. The charges in a petition naming the child must be proved. Then, the court will go on to decide how to help the child not to get into trouble again, or how to help the child's family do a better job of raising him.

C. Juvenile Court Procedure

Procedure in juvenile court hearings can be divided into two kinds. The first kind of procedure, which is formal, is called adjudicatory. This is the fact-finding phase of the court's task. The procedure is similar to what is required for adult "criminal" matters. Adjudicatory procedure is used to decide the legal questions: does this court have jurisdiction?, are there legal grounds for not releasing a child in official custody?, should this child's case be transferred to an adult court?, did this child commit these acts as charged against him in the petition?, has this child violated a condition of his probation?, and so forth.

Then, if the court enters judgment that the charges are true or that certain action may be taken, there is a second type of procedure. This type is often informal, and is called dispositional. During this phase, the judge determines the child's problem that has caused him to misbehave and how the court can best help the child to obey the law and to grow into a useful citizen. This phase might be compared to the presentence investigatory and sentencing phases of adult court.

Formal adjudicatory procedure must meet almost all of the same standards as adult criminal procedure. Informal

dispositional procedure may depart from these higher standards so long as it guarantees each child fair treatment and at the same time honors the best interests of the child and of the whole community.

During both the adjudication and the disposition, the judge will face the problem of how to treat the child and his parents or guardians as a family and still as separate persons. The child himself is the center of the court's attention, the petition is in his name, and the court may apply the law against the wishes of the parents. The parents or guardians cannot speak for the child.

i. Adjudication

Formal adjudicatory procedure must be used whenever there is a judicial hearing which could result in a final judgment which might curtail the child's liberty or greatly affect any of his other protected rights or interests.

It is sometimes said that a delinquency petition is "in the interest of" a child, but that an adult charge sets the government against the accused defendant. This is because the juvenile court's job is to help a child to straighten out his life. However, the Supreme Court recognizes that a juvenile proceeding presents the child and the court with the same kind of questions as a regular criminal trial until formal findings are made and the child is judged to be "delinquent," or until the petition is dismissed.

(a) Due Process in Juvenile Cases

Formal procedure is governed by the "due process" clause

of the Fourteenth Amendment. Section 1302(8) of the Indian Bill of Rights also has this procedural requirement or "due process." The Supreme Court has taken guidance from the federal Bill of Rights, from other Constitutional guarantees, and from decisions in adult criminal law. But the Court has held onto the belief that there is a special relationship between the child and the community and that the juvenile courts should not be held to all the same standards as adult courts. The Supreme Court recognizes that the juvenile court is a special kind of court with a special kind of legal task to perform. The Court has approved seven requirements that formal procedure in juvenile court must meet and which should serve as guidelines for tribal courts.

First, the most general but most important requirement is that the "essentials" of "due process" must be guaranteed in the same degree to adults and to children. The Supreme Court has used words like "fundamental fairness" to set this constitutional standard for juvenile courts. To protect the innocent, there must be caution in how the court finds facts. Fundamental fairness requires enough legal protections so that a child innocent of charges in the petition is not judged to be "delinquent" under the law, and so that the child feels that he has been treated fairly by the law and owes it great respect.

Second, notice must be given to the child and to his parents in advance of scheduled court proceedings. Notice must give the child reasonable opportunity to prepare for the court

proceeding. It must state the alleged misconduct with "particularity," that is, it must specify the charges or specific issues to be considered at the hearing. The charges cannot be so broad or vague that a person cannot prepare to defend himself.

Third, the child has a right to a lawyer at his own expense at every "critical stage" of the proceedings, whenever the child's liberty might come into issue. The child and his parents must be notified of the child's right to be represented at such a proceeding by a lawyer hired by him or his parents. If the child or his parents are unable to afford a lawyer, the judge may appoint a lawyer to represent the child if the child requests and the Tribal Code so provides. The lawyer should be allowed at the child's first appearance before the court, when the child is charged and an admission or confession might be made, and at all other critical stages from arrest to adjudication and disposition.

The judge must examine any waiver the child might make of his right to counsel. The judge must be certain that the child does not give up any rights which he does not fully understand, and that the child does not give up any rights because of ignorance, fear, or pressure from his family. Neither a probation officer nor a member of the child's family nor the judge himself should represent the child unless requested by the child. A child has great need for a lawyer or lay counsel during adjudication because he is likely to be less able than an adult to know how to help himself, to understand what is happening,

and to appreciate what might happen as a result of the judicial proceeding.

Fourth, the child has the right to introduce evidence, and to make argument in the court. The juvenile court judge usually has wide power to change the charges if the evidence appears to support a finding of delinquency but not a finding under the specific original charges. If this occurs, the child will have a right to reasonable continuances to have time to prepare a defense in relation to the changed petition.

Fifth, the child has a right to meet, test, and cross-examine the evidence and the witnesses against him. Evidence and testimony must come into court through sworn witnesses. Only a valid confession overcomes this requirement. Since a child's confession is to be examined very carefully to see if it is fully knowing and voluntary, the judge may decide to accept no admission or confession unless the evidence and witnesses in court would be able to uphold the petition without the admission or confession.

Sixth, the child has a right against incriminating himself, that is, against having any of his own words used to prove him delinquent. Any admissions or confessions by a child must be examined with special care to be certain that they are "fully knowing and voluntary," not demanded by parents or other persons, not the result of ignorance of what the consequences might be, and not the result of fear or suggestion.

The judge must be satisfied by sworn testimony that the child has been warned effectively of his right to remain

silent and that the child understands that anything he says may be used against him in court. Any evidence of statements received by anyone in violation of the child's rights must be rejected by the judge.

In juvenile matters, the court comes across many problems of incrimination, because it usually happens that the child will talk honestly with persons who say they are trying to help him. When a probation officer, doctor, or court worker wants to testify about what a child has told him, the judge will want to watch for matters that are "privileged." Because children are open and candid with adults and persons in authority, it may be necessary to allow no statements by the child which are not made in court, and to be certain that any statement made in court is not only the result of the child's having already made an earlier statement.

Seventh, the charges against the child must be proved "beyond a reasonable doubt," the same standard of proof required to prove criminal charges against adults.

(b) Jury Trial and Appeals

In 1971 the Supreme Court ruled on a juvenile's right to jury trial, a matter which had previously been the cause of some dispute. In McKeiver et. al. v. Pennsylvania, 403 U.S. 528 (1971), it was held that if a state does not require a jury trial by statute in a juvenile case, it is not required by the Constitution. In other words, a government does not have to provide a jury trial in juvenile cases to meet due process requirements. The Court based its reasoning on the

belief that a judge is just as qualified as a jury to be the fact-finder, and a jury adds too much formality to a procedure which should be more informal. If a tribe's Juvenile Code has a jury trial provision, the juvenile is entitled, by law, to a jury trial at the adjudication phase. Only if there is no code provision will the McKeiver case be applied.

Juvenile defendants have recourse both to appellate hearings and the writ of habeas corpus. Most tribal courts do not provide court reporters to write down the testimony given in the hearing. Since a juvenile does have the right to appeal any decision which he considers unfair, the lack of a written transcript is a problem. Most appellate tribal courts handle this by hearing the case de novo. This means presenting the entire case again, including all the witnesses and evidence, but to the Appellate Court. This is another example of the importance of having an appellate court.

A child in custody has the right to use the writ of habeas corpus to obtain a Federal Court review of his hearing in tribal court. If the Federal Court Judge determines that the juvenile was denied due process of law in the adjudication phase of the hearing, the juvenile's case must be readjudicated completely. If the Federal Judge determines that the juvenile's disposition, only, was illegal, the juvenile must be given a new and legal disposition. He does not have to be completely retried.

ii. Disposition

Informal procedure for disposition may be used when the

juvenile court is deciding what will help the child to change his conduct. This informal procedure can only follow the first type of hearing, or adjudication, so that the child has already been found "delinquent" by due process of law. Disposition may be the second stage of a juvenile hearing, or it may be held separately, after an adjudication.

It is at this state of a juvenile case that the paternal role of the court comes into play. Here the formal rules of procedure are relaxed, although the procedure must still be fair. The judge cannot act on the basis of information which is probably unreliable or untrue, or which gives only a one-sided story behind the child's conduct, or which it is unfair to the child to reveal.

Often the judge will order or receive a "social report" from a worker under the court or from some outside agency. The report may be prepared and brought to court, for example, by a welfare or probation worker, or by the police. It is a good idea for the judge to ask some person trained or experienced in helping children to study the information about the child and to put together a "treatment plan" for helping the child. This plan will consider the likely source of the child's problems, and based upon this, it will suggest action that the judge might take to reach certain goals for the child.

The judge will read the report and hear any other witnesses: the child, the family, or a responsible adult who should be able to help the court to decide what is in the best interests of this child. The judge will want a true and wide-ranging

view of the child's past life, of his family, schooling, and so forth, in addition to learning as much as he can about the facts which resulted in the child being found "delinquent." With all this information, the court can hope to make the best disposition for the child.

The judge, of course, should not allow recommendations to take over his own judgment, and he should require that the report be fair to the child. The judge himself is responsible to make as certain as he can that the information in the reports can be relied upon, that the person who made the plan did his work carefully and though about other possible plans, and that the child himself feels respect for and an interest in the plan so that he will want to cooperate with it.

(a) Probation and Continuance Under Supervision

The disposition ordered by the judge will very often call for a period of probation for the child. Probation is a way that the court can watch over the child and give him guidance for his conduct. Many times it is not in the best interests of a child to send him to a place where his freedom is severely restricted, at least not until after the child has had a chance or two to change his behavior. Often, the child needs guidance and help which can best be given while he is living with his own family or someplace in or near his own community.

Where a statute or tribal code allows it, some juvenile courts can place a child under continuing supervision, a kind of probation before he has been found to be delinquent. The court will make findings of fact, under the formal procedure

of adjudication, and then hold off on actually adjudicating the child a delinquent. Instead, the court may place the child under the supervision of a probation worker if the child and his parents/guardians agree. The court's order continuing the child under supervision shall be known as a consent decree, which shall remain in force usually for six months.

Usually, however, the court will make findings, adjudicate the child a delinquent, and then place the child on probation. Then, a probation worker who meets regularly with the child can help the child to live in a way that keeps him out of trouble and helps him order his life. If there are no official probation workers, the judge may put the child under the supervision of some responsible person, or return the child to his family.

Probation will usually be on "conditions of conduct" which the judge may decide, after learning all he can during the disposition hearing, will especailly help the particular child. These conditions might require, for example, that the child get remedial education, that he stay away from a particular place and people, that he help with certain family work, that he earn money to pay for damage he has done, and that he obey the laws of his community.

