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Self-Determination and the American Indian: A Case Study

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SELF-DETERMINATION AND THE AMERICAN INDIAN: A CASE STUDY

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I. INTRODUCTION

In the late 1970s and early 1980s, I lived and worked among the Winnebago Indians. During my time at the reservation, I had the opportunity to observe and assist in the Tribe's efforts to reclaim a semblance of self-determination. The main focus of the Tribe's efforts was to obtain civil and criminal jurisdiction through a process known as retrocession.¹ The struggle by the Winnebago to achieve this minimal amount of self-sufficiency is ironic when one considers the Tribe's proud history.

When the Winnebago first made contact with Europeans in the seventeenth century, they were one of the most powerful tribes in the northern

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1. "The act of ceding something back (such as a territory or jurisdiction); the return of a title or other interest in property back to its former or rightful owner." *BLACK'S LAW DICTIONARY* 1318 (7th ed. 1999).

woodlands. They occupied a substantial amount of territory, which included vast amounts of natural resources, stretching from central Wisconsin to northern Illinois. By the nineteenth century, the Tribe had been decimated by war and diseases brought by the very Europeans they had once welcomed. During its dealings with the Europeans, however, the Winnebago and other Indian tribes were treated as a sovereign government and the land which they inhabited was viewed as Indian country.

Ironically, it was the birth of the United States, with its core virtues of liberty and the right to self-determination, that ended the indigenous peoples'² ability to govern themselves. The policy of the United States government during the nineteenth century was designed to marginalize and exploit the American Indians. This was clearly illustrated in two early United States Supreme Court opinions centering around Indian land rights.³ Writing for the Court, Chief Justice John Marshall exterminated Indian rights to land and self-determination. With the stroke of a pen, Indians were reduced from being free and independent peoples to existing as domestic dependent nations subject to the federal government.⁴ Chief Justice Marshall's perception of Indian rights was later solidified by two coerced treaties that effectively stripped the Winnebago of their territory.⁵ In 1840, the United States forcibly expelled the Winnebago from their ancestral homeland, beginning an odyssey of five forced removals through the states of Iowa, Minnesota, South Dakota, and Nebraska.

In 1953, the last semblance of Indian self-determination was finally erased by the passage of Public Law 280⁶ (PL-280). This federal law enabled the states to assume civil and criminal jurisdiction over Indian tribal reservations.⁷ Before its passage the tribes had shared jurisdiction with the federal government, thus maintaining some aspect of autonomy over their own people. PL-280 eliminated this last remaining aspect of auton-

2. One definition of indigenous people is: the original inhabitants of a territory who, because of historical circumstances, such as conquest or colonization have lost their sovereignty and have become subordinated to the wider society and state control. See Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in *THE RIGHTS OF PEOPLES* 17-18 (James Crawford ed., 1988).

3. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

4. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 196 (1994); see also DAVID AGEE HERR, *AMERICAN INDIAN ETHNOHISTORY: THE WINNEBAGO TRIBE* 147-157 (1974).

5. Treaty with the Winnebagoes, Sept. 15, 1832, U.S.-Winnebago Nation, 7 Stat. 370; Treaty with the Winnebagoes, Nov. 1, 1837, U.S.-Winnebago Nation, 7 Stat. 544; see also PRUCHA, *supra* note 4, at 196.

6. Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§ 1161-62, 25 U.S.C. §§ 1321-22, 28 U.S.C. § 1361 (1953)).

7. *Id.*

omy by ending tribal jurisdiction for all crimes.⁸ Proud tribes like the Winnebago who once occupied vast areas of land were prevented from exercising the most rudimentary aspect of self-determination, the exercise of control over their own people.

Although the passage of PL-280 appeared to be the final act in the play set in motion by Justice John Marshall's perception of Indian rights, the civil rights movement in the 1960s gave the Winnebago and other Indian tribes new hope to reverse the trend of diminishing rights. The civil rights movement provided the catalyst for expanding the rights of minorities in the United States, including the rights of American Indians.

In 1968, PL-280 was amended to allow tribes to reclaim their lost civil and criminal jurisdiction through retrocession. This amendment allows states to transfer its jurisdictional power back to the indigenous peoples, thus giving tribes a modicum of self-determination, and limiting their forced subjugation by state governments.

The Winnebago Tribe was one of the indigenous groups to seize this opportunity and, after a struggle, to obtain civil and criminal jurisdiction over its own people. Achieving this goal was the first step toward rebuilding their tattered government and infrastructure. It was this struggle that I witnessed during my time on the reservation. My recent visits to the reservation revealed a rebirth of a Tribe once unable to perform the basic function of self-government.⁹ Although the Tribe may never obtain the power and prestige that it had prior to the arrival of the Europeans in North America, it has recovered some of its lost dignity.

This article focuses on the concept of self-determination as it applies to indigenous peoples in general and the Winnebago Tribe in particular. Part II examines the argument that self-determination is a human right to which indigenous peoples are entitled. Part III provides an overview of the history of the repression Indigenous peoples have faced as a result of the European influx into North America and the subsequent problems that indigenous peoples face in their struggles for autonomy. These problems include the tension created by the ruling sovereign governments that have historically repressed, exploited, and sometimes annihilated the American Indian.

In Part IV, the article turns to a case study of the Winnebago Indians' efforts to achieve a small measure of self-determination within the frame-

8. This had the collateral effect of ending most aspects of tribal governments in favor of state and county government. *See id.*

9. The passage of the Indian Gaming Regulatory Act (IGRA) afforded the Winnebago additional opportunities to use their rediscovered right of self-determination. *See Indian Gaming Regulatory Act* § 3 Pub. L. No. 100-497, 102 Stat. 2467 (1988); 25 U.S.C. §§ 2701-21 (1988).

work of the sovereign government of the United States. The long struggle of the Winnebago to reclaim determination of its own destiny represents a victory for all indigenous peoples and their right to self-determination.

II. SELF-DETERMINATION AS A HUMAN RIGHT

The right of self-determination finds its legal basis in the evolving body of international human rights law. The expression "human rights" has only come into everyday usage since the mid-nineteen forties, with the creation of the United Nations in the aftermath of World War II.¹⁰ Essentially, human rights are an extension of "natural rights" or natural law,¹¹ and focus on legal protection of the individual from the state. The right of self-determination is a fundamental human right in that it addresses the threshold question of whether a particular government holds a legitimate position over a group of people. A brief overview of the development of human rights law puts the right of self-determination in context.

In general, human rights are conceptualized in a tripartite manner.¹² First generation rights protect a citizen's liberty from arbitrary state action.¹³ These first generation rights, which evolved in the aftermath of the American and French revolutions, were known as negative rights because of their "restraint from the State" emphasis.¹⁴ Derived from philosophers such as Locke and Rousseau, they are often referred to as civil and political rights.¹⁵ Second generation rights, derived out of the concept of socialism, emerged after the Russian Revolution and emphasize positive State action.¹⁶ While these cultural and political rights do not enjoy the same breadth of acceptance by nation-states, they nonetheless are highly incorporated into international law.¹⁷ The most recent development in international human rights law, third generation rights, has re-

10. Burns H. Weston, *Human Rights, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION* 13 (Richard Pierre Claude & Burns H. Weston eds., 1989).

11. *See id.* Burns traces the concept of natural law to its modern definition of implying natural rights. *Id.* Late in the 17th century, John Locke identified the primary natural rights as life, liberty, and property. *See* JOHN LOCKE, *TWO TREATIES ON GOVERNMENT* (P. Laslett ed., 1963).

12. *See* D. J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 625 (5th ed. 1998); Weston, *supra* note 10, at 16.

13. Roland Rich, *The Right to Development: A Right of Peoples?*, in *RIGHTS OF PEOPLES* 41 (James Crawford ed., 1988).

14. *Id.* at 41. Negative rights corresponded by and large to the Civil and Political rights in the International Bill of Rights.

15. *See* HARRIS, *supra* note 12, at 625.

16. Rich, *supra* note 13, at 41.

17. *See* HARRIS, *supra* note 12, at 625.

sulted from the encroaching phenomenon of global interdependence, and is mainly advanced by developing countries. In essence, third generation rights speak to the rights of groups in relation to the state and the international community, as opposed to the first two generations of human rights which address the individual.¹⁸ The right to self-determination and economic development are examples of this genre.¹⁹ The human right of development is connected to the right of self-determination of peoples; in order to achieve development, a people must have the ability to address their own distinct needs.

The concept of self-determination began to gain international momentum after the development of the post-colonialist nation-state. In the aftermath of World War I, United States President Woodrow Wilson articulated the importance of the protection of a people's right to self-determination.²⁰ Wilson's early concept of self-determination had three prongs: People have the right "to be free from alien rule;" people should have the right "to select their own form of government;" and there should be continuous consent to be governed.²¹ His proposal subsequently became the basis for the United Nations' stance and legal understanding of the self-determination of peoples.

Article 1(2) of the United Nations' Charter²² unquestionably the most significant international agreement in all of international law, addresses a peoples' right to self-determination,²³ and, in fact, is the only human right specifically mentioned in the entire Charter. Additionally, Article 55 on

18. *See id.*

19. *See id.* at 626.

20. *See* John Paxman, *Minority Indigenous Populations and Their Claims for Self-Determination*, 21 CASE W. RES. J. INT'L L. 185, 193-94 (1989). Wilson's vision included the formation of a league of nations whose mission included the protection of the people's right to self-determination. *See id.* Notably, the desire for self-determination had an extraordinary impact on an international level. For example, the assassination of Archduke Franz Ferdinand by a Serbian nationalist set off a chain of events that incited the start to World War I. *See id.* The assassin belonged to a nationalist group that believed the Serbian people should be recognized as their own people separate and apart from the Ottoman Empire. *See id.* Post WWI world leaders attempted to create a League of Nations to address the concerns of disenfranchised groups. *See id.* While the League of Nations ultimately failed, its successor the United Nations, which was created in 1945, established an opportunity to deal with the concerns of those groups seeking self-determination.

21. *Id.* at 193.

22. Currently the United Nations Charter has been ratified by 189 countries. *See* United Nations, *List of Member States*, at <http://www.un.org/Overview/unmember.html> (last visited Feb. 9, 2002).

23. *See* U.N. CHARTER art. 1, para. 2. Article 1(2) states:

To develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

International and Economic Social Cooperation reiterates the importance of creating conditions through which the self-determination of peoples can be preserved.²⁴ This right of self-determination was expanded upon in two 1966 United Nations Covenants.²⁵ Both the International Covenant on Civil and Political Rights²⁶ and the International Covenant on Economic, Social and Cultural Rights²⁷ establish that the right of self-determination is a prerequisite for people to "freely determine their political status and freely pursue their economic, social and cultural development."²⁸ However, the ability for any group of people to claim a right to self-determination is not unfettered. In particular, United Nations General Assembly Resolution 1514 paragraph 6 states:

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.²⁹

Id. (emphasis added); see also LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 25 (3d rev. ed. 1969).