The child on probation must report regularly to his probation officer, or to whomever the judge has selected, and if he is charged with violating the conditions of his probation, this can be grounds for new charges of delinquency or revocation of probation. The court should review the probation

regularly, probably every six months or so, in a hearing. The court will end the probation when the child appears to be in control of a law-abiding way of life -- usually after not more than two years, or after the child reaches his eighteenth year. During the probation, at a formal review hearing, the court may want to change conditions of conduct.

(b) Commitment

If the child is not returned to his home or placed with another family or put on a probation, the judge may commit him to a special place for children. The judge may be limited by what kinds of places there are for a child in the area of his court. In some areas there may be a group home for children, a supervised work program, a job, a training program, or a special school where the child could be sent to live. In other places, or for very serious delinquent acts, the judge may commit the child to a special juvenile institution. The court will have wide power to place the child where the judge feels the child can best learn a better way of life. But this power can be used only after the child has been found to be delinquent under the procedure required for an adjudication, and his placement is made under conditions prescribed by the Tribal Code.

Section 3. The Indian Child Welfare Act of 1978

A. Background

Up to the recent past, Indian children have often been separated from their families and tribal communities through placement in non-Indian homes and institutions through adoption,

foster care, and child custody proceedings in state courts. To remedy this problem, Congress enacted the Indian Child Welfare Act in 1978 (the Act). Codified at 25 U.S.C. § 1901, the Act basically requires that preference be given to Indian families, Indian foster care, and Indian group homes in the placement of Indian children by state and private social service agencies. Congress did this in recognizing

> that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe. (§ 1901(3))

Congress was aware of the alarmingly high percentage of Indian families that were broken up by the unwarranted removal of their children to non-Indian foster and adoptive homes and institutions. Pursuant to finding that the states, through judicial and administrative bodies, "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," Congress declared it a national policy to:

> protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. (§ 1902)

As presented in an outline of the Act prepared by Barbara N. Wright, Assistant Attorney General in the state of Washington,

eight major safeguards for Indian families and tribes were created:

1. Tribal jurisdiction of reservation Indian children is exclusive where not previously lost to states under federal law and, where previously lost, may be resumed.

2. State jurisdiction over Indian children may be transferred to tribal courts by State courts at tribes's or parents' request.

3. Tribes and parents have the right to notice of and the right to intervene in State proceedings involving Indian children.

4. Higher standards of proof are applied to State custody proceedings involving Indian children.

5. Placement of Indian children by State agencies is subject to special preference for Indian families and community.

6. Indian parents' consent to adoption or placement must be informed and may be revocable for extended periods of time.

7. Tribe's and parents' access to State records is secured.

8. Full faith and credit is granted to tribal laws and public acts.

Of these major safeguards, the most significant provisions are those conferring exclusive tribal court jurisdiction, where not previously lost to the states, and those requiring state courts to give full recognition to tribal laws and tribal court orders in these matters.

It is also important to note what the Act does not cover. According to § 1903(1), the Act does not apply to the placement of children arising out of divorce or juvenile delinquency cases. Thus, a significant number of custody cases arising out of these types of actions will not be covered by the Act.

Rather, the Act only applies to cases where a child is removed from a family situation for reasons such as abuse, neglect, or parental unfitness, or where parents voluntarily give up a child for foster placement and adoption.

The major provisions of the Act are presented in the following section with a brief explanation of the substance and effect of each provision. Analytic flow charts illustrating the procedure of the Act follow the statutory text. These flow charts were drafted by Mr. Robert L. Bennet, a NAICJA instructor and consultant, to assist Indian Court Judges for the effective and successful implementation of the Act.

B. Statutory Provisions and Explanation

The Act begins with a general statement of purpose "[t]o establish standards for the placement of Indian children in foster or adoptive homes, [and] to prevent the breakup of Indian families. . . ." The national policy behind this purpose was presented in the preceeding section on the background of the Act.

i. Definitions: § 1903

Section 1903 of the Act defines a number of key terms used throughout the statute. These definitions are presented below. Other definitions which are very clear, like "Indian tribe," "reservation," "secretary," and "tribal court," will not be presented.

> For the purposes of this chapter, except as may be specifically provided otherwise, the term -
>
> (1) "child custody proceeding" shall mean and include -

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or insitution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

. . .

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

. . .

The definitions of "child custody proceeding," "Indian child," and "Indian child's tribe" will be most important for the purpose of the following statutory sections.

ii. Child Custody Proceedings: §§ 1911-1923

Sections 1911 to 1923 present the major substantive provisions of the Act:

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

Exclusive jurisdiction

(a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

Section 1911(a) vests exclusive jurisdiction in the tribal court in any child custody proceeding where the Indian child resides or is domiciled on the reservation except where such jurisdiction is otherwise vested in the state. Public Law 280 is an example of exclusive jurisdiction by the state. This section represents the resolution of past conflict between state or tribal courts over jurisdiction of Indian children on reservation. Tribal court jurisdiction extends to children who may be off the reservation temporarily but have a permanent "domicile" or home on the reservation. And further, where the child has been declared a "ward" of the tribal court, residence

or domicile of the child has no effect.

Transfer of proceedings; declination by tribal court

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

Section 1911(b) provides for the transfer of foster care and termination proceedings to tribal jurisdiction absent objection by either parent or a showing of "good cause" by the state not to. This transfer is accomplished by petition of (1) either parent, (2) the Indian custodian or (3) the Indian child's tribe. The tribe can decline such a transfer, and note that this provision applies only to an Indian child not domiciled or residing on the reservation of the Indian child's tribe.

State court proceedings; intervention

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

Section 1911(c) provides that in any state court Indian child proceeding covered by the Act, the parents, tribe and Indian custodian of the child have the right to be recognized as parties in the case by the court. This means that they may argue to the court which must consider their recommendations.

Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Section 1911(d) requires that all state and federal courts give full recognition and effect to tribal laws and tribal court orders in these matters. This provision resolves previous conflict where states have refused to consider tribal determinations regarding Indian child custody matters. It is an extraordinary measure in recognizing the jurisdictional power of the tribe beyond the borders of the reservation.

§ 1912. Pending court proceedings - Notice; time for commencement of proceedings; additional time for preparation

(a) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

Section 1912(a) requires that any party seeking the foster care placement of, or termination of parental rights to, an Indian child, must notify the parents, Indian custodian, and the Indian child's tribe of the pending proceedings and of their right to intervene. This notice is required only in

involuntary proceedings, which should be contrasted to voluntary proceedings where parents willingly give up their children for placement. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice must be given to the Secretary of the Interior who must then attempt to notify the parent, Indian custodian or tribe. No proceeding shall be held until at least ten days after receipt of notice by any of the above parties and an extension to this time period of up to twenty days may be granted upon request.

Appointment of counsel

(b) In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

Section 1912(b) provides for court-appointed counsel in the above proceedings where the court determines that the parent or Indian custodian is indigent. The court can also appoint counsel for the child where appropriate. In the absence of state law providing for such appointments, the court must notify the Secretary who will provide reimbursement for appointed counsel .

Examination of reports or other documents

(c) Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

Section 1912(c) provides for the examination of all records in foster care or termination of parental rights proceedings by all parties to the action. This is important to know upon what basis court determinations will be made.

Remedial services and rehabilitative programs; preventive measures

(d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Section 1912(d) requires that any party seeking to remove an Indian child must show the court that efforts have been exhausted to prevent the breakup of the family.

Foster care placement orders; evidence; determination of damage to child

(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Section 1912(e) requires that no placement may be ordered without a determination that continued custody of the child by the parent or Indian custodian will cause serious emotional or physical damage to the child. This determination of future damage must be shown by "clear and convincing evidence," where the evidence favoring placement must "clearly" outweigh the evidence against such placement.

Parental rights termination orders; evidence; determination of damage to child

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including

testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Section 1912(f) provides that no termination of parental rights may be ordered without a determination, as in § 1912(e), that the continued custody of the child by the parent or Indian custodian will seriously damage the child. The determination must be supported by proof "beyond a reasonable doubt" that continued residence with parent or custodian will harm the child. This proof can leave no doubt in the mind of the court as to the necessity of the termination.

§ 1913. Parental rights, voluntary termination - Consent; record; certification matters; invalid consents

(a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

This section requires the written and recorded consent of any parent or Indian custodian who voluntarily agrees to a foster care placement or to a termination of parental rights. This consent must be given in court and accompanied by a judge's statement that the terms and consequences of the consent were fully explained to and fully understood by the consenting party. This provision seeks to insure the understanding of the parties to the proceeding.

Foster care placement; withdrawal of consent

(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

Collateral attack; vacation of decree and return of custody; limitations

(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

Sections 1913 (b), (c), and (d) present the grounds upon which a parent or Indian custodian may withdraw consent to voluntary proceedings of foster care placement, adoptive placement, and termination of parental rights. Section 1913(b) allows the withdrawal of consent to a foster care placement at any time by right. In a termination of parental right or adoptive placement proceeding, § 1913(c) provides that consent may be withdrawn at any time prior to the entry of a final decree of termination or adoption. Section 1913(d) provides an exception to the rule in § 1913(c) in permitting a parent to withdraw consent to adoption where the consent can be shown to have been obtained by fraud or duress. But this right exists only for two years after entry of the final decree unless state

law provides otherwise.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

Section 1914 provides a remedy to invalidate any state court actions violating any of the above-mentioned sections of the Act. This remedy is available to any parent, Indian custodian, tribe, or Indian child subject to the placement or termination proceeding.

§ 1915. Placement of Indian children - Adoptive placements; preferences

(a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

Foster care of preadoptive placements; criteria; preferences

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with -

(i) a member of the Indian child's extended family;
(ii) a foster home licensed, approved, or specified by the Indian child's tribe;
(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

(c) In the case of a placement under subsection (a)

or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

Social and cultural standards applicable

(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

Record of placement; availability

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Section 1915 states the preferences for foster care or adoptive placement under state law that must be followed concerning an Indian child in an adoptive placement: § 1915(a) requires that preference be given to the child's extended family, then to other members of the Indian child's tribe, and finally, to other Indian families. Section 1915(b) provides that, in the case of foster care or preadoptive placement, preference must be given to an Indian foster home or institution before the child is placed in another setting. An Indian child's tribe may establish a different order of preference than presented in §§ 1915(a) and (b) by resolution pursuant to § 1915 (c). This section also provides that the preference of the Indian child and parent be considered in placement.

State records, available for inspection, must also be maintained of all Indian child placements to show compliance with the preference requirements of the above-mentioned sections.

§ 1916. Return of custody - Petition; best interests of child

(a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

Removal from foster care home; placement procedure

(b) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

Section 1916(a) gives the biological parent or prior Indian custodian the right to request custody of an Indian child when an adoption order has been set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child. The state court must grant such a request unless it can be shown that return of custody is not in the best interests of the child. Section 1916(b) provides that any removal of a child from a foster home must be done under the provisions of the Act.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if

any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

Section 1917 permits any adopted Indian reaching the age of 18 to ask the court for information regarding tribal affiliation and relationship.

§ 1918. Reassumption jurisdiction over child custody proceedings - Petition; suitable plan; approval by Secretary

(a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 568), as amended by subchapter III of chapter 15 of this title, or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

Criteria applicable to consideration by Secretary; partial retrocession

(b)(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

(c) If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

Pending actions or proceedings unaffected

(d) Assumption of jurisdiction under this section shall not affect any action of proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

Section 1918 presents the procedure for any Indian tribe, who might have lost Indian child custody jurisdiction under state or federal law, to reassume that jurisdiction. The tribe must petition the Secretary of the Interior for approval of such action. The Secretary may deny jurisdiction, grant limited jurisdiction, or restore full custody jurisdiction to a tribe by publishing notice and informing the affected states of such approval.

§ 1919. Agreements between States and Indian tribes - Subject coverage

(a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

Revocation; notice; actions or proceedings unaffected

(b) Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

Section 1919 encourages agreements between states and Indian tribes regarding jurisdiction over Indian child custody matters. It also sets forth the procedure to terminate such agreements.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

In the event of improper removal or continuance of custody after visitation of a child, § 1920 provides that the state court must return the child to his lawful parent or Indian custodian. This procedure is required unless this return would subject the child to physical danger.

The substance of §§ 1921, 1922, and 1923 may be provided without the presentation of the statutory text. Section 1921 requires the application of any Federal or State law in Indian child custody proceedings which is more stringent than the provisions of the Indian Child Welfare Act. Section 1922 provides for the emergency removal of an Indian child in order to prevent imminent physical harm to that child. And, lastly, § 1923 provides that none of the provisions of the Act, except §§ 1911(a), 1918, and 1919, shall affect a state child custody proceeding initiated or completed prior to 180 days after the passage of the Act. The Act will apply to any subsequent proceeding in

the same matter or subsequent proceedings affecting the custody or placement of the same child.

In sum, §§ 1911-1923 provide the substance and procedure for Indian child custody proceedings in tribal and state courts. These provisions are further illustrated by flow charts in the following section.

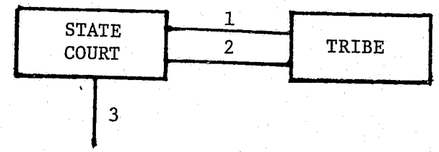
iii. Other Provisions

The provisions of §§ 1931-1934 should be reviewed in a thorough reading of the Act because they give the Secretary of the Interior authority to make funding grants to Indian tribes and organizations for the establishment of and operation of Indian child and family services programs on or near the reservations. Sections 1951 and 1952 outline recordkeeping requirements for Indian child placement proceedings and §§ 1961-1963 set forth miscellaneous provisions concerning future studies and the publication of information concerning the Act.

C. Procedural Flow Charts

The following procedural flow charts of the Indian Child Welfare Act were created by Mr. Robert L. Bennet, a NAICJA instructor and consultant, for guidance in the comprehension and application of the Act. The statutory sections requiring procedural steps in each diagram are referenced wherever possible:

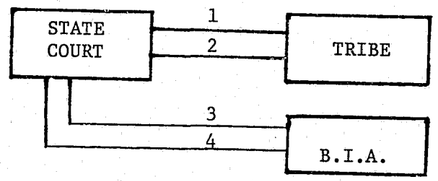
i. Verification of Reservation Residence, Domicile or Ward of Tribal Court *



1. State Court inquiry to Tribe.
2. Tribal Response
3. Dismissal of Response is affirmative

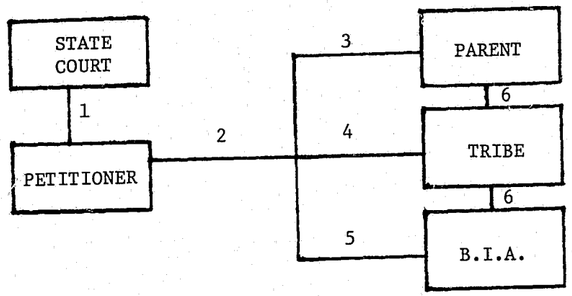
* Not Applicable if State Court has Jurisdiction by Law.

ii. Verification that child is an Indian, Tribal Member or Eligible to be a Member



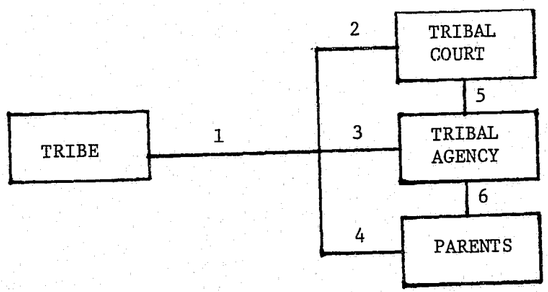
1. State Court inquiry to Tribe.
2. Tribal Response
3. State Court Inquiry to appropriate B.I.A. Area Office if Tribe unknown
4. B.I.A. Response

iii. Notice of Involuntary Child Custody Proceeding (§ 1912(a))



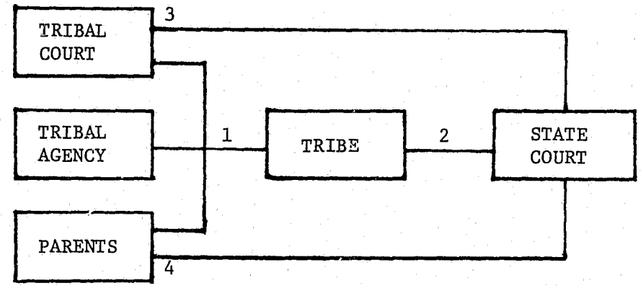
1. Filing of Petition in State Court
2. Notice given by Petitioner
3. Notice to Parents
4. Notice to Tribe
5. Notice to appropriate B.I.A. Area Office if Tribe or Parents are not known or cannot be located
6. Notice by B.I.A. to Tribe and Parents

iv. Action of Tribe Upon Receipt of Notice



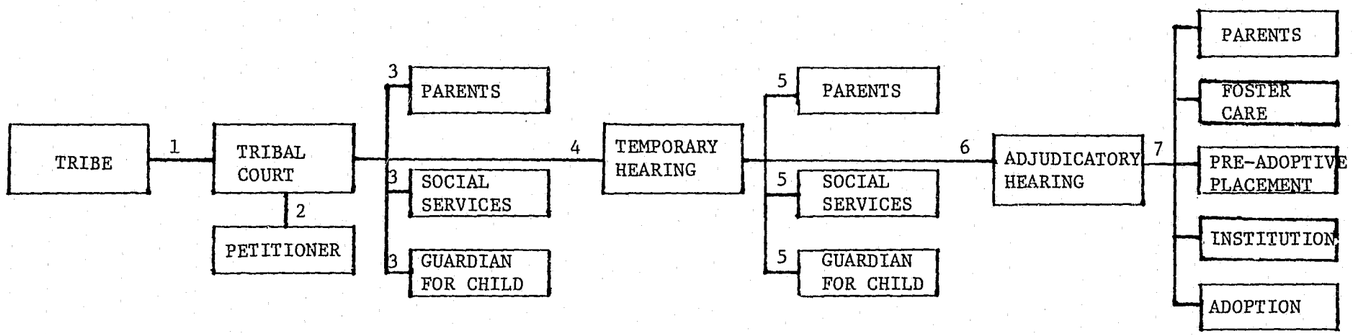
1. Notice given by Tribe
2. Notice to Tribal Court
3. Notice to Tribal Agency or Committee
4. Notice to Parents
5. Consultation between Tribal Court and Tribal Agency to develope recommendations
6. Parental participation in consultations.

v. Recommendation to Tribe and Tribe's Petition to State Court (§ 1911(b))



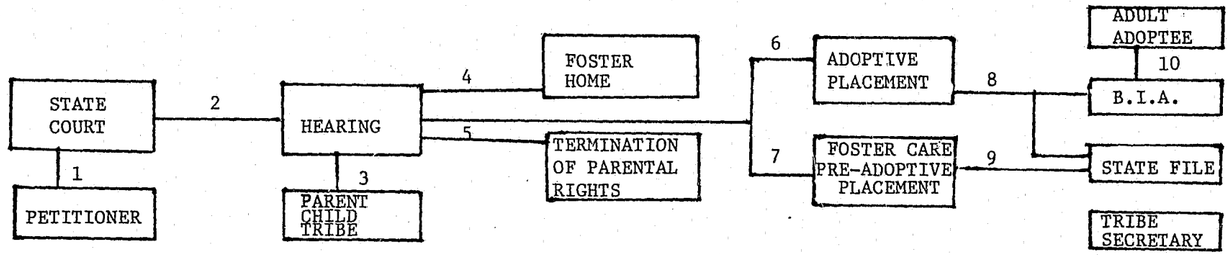
1. Recommendation that Tribe petition for transfer of proceedings
2. Petition by Tribe to State Court for transfer of proceedings or to intervene
3. Declination of jurisdiction by Tribal Court
4. Petition filed separately by parent opposing transfer of proceedings or to intervene and requesting appointment of counsel

vi. Child Custody Proceedings After Transfer to Tribe (Model Tribal Juvenile Code)



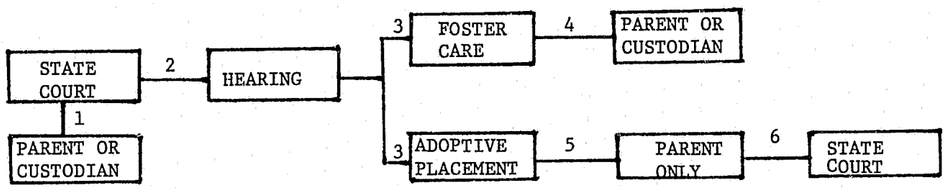
1. Notice to Tribal Court
2. Filing of Petition for Temporary Placement
3. Notice to Parents, Social Services and Guardian ad Litem for Child
4. Hearing on Temporary Placement
5. Notice to Parents, Social Services and Guardian ad Litem for Adjudicatory Hearing
6. Adjudicatory Hearing
7. Final Disposition

vii. Involuntary Child Custody Proceeding in State Court Under State Law (§ 1912)