24. See U.N. CHARTER art. 55. Article 55 reads:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determinations of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; an international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Id. See also GOODRICH ET AL., *supra* note 23, at 371.

25. See International Covenant of Civil and Political Rights, *opened for signature* 1966, art. 1, para. 1, 999 U.N.T.S. 6; International Covenant on Social and Cultural Rights, *opened for signature* 1966, art. 1, para. 1, 993 U.N.T.S. 3.

26. International Covenant of Civil and Political Rights, *supra* note 25, art. 1, para. 1.

27. International Covenant on Social and Cultural Rights, *supra* note 25, art. 1, para. 1.

28. Articles 1(1) of both covenants read:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

International Covenant of Civil and Political Rights, *supra* note 25, art. 1, para. 1; International Covenant on Social and Cultural Rights, *supra* note 25, art. 1, para. 1.

29. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, ¶ 6, U.N. Doc. A/4684 (1960). See also G.A. Res. 1514, *supra* ¶ 7. Ironically, in the same breath, the General Assembly resolution requires that States adhered to the provisions of the United Nations' Charter. *Id.* Paragraph 7 states:

All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declara-

This clarifying Resolution exemplifies one of the earliest tensions in international human rights law—the conflict between preserving the territorial sovereignty rights of governments and the self-determinative human rights of peoples.³⁰ Historically, the international community has favored the position of nation-states over the peoples living within their borders, and while the body of international human rights law has garnered much more authority in recent history, the State still maintains a superior position.³¹ Consequently, the right of peoples to self-determination must be reconciled with the right of governments to rule those who live within their territory.³²

International law began as the law amongst nation-states, not people. This is reflected through the United Nations Charter's positive duties imposed on nations, most notably to promote international peace and security.³³ Though the Charter promotes the rights of people *vis a vis* the state, this affirmation is outweighed by the Charter's embracement of national sovereignty and external non-intervention or interference with any states' administration of its peoples.³⁴ Unfortunately, this position leads to the subrogation of indigenous peoples' right to self-determination.³⁵

tion on the basis of equality, non interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

Id.

30. *Id.* See Falk, *supra* note 2, at 25-26 (explaining how tensions between territorial sovereignty and individual human rights is most often resolved in favor of the state); Weston, *supra* note 10, at 21.

31. See Falk, *supra* note 2, at 17; see also Rebecca L. Robbins, *Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 87, 90, 92 (M. Annette Jaimes ed., 1992) (stating the Native American Indian nations' rights to self-government are usurped by the foreign power of the United States).

32. See Falk, *supra* note 2, at 25-26; Glenn T. Morris, *International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 55, 67, 92 (M. Annette Jaimes ed., 1992)

33. See Falk, *supra* note 2, at 26. Paragraph 7 of the U.N. Charter states:

All states uphold the obligation to enforce the Charter of the United Nations and the Universal Declaration of Human Rights and this Declaration on the basis of equality, non-interference in the internal affairs of all states and respect for the sovereign rights of all peoples and their territorial sovereignty.

U.N. CHARTER para. 7. See also U.N. CHARTER art. 1 (listing the purposes of the U.N.); U.N. CHARTER arts. 55, 73, 76 (describing the application of the U.N. Charter to the self-determination of Peoples).

34. See Falk, *supra* note 2, at 26; GOODRICH ET AL., *supra* note 23, at 30.

35. See James Crawford, *The Rights of Peoples: 'Peoples' or 'Governments'?*, in *THE RIGHTS OF PEOPLES* 55, 55-56 (James Crawford ed., 1988); Falk, *supra* note 2, at 26 (stating, in this context, self-determination is subordinated to the more important integrity of the state); Robbins, *supra* note 31, at 90.

Total deference to state sovereignty and non-intervention is problematic when “the State” is controlled solely by a fragment of the people who reside within its borders.³⁶ Consequently, that unrepresentative population becomes, by virtue of the assumptions inherent in the U.N. Charter, understood to be the totality of the peoples within the state.³⁷ It then follows that unrepresented members of “the population” are not only without a “State,” but have little recourse because they do not fit the matrix of international law, which places a premium on statehood, not peoplehood.³⁸

Native Americans provide an example of a people who lived in territory later claimed by a new State, and were not included in either that new State’s power apparatus, or, according to the United Nations’ Charter, in the definition of a separate independent State.³⁹ To truly understand the socio-political plight of Native Americans, it is important to know what constitutes a “people,” to define “peoplehood,” and to examine these concepts in relation to statehood.

A. *The Concept of Peoplehood*

In analyzing the language in the various United Nations’ instruments which assert that “[all] people have the right of self-determination,”⁴⁰ it is necessary to clearly define who holds this right.⁴¹ In the present lexicon of international thought, there are two competing notions of “peoplehood”—that of all people within a nation-state’s sovereignty, and an alternative, more general concept not derived from nationality, but rather

36. See Falk, *supra* note 2, at 26; see also JOHN R. WUNDER, “RETAINED BY THE PEOPLE:” A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 159-160 (1994) (adding that the Indians regarded self-determination as “legal and political sovereignty”).

37. See Crawford, *supra* note 35, at 55-56; Falk, *supra* note 2, at 26.

38. See Crawford, *supra* note 35, at 55-56; Falk, *supra* note 2, at 17, 26; David Makinson, *Rights of Peoples: Point of View of a Logician*, in THE RIGHTS OF PEOPLES 69, 74-75 (James Crawford ed., 1988). See generally U.N. CHARTER.

39. Cf. Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, in INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN, 191, 204-05 (Kenneth R. Philp ed., 1986) (noting the State entity has consistently failed to protect Indian interests); Falk, *supra* note 2, at 26.

40. Yoram Dinstein, *Self-Determination and the Middle East Conflict*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 159, 160 (Richard Pierre Claude & Burns H. Weston eds., 1989); Robert McCorquodale, *The Right of Self-Determination*, in THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 91, 91 (David Harris & Sarah Joseph eds., 1995).

41. Dinstein, *supra* note 40, at 161; McCorquodale, *supra* note 40, at 96 (noting Article 1 of the International Covenant on Civil and Political Rights does not define who can exercise such rights as “peoples”); see also ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 59 (1995).

membership in a particular race, ethnicity, or religion.⁴² The first characterization of a people seemingly collapses the notion of statehood and peoplehood; it states that all people within a nation are “a people,” thus making peoplehood and statehood almost interchangeable. The second definition distinguishes a “nation” from a “people” by holding that a nation “consists of the entire citizen body of a state” and within that “nation there can exist several peoples, large and small.”⁴³ This definition holds that a particular group within a nation’s citizenry can claim to possess “peoplehood” based on both objective and subjective criteria.⁴⁴

The objective criteria of peoplehood requires a group to have a common identity based on history.⁴⁵ Other objective aspects of peoplehood include, but are not limited to common territory, religion, or language.⁴⁶ Variations in religion or language as the result of migration can be tolerated if the group has maintained its ethnic identity over space and time.⁴⁷ In fact, the bonds of common suffering are often a characteristic of peoplehood.⁴⁸

The subjective standard that must also be met expands upon the objective historical standard. Namely, the group must presently maintain a specific ethnic identification.⁴⁹ This present ethos may manifest itself as a commitment by the group to live together and continue practicing their common traditions.⁵⁰ Together, these two criteria of a shared history and present participation in a culture based on that history play an important role when considering the impact of statehood on peoples who are not part of the dominant culture. Specifically, the tension between peoplehood and statehood plays out in the context of human rights protections of minority groups from the government or international law.

42. See ROSALYN HIGGINS, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 124 (1994).

43. Dinstein, *supra* note 40, at 161; McCorquodale, *supra* note 40, at 97 (noting that the definition of “peoples” is not limited to all inhabitants of one state as a single group).

44. Dinstein, *supra* note 40, at 161. Dinstein recognizes, however, that there is “no acid technical test which would enable us to determine whether a cluster of human beings constitutes a people.” *Id.* See also McCorquodale, *supra* note 40, at 97 (listing objective conditions suggested and acknowledging the subjective aspect of a group’s conscious need to identify itself as a “people”).

45. See Dinstein, *supra* note 40, at 161; McCorquodale, *supra* note 40, at 97.

46. See Dinstein, *supra* note 40, at 161; McCorquodale, *supra* note 40, at 97.

47. See Dinstein, *supra* note 40, at 161.

48. See *id.*

49. See *id.* See generally McCorquodale, *supra* note 40, at 97 (stating the need for ethnic identification has been recognized).

50. See Dinstein, *supra* note 40, at 161.

B. *The States' Impact on Indigenous Human Rights*

Historically, state policy has victimized the indigenous population,⁵¹ and because of their shared grievances of state encroachment, many indigenous groups have come together to share a collective identity.⁵² This situation creates a competing nationalism within the State's boundaries.⁵³ As a consequence, indigenous peoples have challenged governmental notions of territorial sovereignty and jurisdictional institution.⁵⁴ Indigenous peoples assert their own sovereign right and a nationality based on history, tradition, and self-determination. Such assertions have led to conflicts over claims to lands, refusal to pay taxes, refusal to serve in the military, and repudiation of the states' educational programs.⁵⁵ According to the coalition of indigenous persons, these programs promote the dominant culture and society, while effectively diminishing and destroying the culture and lifestyles of indigenous peoples.⁵⁶

Since indigenous peoples have been systematically exploited and victimized by the state governments in which they are entrapped, there has been effort in recent years to redress their claims in the international arena through human rights law.⁵⁷ Unfortunately, state systems such as the United Nations and its International Court of Justice (I.C.J.) exert considerable control over international systems by restricting membership and participation.⁵⁸ The I.C.J., for example, may only hear cases

51. See Falk, *supra* note 2, at 18; see also Robbins, *supra* note 31, at 87, 90 (describing the plenary power asserted by the United States).

52. See Falk, *supra* note 2, at 18 (stating the collective identity represents a competitive nationalism within the state); see also Deloria, *supra* note 39, at 198.

53. See Eugene Kamenka, *Human Rights: Peoples' Rights*, in *THE RIGHTS OF PEOPLES* 127, 131 (James Crawford ed., 1988). Nationalism has several definitions; however, for the purposes of this article, nationalism is connected with the need to define and unify the new sovereign. See *id.* See also Garth Nettheim, "Peoples" and "Populations" – *Indigenous Peoples and the Rights of Peoples*, in *THE RIGHTS OF PEOPLES* 107, 117-18 (James Crawford ed., 1988). Nettheim explains the merits of arguing self-determination instead of sovereignty. *Id.* Sovereignty refers to the independent nation state in international law. See *id.* at 117.