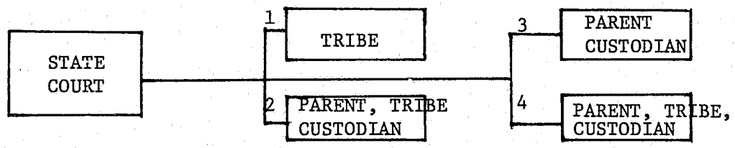
1. Petition must state active efforts made to provide family programs and proof of lack of success (§1912(d)).
2. Hearing on Petition following State Law.
3. Parties right to access to records and to intervene (§ 1912(c)).
4. Degree of proof clear & convincing (§ 1912(e)).
5. Degree of proof beyond reasonable doubt (§ 1912(f)).
6. Order of preference must be followed (§ 1915(a)).
7. Order of preference must be followed (§ 1915(b)).
8. Adoptive Placement records with State & B.I.A.
9. Foster Care Records in State with easy access (§ 1915(e)).
10. Adult adoptee's right to information as to membership or eligibility for membership in Tribe - confidentiality must be respected (§ 1917).

viii. Voluntary Child Custody Proceeding in State Court under State Law



1. Parent or Indian Custodian may consent to foster care placement or termination of parental rights (§ 1913(a)).
2. Court must certify, after hearing, that consent was freely given and consequences of consent were understood by consenting party (1913(a)).
3. At Adjudicatory Hearing, Court places child in Foster Care or Adoptive Placement.
4. Placement in Foster Care - Consent may be withdrawn by Parent or Indian Custodian at any time (§ 1913(b)).
5. Adoptive Placement - Consent may be withdrawn by Parent only prior to signing of final decree of adoption (§ 1913(c)).
6. Parent may petition State Court within two years after final decree of adoption to vacate adoption if obtained under fraud or duress (§ 1913(d)).

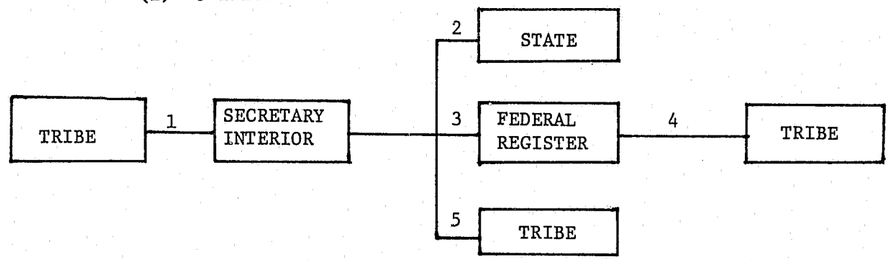
ix. Options - State Court



1. State Court can refuse transfer to Tribe for good cause (§1911(b)).
2. State Court action may be invalidated and child returned if hearing on petition filed by Parent, Tribe or Custodian shows Indian Child Welfare Act was violated (§ 1914).
3. State Court must decline jurisdiction and return child to Parent or Custodian if petitioner has improperly removed child and improperly retained custody unless action would place child in danger (§ 1920).
4. State Court may order emergency removal of child to protect child and as soon as emergency is over, Court must initiate child custody proceedings, transfer the child to the Indian Tribe or restore child to parent or Indian custodian (§ 1922).

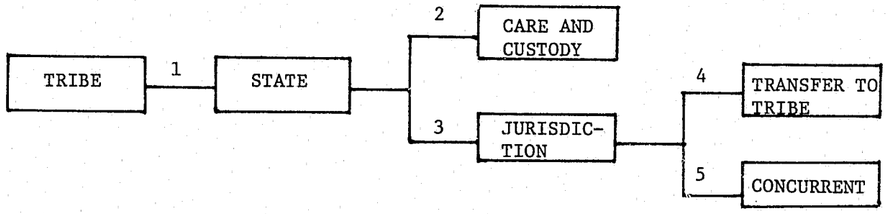
x. Tribal Initiatives

(1) § 1918:



1. Tribe may petition Secretary of Interior for reassumption of jurisdiction over Child Custody Proceedings, either complete or partial.
2. Upon approval of petition, Secretary of Interior must notify State.
3. Notice of approval of petition must be published in Federal Register.
4. Tribe shall reassume jurisdiction sxity days after approval.
5. Upon disapproval of petition, Secretary of Interior must provide technical assistance to Tribe to correct deficiency which caused disapproval.

(2) § 1919:



1. Tribe may enter into agreements with States.
2. Agreement can cover care and custody of Indian children.
3. Agreement can provide for jurisdiction over Child Custody cases.
4. Jurisdiction can be transferred to Tribe on case-by-case basis.
5. Jurisdiction can be concurrent between State and Indian Tribes.

CHAPTER VI. A SPECIAL NOTE ABOUT ALCOHOLISM

For the book, "Indian Courts and the Future," the NAICJA Long Range Planning Project surveyed twenty-three Indian courts and reported the following:

> All reservations reported that adult and juvenile alcoholism is the major cause of crimes and cases before Indian courts. [A]lcohol accounts for perhaps 90 per cent of all cases in Indian courts, and several courts visited maintained that alcohol is a factor in every case. Indeed, most people thought that high reservation crime rates would be more in line with off-reservation rates if the alcohol problem could be abated. However, the judges interviewed reacted strongly to decriminalizing alcohol as an alternative because, at present, they felt the court is the only method available for "rehabilitating" offenders. If adequate facilities and personnel were provided by the federal government, judges would feel easier about diverting alcohol cases from the criminal justice system. There are few cases at present in the Indian court system that do not deserve referral to some treatment program, alcohol or otherwise. (p.78)

This passage illustrates the dual nature of the Indian alcoholism problem: 1) criminal conduct on reservations is almost <u>always</u> related to alcohol; and 2) there is a critical lack of adequate alcoholism treatment facilities on reservations.

The Report also considers the cause of alcoholism in stating, "Alcoholism is partly a result of the depressed economic situation on most reservations." (p. 47). Personal problems and boredom caused by lack of employment opportunities on reservations also contribute to this rampant alcoholism problem.

To remedy this problem, the Report presents the need for adequate treatment facilities on reservations for referrence of individuals by the tribal court and other reservation agencies. When an offender is convicted of a crime where the tribal court can determine that the underlying cause of the conduct is alcoholism, "the preferred disposition by the court should be the provision of proper treatment to

correct the defendant's conduct." (p. 119) But this alternative disposition is only possible if there is an alcohol rehabilation center, which is dependent on limited or non-existent tribal or federal funds. If no treatment facilities are available, incarceration may be the only alternative.

The problem of alcoholism on the reservation and it's relation to criminal behavior deserves much more development than can be presented here. But it is important for the Indian court judge to recognize this problem and work for the funding and development of treatment programs and facilities. As the NAICJA Long Range Planning Project reports:

> Alcoholism is unquestionably the greatest single problem for Indian courts (as well as Indian law enforcement, Indian health, and virtually every other aspect of Indian social welfare and relations). The revolving door syndrome for repeating alcohol offenders is not unique to Indian courts, but the percentage of alcohol related offenses is greater in Indian courts than in others. This signals a problem to which all levels of tribal government must respond, as must government agencies whose duty and mission it is to assist tribes and their governments. (p. 100)

APPENDIX

FEDERAL STATUTES AFFECTING INDIANS

A. Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et. seq.

§ 1301. Definitions

For purposes of this subchapter, the term -

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

Pub.L. 90-284, Title II, § 201, Apr. 11, 1968, 82 Stat.77.

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall-

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

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

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

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property

without due process of law;

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

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Pub.L. 90-284, Title II, § 202, Apr. 11, 1968, 82 Stat. 77.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Pub.L. 90-284, Title II, § 203, Apr. 11, 1968, 82 Stat. 78.

§ 1321. Assumption by State of criminal jurisdiction - Consent of United States; force and effect of criminal laws

(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

§ 1323. Retrocession of jurisdiction by State

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Pub.L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79.

§ 1326. Special election

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

Pub.L. 90-284, Title IV, § 406, Apr. 11, 1968, 82 Stat. 80.

B. Federal Jurisdictional Statutes, Title 18 U.S.C.

§ 13. Laws of states adopted for areas within federal jurisdiction

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment. June 25, 1948, c. 645, 62 Stat. 686.

§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.

§ 1152. Laws governing

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively. June 25, 1948, c. 645, 62 Stat. 757.

§ 1153. Offenses committed within Indian country

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall

be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense. As amended Nov. 2, 1966, Pub.L. 89-707, § 1, 80 Stat. 1100; Apr. 11, 1968, Pub.L. 90-284, Title V, § 501, 82 Stat. 80; May 29, 1976, Pub.L. 94-297, § 2, 90 Stat. 585.

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jursidiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.
As amended Nov. 25, 1970, Pub.L. 91-523, §§ 1, 2, 84 Stat. 1358.

§ 3242. Indians committing certain offenses; acts on reservations

All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.
As amended May 29, 1976, Pub.L. 94-297, § 4, 90 Stat. 586.

C. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et. seq.

[Please see Chapter V for the text of this statute.]

GLOSSARY OF TERMS

admissibility: the quality of evidence being acceptable for presentation to a court as proof of a fact or proposition in the case.

advocate: one who argues in favor of a particular position or point of view; as opposed to one who considers all points of view or all sides of a question; attorneys are advocates for the parties they represent.

alleged: a fact is alleged if it is claimed to be true, but not yet proven.

answer: the document or pleading filed by a defendant in a civil case which explains or denies the charges contained in the complaint.

antogonistic: to be hostile or angry toward a person or an idea offered by someone.

arbiter: a person who listens to both sides of a dispute and tries to find a fair solution to the problem; the judge and the jury are the final arbiters of a law suit.

arraignment: an official court proceeding in which a person accused of a crime is brought to court and told of the charges against him; the accused person must enter a plea of 'guilty' or 'not guilty'. If he pleads 'not guilty' the proceedings end with the setting of a date for trial and the accused may be released or returned to jail to await trial. If he pleads 'guilty' he may be sentenced at that time or a later date may be set for sentencing.

bail: money paid to a court so that a person who has been arrested but not yet tried may be released from custody (jail). The money is given as part of a pledge that the person will return to the court for trial at the proper time.

beyond a reasonable doubt: in criminal cases, this refers to the burden of proof on the prosecution to prove its case to the point where a reasonable, normal person would no longer have any real or substantial doubt about the guilt of the defendant.

burden of going forward with the evidence: the duty of a party in a law suit to either initially present evidence to prove or disprove a fact or proposition, or to carry on with such evidence.

burden of proof: the initial duty of a party, fixed at the outset of a trial, to prove or disprove certain facts or propositions, lest the opposing party prevail in the case.

civil suit: a case in which a person comes to court to have the court require another person to do something for the first person, for example: to pay a bill, to pay the costs resulting from an accident,

to get a divorce or custody of children. Civil suits are all cases which do not involve criminal prosecution.

complaint: in a civil case the document or pleading filed in court by the plaintiff which describes the basis, nature, and amount of the plaintiff's claim against the defendant; in a criminal case, the document or pleading filed in court by the plaintiff (the prosecution) charging the defendant (the accused) with the commission of a criminal offense.

contempt of court: any act which tends to embarrass, hinder, or obstruct the court in its administration of justice, or which tends to lessen the authority or dignity of the court. Such acts are usually punishable by fine or imprisonment.

continuance: a postponement of court action to a later date either on the request of one of the parties or for the convenience of the judge.

credibility: the believability of a witness or of evidence, including its accuracy and truthfulness.

cross-examination: the questioning of a witness which is conducted by the party other than the party which called the witness to testify, and which is usually conducted after direct examination of the witness.

default judgment: a final judgment entered in favor of the plaintiff because the defendant has failed to file an answer, appear in court, or otherwise comply with the rules of the court, having the same effect as does a judgment entered after a full trial.

demeanor: the appearance of a witness as he testifies at trial, such as his tone of voice, gestures, and mannerisms.

demonstrative evidence: a presentation which demonstrates how a particular thing works, or how some event happens, such as a demonstration of how a pulley works, or how fast a car can stop under emergency conditions.

deposition: testimony by a witness, given outside of court, but in pursuance of a order issued by the court to take such testimony, and transcribed into writing and duly authenticated, for intended use at a later trial. Both parties must have had an opportunity to be present during the deposition.

direct evidence: evidence which, if believed to be true, immediately establishes the facts which it is concerned with.

direct examination: the initial questioning of a witness by the party who called the witness to testify.

directed verdict: a decision by the judge that the facts and issues are so clear that the jury could only decide the case in one way, therefore the judge decides the case without submitting it to the jury.

disqualify: the removal of a judge from presiding over a particular case either at the request of a party in the case or at the judge's own suggestion.

dying declaration: a statement made by a person who knows he is on the verge of death, about the cause of his death, and the person responsible for his death, generally used in murder cases.

enjoin: to require a person to do or to not do a certain act; the court may issue an order called an injunction which has the force of law. Failure to obey an injunction may result in civil or criminal contempt.

evidence: any kind of proof which is presented at a trial, by the parties, for the purpose of causing the jury to believe a certain assertion or proposition of fact.

exhibit: an object, document or chart, model or photograph used during a trial to prove a factual assertion of a party or to help the jury and the judge understand the basis for the law suit.

fraud: an intentional misrepresentation of the truth, for the purpose of inducing another person to part with some valuable thing, such as money, property, or a legal right.

general verdict: a decision of the jury concerning the final outcome of the case without any further explanation, for example, "Guilty," or "Not Guilty."

homicide case: a case involving the killing of a human being.

hostile witness: a witness who is antagonistic or uncooperative with the party who called him to testify, such that the party who called the witness may be permitted to ask the witness leading questions.

hypothetical question: a question which states certain facts or circumstances, and asks for an opinion or conclusion based on those facts or circumstances. For example, "If the train was going 50 m.p.h., how far would it take it to stop, applying full braking power?"

impeachment--of evidence, or of a witness: the presentation of proof that certain evidence, or the testimony of a certain witness, is inaccurate, untruthful, or otherwise unworthy of belief.

indirect evidence: evidence which only tends to prove a fact, but does not prove it conclusively.

inference: a conclusion or determination, made on the basis of the presentation of evidence and proof of other facts.

irrebuttable presumption: a presumption which exists and remains, and cannot be disproven or destroyed by the presentation of any evidence to the contrary.

judgment notwithstanding the verdict(judgment n.o.v.): in effect, the reversal of the jury's verdict by the judge; this can only be done in rare cases where the judge is convinced the jury failed to apply the law or was improperly influenced in reaching its decision.

judicial competence: the ability of a judge to properly decide an issue or a law suit brought before him.

judicial ethics: the fundamental principles which govern the conduct of a judge on or off the bench.

judicial immunity: the protection given a judge (or other judicial employees) which frees him from civil liability for mistakes he meakes as a judge.

judicial impropriety: the action of a judge which is prohibited by law or by the rules or canons of judicial ethics.

judicial notice: the act by which a court recognizes the truth of certain well-known, undisputed facts, without requiring further proof of those facts.

jurisdiction: the legal authority or power of a particular court to settle a particular case; whether a particular court has jurisdiction over a case may depend on who the parties are, where the event occurred and the type of case. If the court does not have jurisdiction, the parties are not legally required to appear and are not bound by any judgment of the court.

jury list: the preliminary list of persons selected for possible jury duty within a fixed period of time, usually a year or more.

jury panel: the group of potential jurors chosen from the jury list who will be called on a particular day (or week) for jury service; all jurors needed during this period will be selected from this jury panel.

law: rules made to govern human conduct, including statutes, Tribal codes, rules made by courts or administrative agencies, and rules established by Tribal traditions or customs, to control and guide the members of the Tribe.

liability: being responsible, under the law, for any harm or injury or damage done to a person or his property.

litigants: the various parties in a law suit, the plaintiff(s) and the defendant(s).

litigation: a law suit or group of law suits usually involving two or more parties called litigants.

materiality: that quality of evidence which makes the evidence important and necessary to the case, because the evidence goes to vital issues or facts in the case.

mistrial: an erroneous, invalid trial, which is of no effect, because of some serious fault, such as lack of jurisdiction or extremely improper procedure.

mitigate: to make more mild, or less harsh on the basis of fairness, mercy or justice; to mitigate a sentence is to give a smaller fine or shorter prison term than the largest allowed or that usually is given for the same offense.

motion to strike: a request by one of the parties to have a certain portion of the evidence or testimony removed from the official record of the trial, so that it will not be considered a part of the evidence in the case.

non-prejudicial error: an error made by the court, such as an erroneous ruling on an evidenciary objection, which is not important enough to affect the outcome of the case, or prejudice the case of one of the parties.

order of proof: the sequence in which a party should present his evidence, so that essential authentication, qualification, or other groundwork is presented before other evidence is introduced.

pleading: all documents or papers filed with the clerk of court by the parties in a case, including the complaint, answer and all motions.

preemptory challenge: in the selection of members of a jury either party or their attorneys may challenge a particular juror without giving any reason and the juror is excused; court rules provide how many preemptory challenges can be made by each side. Preemptory challenges should not be confused with challenges for cause. Any party or the judge may exclude any juror who appears unable to judge the case fairly; there is no limit to the number of jurors who can be challenged for cause.

prejudicial error: a mistake made by the court which seriously affects the outcome of the case, and which is usually grounds for the appellate court to remand or reverse the decision of the court.

presumption: a fact or proposition that is assumed to be true, until it is otherwise disproved.

prima facie case: the elements, facts, or propositions which must be proven, as a minimum, if a party is to prevail in a law suit.

rebuttable presumption: a presumption which exists until evidence is presented to disprove it, then it disappears.

release on his own recognizance: to release a defendant from custody on the basis of his own promise to return for trial, or do some-other act required by the court without him having to post a bond.

relevancy: the quality of evidence which makes it applicable to a case, such as its tendency to prove or disprove a fact or proposition in the case.

reversible error: an error in a trial which is so serious that the judgment cannot stand and a new trial will have to be held.

self incrimination: any statement by a person accused of a crime which might prove that he may be guilty of the crime.

sequestration: the separation of the jury from all outsiders during a trial and the deliberations which follow; they must be fed and housed together and are not permitted to go home or visit with friends or relatives during the trial.

special verdict: a procedure whereby the jury instead of rendering a general verdict, answers specific questions given to it by the judge; after receiving the answers from the jury the judge then decides which party wins the law suit.

suppressed evidence: evidence which was obtained improperly; such evidence cannot be considered in deciding the innocence or guilt of the person being tried. Also called inadmissible evidence.

subpoena duces tecum: an order by the court, usually at the request of one of the parties in a case, for a person to bring a particular document to the court at a specific time and date, for use in the trial.

sufficiency of the evidence: the degree to which the evidence carries the burden of proof of a party in the case, such as the prose-cution's burden of proving his case beyond a reasonable doubt.

testimony: evidence given orally by a witness, under oath, as opposed to such evidence as documents and real evidence.

trier of fact: the person or persons who decide what the facts are in a particular case. This might be the judge or the jury.

vacate a judgment: to set the judgment aside; to cancel the judgment.

voir dire: the questioning of the potential members of the jury, either by the parties or their attorneys or by the judge to determine if any are unfit to decide the case.

waive: to voluntarily give up a legal right or privilege. For example, to waive the right of trial by jury and agree to have one's case heard by a judge without a jury.

waiver: the act of waiving a legal right or privilege.

warrant of arrest or search warrant: a written order, issued by a judge or other judicial officer stating that a police officer has the authority to arrest a specific person or search a specific place for certain things. Evidence obtained without a valid warrant may not be allowed in court; such evidence may be inadmissible or suppressed (see suppressed evidence).

UNITED STATES OF AMERICA
_____ INDIAN RESERVATION
COURT OF _____ TRIBE

_____ TRIBE)
)
V.) WARRANT OF ARREST
)
) Case No. _____
_____)
(Name of Accused)

TO ANY TRIBAL POLICE OFFICER OR OTHER AUTHORIZED LAW ENFORCEMENT OFFICER:

You are hereby commanded to arrest _____
(Name of Accused)
and forthwith bring him (her) before any Judge of the _____
Tribal Court to answer to a complaint charging him (her) with

_____ in violation of Section _____
(Describe Offense)
of the Code of Law and Order of the _____ Tribe.

Date: _____ Bail: $_____

_____
(Signature of Tribal Court Clerk or Judge)

RETURN

RECEIVED this Warrant of Arrest on _____, 19 ____, and executed it by arresting the above-named accused at _____
(Location of Arrest)
_____ on _____, 19 ____, at _____ A.M. / P.M.
(Date of Arrest)

and bringing him (her) before Judge _____ of the

_____ Tribal Court on _____, 19____ at

_____ A.M. / P.M.

Date:_____

_____
(Signature and title of Arresting Officer)

UNITED STATES OF AMERICA
_____ INDIAN RESERVATION
TRIBAL COURT OF THE _____ TRIBE

WARRANT TO SEARCH

TO ANY TRIBAL POLICE OFFICER OR OTHER AUTHORIZED LAW ENFORCEMENT OFFICER:

Sworn statement having been filed with me by _____
(Name of person requesting warrant)
charging that (s)he has reason to believe that on the premises known as

_____ located within the jurisdiction
(address or description of property)
of this court, there is located certain seizable property, namely,

_____
(Describe property to be seized)
and as I am satisfied that there is probable cause to believe that such property is located as above defined,

YOU ARE HEREBY COMMANDED to search the premises names above for the property specified and to serve this Warrant, and if the property is found there to seize it and bring it forthwith before this Court.