54. See Falk, *supra* note 2, at 18; see also Nettheim, *supra* note 53, at 112-13 (stating the claims advanced in Canada have a strong basis in treaty and judicial recognition).

55. See Falk, *supra* note 2, at 18 (stating that the practical result of such conflicts is resistance on the part of indigenous peoples primarily due to the state's victimization of indigenous peoples).

56. See *id.* at 20 (claiming progressive approaches tend to result in more pressure on state systems).

57. See *id.* at 18-21. The growth of modern communications and transportation has internationalized the struggle of indigenous peoples in the last decade. *Id.* at 19.

58. See U.N. CHARTER arts. 3-4; Statute of the International Court of Justice, June 26, 1945, U.S.T.S. 933, 59 Stat. 1031, art. 34, para. 1; Falk, *supra* note 2, at 19-20.

involving its members, and membership is restricted to nation-states.⁵⁹ Furthermore, states must consent to the Court's jurisdiction.⁶⁰ Consequently, indigenous peoples cannot realistically expect resolution of their claims in the I.C.J., or other regional international governmental organizations with similar arrangements, namely the Organization of American States.⁶¹

Options do exist for addressing the human rights of indigenous people outside of the international judicial system. These options include promoting the creation of national regimes which embrace both the individual and group rights of indigenous peoples, international non-governmental agencies applying pressure on nation-states, and a specific examination of the role indigenous peoples play as formal international actors.⁶²

First, sovereign governmental notions of territorial sovereignty and nationalism provide a framework in which to address and advance the human rights of indigenous peoples.⁶³ The rights of peoples provide perspective and support for a non-statist approach by challenging the competence of an inter-governmental system. Challenging the State's power apparatus within the system has been an effective tool for indigenous peoples, and has resulted in numerous gains such as jurisdictional retrocession.

Second, the establishment of non-governmental forums to address human rights, including but not limited to non-governmental organizations, provides an alternative option for preserving the rights of indigenous people.⁶⁴ Such independent access to the international legal system not only checks the State's power, but also treats the law as an instrument of the people, and not entirely of the government.⁶⁵ An example of such

59. See Statute of the International Court of Justice, June 26, 1945, U.S.T.S. 933, 59 Stat. 1031, art. 4, para. 1-3, art. 34, para. 1; Falk, *supra* note 2, at 19.

60. See Statute of the International Court of Justice, June 26, 1945, U.S.T.S. 933, 59 Stat. 1031, art. 36, para. 1-5; Falk, *supra* note 2, at 19.

61. See Falk, *supra* note 2, at 19-20. The statist nature of such regional organizations impedes resolution of indigenous people's claims by the very structure of the claiming process, in which states exert dominant control. See *id.* See also Morris, *supra* note 32, at 73-77 (discussing whether the U.N.'s right to self-determination applies to indigenous peoples).

62. See Wunder, *supra* note 36, at 8. The rights of the individual in an indigenous group are those predictable rules reached and enforced by the Tribe. *Id.* Group rights are those rights given to ensure the tribe's survival and those that are best for the group as a whole. *Id.* See generally Falk, *supra* note 2, at 24-36 (noting the three uses of the term "rights of peoples" must be distinguished from one another).

63. See Falk, *supra* note 2, at 18; see also U.N. CHARTER; Statute of the International Court of Justice, June 26, 1945, U.S.T.S. 933, 59 Stat. 1031.

64. See Falk, *supra* note 2, at 27.

65. See *id.* at 29.

a forum is the Permanent People's Tribunal.⁶⁶ The tribunal consists of private citizens of high moral authority, including Nobel Prize winners and well-known cultural, legal, and religious leaders.⁶⁷ The Tribunal attempts to address concerns of global society. For example, the Tribunal has heard arguments on allegations of genocide of the Armenian people by Turkey, the Soviet invasion of Afghanistan, the use of Indonesian force in East Timor, American intervention in Central America, and the repression of human rights in the Philippines by former President Ferdinand Marcos.⁶⁸ In several instances, the Tribunal presented legal documentation of injustices experienced by victims, thereby performing the valuable function of educating the international community and highlighting certain regimes violations of international human rights law.⁶⁹

A third option addressing human rights is manifested by a movement to develop a set of initiatives targeting the needs of indigenous peoples.⁷⁰ This movement acknowledges the impact of past experiences, the insufficiency of existing international laws and procedures, and establishes organizations for determining and protecting the human rights of indigenous peoples.⁷¹ Furthermore, this movement readily admits that the present international legal framework neither provides indigenous peoples with access to the main political arenas, nor appreciates their specific historic identity, their special claims, and their special value to society as a whole.⁷²

66. See *id.* at 28-29, 29 n.17. Created in the late 1970s, the Permanent People's Tribunal has examined previously untreated grievances or problems which have been insufficiently addressed. See *id.* See also PERMANENT PEOPLES' TRIBUNAL, A CRIME OF SILENCE, THE AMERICAN GENOCIDE: PERMANENT PEOPLES' TRIBUNAL (Gerard Libaridian, ed., Zed Books Ltd., 1985).

67. See Falk, *supra* note 2, at 28.

68. In making its decisions, the Tribunal heard witnesses, invited the defendant governments to participate, and issued a judgment based on the evidence presented in each proceeding. See *id.* The Permanent People's Tribunal held that the Armenian and East Timor populations had a protected right, and the resulting extermination was a crime of genocide. In addition, the Tribunal found that the International Law and rights of the Afghanistan people were violated by the Soviet Union. See *Lelio Basso International Foundation for the Rights and Liberation of Peoples*, at <http://www.grisnet.it/filb/filbeng.html> (last visited Feb. 8, 2002).

69. See Falk, *supra* note 2, at 28. Other *ad hoc* tribunals have considered the legality of: the nuclear arms race in 1982 and Israel's invasion of Lebanon in 1983. See *id.* at 29; see also *Lelio Basso International Foundation for the Rights and Liberation of Peoples*, *supra* note 68.

70. See Falk, *supra* note 2, at 31 (stating that both individual and group rights would be applicable). See generally Deloria, *supra* note 39, at 191-207 (outlining policies and initiatives that address the human rights of Indians).

71. See Falk, *supra* note 2, at 31.

72. See *id.* See generally Joe De La Cruz et al., *What Indians Should Want: Advice to the President*, in INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELA-

This third option has been described as a “qualitative extension of human rights and self-determination.”⁷³ This strategy to protect human rights for indigenous people exists for several reasons, and public policy rather than logic dictates its necessity.⁷⁴ International conventions pertaining to the rights of women, Apartheid, and genocide have been formulated under this mantra of public policy.⁷⁵ Individuals from humanity’s most vulnerable sectors, victimized and oppressed by current policies and arrangements, seek the protective measures offered by the creation of distinctive categories of human rights.⁷⁶ When ignorance and misunderstanding fuel this abuse, the claim for protection is more pronounced. Such is the case of indigenous peoples. Historically, indigenous peoples have been excluded from all decision making processes as the “alien assumptions and institutional arrangements” of the dominant society assess claims on their behalf.⁷⁷ Nonetheless, a political and moral climate currently exists to support a regime advocating the claims of indigenous peoples. Without separate treatment and full participation in the deliberations and considerations of their problems and claims, they cannot be understood.⁷⁸

Historically, the effects of international institutions creating a special category of human rights for indigenous peoples, or for taking into account the adverse circumstances of indigenous peoples, are “woefully inadequate.”⁷⁹ The International Labor Organization (ILO) Convention 107, adopted in 1957,⁸⁰ remains the only specific intergovernmental docu-

TIONS FROM ROOSEVELT TO REAGAN 311 (Kenneth R. Philp ed., 1986) (discussing difficulties that Indians still face).

73. Falk, *supra* note 2, at 31.

74. *See id.* at 32.

75. Convention on the Political Rights of Women, Mar. 31, 1993, 193 U.N.T.S. 135; Convention on the Elimination of all Forms of Discrimination Against Women, Mar. 1, 1980, 1249 U.N.T.S. 14 (entered into force Sept. 3, 1981) (providing for the rights of all women); Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243 (condemning apartheid as a crime against humanity); Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 U.N.T.S. 277 (labeling genocide as a crime under international law).

76. *See* Falk, *supra* note 2, at 31.

77. *See id.*

78. *See id.*

79. *Id.*

80. International Labor Organization Convention (No. 107), The Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, in INTERNATIONAL LABOR CONVENTIONS AND RECOMMENDATIONS, 1919-1981 858 (1982). *See* Maria Stavropoulou, *The Right Not to Be Displaced*, 9 AM. U. J. INT’L & POL’Y 689, 731 (1994) (claiming Convention 107, adopted in 1957 and 1989, both recognize the right of ownership and possession applicable only to indigenous and tribal peoples); *see also* Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art.

ment in the human rights context that specifically addresses the discrimination and exploitation of indigenous peoples.⁸¹ Unfortunately, ILO Convention 107 is predicated upon the paternalistic notion that assimilation into the dominant society by indigenous peoples should be the ultimate objective.⁸²

However, ILO Convention 107 contains some beneficial elements. For example, it recognizes growing international concern that abusive practices towards indigenous peoples are widespread throughout the world.⁸³ Further, the Convention asserts that indigenous peoples are entitled to non-discriminatory treatment and equality of treatment in their dealings and relations with mainstream society.⁸⁴

A third justification prescribes the formulation of a coherent legal regime due to the beneficial aspects of raising political and social consciousness.⁸⁵ In doing so, governments, other institutions, and indigenous peoples themselves better appreciate the problems and politics of their time.⁸⁶ It would be ideal if indigenous peoples had a central function in defining their own framework of rights as particular societal circumstances dictate present laws.⁸⁷

In sum, when considering self-determination for indigenous peoples, the discussion should be placed in a world context rather than a State context.⁸⁸ The struggle by indigenous people for self-determination could reduce control of the central government and even threaten cohesiveness within a State. The reality of this struggle leads to a sobering

14(1), 16(1) (1989), reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 303 (Ian Brownlie ed., 1992).

81. See Falk, *supra* note 2, at 32; Stavropoulou, *supra* note 80, at 731.

82. See Falk, *supra* note 2, at 32-33; see also Roxanne Dubar Ortiz, *Protection of American Indian Territories in the United States: Applicability of International Law*, in IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 253 (Imre Sutton ed., 1985) (noting that this treaty was not ratified by the United States when it was adopted in 1957).

83. See Falk, *supra* note 2, at 33; see also CASSESE, *supra* note 41, at 329 (finding ILO Convention 107 is the only treaty that protects indigenous populations).

84. See Falk, *supra* note 2, at 32. The author notes equality and non-discrimination should be granted to those who are victimized, because they are unable to assimilate into the dominant society. See *id.*

85. See *id.* at 33.

86. The efforts of preparation in such a process compels all parties involved – those that represent governments or other institutions, and indigenous peoples themselves – to better appreciate such problems and policies. See *id.*

87. See *id.*

88. See *id.* at 34 (also claiming the rights of indigenous peoples and the relationship between communities must be considered).

conclusion: within a statist framework, a legal regime characterized as anti-statist will most likely never be endorsed.⁸⁹

Besides a heavy bias within international law for sovereign regimes, the lack of consensus among indigenous peoples in many areas serves as an obstacle to achieving self-determination as well.⁹⁰ This disparity exists when conflicts of particular groups of indigenous peoples overlap, as with their claims to individual rights and antecedent lands. Indigenous peoples also differ in assessing strategies for their continuing existence.⁹¹ Survival is viewed as either merely seeking to preserve and augment their current status or as a radical and complete restoration of traditional rights.⁹² Notably, there are differences in leadership styles among indigenous peoples.⁹³ The American Indians of the United States present one example of a group of indigenous people striving to achieve a semblance of self-determination within the established state system. As with all indigenous groups, whatever governmental philosophy is ultimately chosen, special care must be taken to fully address the social, political, and legal issues facing the modern indigenous peoples of America.⁹⁴

III. HISTORICAL BACKGROUND: THE HISTORY OF THE REPRESSION OF THE AMERICAN INDIAN

In the early history of the United States, the Supreme Court, led by the Chief Justice John Marshall, established a precedent through two opinions⁹⁵ that served as the impetus behind the government's subsequent detrimental policies dealing with Native Americans.

In *Johnson v. M'Intosh*,⁹⁶ Marshall wrote:

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.* Leaders range from assimilationists to separatists. *Id.* Assimilationist leaders may choose accommodation because of stakes with the dominant culture. *Id.* Separatist leaders may choose radical encounters to show support for indigenous peoples. *Id.*

94. *See id.* at 34-35. One recommendation involves implementing a regime that includes autonomy through the reconciliation of conflicting interests, territorial clarification, and gathering dispersed peoples; building networks of solidarity with other groups on both an international and transnational scale; protection against exploitation through the promotion of human rights; international recognition of indigenous peoples that allows claims and grievances to be brought in arenas alternative to national legal systems; restoration of Native American holy lands to sustain the integrity of religion and culture; and restitution for those Indian tribes in danger of extinction. *Id.*

95. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

96. 21 U.S. (8 Wheat.) 543 (1823).

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave a wilderness⁹⁷

These words reveal the predominant attitude at the time towards indigenous peoples in the United States. The opinion in *Johnson* dedicates itself to the rationalization of the appropriation of Indian land by the United States government. Ironically, Marshall's own use of the words "their country,"⁹⁸ indicates a full admission that the country and thus the land, belonged to the Indians. Yet, regardless of his understanding of the Indians' property rights, Marshall and the Court denied the true standing of Indian land and determined that the United States held ultimate title.⁹⁹ In effect, Marshall's words in *Johnson* are testimony to the fact that the Supreme Court enabled the government to solidify its acquisition of wrongful title.¹⁰⁰

In the second opinion, *Cherokee Nation v. Georgia*,¹⁰¹ Marshall further diminished the importance of free, independent Indian nations by referring to them as dependants and comparing the relationship between the United States and the Indian nations to "that of a ward to his guardian."¹⁰² These two opinions reveal the paradigm through which the federal government viewed American Indians and their property rights, or rather, their lack thereof. American Indians were designated to a juvenile, dependent status—their rights "necessarily" lessened by their convenient classifications.¹⁰³

These opinions enshrined the basic foundation for the United States' discriminatory policy towards Native Americans, and negatively impacted

97. *Id.* at 590.

98. *Id.*

99. *Id.* at 592. Marshall actually states that, "[i]t has never been contended, that the Indian title amounted to nothing. Their rights of possession has [sic] never been questioned." *Id.* at 603. And this same opinion is supported by the argument that "[d]iscovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives." *Id.* at 567. It is these kinds of disparities that allow characterization of the opinion as one based on spurious logic. The latter quote also begs the observation that Indians must inherently have "discovered" the land before any of their European conquerors because they were *already living on it*.

100. *Id.* at 590. Marshall provided two rationales for this decision. *Id.* First he gave exclusive title of land to those nations who "discovered" it. *Id.* The second rule labeled "Indian inhabitants" as "occupants" no matter how long they might have lived on the land. *Id.* Marshall concluded by stating that "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." *Id.*

101. 30 U.S. (5 Pet.) 1 (1831).

102. *Id.* at 21.

103. *Id.*

all indigenous peoples. The Winnebago Tribe represents just one example of the loss that Native Americans suffered as a result of the United States' guardianship. In the 1830s, the United States implemented Marshall's vision by systematically stripping the Winnebago of their territory through two coerced treaties.¹⁰⁴ Subsequently, in 1840, the United States forcibly expelled the Tribe from its ancestral homeland, in Wisconsin, beginning an odyssey of five forced removals from the states of Iowa, Minnesota, South Dakota, and Nebraska.¹⁰⁵

IV. WINNEBAGO SELF-DETERMINATION

A. *The People*

The Winnebago Indians have a long history as a separate and distinct people. Winnebago traditions assert that the Tribe originated in the Green Bay, Wisconsin area.¹⁰⁶ It is believed that the Winnebago represent the second wave of Siouan migrations westward, from a possible homeland somewhere in the Appalachian Mountains.¹⁰⁷ Ethnologists describe four migrations: first the influx of the Mandan, Hidatsa, Crow; second came the Iowa, Oto, Missouri, Winnebago; third included the Omaha, Ponca, Osage, Kansa, Quapaw; and the fourth consisted of the Dakota and Assiniboin.¹⁰⁸ On this basis, the assertion is made that the Winnebago are closely related to the Missouri, Oto and Iowa tribes.¹⁰⁹ Moreover, the Hidatsa and Crow of the first migration speak dialects closely related to the Dakota and Assiniboin of the fourth migration.¹¹⁰ The Mandan, however, are closely related linguistically to the Winnebago and others of the second migration as opposed to the Hidatsa.¹¹¹

A number of Winnebago recollections of their separation from their kindred tribes have been recorded.¹¹² According to one account:

When the Winnebago lived on Lake Michigan the tribe was so large that each clan had its own chief and a general chief presided over the

104. Treaty with the Winnebagoes, Nov. 1, 1837, U.S.-Winnebago Nation, 7 Stat. 544; Treaty with the Winnebagoes, Sept. 15, 1832, U.S.-Winnebago Nation, 7 Stat. 370; *see also* PRUCHA, *supra* note 4, at 196.

105. PAUL RADIN, *THE WINNEBAGO TRIBE* 2, 28-29, 32 (Bison Books 1990) (1923) (describing the difficulty in determining exactly when the Winnebago entered the Wisconsin area, and revealing the evidence that does exist is largely anecdotal).

106. *Id.* at 1-2 (describing the four successive Siouan migrations westward that may have explained the Winnebago migration from the east).

107. *Id.*

108. *Id.* at 2.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

whole tribe. After a while it became so hard to obtain food that a band of Winnebago went south. They never returned. Band after band kept moving away until only one was left—the present Winnebago.¹¹³

The other tribes of the second migration, the Iowa, Oto, and Missouri, have recorded their recollections of the Winnebago as well.¹¹⁴ An Oto chief once stated that the Winnebago originally inhabited the area of the Great Lakes and subsequently migrated southwest in pursuit of buffalo.¹¹⁵ Originally, the Winnebago remained at Green Bay, while the other tribes journeyed southwest.¹¹⁶ This began their separation from other kindred tribes as the Winnebago nation once included the Missouri, Omaha, Oto, and Ponca tribes.¹¹⁷ Initially, the tribes moved together from a home to the north of Great Lakes, but the Winnebago stayed near Lake Michigan because of its abundant fish.¹¹⁸

By the time the French encountered the Winnebago in 1634, the Central Algonquin tribes had already moved into the surrounding area.¹¹⁹ Situated to the north on the Green Bay shore were the Menominee; the Miami occupied the southeast; the Sauk and Fox were located toward the south and southwest; and the west was inhabited by the Ojibwa.¹²⁰ The nearest kindred to the Winnebago lived in eastern Minnesota, western Wisconsin, and southern Iowa.¹²¹ Ethnologists believe the Winnebago became isolated from their Siouan relatives no earlier than the sixteenth century.¹²² With the isolation, the Winnebago began to adopt Algon-

113. *Id.* Another account maintains that when the other tribes organized against the Winnebago, four Winnebago lodges, fearing the outbreak of war, moved from Prairie Du Chien, or present-day MacGregor, Wisconsin, never to be seen again. These lodges are believed to have resurfaced as the Oto tribe, which speaks a similar language that includes many Winnebago words which are no longer in use. *See id.* at 3.

114. *Id.* at 9.

115. *Id.* at 4; J.A. Jones, *An Anthropological Report on the Indian Occupancy of Royce Areas 149, 174 and 245*, in WINNEBAGO INDIANS 25, 21 (David Agee Horr ed., 1974).

116. RADIN, *supra* note 105, at 4; Jones, *supra* note 115, at 21.

117. RADIN, *supra* note 105, at 4 (according to the recollections of several Iowa chiefs). *See generally* Jones, *supra* note 115, at 21 (observing that those four tribes share similar dialects and customs).

118. RADIN, *supra* note 105, at 4; *see* Jones, *supra* note 115, at 21.

119. RADIN, *supra* note 105, at 4; Jones, *supra* note 115, at 21.

120. RADIN, *supra* note 105, at 4; Jones *supra* note 115, at 21.

121. RADIN, *supra* note 105, at 4.

122. *Id.*

quian traits. For example, the name Winnebago is of Algonquian origin.¹²³ The Winnebago call themselves *Hotcangara*.¹²⁴

However, the Winnebago also gained the enmity of their Algonquian-speaking neighbors as they fought over control of natural resources.¹²⁵ The Algonquins waged a relentless war against the Winnebago, eventually leading to their destruction.¹²⁶

In 1634, the Frenchman Jean Nicolet, an agent for Governor Champlain of New France became the first European to visit the Winnebago.¹²⁷ He found them to be prosperous and numerous.¹²⁸ Over a period of time, and as a consequence of a succession of wars with their Algonquian neighbors, the Winnebago population began to decline.¹²⁹ Then came “a disease that turned their bodies yellow and many died of this sickness.”¹³⁰ This influx of disease resulted in the decimation of the population.

The growing French presence in Winnebago country added a new dimension to the intertribal strife that had pre-dated white incursion into the Green Bay area.¹³¹ For example, in 1728, the French, fearing a possible Fox, Iroquois, and Sioux alliance against them, set out to crush the Fox with 450 French soldiers and 1,200 Indian allies.¹³² This venture failed, but a Winnebago village located on Lake Winnebago was destroyed as a result of the collateral damage of war waged by fellow Indians acting in concert with the French.¹³³

123. See Lee Sultzman, *Winnebago History*, at <http://www.dickshovel.com/win.html> (last visited Feb. 11, 2002) (on file with author) (noting that while rebuilding their population the Winnebago adopted many Algonquian traits).