Date:_____

_____
(Signature of Judge)

RETURN

RECEIVED THIS WARRANT TO SEARCH on _____, 19____, and executed
(date)
it on _____, 19____, at _____ A.M. / P.M. and seized the
(date)
following property: _____

_____

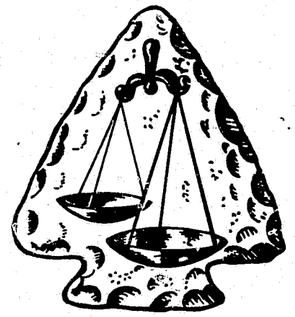
_____

Date: _____

_____
(Signature and title of Officer)

INSTRUCTORS MANUAL
for

CRIMINAL PROCEDURE FOR INDIAN COURTS
and
CRIMINAL LAW FOR INDIAN COURTS



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Introduction

This Instructors Manual is designed for use with NAICJA's Criminal Law for Indian Courts and Criminal Procedure for Indian Courts. The purpose of this manual is to provide instructions on the proper use of these two textbooks for NAICJA training program instructors. In addition, this manual will assist Indian Court Judges in directing their study of criminal law and criminal procedure as they participate in NAICJA's Judges Training Program.

The textbook Criminal Law for Indian Courts addresses the substantive criminal law of jurisdiction, evidence, the warrant process, juvenile justice, and the elements of a crime. The textbook Criminal Procedure for Indian Courts addresses the procedural aspects of criminal law at the trial court and appellate court levels.

This manual presents the major points developed in each chapter of these two NAICJA textbooks which should be discussed by NAICJA training seminars. These points are presented section by section and a set of questions duplicated from the textbooks appear at the end of each chapter. These questions are designed to test the understanding of the instructors and judges of the material presented in each chapter.

To facilitate the use of this manual, we have used the same subject headings and order of presentation which appear in the textbooks. We have included in parentheses next to each section heading the page numbers where this material can be found in the textbook.

As you consider the questions during your review of this manual, we suggest that you write your answers directly into the space provided after each question. If you need more space or want to make detailed notes, blank pages at the end of the manual are provided. Because the textbooks are intended to serve as a permanent reference book for Indian Court Judges, as well as the basis for training programs, it is anticipated that each judge will become familiar with their material. Moreover, in using the textbooks as a reference after the training sessions are completed, a review of the questions and your responses in this manual will be helpful to insure the future understanding and application of this material in the courtroom.

John W. Milne

Ralph W. Johnson

PART I

Criminal Law For Indian Courts

CHAPTER I. Criminal Jurisdiction in Indian Country

Section 1. Introduction (1-5)

The major points to be discussed in this section are:

1) the general concepts of jurisdiction; and

2) the general principles affecting Indian court criminal jurisdiction.

Section 2. Federal Criminal Jurisdiction in Indian Country (6-11)

The major points to be discussed in this section are:

1) the definition of "Indian Country" and who is an "Indian";

2) the general federal statutory framework regulating criminal jurisdiction in Indian country; and

3) the exceptions to this federal statutory framework.

Section 3. Tribal Criminal Jurisdiction in Indian Country (12-16)

The major points to be discussed in this section are:

1) the types of tribal courts;

2) tribal court jurisdiction under the federal statutory framework; and

3) tribal court jurisdiction and the Indian Civil Rights Act.

Section 4. State Criminal Jurisdiction in Indian Country (17-20)

the major points to be discussed in this section are:

1) the general principle that state law does not normally apply on the reservation; and

2) the federal statutory framework and common law extending State jurisdiction to Indian country.

Section 5. An Analytical Approach to Jurisdiction (21).

The series of questions presenting an analysis to the determination of tribal court criminal jurisdiction should be discussed.

Section 6. Jurisdictional Summary (21-22, 25)

The jurisdictional chart allocating criminal jurisdiction in Indian country should be discussed.

Section 7. Recommendations (22)

The jurisdictional recommendation of the Report of the NAICJA long range planning project, Indian Courts and the Future (1978), should be discussed.

Section 8. Questions (23-24).

State whether the following questions are true, false, or unsettled, and indicate briefly the reason for your answer if possible.

(1) The United States Congress does not have the power to limit tribal court jurisdiction within the reservation.

(2) The United States Congress may make state law applicable on the reservation.

(3) The term "Indian Country" as defined in 18 United States Code Section 1151 includes public highways.

(4) A Tribal Court would probably have jurisdiction over an offense committed by an Indian at an off-reservation treaty protected fishing site.

(5) The McBratney rule states that federal criminal law applies to a crime committed by a Non-Indian against a Non-Indian on the reservation.

(6) Tribal courts retain concurrent jurisdiction over crimes covered by the Major Crimes Act.

(7) A Tribal court can exercise jurisdiction over any crime identified in federal or state law, whether or not it is covered by the tribal code.

(8) Under the Assimilative Crimes Act, 18 U.S.C.A., Section 1152, federal law applies to a Non-Indian committing a crime against an Indian in Indian Country.

(9) The Oliphant case held that a Tribal court does not have jurisdiction to try a Non-Indian for a crime under a tribal code.

CONTINUED

2 OF 3

(10) A Tribal court has jurisdiction to try a non-member for a crime against the tribal code.

(11) Under the Martinez case the Indian Civil Rights Act no longer applies to Tribal Courts.

(12) Under the Indian Civil Rights Act of 1968, a tribe must consent before state jurisdiction may be imposed on the reservation.

(13) Indian Tribes retain concurrent jurisdiction even if a state has jurisdiction over the Reservation P.L. 280.

(14) CFR courts are bound by Federal law, but Tribal Courts are not. Tribal Courts are bound only by Tribal Constitutions and laws.

CHAPTER II. The Law of Evidence

Section 1. Introduction (26-28)

The definition of evidence and the law of evidence should be discussed.

Section 2. The Types and Forms of Evidence (29-30).

Section 3. Burden of Proof (31-36)

The major points to be discussed in this section are:

1) the definition of burden of proof; and
2) the differences between civil law and criminal law burden of proof.

Section 4. Presumptions and Inferences (36-45)

The major points to be discussed in this section are:

1) the differences between presumptions and inferences; and
2) the examples of presumptions.

Section 5. Relevancy and Exceptions (45-51).

The definition of relevant evidence and the exceptions to the rule that all relevant evidence should be admissible should be discussed.

Section 6. The Hearsay Rule and Exceptions (52-60)

The definition of hearsay, the hearsay rule, and the exceptions to the hearsay rule should be discussed.

Section 7. Character Evidence (61-68)

The major points to be discussed in this section are:

1) the definition of character evidence;
2) the admissibility of character evidence; and

3) the proof of character.

Section 8. Privileges (69-71)

The definition of privilege and examples of privileged communications should be discussed.

Section 9. Evidence and the Right of the Accused to Remain Silent (71-76)

The right against self-incrimination and the Miranda warnings should be discussed.

Section 10. Weighing the Evidence (76-78)

Section 11. Questions.

(1) Why is it important that the rules of evidence are followed in an Indian tribal court? Why should tradition and custom always be considered in applying the rules of evidence?

(2) Standing Elk testified that he saw the defendant running from the scene of the theft. What type of evidence is this testimony?

(3) Does the prosecutor have to show that a defendant committed a crime by a "preponderance of the evidence", or some other measure of proof?

(4) During trial, the judge ruled that the defendant was presumed guilty unless she met her burden of going forward with the evidence to prove her innocence. What were the two errors the judge made in his ruling?

(5) The witness testified that he had heard that the defendant, who was being prosecuted for reckless use of a firearm, had once hunted wild boar in Africa. The prosecutor objected to this testimony on the grounds that it lacked "relevance" and was "hearsay". What do these terms mean? Should the motion to exclude the evidence have been granted?

(6) If an officer who was testifying in a burglary prosecution could not recall from memory the factual situation and description of the alleged burglar, would it be permissible for him to consult his notebook?

CHAPTER III. Substantive Criminal Law

Section 1. Introduction (79-81)

The major points to be discussed in this section are:

1) the structure of criminal law; and

2) the burden of proof in criminal law.

Section 2. Elements of a Crime (81-85)

The major points to be discussed in this section are:

1) the two elements necessary in the definition of most crimes - acts and mental states; and

2) the definition of strict liability crimes.

Section 3. Attempting the Commission of a Crime (85-86)

Section 4. Specific Crimes (86-94)

The definition of the following specific crimes should be discussed:

1) assault and battery;

2) theft; and

3) driving while under the influence of intoxicating liquor or drugs.

Section 5. Questions (94-95)

(1) To be convicted of a criminal offense, a person must usually be shown to have committed an act while having a certain mental state.

(2) Which of the following is not a mental state relevant to criminal law?

a. knowledge
b. negligence
c. recklessness
d. boredom

(3) Which side normally has the burden of proof in criminal law? Why?

a. the prosecution
b. the defense

(4) Joe swung at Bill while yelling, "I'll knock you on your queester!" but missed. Was a crime committed, and, if so, which one?

(5) A Tribal ordinance provides that: "An Indian who knowingly buys stolen property from another Indian shall be guilty of the offense of receiving stolen property." In a trial for this offense, what are the elements of the crime that the prosecution must prove?

(6) Assume the ordinance in question (5) is in force. A calls B, his cousin, and tells him he bought a new TV and would like to sell his old one. B comes and looks at the old TV, and then buys it. While carrying it home in his truck B is arrested by tribal police who recognize the TV as one that was recently stolen. If you were B's lawyer, what would you argue at trial?

CHAPTER IV. Arrest and Search Warrants

Section 1. Introduction (96-98)

The warrant requirement of the Indian Civil Rights Act and the definition of probable cause should be discussed.

Section 2. Arrest Warrants (98-104)

The major points to be discussed in this section are:

1) the circumstances for arrest with a warrant;
2) the circumstances for arrest without a warrant; and
3) the summoning and arrest process.

Section 3. Search Warrants (104-107)

The major points to be discussed in this section are:

1) the issuance of the search warrant;
2) the execution of the search warrant;
3) the exceptions to the rule requiring a warrant for searches; and
4) the effect of an illegal search and seizure - the exclusionary rule.

Section 4. Questions (107)

(1) How would you define the crucial requirement of "probable" cause" in the warrant process? If an officer reported to you that if a person who had a bad reputation in the community had been seen in a gas station the day before it was burglarized, would this be sufficient probable cause to issue an arrest warrant?

(2) While patrolling a neighborhood, Officer White saw what he believed to be a motorcycle which had been reported stolen in He-Who-Run's back yard. Does Officer White need a warrant to seize the bike?

(3) Officer White seized the motorcycle without securing a warrant, and He-Who-Run's neighbor filed a motion in court objecting to the seizure because he doesn't like the tribal police on the neighborhood premises without permission. Can he do this?

(4) The tribal police obtain a warrant based on probable cause to search an apartment for narcotics. They proceeded to the apartment and, without more, burst through the door interrupting a family dinner. What did they do wrong?

(5) The tribal police searched X's house under a warrant which was later held to be invalid because the police had lied to the judge regarding the circumstances supporting the finding of probable cause. During the illegal search, the police found narcotics belonging to Y, who did not live at the residence. Can this evidence be used against Y or is it also subject to exclusion as the fruit of the illegal search?

CHAPTER V. Juvenile Justice and the Indian Child Welfare Act

Section 1. Introduction (108-109)

Section 2. Juvenile Courts (109-124)

The major points to be discussed in this section are:

1) juvenile court function;

2) juvenile court jurisdiction; and

3) juvenile court procedure.

Section 3. The Indian Child Welfare Act of 1978 (124-150)

The major points to be discussed in this section are:

1) the background and purpose of the Act;

2) a presentation and explanation of the Act's statutory provisions; and

3) the procedural flow charts illustrating the Act.

CHAPTER VI. A Special Note About Alcoholism (150-151)

The problem of alcoholism and the critical lack of alcoholism treatment facilities on reservations should be discussed.

PART II

Criminal Procedure for Indian Courts

CHAPTER I. The Duties and Responsibilities of Tribal Judges

Section 1. The Role of the Judge (1-19)

The major points to be discussed in this section are:

1) the importance of the function of the judge;

2) the judge's relation to the community and the legal system; and

3) judicial selection, tenure, removal and discipline.

[Section 1] Questions (19)

(1) The law provides for a maximum fine of $100 for speeding violations and makes no provision for multiple offenses. Kim Maxwell has been convicted for speeding on five occasions. The judge wants to fine him $250 this time to teach him a lesson. Can he do it? Why or why not?

(2) Judge Thomas has a case before him involving an interpretation of the tribal law of disturbing the peace. Two years ago, before he became judge, the former judge had a case involving substantially the same facts and decided that the law did not apply. Should Judge Thomas follow that former decision? Why or why not?

(3) Judge Yellowtail decided a case some time ago requiring that the defendant pay the plaintiff $250 which was owed on a bad debt. The judge now discovers that none of the money has been paid. What are the judge's obligations on the case? Is it a judge's duty to find out if his judgments are being satisfied?

(4) Judge Williams has a case before his court which involves a section of the criminal code recently adopted by the tribal council. Some of the language can be interpreted two ways: one that would result inthe defendant's conviction, the other in his release. What should the judge do to properly interpret this law?

(5) In another jurisdiction they are having trouble selecting their judges. Over the years the judges have been appointed by the tribal council, but now the people object saying that the appointees have been relatives or friends of the council members and have not been competent judges. A citizens committee has asked your advice on methods of selection which might prove more effective. What would you suggest?

(6) When the new criminal code was adopted last year, Judge Jackson objected to a provision requiring a mandatory jail sentence for certain offenses. He contends that probation can be more effective in some cases. A defendant has been convicted of one of those offenses in Judge Jackson's court. Can the judge place him on probation?

(7) Two years ago Judge Bear interpreted a section of the criminal code in one way and convicted the defendant. He is convinced that he was wrong in his interpretation. Must he convict another defendant under the same circumstances or can he rule differently in this case.

Section 2. The Independence of the Judge (20-37)

The major points to be discussed in this section are:

1) the necessity for judicial independence;

2) recommendations to avoid conflicts of interest;

3) disqualification; and

4) relationships with parties and their attorneys.

[Section 2] Questions (37)

(1) Judge Jones has been asked by Joe Green, an old and trusted friend, to support his candidacy for Tribal Council. How much "support" can Judge Jones give to his old friend?

(2) Judge Smith used to be half owner of the Ford dealership in his local community, but he sold his interest when he became judge. Now Mr. Ray is suing the Ford dealership in the judge's court. Must the judge disqualify himself?

(3) Mr. Norbert is an old friend of Judge Smith. He has never been in trouble and has no business dealings. Can the judge accept a Christmas present from Mr. Norbert?

(4) Mr. Norbert has been sued by Mrs. Williams because she fell on his sidewalk and broke her arm. The case has been assigned to Judge Smith. Can the judge accept the Christmas present from Mr. Norbert?

(5) There are two judges in local court. The first cousin of one of the judges is being tried for drunk driving. Should the judge hear the case?

(6) The local chapter of the American Cancer Society has asked Judge Williams to be chairman of the annual fund drive in his community. Can he accept? Can he use court stationary to solicit donations?

(7) Judge Defoe wants to run for Council chairman, but doesn't think he will win. Can he continue to serve as judge until the election is over?

(8) Judge Lone Wolf wants to buy a ranch. He knows that Bill Smith is thinking about selling his ranch, but Smith is being sued in the judge's court. Can the judge still offer to buy the ranch?

Section 3. The Personal Qualities of the Judge (38-48)

The major points to be discussed in this section are:

1) judicial qualifications and competence;

2) judicial conduct;

3) courtesy in the courtroom;

4) impartiality; and

5) judicial courage.

[Section 3] Questions (48)

(1) A nearby tribal council is revising its procedures for the selection of judges. Because of your experience as a judge, they have asked you to help them by drawing up a list of qualifications which they can use in their selection process. What qualifications do you think are most important?

(2) James Bailey has just been selected as tribal judge for a local tribal court. While he finished two years of college, he has had no formal legal training. He has come to you for advice as to how he should prepare himself for judicial duty. What will you tell him?

(3) After retiring from the bench, Judge Bartlett was offered a job as assistant manager in the local supermarket. The judge had once been in the grocery business before assuming duties as judge. During the ten years that the judge was on the bench, the supermarket had been involved in court action to collect debts at least once every month. What should the judge consider in making his decision about accepting the job?

(4) The local banker has been charged with reckless driving in Judge Eagle's court. Before the trial the judge's wife becomes seriously sick and has to have an operation which will cost the judge a great deal of money. Can the judge go to the banker to get a loan? What problems might arise if he does?

(5) Your court budget includes expenses for such things as books, instructional magazines, and travel to Judge's meetings. Several members of the tribal council are interested in cutting down on expenditures. They feel that all a judge has to do is to listen to both sides of a case and make a decision. They do not like the idea of a judge studying on their money. What would you say in response to them?

Section 4. The Judge and the Court (49-59)

The major points to be discussed in this section are:

1) the facilities and stall for the court;

2) court rules;

3) judicial opinions; and

4) the concept of judicial immunity.

[Section 4] Questions (60)

(1) The court clerk in Judge Boudreau's court is the local gossip in town. The judge discovers that the clerk has been talking about cases which have not yet been decided and are still confidential to the court. What should he do?

(2) What are the reasons for having a set of rules of procedure for the court?

(3) Judge Bear has just decided a complicated case involving an automobile accident. He wants to give the reasons for his decision. What should he include in his opinion?

(4) Al Petri is a defendant in Judge Bross' court. The judge has disliked Al since he was a small boy and set fire to some papers in the judge's garage. The judge has a very strong feeling of revenge. Should he hear the case or disqualify himself?

(5) Judge Williams is a juvenile judge, but he issues an order requiring a defendant to pay a plaintiff some money. It turns out that the money was not due. Can the defendant sue the judge for taking his property?

(6) A tribal judge convicts and sentences a non-Indian when he knows of the case law that tribal courts do not have jurisdiction over non-Indians. Can he be sued for damages for false imprisonment?

Section 5. The Judge and Trial Proceedings (60-74)

The major points to be discussed in this section are:

1) the necessity for maintaining control and order in the court; and

2) the nature and function of the contempt power.

[Section 5] Questions (73-74)

(1) C. J. Brown is a young attorney who is representing a defendant charged with malicious destruction of property. He feels that the complaining witness is trying to frame his client. During cross examination of the witness, he continually brings up the witness's personal problems which have nothing to do with the case. The judge has repeatedly warned him not to mention these irrelevant matters, but he persists. What should the judge do?

(2) Robert Fishback has been charged with petty theft, and has plead not guilty. He is not represented by counsel. During his trial he becomes outraged at the testimony against him. Finally he jumps up and calls the policeman who is testifying against him a liar. What measures should the judge take? What should be done if the conduct persists?

(3) The trial of Alice Lame Deer has received a great deal of attention in the community, and the courtroom is filled as the trial begins. During several parts of the trial the noise level is so high that the jury has a difficult time hearing some of the witnesses. There is no particular group causing the disturbance. What can the judge do?

(4) The judge has told the young reporter from the radio station that no tape recorders are allowed in the courtroom during a trial. Following a trial at which the reporter was present, the judge turned on his radio and heard exerpts of the actual testimony from the trial that day. What should the judge do?

(5) The judge recently sentenced a juvenile for an extended term. The editor of the local paper wrote an editorial severely criticizing the judge and his sentencing practices. Can the judge charge the editor with contempt of court?

(6) During the course of a trial the mother of the defendant jumped from her seat in the gallery and shouted that the police were trying to frame her son. She then broke down sobbing. What should the judge do?

(7) After a trial the judge discovers that the father of the defendant tried unsuccessfully to bribe a juror. Should the father be charged with contempt of court? Suppose he is a non-Indian?

(8) Before the trial of a leading citizen charged with drunken driving, the judge received a telephone call from one of the members of the tribal council. The councilman tells the judge that if he wants to keep his job he had better find the defendant not guilty. Can the judge charge the councilman with contempt?

CHAPTER II - Trial Court Procedure

Section 1. General Principles (75-92)

The major points to be discussed in this section are:

1) courtroom arrangement;
2) a suggested law library;
3) Indian courts as "courts of record"; and
4) attorney and lay advocate admission requirements.

Section 2. The Duties of the Judge Before Trial (93-165)

The major points to be discussed in this section are:

1) the summoning, bail and arraignment procedures;
2) jury selection, control and responsibilities; and
3) the pretrial conference.

[Section 2] Questions - Arraignment Procedure (131-132)

(1) What is the nature and purpose of an arraignment?

(2) Why should a judge explain the effect of a guilty plea to a defendant?

(3) Does the Civil Rights Act of 1968 apply to arraignments or only to trials?

(4) Is a defendant entitled to an attorney at an arraignment? What if he cannot afford to pay for one?