124. See *id.* (stating this name means “people of the parent speech”); see also RADIN, *supra* note 105, at 5 (explaining the name has also been interpreted to mean “big fish people”).

125. See Jones *supra* note 115, at 49. The Kickapoo, the Menominee, the Sac, the Chippewa, the Fox, the Mascouten, the Illinois, and the Potawatomi were at one period or another Algonquian-speaking neighbors of the Winnebago. See *id.* at 41.

126. See RADIN, *supra* note 115, at 5-6; Jones, *supra* note 115, at 49-50; see also Sultzman, *supra* note 123 (describing resulting wars leading almost to the extinction of the Winnebago).

127. RADIN, *supra* note 105, at 5; see Sultzman, *supra* note 123 (noting that only 500 of the Winnebago remained from the numbers described by Nicolet); see also Jones, *supra* note 115, at 41.

128. RADIN, *supra* note 105, at 7.

129. *Id.* at 6. See also Jones, *supra* note 115, at 50-52 (providing an account on how the Winnebago betrayal to the Illinois led to their downfall).

130. RADIN, *supra* note 105, at 9-10.

131. Jones, *supra* note 115, at 66. See generally Sultzman, *supra* note 123 (describing a series of battles and conflicts involving the French).

132. See Jones, *supra* note 115, at 66.

133. See *id.*

In this new environment, it was not uncommon for alliances to shift, enemies to join each other, and partners to fight.¹³⁴ This is demonstrated by the partial Winnebago participation, later that same year, in a French, Ottawa, and Menominee attack on a Fox village.¹³⁵ Eventually this fluidity of alliance led to Indian involvement in the conflicting interests of European powers in North America.¹³⁶

In 1752, the French, fearing a British plan to use the Illinois Indians against them, sought Indian assistance of their own.¹³⁷ A war party of Winnebago, Sac, Fox, Potowatomie, and Menominee were incited by the French to attack the Illinois, thus disrupting the British plan.¹³⁸ Shortly thereafter, open warfare between the British and French broke out over control of the Ohio Valley,¹³⁹ and in September 1759, the English captured Quebec, thereby breaking French power in the region.¹⁴⁰ In 1763, the French signed the Treaty of Paris, officially relinquishing control of Canada.¹⁴¹

Throughout this British-French struggle, the Winnebago remained allied with the French.¹⁴² After the French defeat and their subsequent expulsion from North America, the Winnebago region fell under British influence.¹⁴³ Eventually the American Revolutionary War brought the British to the Winnebago in search of allies to fight against the American colonial rebels.¹⁴⁴ The Winnebago, as well as other Western tribes lent their help.¹⁴⁵

134. *See id.* at 67.

135. *See id.*; Sultzman, *supra* note 123.

136. *See generally* Jones, *supra* note 115, at 36-69; Sultzman, *supra* note 123 (outlining Indian alliances with the French and British, to include participation in the Revolutionary war).

137. *See* Jones, *supra* note 115, at 43.

138. *See* RADIN, *supra* note 105, at 42-43; Sultzman, *supra* note 123.

139. *See* FRED A. ANDERSON, THE CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766, at xxi (2000) (noting the French and the British went to war over control of the Ohio Valley); Sultzman, *supra* note 123.

140. *See* ANDERSON, *supra* note 139, at 365; Sultzman, *supra* note 123.

141. *See* ANDERSON, *supra* note 139, at 505; *see also* CALDER, REVOLUTIONARY EMPIRE: THE RISE OF THE ENGLISH SPEAKING EMPIRES FROM THE 15TH CENTURY TO THE 1780s, at 412 (Pimlico 1998) (1981); Sultzman, *supra* note 123.

142. Jones, *supra* note 115, at 43-44. *See generally* Sultzman, *supra* note 123 (outlining French and British alliances over the years).

143. *See* Jones, *supra* note 115, at 73; Sultzman, *supra* note 123.

144. *See generally* Jones, *supra* note 115, at 84-99 (discussing the recruitment of Western Indians, including the Winnebago, by the British during the Revolutionary War); Sultzman, *supra* note 123.

145. *See generally* Jones, *supra* note 115, at 84-99; Sultzman, *supra* note 123.

Ultimately, the Colonists prevailed and in the early 1800s the Winnebago joined Tecumseh and other tribes to oppose the white people pouring into their homelands.¹⁴⁶ In support of this opposition, the Winnebago even made attacks on the settlements of St. Louis and Chicago.¹⁴⁷ However, by 1825, the tribes began submitting to treaties formally relinquishing their tribal homelands.¹⁴⁸

In 1832 and 1837, the United States systematically stripped the Winnebago Tribe of its territory through two coerced treaties.¹⁴⁹ As a result, the Tribe was forcibly expelled from its ancestral homeland by the United States government in 1840. This expulsion began the odyssey of five forced removals to the states of Iowa, Minnesota, South Dakota, and finally Nebraska—the site of the present-day reservation.¹⁵⁰

B. *Public Law 280*

In 1952, the Republican Party, led by General Dwight D. Eisenhower, won both houses of Congress and the Presidency.¹⁵¹ Upon being sworn into office in 1953, a hardcore faction of conservative lawmakers, headed by Congressman E.Y. Berry of South Dakota and Senator Arthur Watkins from Utah, immediately forged legislation designed to terminate the federal government's supervision of and responsibility for the tribes.¹⁵²

Congressman Berry and Senator Watkins also pressed lawmakers to open Indian land and natural resources for development.¹⁵³ Subsequently, on January 9, 1953, Congressman William Henry Harrison introduced House Concurrent Resolution 108.¹⁵⁴ This resolution announced Congress' intention to terminate federal supervision over Indian tribes at the "earliest possible time."¹⁵⁵

146. See generally Jones, *supra* note 115, at 114-47; Sultzman, *supra* note 123.

147. See generally Jones, *supra* note 115, at 114-47.

148. See generally *id.* at 118-57; Sultzman, *supra* note 123 (outlining treaties signed by the Winnebago).

149. See generally Jones, *supra* note 115, at 177-99.

150. See PRUCHA, *supra* note 4, at 196.

151. See VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 67 (1972).

152. *Id.* See D'ARCY McNICKLE, THEY CAME HERE FIRST: THE EPIC OF THE AMERICAN INDIAN 264 (1975).

153. DELORIA, JR., *supra* note 151, at 68. (referring to Congress' exploitation of Indian needs to gain termination).

154. *Id.*

155. H.R. CON. RES. 108, 83d Cong., 67 Stat. B132 (1953); see DELORIA, JR., *supra* note 151, at 68; Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 630-32 (1975).

Termination was argued on two major grounds. First, termination removed the tribes from the Bureau of Indian Affairs' domination.¹⁵⁶ Second, termination saved the taxpayers money.¹⁵⁷ In reality, Resolution 108 was designed to eradicate Indian communities.¹⁵⁸ By 1968, the federal government had terminated its relationship with over 100 indigenous tribes and bands.¹⁵⁹ Most tribes were small, with enrollments of less than 100 members.¹⁶⁰ However, two tribes stand out: the Menominee of Wisconsin with 3,270 members and the Klamoth of Oregon with 2,133 members.¹⁶¹

The Bureau of Indian Affairs (BIA) implemented a liquidation policy, later known as the federal termination policy, which devastated the Indian population, lands, culture, economy, and governments.¹⁶² First, Indian lands passed into private ownership. The land could be sold, mortgaged, and taxed by state and local governments and in many instances, the tribal land was sold and per capita distribution was given to tribal members.¹⁶³ Second, civil and criminal jurisdiction over tribal territory was shared with the state.¹⁶⁴ Additionally, all services, including education, housing, and welfare, administered by the Bureau of Indian Affairs, were extinguished.¹⁶⁵ Finally, pursuant to the federal termination policy, all tribal governmental structures were dissolved.¹⁶⁶ In the end, more than 100 Indian nations were erased by Congressional Action between 1953 and 1958.¹⁶⁷

156. James E. Officer, *Termination as Federal Policy: An Overview*, in INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN, 114, 114-24 (Kenneth R. Philip ed., 1986) (noting the termination policy culminated in House Concurrent Resolution 108).

157. *Id.*

158. WUNDER, *supra* note 36, at 99 (noting federal services were stopped, reservations abolished, and tribal assets extinguished).

159. *Id.* at 102; Robbins, *supra* note 31, at 99.

160. WUNDER, *supra* note 36, at 102; *see* DELORIA, JR., *supra* note 151, at 60-82.

161. WUNDER, *supra* note 36, at 102 (stating that of the 1.3 million acres which were liquidated, the Klamath of Oregon once retained 862,662).

162. Both termination and liquidation are defined as terminating federal tribal legal relationships. Such a policy stopped federal services and abolished reservations. Interestingly, the term termination replaced the harsher term of liquidation coined by the Bureau of Indian Affairs in the 1940s due to its derogatory connotation. *Id.* at 98-123.

163. Menominee Tribe of Indians v. United States, 391 U.S. 404, 404 (1968) (explaining how the Termination Act provided for the termination of federal supervision of land and population of the tribe).

164. ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 85 (3d ed., The Michie Co. 1991) (1973).

165. WUNDER, *supra* note 36, at 100-01 (explaining how Congress passed Resolution 108, which ceased all federal services to Indians).

166. Robbins, *supra* note 31, at 98-99.

167. *Id.* at 99.

In conjunction with its termination policy, the federal government instituted a relocation program, which offered grants, promised jobs, and provided housing and other opportunities for those who would leave the reservation and move to designated metropolitan centers.¹⁶⁸ Tragically for most Indians who joined the program, relocation meant temporary employment in minimum wage dead-end jobs and life in housing projects and slums.¹⁶⁹

A compromise measure was formulated through the enactment of PL-280 for Indian tribes who manifested sufficient clout to oppose outright termination.¹⁷⁰ The measure transferred civil and criminal jurisdiction over reservation Indians to five "mandatory" states: California, Minnesota, Nebraska, Oregon, and Wisconsin.¹⁷¹ Similar jurisdiction was offered by PL-280 to all other States, except as specifically exempted.¹⁷² Ironically, the legislation did not require the consent of the tribes even though the language of PL-280 was a clear infringement on tribal sovereignty.¹⁷³ As a result of the compromising nature of PL-280, both Indian tribes and the States were distressed about the enforcement of the policy's regulations.¹⁷⁴ Indian discontent stemmed from the fact that their consent to PL-280 was not required, a fear of discrimination by both law enforcement officials and the judiciary, and deprivation of hunting and fishing rights.¹⁷⁵

168. WUNDER, *supra* note 36, at 105-07.

169. *Id.* at 105; *see also* Robbins, *supra* note 31 (explaining relocation also meant losing potential leadership).

170. Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§ 1161-62, 25 U.S.C. §§ 1321-22, 28 U.S.C. §§ 1361 (1953)).

171. *Id.* Public Law 280 affected the Indian country in California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.* However, there were some exceptions. For instance, in Minnesota, Oregon, and Wisconsin the Red Lake, Warm Springs, and Menominee Reservations were excluded from the jurisdiction implication respectively. *Id.*

172. *Id.* § 1360; *see also* Bryan v. Itasca County, 426 U.S. 373 (1976); *Wonchester v. Georgia*, 31 U.S. 515 (1832).

173. *See* Ward Churchill & Glenn T. Morris, *Key Indian Law and Cases, in THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 13, 15-16 (M. Annette Jaimes ed., 1992). *See generally* Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§ 1161-62, 25 U.S.C. §§ 1321-22, 28 U.S.C. § 1361 (1953)) (describing applicability to Indian customs and ordinances).

174. NATIVE AMERICAN RIGHTS FUND, BRIEFING DOCUMENT: PUBLIC LAW 280 AND RETROCESSION AFFECTING THE WINNEBAGO INDIAN RESERVATION 4 (1985) [hereinafter BRIEFING DOCUMENT] (on file with author) (stating the reasons for Indian criticism of PL-280); *see also* WUNDER, *supra* note 36, at 108 (listing the fears of Indians with respect to PL-280, such as having their treaty protections, favorable Supreme Court holdings, and fishing and hunting rights taken from them).

175. WUNDER, *supra* note 36, at 108-09; *see* BRIEFING DOCUMENT, *supra* note 174, at 4 (stating the reasons for Indian criticism of PL-280); *see also* WUNDER, *supra* note 36, at 108 (listing the fears of Indians with respect to PL-280).

From its inception, PL-280 was seen by critics as an inappropriate intrusion by the United States government into the lives of the Indians.¹⁷⁶ Moreover, many states that exercised jurisdiction over Indian country complained that PL-280 provided no mechanism for Indians to pay for the law enforcement and court services provided to them.¹⁷⁷ Under PL-280, the federal trust responsibility for Indian lands had remained intact, and thus the States could not tax Indian land.¹⁷⁸

In light of the criticism, Congress amended PL-280 in 1968 to require consent of Indian tribes for subsequent state assumption of jurisdiction over Indian lands.¹⁷⁹ The amendment also enabled states to transfer back (retrocede) to the federal government all or part of the jurisdiction they previously assumed pursuant to PL-280.¹⁸⁰

In 1969, the Nebraska Unicameral¹⁸¹ adopted Legislative Resolution 37, offering to retrocede almost all aspects of criminal jurisdiction over the Omaha and Winnebago Indian Reservations.¹⁸² The Omaha Tribe jumped at the opportunity, but the Winnebago balked,¹⁸³ since its tribal government had been rendered vestigial by PL-280. With no budget to pay for law enforcement and court services at the reservation, the Winne-

176. See WUNDER, *supra* note 36, at 108-09 (recounting the sources of criticism PL-280 drew prior to its enactment); see also Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§ 1161-62, 25 U.S.C. §§ 1321-22, 28 U.S.C. § 1361 (1953)).

177. BRIEFING DOCUMENT, *supra* note 174, at 5. According to the *Briefing Document*, the added responsibilities in Indian Country meant local and state governments had to hire additional police, judges, jail guards, probation, and parole officers, as well as construct new facilities and buy new equipment.

178. Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§ 1161-62, 25 U.S.C. §§ 1321-22, 28 U.S.C. § 1360 (1953)); see also *United States v. Brown*, 334 F. Supp. 536, 538 (D. Neb. 1971).

179. *Cf.* Pub. L. No. 90-284, 82 Stat. 78 (1968) (codified as amended at 25 U.S.C. § 1323); see also BRIEFING DOCUMENT, *supra* note 174, at 4.

180. See Pub. L. No. 90-284, 82 Stat. 78 (1968) (codified as amended at 25 U.S.C. § 1323); *Brown*, 334 F. Supp. at 538 (stating that in 1968, Congress allowed the United States to take back via retrocession from Nebraska any or all measure of state jurisdiction transferred in 1953); see also BRIEFING DOCUMENT, *supra* note 174, at 3.

181. Leg. Res. 37, 80th Leg., 1st Sess (Neb. 1969); see also *Brown*, 334 F. Supp. at 544.

182. BRIEFING DOCUMENT, *supra* note 174, at 3; see *Omaha Tribe v. Village of Walthill*, 460 F.2d 1327, 1328 (8th Cir. 1972) (reiterating that in 1968 the Nebraska Legislature ceded all criminal jurisdiction except for motor vehicle offenses to the federal government); *Brown* 334 F. Supp. at 538. Inexplicably, the State retrocession completely ignored the jurisdiction over the Santee Sioux Indian Reservation. *Id.* The Santee Sioux Reservation is the only other Indian Reservation in Nebraska. *Id.* All three reservations are under the supervision of the federal Bureau of Indian Affairs. See *id.*

183. BRIEFING DOCUMENT, *supra* note 174, at 3 (stating the Winnebago Tribal council was not prepared "to accept the responsibilities attendant with retrocession, [and] adopted a resolution opposing it").

bago opposed retrocession.¹⁸⁴ On April 11, 1969, fearing total withdrawal of state and local police services on the reservation, the Winnebago Tribal Council adopted a resolution opposing retrocession.¹⁸⁵ Subsequently, the Secretary of Interior limited acceptance of retrocession to the Omaha Indian Reservation.¹⁸⁶

The Winnebago then made vigorous efforts to rebuild its institutions of government in order to ready themselves for the eventual retrocession.¹⁸⁷ In 1975, the Tribe unsuccessfully petitioned the Nebraska Unicameral for retrocession of civil and criminal jurisdiction.¹⁸⁸ Non-Indians who owned and operated businesses and farms on the reservation lobbied against retrocession.¹⁸⁹ Responding to the concerns of non-Indians, the Judiciary Committee for the Nebraska Unicameral postponed consideration of the Winnebago Tribe's retrocession resolution, effectively killing it.

Despite this opposition, the Winnebago continued to take steps to show the unfairness of non-Indian jurisdiction over them, never surrendering the fight for retrocession. On June 8, 1984, the Nebraska Indian Commission conducted public hearings on issues affecting the American Indian population in Thurston County.¹⁹⁰ At these hearings, problems of law enforcement with Thurston County officials regarding the Winnebago Indian Reservation were identified. Evidence adduced at the hearings indicated the Winnebago were disproportionately impacted by the county's criminal justice system.¹⁹¹

As the result of the hearings the Nebraska Indian Commission reported four main findings.¹⁹² They discovered that there was "a lack of

184. *Id.*

185. *Id.*

186. *Brown*, 334 F. Supp. at 538; *see also* Notice of Acceptance of Retrocession of Jurisdiction, 35 Fed. Reg. 16,598 (Oct. 25, 1970).

187. BRIEFING DOCUMENT, *supra* note 174, at 4.

188. WUNDER, *supra* note 36, at 131 (citing Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 559-60 (1975); *see also* BRIEFING DOCUMENT, *supra* note 174, at 4.

189. WUNDER, *supra* note 36, at 176.

190. BRIEFING DOCUMENT, *supra* note 174, at 27. The hearings in 1984 concerned unfairness in criminal arrests against Winnebago. *See id.* It discussed the number of Indian incarcerations, alcohol related offenses and warrants issued.

191. *Id.* The issues discussed at the hearings included an overview of arrest records in 1983. Looking specifically at 1983, the following statistics describe the difference between Indian and non-Indian arrest records: between 60-65% of the Indians arrested were charged with alcohol-related offenses, compared with 21% for non-Indians; 62% of Indian arrests may have been accomplished without an arrest warrant, compared with only 47.8% for non-Indians; 80% of Indians were held for pretrial reasons, compared with 64% of non-Indians; Indians also completed their sentences in greater percentages than non-Indians. *See id.* at 28-29.

192. *See id.* at 29.

understanding and communication between tribal and county officials."¹⁹³ In addition, the Commission reported that the county had "failed to recognize, appreciate or provide for the cultural and rehabilitative needs" of Winnebago arrestees.¹⁹⁴ Further, the Commission stated that "the lack of cooperation and mutual working relationships, coupled with inadequate funding and accountability" had led to Indian perceptions of disparate and retaliatory treatment" and to "inadequate and below standard services and facilities."¹⁹⁵ Finally the commission decided that there was a mutual reluctance by both county and tribal officials to recognize the validity of each other's law enforcement.¹⁹⁶

As a result of the hearings, the Commission made several recommendations. By far, the two most important recommendations were retrocession of the Winnebago Indian Reservation and the establishment of agreements between the state and the Tribe. Both of these recommendations were seen as necessary and viable solutions to the problems identified.¹⁹⁷

Upon conclusion of the hearings, the Winnebago Tribe made preparations for retrocession and the introduction of a resolution in the Nebraska Unicameral.¹⁹⁸ By January 1985, the Tribe had completed its tribal plan for retrocession.¹⁹⁹ On February 23, 1985, the Tribe adopted its own resolution calling for the retrocession of criminal and civil jurisdictions.²⁰⁰ Two days later, the Tribe announced its intention to seek retrocession at an open meeting held with the Bureau of Indian Affairs, agency officials, the Omaha Tribe, the Thurston County Board of Supervisors, the Thurston County Sheriff, the Thurston County Attorney, and State of Nebraska officials.²⁰¹ At this meeting, the Tribe announced its intention to seek retrocession.²⁰² On February 28, 1985, Senator Pappas introduced Legislative Resolution 57, which called for the retrocession of civil and

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

198. *See id.* Tab A, 2.

199. *See* BRIEFING DOCUMENT, *supra* note 174, Tab A, 30-33.

200. Res. No. 85-31, Winnebago Tribal Council (1985) (petitioning the State of Nebraska for retrocession of Criminal and Civil Jurisdiction), *reprinted in* BRIEFING DOCUMENT, *supra* note 174, App. D; *see* Charles F. Wilkinson, *Civil Liberties Guarantees When Indian Tribes Act as Major Societies: The Case of the Winnebago Retrocession*, 21 CREIGHTON L. REV. 773, 793 n.137 (1988).

201. *See* BRIEFING DOCUMENT, *supra* note 174, Tab A; *see also* Wilkinson, *supra* note 200, at 793 n.136.