(5) What action should the judge take if a defendant does not show up for arraignment? Would it make a difference if the judge saw the defendant that morning leaving on a fishing trip?

(6) Suppose the defendant pleads guilty and then appears to be lying when he tells the court about the circumstances of the offense. Can the tribal court call on additional witnesses to clarify the circumstances of the offense to aid the judge in imposing sentence?

(7) Tom White has just been charged with possession of stolen property, a watch that was found in a search of his car. He pleads guilty to the charge, but the judge thinks he is covering up for someone else. Does the judge have to accept Tom's plea?

[Section 2] Questions - The Judge and the Jury (162)

(1) The procedure in Judge Brown's court requires him to select the jury. In a trial for drunken driving the defense counsel has asked the judge to question whether the prospective jurors have ever received a traffic ticket. Should the judge include that with his question?

(2) The defendant is being tried for assault in a widely publicized and controversial trial. It is now time for lunch. Should the judge release the jury members to go to their homes for lunch? What other alternatives are open to him?

(3) The defendant's attorney has challenged a prospective juror for cause. He says that the juror has traded in the plaintiff's store and that he would therefore be prejudiced for the plaintiff. The case involves a bad debt. The plaintiff is owner of a large grocery store where over 60% of the community does its shopping. Should the judge remove the juror?

(4) During the course of the trial three of the jurors have been taking notes. When it comes time for the jury to retire to decide the case the prosecution objects to the jurors taking their notes to the jury room. How should the judge rule on the objection?

(5) During a trial for disorderly conduct Judge Franks permitted jurors to ask questions of the defendant. Without telling the judge in advance what the questions would be, they asked a total of 43 questions. The defense attorney objected to some of the questions but after receiving scowls from the jurors when his objections were sustained, he quit objecting. He now requests a new trial. How would you rule on his motion?

Section 3. The Duties of the Judge At Trial (166-195)

The major points to be discussed in this section are:

1) opening statement by the court and counsel;
2) the presentation of the prosecution case;
3) the presentation of the defense case;
4) the motion to dismiss; and
5) rebuttal and closing argument.

[Section 3] Questions (195)

(1) What basic information would a judge want to give the jury in introductory remarks at the beginning of the trial?

(2) What is the purpose of the opening statement?

(3) Why does the defendant's attorney often decline to make an opening statement prior to the prosecution's case, and reserve the opportunity to make such a statement at the beginning of defendant's case?

(4) What does it mean when the judge instructs the jury that their task is to find the facts and that they should ignore the arguments of counsel about questions of law?

(5) In the questioning of a witness, the prosecutor pointed to a map exhibit and commented about where the events of the alleged crime occurred. The defendant's attorney objected to the form of question asked by the prosecutor. The judge granted the defendant's objection and told the prosecutor to rephrase the question. State the question asked and tell why it was objectionable.

(6) When a witness was describing the defendant's actions he said that "she was drunk". The defendant's attorney objected to this testimony and the judge granted the objection and told the jury to ignore the statement. Why?

(7) On cross examination is it appropriate for an attorney to ask leading questions?

(8) Why would the defendant's attorney make a motion to dismiss the prosecution's case?

(9) The judge overruled the prosecutor's objection to testimony regarding the health of the defendant in saying that the testimony was "subject to connection" later. What did he mean by this?

(10) During closing argument the prosecutor (1) expresses his personal opinion that the defendant was lying and (2) says that the judge has clearly been prejudiced against the prosecution. The defense counsel objects to each of these statements. If you were the judge, how would you rule on the objection?

Section 4. The Duties of the Judge After Trial (196-210)

The major points to be discussed in this section are:

1) non-jury trial and jury trial verdicts;
2) sentencing procedure and sentencing alternatives; and
3) post-trial proceedings such as the right to appeal.

[Section 4] Questions (209-210)

(1) Why should the jurors be told not to discuss a verdict until it is announced in court where the verdict was reached late at night, written and sealed, and given to the foreman to open and read in court?

(2) Why should each member of the jury be polled by the court after the verdict has been delivered?

(3) In a criminal trial the judge becomes convinced that the jury did not follow an instruction on the law. Their verdict of guilty could only have been rendered by disregarding the judge's instructions. What should he do?

(4) The day after the trial in a criminal case two members of the jury approach the judge saying that they want to change their votes. They explain that they did not understand the instructions at the time they were given, but that they do now and therefore want to change their views. With the changed votes, the convicted defendant would be found innocent. What should the judge do?

(5) The defendant was acquitted of a charge of assault by a vote of 4-2. Two of the jurors later tell the judge that they were afraid of what the defendant might do to them if they found him guilty so they voted to acquit him even though they were sure he was guilty. They are not willing to change their votes. What should the judge do to the defendant? to the jurors?

(6) What are the purposes of sentencing?

(7) What is the purpose of the presentence investigation? Why should the judge not examine the presentence investigation until after a finding or plea of guilty?

(8) Why should the defendant be given an opportunity to explain his prior conduct or background presented in the presentence report?

(9) When might a judge want to defer sentencing and place a defendant on probation?

(10) What factors should a judge consider in imposing a fine on a defendant as punishment?

Section 5. Practice Non-Jury Trial (211-217)

Section 6. Practice Jury Trial (218-223)

CHAPTER III. Appellate Court Procedure and the Indian Civil Rights Act of 1968

Section 1. An Overview of Appellate Court Procedure (224-239)

The major points to be discussed in this section are:

1) the basic nature of and necessity for Indian appellate courts;

2) what can be appealed; and

3) the role of the court and counsel on appeal.

Section 2. Indian Appellate Court Function and the Indian Civil Rights Act (239-267)

The major points to be discussed in this section are:

1) the background and provisions of the Act; and

2) the landmark Santa Clara Pueblo v. Martinez case affecting equal protection and appellate review in Indian courts.

Section 3. How an Appellate Court Operates (268-275)

The physical setting and rules for appeal for the appellate court should be discussed.

[Section 3] Questions (275)

Consider the following rules which might be adopted by a tribal appellate court. These rules are not the only rules which such courts may establish, and are intended to be illustrative only. What is the purpose of each rule? Should it be adopted by your tribe/s appellate court?

(1) Appeals may be taken only from final judgments or final orders of the trial court.

(2) The appellate court will not consider appeals which involve allegations of error by the trial court which, even if proven, would constitute harmless error in the sense that such error did not affect the judgment of the trial court and would not change the result.

(3) The appellate court will not consider evidence which was not presented to the trial court, except that a new trial will be ordered if it can be shown that such evidence could not have been presented to the trial court even if the parties had exercised due diligence.

(4) In a nonjury case, the findings of fact made by the trial court will be accepted as the established facts in the case so long as they are supported by substantial evidence.

(5) Jury instructions which are challenged as erroneous must be set out in full in the brief of the appellant, even if only a part of them is alleged to be wrong; otherwise, the claim of error will not be considered by the appellate court.

(6) Only persons who were parties to the trial court action and who are aggrieved by that action may appeal to the appellate court.

(7) In civil actions, if a party aggrieved by a final order or judgment files notice of appeal, but dies before that appeal is prosecuted, then the heirs of such deceased party may prosecute the appeal.

(8) If, following notice of appeal and prior to oral argument in the appellate court, the parties to the action stipulate that they agree to a dismissal of the appeal, the appellate court may order the appeal dismissed.

(9) The appellate court must decide each case it hears by written opinion, giving reasons for its decision.

(10) The appellate court must decide and publish its written opinion in each case within 60 days of the date the oral arguments were heard.

Section 4. Preparing the Record for Appeal (276-282)

The preparation, substance, and certification of the record should be discussed.

[Section 4] Questions (282)

(1) Describe the steps involved in bringing a trial record before an appellate court.

(2) What may be included in a record on appeal? For example, can an appellate record include testimony that was not presented to the trial court?

(3) What is a "transcript"?

(4) Who pays the cost of preparing a record on appeal?

(5) How can an appellate court be sure that the record brought before it is authentic?

Section 5. Briefs on Appeal (283-307)

The nature and substance of an appellate brief should be discussed and the illustrative brief examined.

[Section 5] Questions (304 - 305)

(1) Do you think it is a good idea for Indian appellate courts to require written briefs on appeal? Explain.

(2) Briefly describe the purpose and content of
(a) an appellant's brief;

(b) a respondent's brief.

(3) What is the primary exception to the rule that arguments not raised in briefs will not be considered by an appellate court?

(4) What should an appellate court do if
(a) the appellant fails to file a brief:

(b) the respondent fails to file a brief?

(5) What is the purpose of a "reply brief"?

(6) What is a "statement of additional authority"?

Section 6. How Judges Can Use Oral Argument (308 - 316)

The nature and format of oral argument should be discussed.

[Section 6] Questions (316)

(1) Oral argument is described in this section as the "fourth basic step in an appeal". As a matter of review, what are the first three steps in an appeal.

(2) (a) Do you think is it a good idea to limit the amount of time each party has in which to present his oral argument to an appellate court?

(b) What time limit for oral argument would you suggest?

(3) Describe the limitations which an appellate court should place on the content of oral arguments.

(4) What should an appellate judge do if one or both parties to an appeal fail to appear for oral argument?

(5) What is a "prehearing memorandum"?

Section 7. Remedies on Appeal (317 - 322)

The basis remedies on appeal of affirming, reversing, or modifying the judgment should be discussed.

[Section 7] Questions (322)

(1) What is "substantial evidence"?

(2) Suppose an appellate court reviews all of the evidence in a case and concludes the trial judge's findings, although supported by substantial evidence, are wrong. What can the appellate court do?

(3) What happens if an obviously guilty defendant is acquitted by a trial jury because the tribal prosecutor did a bad job in presenting the evidence? What can an appellate court do in such a case?

(4) Explain what is meant by "double jeopardy".

Section 8. How to Write an Appellate Court Opinion

The process of writing an appellate court opinion should be discussed and the sample opinion should be examined.

[Section 8] Questions (338)

(1) In the sample opinion, State v. Cornell, you will notice that notes summarizing the main points in the opinion have been printed ahead of the actual opinion. These are called "headnotes". Do you think they make the opinion more understandable? What other purpose do they serve?

(2) In opinion writing, what is the purpose of the opening sentence?

(3) (a) When writing an opinion, should an appellate judge include every fact relevant to the issues on appeal in his factual statement? Explain.

(b) In the factual statement, the appellate judge summarizes what the case is about. What else should be included in the factual statement?

(4) Why should an appellate judge include in his opinion brief summaries of the arguments raised on appeal? Why shouldn't he just state which argument he believes to be correct, and exclude all of the others?

(5) How does an appellate judge find out what the "law" is?

(6) What is a "holding"?

END