202. *See* BRIEFING DOCUMENT, *supra* note 174, Tab A. *See generally* Wilkinson, *supra* note 200, at 792-94 (discussing the retrocession campaign).

criminal jurisdiction over the Winnebago Indian Reservation.²⁰³ This burdensome legislative battle, filled with vitriolic debates and cluttered with issues outside the scope of PL-280, finally reached its pinnacle with the passage of Legislative Resolution 57 on January 16, 1986.²⁰⁴ Its passage ended the criminal jurisdiction of Thurston County courts over the Tribe.²⁰⁵

C. *The Politics of the Retrocession Campaign*

Indians faced fierce opposition to retrocession from non-Indians. Specifically, non-Indians owned 80% of the land within the original treaty boundaries of the reservation. They feared the Indians would use their power to tax and condemn property and crush the non-Indian landowners and businesses on the reservation.²⁰⁶ Non-Indians who opposed retrocession were able to obtain support from the County Board of Supervisors and the County Sheriff. By virtue of their 4-1 advantage in population, non-Indians had a greater amount of influence with their state senator.²⁰⁷ Another advantage the non-Indians had over the Indians was the fact that the Unicameral had no Indian legislators. In fact, there was only one minority state senator in the Nebraska Unicameral, an African American from Omaha.²⁰⁸

In response to non-Indian arguments that the Tribe was not competent to assume jurisdiction over the reservation, the Tribe put forth a list of accomplishments that had been achieved since the federal termination policy, PL-280, had been amended.²⁰⁹ Their accomplishments covered the areas of education, law, government, economic development, and social services.

The first accomplishment was the increase in the level of qualifications held by tribal officials. During the 1960s, a Tribal Council members' average age was sixty-five years, while their average formal educational level was limited to eight years of schooling.²¹⁰ By 1985, the average age of a Tribal Council member was forty-eight years, and the average educa-

203. Leg. Res. 57, 89th Leg., 2d Sess. (Neb 1986); see BRIEFING DOCUMENT, *supra* note 174, Tab A.

204. See Wilkinson, *supra* note 200, at 794. The resolution barely passed with a 25-21 vote. See *id.*

205. See *id.* at 794. Federal and Tribal courts now had criminal jurisdiction. See *id.*

206. *Id.*

207. *Id.*

208. Senator Ernie Chambers represented District 11 in Omaha. He was an ardent advocate of minority rights and a true friend to the Indians.

209. See BRIEFING DOCUMENT, *supra* note 174, at 31.

210. See *id.*

tional level was fourteen years.²¹¹ One member of the Council had a master's degree, two had bachelor's degrees, and several others had two to three years of college. The attainment of higher education levels and the increase in the tribal budget demonstrate the considerable advancement of the Winnebago Tribe. After the amendment to the federal termination policy, the Tribe created a strong tribal government. It also built a number of enterprises on the reservation. The annual tribal budget grew from a mere \$6,000 in the 1960s to \$2.7 million in 1985.²¹²

Further development is shown in other areas of the reservation that demonstrate the capacity of the Winnebago Tribal Government. By 1985, twelve tribal members had been certified as qualified police officers by the Bureau of Indian Affairs and/or the Nebraska State Police Academy.²¹³ The Chief Judge of the Winnebago Tribal Children's Court, an enrolled²¹⁴ member of the Tribe, had a law degree from the University of Nebraska.²¹⁵ In addition, pursuant to the Indian Child Welfare Act of 1978, the Tribe reassumed jurisdiction over child custody proceedings and heard nearly 300 cases.²¹⁶ To address health and infrastructure needs, the Tribe promulgated codes in child welfare, fish and game, natural resources, and hazardous waste or disposal areas. The Tribe also developed codes for building, environment, taxation, and criminal and civil matters.

Tribal social service programs also operated in the areas of substance abuse and child welfare.²¹⁷ Rehabilitation and related counseling services were enacted for those dependent on drugs,²¹⁸ and foster care and group homes were made available for needy children. Additionally, the Tribe had an emergency medical team, a tribal health department, a com-

211. *Id.*

212. *Id.* at 32-33. Economic development by the Tribe included a beef, hog, and row-cropping operation, an auto-truck service center, a grocery store and café, a bingo operation, and an aero-space manufacturing division.

213. *Id.* at 31.

214. In many instances, tribal enrollment is necessary to access political and social associations, education in Indian schools, religious activities, and property rights. See CLINTON ET AL., *supra* note 164, at 85. Currently there are 3,928 enrolled members of The Winnebago Tribe of Nebraska. See The Winnebago Tribe of Nebraska, *The Winnebago Tribe of Nebraska*, at http://www.winnebagoTribe.com/winnebago_tribe_of_nebraska.htm (last visited Feb. 12, 2002).

215. BRIEFING DOCUMENT, *supra* note 174, at 31.

216. Indian Child Welfare Act, 25 U.S.C. § 1901 (1978). Congress took control of the regulation of Indian affairs in 1978 by the passage of this Act, but its purpose was to give Indian tribes more control and take power away from the states that were administering it unfairly. Section 4 of this Act stated the unnecessary break-up of Indian families by non-tribal agencies. Section 5 suggests the states have failed to recognize the social and cultural relations of Indian rule.

217. BRIEFING DOCUMENT, *supra* note 174, at 33.

218. *Id.*

munity college, pre-school and other adult level educational programs, and employment assistance services.²¹⁹

Obviously, the advances made by the Tribe were equal to, if not better than, those of any other town of its size in America. Thus it was paramount that the Winnebago achieved their ultimate goal of retrocession and control over their own people—a people victimized, abused, and deprived of all of their lands and past heritage. Only a victory in the Nebraska Legislature could end this constant suffering and the fight would not be easy.

On January 16, 1986, the Senate debated Legislative Resolution 57 on the Nebraska Unicameral floor.²²⁰ During the debate, Winnebago men, women, and children filled the north gallery of the Senate Chamber, watching as the senators debated and voted on their request for retrocession. They heard one senator speak with disgust about life on Indian reservations.²²¹ Another wondered out loud whether Indians were competent to administer their own laws.²²² One senator even attempted to link Indians with organized crime and gambling.²²³ They watched as senators read racist handouts describing the Indian “problem” and the Indian “situation.”²²⁴

Senator Pappas argued that gambling was not the issue, but instead stressed that the focus should be on what is right and fair for the Winnebago.²²⁵ Noting that the Winnebago had promised in writing to fairly and justly administer the law, Pappas thought it was hypocritical to question the Tribe’s promise in view of the history between non-Indians and Indians.²²⁶ It was not the Indians who have historically broken treaties he argued, it was the white man who had been breaking treaties since the beginning of time.²²⁷

When the heated debates came to an end, the resolution was moved and a roll call vote was requested, which passed by a vote of 25 to 21.²²⁸

219. *Id.*

220. Leg. Res. 57, 89th Leg., 2d Sess. (Neb 1986).

221. *See generally id.*

222. *See generally id.*

223. Wilkinson, *supra* note 200, at 793 n.136.

224. *Id.*

225. *Id.* at 792-93 (stating that various arguments were made against retrocession).

226. *Id.* at 793 n.137.

227. *Id.*

228. *Id.* at 794 (saying that the vote was the best possible majority, because 25 of 49 Nebraska Senators were required for victory); *see also Tribe Celebrates Legislative Win: Non-Indians Feel Disenfranchised*, OMAHA WORLD HERALD, Jan. 17, 1986, at 1.

This vote represents a historic victory that ended forty years of political strife revolving around the initiation of the federal termination policy.²²⁹

Outside the Senate Chamber in the Capitol Rotunda, several Winnebago gathered to thank the senators who voted for retrocession. Neola Walker, a proud and feisty grandmother and a long-time member of the Tribal Council, said retrocession meant the end to the Tribe's prolonged battle with the County Sheriff. Walker strongly asserted that the Winnebago tried to make changes peacefully. But when push came to shove the Tribe had to take the Sheriff to court. Now she said, "the Sheriff just needs to get off the reservation."²³⁰ Tribal member Donna Vandall commented that senators who criticized the Indian way expressed ignorance and fear rather than bigotry.²³¹ "People who debated against it are fearful," she said. "They don't know us. There's a lot of fear of people who don't know us. We belong together," she wept. "We choose to live together. We're a people."²³²

D. *The Impact of Retrocession on Jurisdiction*

1. Retrocession of Criminal Jurisdiction²³³

The retrocession process was rife with statist paternalistic bias. The following is an analysis of the federal statutes that substantially affected criminal jurisdiction on Indian reservations, even after retrocession of criminal jurisdiction occurred. These statutes included: 1) The General Crimes Act;²³⁴ 2) The Assimilative Crimes Act;²³⁵ 3) The Major Crimes Act;²³⁶ and 4) The Indian Civil Rights Act of 1968.²³⁷

The General Crimes Act extended general criminal laws of the United States to Indian reservations, thereby placing all major interracial crimes

229. Wilkinson, *supra* note 200, at 794; *see also* *Tribe Celebrates Legislative Win: Non-Indians Feel Disenfranchised*, *supra* note 228.

230. Gabriela Stern, *Senators Give Winnebagos Jurisdiction*, OMAHA WORLD HERALD, Jan. 17, 1986, at 1; *Tribe Celebrates Legislative Win: Non-Indians Feel Disenfranchised*, *supra* note 228.

231. Stern, *supra* note 230; *Tribe Celebrates Legislative Win: Non-Indians Feel Disenfranchised*, *supra* note 228, at 2.

232. Stern, *supra* note 230; *Tribe Celebrates Legislative Win: Non-Indians Feel Disenfranchised*, *supra* note 228, at 2.

233. *See generally* BRIEFING DOCUMENT, *supra* note 174, at 8-10 (listing federal statutes limiting the criminal jurisdiction of Tribal courts); Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 520-52 (1976) (discussing federal statutes restricting the criminal jurisdiction of tribal courts).

234. The General Crimes Act, 18 U.S.C. § 1152 (1994).

235. Assimilative Crimes Act, 18 U.S.C. § 13 (1994).

236. Major Crimes Act, 18 U.S.C. § 1153 (1994)

237. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1968).

under the jurisdiction of federal courts.²³⁸ However, criminal jurisdiction was not extended to offenses committed by one Indian against another Indian.²³⁹

The Assimilative Crimes Act permitted the federal government to apply or assimilate minor state criminal laws to offenses committed on a reservation. This allowed for the assumption of jurisdiction over such offenses that had not been specifically prohibited by federal or tribal law. The Act permitted the federal government to apply (assimilate) minor state criminal laws. This allowed the Tribe to obtain jurisdiction over interracial crimes committed on a reservation.

The Major Crimes Act enumerates fourteen crimes that if committed by an Indian on Indian land would result in federal jurisdiction. The crimes include, but are not limited to “murder manslaughter, kidnapping, maiming, incest, assault with an attempt to commit murder, assault with a dangerous weapon . . . arson, burglary [and] robbery.”²⁴⁰

The Indian Civil Rights Act of 1968 limited tribal courts to the imposition of misdemeanor sentences resulting in a \$500 fine, six months in jail, or both.²⁴¹ It also provided for the right to invoke and retain counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses.²⁴² This represents the largest area of criminal jurisdiction the Tribe was hoping to acquire through retrocession. Previous to the act being passed, the Tribe had no criminal jurisdiction over incidents that took place on their land.²⁴³ By not having jurisdiction over their land, Indians were prevented by a paternalistic government from exercising their self-determination rights.²⁴⁴

238. The General Crimes Act, 18 U.S.C. § 1152 (1994)

239. *See id.*

240. Major Crimes Act, 18 U.S.C. § 1153 (1994). In pertinent part the act states:

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

Id.

241. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1968).

242. *Id.*

243. Wilkinson, *supra* note 200, at 791.

244. *Id.* (stating, however, that the Tribe reluctantly admitted it was not prepared to accept responsibilities of retrocession).

The Winnebago assumption of jurisdiction in 1985 gave the tribal court jurisdiction involving most non-major crimes.²⁴⁵ For example, where a crime is perpetrated by an Indian against another Indian, tribal courts have absolute jurisdiction unless it is one of fourteen major crimes as provided for in the Major Crimes Act,²⁴⁶ in which case the federal courts would have jurisdiction. Alternately, where a non-major crime is committed by an Indian against a non-Indian, federal prosecutors apply state laws in federal courts under the Assimilative Crimes Act.²⁴⁷ In those situations, the tribal court still retains concurrent jurisdiction over misdemeanor crimes.²⁴⁸ A crime committed by a non-Indian against an Indian falls within federal jurisdiction.²⁴⁹

The Winnebago Tribe identified several areas of concern wherein cooperation between state and tribal authorities would be needed. Those areas include cross deputization, fresh pursuit, and extradition.²⁵⁰ Since the Winnebago Reservation was configured in such a manner that tribal and individual trust land alternated with fee simple land, it was not always clear where Indian jurisdiction would end and where state jurisdiction would begin.²⁵¹ Cross-deputization represented a solution whereby the Tribe and state granted each the authority to arrest and detain an offender, whether the offender was Indian or non-Indian.²⁵² After arrest,

245. BRIEFING DOCUMENT, *supra* note 174, at 10-11. Under Winnebago assumption of criminal jurisdiction, the following scenarios were possible:

1. Crime by an Indian Against an Indian.
2. Crime by an Indian Against a Non-Indian.
3. Crime by a Non-Indian Against an Indian
4. Crime by a Non-Indian Against an Indian.
5. "Victimless" or "Consensual" Crimes by an Indian.
6. "Victimless" or "Consensual" Crimes by a Non-Indian.

Id.

246. *See* Major Crimes Act, 18 U.S.C. § 1153 (1994); 51 Fed. Reg. 24,234 (1986). The major crimes are murder, manslaughter, kidnapping, rape, carnal knowledge of any female that is not the offenders wife and who is not 16 years old, assault with intent to commit rape, incest, murder, assault with a deadly weapon, assault resulting in serious bodily harm, arson, burglary, robbery, and larceny. *See id.*

247. Assimilative Crimes Act, 18 U.S.C. § 13.

248. BRIEFING DOCUMENT, *supra* note 174, at 15-16. *See also* Wilkinson, *supra* note 200, at 790. Tribal courts retain exclusive jurisdiction when the parties are Indians. *Id.* at 790 n.119.

249. Assimilative Crimes Act, 18 U.S.C. § 13; The General Crimes Act, 18 U.S.C. § 1152 (1994).

250. Wilkinson, *supra* note 200, at 793-94.

251. *Id.* at 790 (explaining how jurisdictional overlap was not alleviated by PL-280); *see also* WUNDER, *supra* note 36, at 1008 (noting state jurisdiction could not conflict with federal statutes, treaties, or executive agreements, and tribal laws conflicting with state laws were void).

252. WUNDER, *supra* note 36, at 108-10.

the offender would be delivered to the proper authority for prosecution. But under the “fresh-pursuit” doctrine, the officers of each could pursue an offender from one jurisdiction to another.²⁵³ Once the offender was arrested, he would be held in the jurisdiction where the arrest was made and then extradited to the jurisdiction where the crime was committed.²⁵⁴

2. Retrocession of Civil Jurisdiction

In acquiring retrocession of civil jurisdiction, the tribal court established exclusive jurisdiction over disputes involving Indians. Issues relative to adoption, child custody, marriage, divorce, contract and tort actions are resolved in tribal court.²⁵⁵ In a civil dispute on the reservation involving an action by a non-Indian against an Indian, the Tribal court normally has exclusive jurisdiction.²⁵⁶ Otherwise, if the action arises outside of “Indian Country,” the State court retains jurisdiction.²⁵⁷ However, where an Indian files suit against a non-Indian, and the tribe assumes exclusive jurisdiction, the Indian plaintiff is precluded from suing in state court.²⁵⁸ Finally, if a claim arose from a situation on the reservation between non-Indians, the State court rather than the tribal court assumes jurisdiction.²⁵⁹

V. CONCLUSION

Since the passage of Legislative Resolution 57 in January 1986, the Winnebago have embraced the benefits of retrocession.²⁶⁰ Today, the positive impact of attaining a semblance of self-government has been reflected in the strides and achievements the Winnebago have made.

The Winnebago have established various business enterprises dedicated to increasing their self-sufficiency and encouraging the development of the Tribe and its members.²⁶¹ For example, in a collateral effort to preserve the cultural traditions of the Winnebago and simultaneously bolster the economy, the Tribe is establishing a tourism sector.²⁶² This

253. *See id.* *See also* BRIEFING DOCUMENT, *supra* note 174, at 10-12.

254. BRIEFING DOCUMENT, *supra* note 174, at 12. Extradition agreements provided for the return of offenders to the jurisdiction in which a crime was committed.

255. *Id.* at 10.

256. *Id.* at 15-16.

257. *Id.*

258. *Id.* at 16.

259. *Id.*

260. *See* Wilkinson, *supra* note 200, at 794. The resolution barely passed with a 25 to 21 vote. *See id.*

261. *See* The Winnebago Tribe of Nebraska, *Enterprise*, at <http://www.winnebagotribe.com/enterprise.htm> (last visited Feb. 12, 2002).

262. *See id.*

initiative has seen the creation of a Cultural Resource Center, the extension of an open invitation to the Tribe's annual PowWow, an increase in ferry service across the Missouri River, and the promotion of the Lewis and Clarke Trail which passes through the Reservation.²⁶³

Additionally, in 1992, the Tribe opened and began operating the *WinnaVegas* Casino, as a result of the passage of the federal Indian Gaming Regulatory Act of 1988 (IGRA).²⁶⁴ Congress' purpose in enacting IGRA was "to provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments."²⁶⁵ The Winnebago took advantage of the opportunity IGRA presented and, since its opening, the *WinnaVegas* Casino has had a major economic impact providing both increased employment and revenue for the Tribe.²⁶⁶

In December 2001, the Winnebago Tribe was recognized for the innovative manner in which it approached the challenges of governing.²⁶⁷ The Winnebago's economic development corporation, Ho-Chunk Inc., was one of five recipients of the Innovations in American Government Award.²⁶⁸ Ho-Chunk, which was founded in 1994 for the purpose of reinvesting profits from the gaming industry and diversifying businesses in the economy, has positively impacted the lives of the Winnebago people.²⁶⁹ In addition to operating the *WinnaVegas* Casino, it has generated

263. *See id.*

264. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988); 25 U.S.C. §§ 2701-2721 (1988).

265. *See id.* § 3(1).

266. *See* The Winnebago Tribe of Nebraska, *supra* note 214.

267. *See* News Release, Institute for Government Innovation, Winnebago Tribe's Economic Development Corporation Wins Prestigious American Government Innovation Award: Ho-Chunk, Inc. Awarded One of Five \$100,000 Prizes (Dec. 13, 2001) (announcing Ho-Chunk, Inc., received the honor in recognition of its successful generation of employment opportunities and business development), *available at* <http://www.innovations.harvard.edu/release/2001/121301-hc.html> (on file with author).

268. *See id.* This award is through a program of the John F. Kennedy School of Government at Harvard University. *See id.* *See also* *Winnebago Tribe Recognized for Economic Success*, (Dec. 14, 2001), *available at* <http://www.indianz.com/SmokeSignals/Headlines/showfull.asp> (on file with author). Of the five awards presented the Winnebago were the only tribal government recognized. *Id.* The other winners included: "the federal government's Department of Veterans Affairs National Center for Patient Safety; OK First, the state of Oklahoma's web-based emergency awareness system; California's Mathematics, Engineering, Science Achievement (MESA) program; and the Toledo Plan to improve the quality of teaching in Toledo, Ohio." *Id.*

269. News Release, *supra* note 267.

other successful businesses, including hotels, shopping centers, gas stations and three technology enterprises.²⁷⁰

The establishment of the gaming industry and its subsequent profits have allowed the Winnebago to upgrade and implement a number of social welfare programs to treat, rehabilitate, and educate its people. On the reservation, self-esteem, often tied to gainful employment, has also increased dramatically. In the past, the Winnebago struggled against barriers such as low income, high unemployment, and an inability to access affordable housing. Since Ho-Chunk's founding, however, unemployment on the reservation has decreased dramatically—from 70% to 20%.²⁷¹ A collateral effect of the casino was a dramatic decrease in crime. With the opening of the casino and increased job opportunities at the reservation, Indian arrests at the reservation declined by 75% in the first 18 months of the casino's operation.

The Winnebago initiative, undertaken through incorporating Ho-Chunk, has established a model for all Indian Nations to follow, as it successfully demonstrates how to create infrastructure and institutions necessary for development.²⁷² Clearly, that investment is paying off as indicated by the fact that in the last ten years the Tribe's discretionary annual income has increased from a mere \$150,000 to \$50 million.²⁷³ Such a measure of achievement is indicative of the positive reinforcement that occurred when retrocession returned to the Tribe the ability to reassert their sovereignty through tribal self-determination.

Although the Tribe may never attain the prestige and glory that it had prior to the arrival of Europeans in North America, the achievements of the Winnebago Tribe of Nebraska are models for all Indian peoples. The measure of sovereignty that Indian tribes exercise will not only ensure their continued economic development and cultural growth but also provide for a greater contribution to society as a whole. The time has come for all Indian peoples to emerge, as the Winnebago has done, like a great phoenix to claim their share of the American Dream.

270. *Id.* In order to be successful, tribal governments must generate revenue through the development of businesses because they are prevented from establishing a stable tax base.

271. *Id.*

272. Many tribes are following the successful Ho-Chunk example and replicating the system. *Id.*

273. *See id.*